# Queensland Law Society: Insurance Law Intensive

## Surfers Paradise Marriott Hotel
## Friday 13 May 2005, 3.30pm
## Panel discussion: Expert evidence – UCPR changes and cases on disclosure

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**The Hon P de Jersey AC,**
**Chief Justice**

1. The objectives are:
   (a) to improve the presentation of expert witness's reports, including emphasizing that the expert's obligation of impartiality is owed primarily to the court; and
   (b) to streamline the judicial decision-making process, by enhancing the reliability of expert evidence.

2. (a) above, is uncontroversial.
   (b) is criticized because of the preferred mechanism – the sole expert appointed by the parties or the court.

3. The advantages of sole experts include:
   - avoiding gladiatorial conflicts in courts with multiple opposing experts, with consequent savings in expense, time and angst; and
   - the assurance of courts' relying on expert evidence which is more likely to be free of partisan bias.

4. Suggested criticisms are answerable.
   (i) The court will feel obliged to accept the sole witness's evidence.
      - Not so: that evidence will be tested by informed cross-examination, and it remains up to the Judge whether or not it is accepted; the parties may ask the Judge to appoint an additional expert. Lord Eldon's view – "truth is best discovered by powerful statements on both sides of the question" – translates here to "powerful questioning" on both sides.

(ii) The single expert may be of doubtful quality, perhaps a conservative, behind-the-times elder of the relevant profession; or with his or her own, difficult to uncover, ideological inclination.

- with careful attention to selection, this risk should be minimized; selection by the court may be assisted by adversarial style scrutiny.

(iii) Costs will not reduce because the parties will still retain their own experts.

- At least trial costs should be reduced; but as the new system takes hold, with cultural change, disputants will hopefully come to recognize the advantages and agree early on joint appointments.

(iv) Areas which would arguably be the most obvious beneficiaries of a single expert regime – personal injury and planning and environment litigation – are effectively excluded.

(That is brought about, in relation to personal injury matters, by the exclusion, from the requirement to file an application for directions under Practice Direction 2 of 2005, of claims under three statutes: *Motor Accident Insurance Act* 1984, *Workers' Compensation and Rehabilitation Act* 2003, and (repealed) *WorkCover Queensland Act* 1996. As to the Planning and Environment Court, the new rules apply only to the Supreme Court.)

- With personal injury litigation (save under the *Personal Injuries Proceedings Act* 2002), it was considered undesirable to complicate the already burdensome statutory schemes, and the Planning and Environment Court has an already working single expert regime (subject to leave) (Rule 23, Planning and Environment Court Rules 1999).
- Comprehensive extension of this new scheme to the Planning and Environment Court by amendment of its Rules may be considered if the current reform proves effectual in Supreme Court proceedings.
- Presently justified exclusions should not in any event deny application of the new procedures to other areas where benefits should ensue (for example, medical negligence proceedings).

(v) Adopting other less stringent mechanisms, for example so-called "hot tubbing", would be enough.

- Hot tubbing has less prospect than this approach of avoiding partisanship, even if subconscious.
- The court may direct more than one "competing" experts to meet (Rule 429B).

(vi) The Supreme Court will become a less attractive jurisdiction for disputants.

- It should become more attractive, because the quality and reliability of the decision-making should be enhanced.
- This court's initiative does not stand alone: compare the Supreme Court of New South Wales, the New South Wales Land and Environment Court, the Family Court, among others.

5. The new Rules apply to Supreme Court proceedings commenced before the Rules commenced (2 July 2004) other than in relation to an expert already appointed (Rule 996); and of course prospectively.

6. How does the new system operate in practice?

- Where a dispute arises, and resolution in court would involve expert evidence on a substantial issue, approach your counterpart for a joint appointment, or, in the absence of agreement, by the court.
  - Consider a panel of possible experts
  - Take note of Practice Direction 2 of 2005, and related amendments to the request for trial date form, Form 48.

7. The new rules signal costs sanctions where they are unreasonably not followed (Rule 429D).

To ensure they are considered, Practice Direction 2 of 2005 requires the filing of an application for directions at an early stage. Paragraph 5 provides:

> "As soon as it is apparent to a party that expert evidence on a substantial issue in a proceeding will be called at the trial or

> hearing, that party must file an application for directions. On the hearing of that application, that party must inform the court of steps taken or to be taken to conform with these Rules."

By these means, the court will have the facility to monitor and ensure compliance with Part 5, Chapter 11 UCPR. That is how the court is addressing this sort of concern expressed by a commentator (A Luchich, "Expert Evidence, the New Rules", September 2004 Proctor, pages 11-13):

> "What will be most interesting is to see how many practitioners are actually prepared to agree to the appointment of a single expert, or are prepared to apply for one to be appointed, knowing that in the event of an unfavourable report, that is the only expert who may give evidence in relation to that issue. If practitioners are unwilling to take that not insignificant risk, it will be up to the court to actively implement the regime if it is to be effective."

8. The new Rules contain important provisions:

- To ensure the expert is comprehensively informed of the facts, or of competing versions of the facts (Rule 429H).

  (The worth of an expert's opinion depends on the court's accepting its factual basis.)

- To ensure the early disclosure of experts' reports (Rule 429), even where the single expert regime is not being used.
  - Plaintiff's within 90 days within close of pleadings.
  - Defendant's within 120 days of close of pleadings.
  - Other parties within 90 days of close of pleadings.

  (Under former Rule 423, reports had to be exchanged within 21 days after the appointment of a date for trial).

9. I conclude by repeating some sentiments I recently expressed at a forum on this subject (Personal Injuries Queensland 2005 Conference, 12 April 2005):

> "There is no doubt implementing this new regime requires a sharp change of culture, both for the courts and the profession. Acknowledging the potential benefit of the new Rules, I am

confident that that cultural change will be forthcoming. History tends to support that confidence.

The public expects us, and reasonably, to refine the adversarial system, as the years progress, so it will better ensure 'justice according to law'. The law is the determinant, and justice is the ideal.

Where serious doubt about the current approach is, in this area, so persistently expressed, we should, in deference to that public expectation, be prepared to work laterally, and be prepared responsibly to pursue new possibilities. That is what we are doing."