Ontario Energy Board **Commission de l'énergie de l'Ontario**

EB-2011-0354

IN THE MATTER OF the *Ontario Energy Board Act 1998*, S.O.1998, c.15, (Schedule B);

AND IN THE MATTER OF an Application by Enbridge Gas Distribution Inc. for an Order or Orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of gas commencing January 1, 2013.

BOARD STAFF SUBMISSION
PROCEDURE FOR THE HEARING OF CONCURRENT EXPERT WITNESS PANEL

November 13, 2012

Enbridge Gas Distribution Inc. ("Enbridge") filed an application on January 31, 2012 with the Ontario Energy Board (the "Board") under section 36 of the *Ontario Energy Board Act, 1998*, S.O. c.15, Schedule B for an Order or Orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of gas commencing January 1, 2013.

Following a Board ordered Settlement Conference Enbridge filed a settlement agreement with the Board on October 3, 2012. The Board issued its Decision on Settlement Agreement and Procedural Order No. 5 on October 15, 2012. In that decision, the Board accepted the settlement agreement with the exception of one settled item, that being the matter of the Pension True-up Variance Account (the "PTUVA"). The Board indicated it would accept the settlement agreement if certain wording related to pension costs beyond 2013 was removed. The Board directed Enbridge to file a revised settlement agreement by October 26, 2012 incorporating new wording for the PTUVA, and allowed parties the option to consider other changes to the

settlement agreement. In its Decision and Procedural Order No. 6 dated November 2, 2012 the Board accepted a revised Settlement Agreement dated October 26, 2012.

The revised Settlement Agreement resulted in a settlement of 53 of 56 issues in the case. One of the unsettled issues, relating to the Open Bill Access Program (Issue D11), was the subject of a separate settlement process and a Supplementary Settlement Agreement with respect to this issue was filed with the Board on November 9, 2012.

The other two unsettled issues relate to cost of debt and equity thickness (Issues E1 and E2). These issues are framed as follows:

- Issue E1 [Partial Settlement]
  Is the forecast of the cost of debt for the Test Year, including the mix of short and long term debt and preference shares, and the rates and calculation methodologies for each, appropriate?

- Issue E2 [No Settlement]
  Is the proposed change in capital structure increasing Enbridge's deemed common equity component from 36% to 42% appropriate?

The Settlement Agreement states that Issue E2 is expected to proceed to hearing and that parties may take a position on Issue E1 when Issue E2 is considered by the Board.

In its Decision on Settlement Agreement and Procedural Order No. 5 dated October 5, 2012, the Board ordered that an experts' conference be held between Concentric Energy Advisors who prepared evidence for Enbridge with respect to Issue E2, and Dr. Laurence Booth, who prepared evidence for the Canadian Manufacturers and Exporters (CME), the Consumers Council of Canada (CCC), the School Energy Coalition (SEC) and the Vulnerable Energy Consumers Coalition (VECC) (collectively, the "Consortium") with respect to this issue. The Board indicated that the experts were to file a Joint Written Statement ("JWS") outlining the key issues, the points of agreement and disagreement on those issues, and the reasons for any disagreement.

The Board indicated that it would require a presentation of the JWS at the oral hearing and that at the hearing, the experts for both Enbridge and the Consortium would appear together as a concurrent expert witness panel for the purposes of answering questions from the Board and other parties, as may be permitted by the Board, and providing comments on the views of the other experts on the same panel.

The Board also invited all parties to file submissions with respect to the most appropriate procedure for the oral hearing of the concurrent expert witness panel in light of the objectives of the Board as expressed in Procedural Order No. 5 and in Rule 13A of the Board's Rules of Practice and Procedure.

These are Board staff's submissions with respect to the appropriate procedure for the oral hearing of the concurrent expert witness panel.

By way of introduction, Board staff notes that the part of the Board's Rules of Practice and Procedure that is relevant to the oral hearing of concurrent expert evidence is found at 13A.04 and states as follows:

> 13A.04 In a proceeding where two or more parties have engaged experts, the Board may require two or more of the experts to:
>
> . . .
>
> (b) at the hearing, appear together as a concurrent expert panel for the purposes of, among others, answering questions from the Board and others as permitted by the Board, and providing comments on the views of another expert on the same panel.

As a preliminary matter, staff notes that the suggested procedure for the hearing of concurrent evidence is with reference to the needs of this particular case. Staff recognizes that as a relatively new process for the Board, it may evolve over time with continued experience. It may be helpful for the Board to be explicit that the procedure adopted for the hearing of the Coyne/Lieberman and Booth evidence may or may not be indicative of the process to be used for the hearing of future concurrent expert witness panels.

Based on the general guidance provided in the Board Rules of Practice and Procedure and on a review of various authorities on procedure for the receipt of concurrent expert evidence, which is discussed briefly below, Board staff proposes that the Board adopt a three phased procedure for the oral hearing of the concurrent expert witness panel.

The first phase is brief and is intended to address the swearing and introduction of the experts and their evidence. The second phase is intended to allow the experts to provide an overview of their evidence, to summarize their positions and to participate in a discussion chaired by the hearing panel. In this phase, the experts may ask questions of each other, the hearing panel may ask questions of the experts and, with the

permission of the hearing panel, other parties (including the applicant and Board staff) may ask questions of the experts. The third phase is intended to return to the more traditional questioning (cross-examination) of the experts while they continue to be empanelled concurrently. This is followed by an opportunity for the hearing panel to ask any follow-up questions it may have of the experts.

Board staff notes that as is always the case, the hearing panel should be permitted to ask questions at any time during the proceeding and to intervene with respect to procedural or other issues in order to oversee, organize and manage the proceeding.

A further breakdown of Board staff's suggested procedure is provided below.

Phase I

1. Each of the experts is sworn and introduced.

2. Each of the experts adopts their evidence, filed individually and concurrently, and advises of any errors or other issues of an administrative nature that arise out of the evidence.

Phase II

3. Each of the experts is given up to 30 minutes for the purpose of providing an overview of their evidence, to summarize their position on the unsettled issue, to walk through the points of agreement and disagreement in the Joint Written Statement, and to comment on the views or positions of the other expert.

4. The hearing panel chairs a discussion between the expert witnesses using the points in the JWS as an agenda. Each of the experts is given an opportunity to ask questions of the other expert in order to clarify positions on the issue and sub-issue identified in the JWS. The hearing panel may, during the discussion, ask questions relevant to the points being discussed and may allow questions from other parties.

5. The hearing panel asks any questions it may have of the expert witnesses.

Phase III

6. Should there be remaining questions, representatives for each of the parties to the proceeding (including the applicant and Board staff) are permitted to direct questions to the expert witnesses. The purpose of this phase is not, however to engage in cross-examination in the traditional sense, but rather to allow all

parties an opportunity to clarify the views of the experts and to understand where and on what basis those positions diverge.

Staff is of the view that while each of the parties to the Consortium should have an opportunity to ask questions of the experts individually, some effort should be made to ensure that little if any overlap in the areas of questioning occurs. Staff suggests that where the party questioning the experts has sponsored a particular expert's evidence, that such party direct the questions to the opposing expert, but that the other expert be permitted to comment on answers provided by the expert to whom the question was directed.

Finally, Board staff suggests that the order for party questioning be determined by the hearing panel and follow the traditional rules of allowing for "re-direct" questions first by counsel designated for the Consortium and then by counsel for the applicant.

7. The hearing panel asks any follow-up questions it may have of the expert witnesses.

Staff's submissions are informed by a number of authorities in the area of concurrent expert evidence.[1] As this Board will no doubt be aware, the receipt of concurrent expert evidence was first introduced in Australia. In a paper discussing concurrent evidence[2], the Honourable Justice Peter McClellan[3] says as follows:

> Concurrent evidence is essentially a discussion chaired by the judge in which the various experts, the parties, the advocates and the judge engage in a cooperative endeavour to identify the issues and arrive where possible at a common resolution of them.
>
> …
>
> The experts are sworn together and, using the summary of matters upon which they disagree, the judge settles an agenda with counsel for a "directed" discussion, chaired by the judge, of the issues in disagreement. The process provides an opportunity for each expert to place his or her view on a particular issue or sub-issue before the court. The experts are encouraged to ask and answer questions of

[1] Staff has included copies of each of the authorities cited and has attached them in an appendix to this submission.
[2] New Method with Experts – Concurrent Evidence, at page 264.
[3] Chief Judge at Common Law, Supreme Court of New South Wales Australia; formerly Chief Judge of the Land and Environment Court of New South Wales.

> each other. The advocates also may ask questions during the course of the discussion to ensure that an expert's opinion is fully articulated and tested against a contrary opinion. At the end of the discussion, the judge will ask a general question to ensure that all of the experts have had the opportunity to fully explain their positions.

In a publication entitled *Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure*[4], Gary Edmond states as follows:

> Most of the concurrent-evidence sessions I have observed break down into two quite distinct parts. The first stage represents a major shift from conventional adversarial proceedings. During this stage, all of the experts are asked to comment, sometimes in very general terms, about the case, the issues, their opinions, and the differences between them. These comments can be protracted and are sometimes punctuated by questions from the lawyers, the judge and even the other experts participating in the sessions. The questions, at least initially, tend to be of an elucidatory nature. Once each of the experts has explained her position, she usually supplements her initial testimony with comments on the opinions and testimony of the other experts. The judge, rather than the lawyers, often presides over this first stage. Sometimes the judge suggests topics and directs the experts to comment on legally relevant issues. It is common for judges to ask questions and not uncommon for them to ask lots of questions. At the end of this first stage (or sometimes at the end of the entire concurrent-evidence session), the experts are usually asked if there is anything they would like to add, qualify, or clarify.
>
> The second stage of the concurrent-evidence session more closely resembles the conventional adversarial trial. Here, the lawyers reasserts control by directly questions to the expert witnesses. Usually, there is little need for examination-in-chief and the lawyers begin by cross-examining the opposing experts in the usual order. The presence of several expert witnesses allows questions to be

[4] 72 Law & Contemp. Probs. 159, 2009.

> put to more than on witness, and witnesses can be asked to comment on the other experts' answers.[5]

In a paper entitled *Using the "Hot Tub" - How Concurrent Expert Evidence Aids Understanding Issues*[6], Steven Rares[7] describes the courtroom process as follows:

> The judge explains to the experts the procedure that will be followed and that the nature of the process is different to their traditional perception or experience of giving expert evidence. First, each expert will be asked to identify and explain the principal issues, as they see them, in their own words. After that each can comment on the other's exposition. Each may ask then, or afterwards, questions of the other about what has been said or left unsaid. Next, counsel is invited to identify the topics upon which they will cross-examine. Each of the topics is then addressed in turn. Again, if need be, the experts comment on the issue and then counsel, in the order they choose, being questioning the experts. If counsel's question receives an unfavourable answer, or one counsel does not fully understand it, he or she can turn to their expert and ask what that expert says about the other's answer.

In a paper entitled *Concurrent Expert Evidence in the Administrative Appeals Tribunal: The New South Wales Experience*, the Honourable Justice Garry Downes[8] describes the procedures for the receipt of concurrent evidence as follows:

- Expert witnesses should arrive in time to confer before evidence is taken.
- The Tribunal welcomes and swears the expert witnesses.
- At the outset of the expert evidence, the Tribunal summarises orally or in writing, the agreed and disagreed facts.
- The applicant's expert witness gives a brief oral exposition.
- The respondent's expert witness then gives a brief oral exposition.
- Alternatively, the Tribunal may proceed to ask questions of the expert witnesses.

[5] At page 164.
[6] A paper presented at the New South Wales Bar Association Continuing Professional Development seminar on August 23, 2010.
[7] A judge of the Federal Court of Australia.
[8] President of the Administrative Appeals Tribunal.

- The respondent's expert is invited to ask the applicant's expert witness questions, without the intervention of counsel.
- The process is then reversed, so that a brief colloquium takes place.
- Each expert witness is invited to give a brief summary (including his or her view on what the other expert has said and identifying areas of agreement and disagreement).
- The parties' representatives may then ask any relevant or unanswered questions of the expert witnesses.
- At any appropriate time in the process the Tribunal may intervene and ask questions.[9]

Although there are variations in the samples of procedures used in the Australian context, the general theme seems to be that the hearing is more in the nature of a discussion chaired by the tribunal, whereby the experts themselves lead the conversation and are available to clarify their positions and to question each other about their positions, rather than being in a strictly adversarial cross-examination model.

The Canadian experience with the hearing of concurrent expert testimony is limited, however, there are rules in place at the federal Competition Tribunal and the Federal Court, that are instructive.

The Federal Court Rules[10] provide the following guidance:

> 282.1 The Court may require that some or all of the expert witnesses testify as a panel after the completion of the testimony of the non-expert witnesses of each party or at any other time that the Court may determine.
>
> 282.2(1) Expert witnesses shall give their views and may be directed to comment on the views of other panel members and to make concluding statements. With leave of the court, they may pose questions to other panel members.

[9] Paper presented at the Australasian Conference of Planning and Environment courts and Tribunals in Hobert on February 27, 2004.
[10] SOR/98-106.

(2) On completion of the testimony of the panel, the panel members may be cross-examined and re-examined in the sequence directed by Court.

The Competition Tribunal Rules leave the procedure for the receipt of expert concurrent evidence largely within the discretion of the tribunal.

Board staff has attempted to outline a procedure which will allow a meaningful conversation to take place between the experts, with the hearing panel and ultimately with all parties to the proceeding, while ensuring that all parties are entitled to examine the experts in the more traditional sense.

All of which is respectfully submitted.

APPENDIX

TO BOARD STAFF SUBMISSION

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NEW METHOD WITH EXPERTS – CONCURRENT EVIDENCE

*Hon. Justice Peter McClellan**

The title of this journal captures two certainties: first, that no court system is perfect; second, that through joint endeavors, we are better placed to reach perfection. The launch of the International Judicial Institute for Environmental Adjudication provides a unique opportunity for judges, practitioners and academics to share insights from their own court systems and to benefit from hearing those of their overseas counterparts.

The New South Wales Land and Environment Court

The New South Wales Land and Environment Court (Court) was established under the Land and Environment Court Act 1979 (N.S.W.). At the time of its inception, the Court was described as "a somewhat innovative experiment in dispute resolution mechanism."[1] The Court provides a specialized forum for the determination of land, environmental and planning disputes and has jurisdiction over judicial and merits reviews, civil and criminal enforcement and

*Hon. Justice Peter McClellan is the Chief Judge at Common Law, Supreme Court of New South Wales, Australia; formerly Chief Judge of the Land and Environment Court of New South Wales.

1. P. Ryan, *Court of Hope and False Expectations: Land and Environment Court 21 Years On*, 14(3) J. ENVTL. L. 301 (2002) (U.K.) (citing N.S.W. Parliamentary Debates, Legislative Council, 21 Nov 1979, 3349-50 (Hon. D.P. Landa).

appeals.

When conducting merits reviews, the Court is not bound by the rules of evidence. Rather, Section 38(2) of the Land and Environment Court Act provides that the Court "may inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the Court permits." In merits appeals, both judges and commissioners (who have specialized expertise in relevant environmental fields) preside to determine the matters that come before the Court.

Problems with Expert Evidence in the Land and Environment Court

The Land and Environment Court Act made plain Parliament's intention that the Court should not be bound by conventional adversarial principles in its operation. Initially, discomfort and, on occasion, resistance from within the legal profession hampered the implementation of this intention but over time these have diminished. The debate is reflected in two differing opinions of the New South Wales Court of Appeal.[2] Public concern about the operation of the Court became so intense that in 2001 the Hon. Jerrold Cripps QC, a former Chief Judge of the Court, was asked to conduct a public review of the Court's procedures and make recommendations for change (known as the "Cripps Inquiry").[3] Following issuance of the "Cripps Inquiry" report, some procedural changes were implemented while other concerns remained unaddressed.[4] Many of the unaddressed concerns related to the handling of expert evidence in proceedings. Duplication of evidence, and inefficient and unnecessary cross-examination were common. Similarly, as with many common law jurisdictions, there were legitimate concerns regarding the impartiality and integrity of expert evidence.[5]

Difficulties with the integrity and reliability of expert evidence have been recognized by many commentators over a long period. Learned Hand challenged the accepted utility of expert evidence and

2. Residents Against Improper Dev. Inc v. Chase Prop. Investments Pty. Ltd. [2006] NSWCA 323; *cf.* Hunter Dev. Brokerage Pty. Ltd. v. Cessnock City Council (No 2) [2006] NSWCA 292.

3. Report of the Land and Environment Court Working Party (Sept. 2001).

4. *See also* McClellan CJ at CL, *Land and Environment Court – Achieving the Best Outcome for the Community*, Paper presented at the EPLA Conference, Newcastle, N.S.W. (Nov. 28-29, 2003).

5. McClellan CJ at CL, *Problems With Evidence*, Speech delivered at the Government Lawyers' Annual Dinner, N.S.W. (Sept. 7, 2004).

the procedures by which it was received in court in his well-known article written in the *Harvard Law Review* in 1901:

> No one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes. The only question is as to how it can do so best. In early times, and before trial by jury was much developed, there seemed to have been two modes of using what expert knowledge there was: first, to select as jurymen such persons as were by experience especially fitted to know the class of facts which were before them, and second, to call to the aid of the court skilled persons whose opinion it might adopt or not as it pleased. Both these methods exist at least theoretically at the present day, though each has practically given place to the third and much more recent method of calling before the jury skilled persons as witnesses. No doubt, there are good historical reasons why this third method has survived, but they by no means justify its continued existence, and it is, as I conceive, in fact an anomaly fertile of much practical inconvenience.[6]

The article contains a comprehensive discussion of the history and use of experts in the common law system, and the perceived difficulties. These difficulties include the expectation that in the adversary system the expert becomes the hired champion of one side. These problems have been acknowledged by many commentators, including myself.[7]

Learned Hand was writing at a time when the complexity of litigation and the issues to be decided were significantly less than today. The growth in complexity has of course been accompanied by an enormous increase in the available knowledge in all areas of intellectual endeavor, not least in the environmental sciences. Environmental courts and tribunals are required to resolve disputes between experts with respect to a large catalogue of other complex matters, including the impact of past and future development on the natural and built environment, the causes and consequences of

6. Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 40 (1901).

7. *See, e.g.*, McClellan CJ at CL, *Recent Changes and Reforms at the Land and Environment Court*, Speech delivered to the Local Government Association of N.S.W. (July 27, 2004); McClellan CJ at CL, *Expert Witnesses: the recent experience of the Land and Environment Court*, 17 JUD. OFFICERS BULL. 83 (2005) (N.S.W.); McClellan CJ at CL, *Environmental Issues: How Should We Resolve Disputes?*, 1 NAT'L ENVTL. L. REV. 36 (2005) (Austl.); McClellan CJ at CL, *Problems with Evidence*, *supra* note 5.

pollution and contamination, and the related social and financial issues. The resolution of these matters may significantly impact the experts' reputations and, consequently, have significant financial consequences.

The Process of Change in the Land and Environment Court

In response to these concerns, the Land and Environment Court began modifying its Practice Directions to clarify the duties and expectations of expert witnesses. In 1999, it introduced a pre-hearing conference that required experts to meet prior to the hearing to discuss those matters upon which they agreed and to identify the points on which they disagreed. Although this proved beneficial, notwithstanding the expectations in the Land and Environment Court Act, the adversarial nature of the proceedings continued to underpin the "culture" of the Court.

In a speech to the National Conservation Council of New South Wales in 1999, one former chief judge stated:

> First, the Court is a court. The hearings conducted in it involve the traditional hallmarks of a court, that is, an adversarial proceeding at the end of which the judge or commissioner reaches a decision on the evidence adduced during the hearing, and in the result there will be a winner and a loser.[8]

By the time I commenced as chief judge, it was plain that further change was necessary. Public concerns about the adversary process and its perceived failure to provide for the most desirable community outcomes from a dispute led to the "Cripps Inquiry." Personally, I was concerned that the Court's continued focus on the traditional winner versus loser dichotomy conflicted with its public function. Most importantly, in a specialized environmental court, community outcomes must be given appropriate emphasis, generally beyond the interests of the private litigants. To address these concerns, during my term as chief judge, the Court altered many of its procedures including changes designed to increase the integrity and efficiency of expert evidence. One such procedural change was the introduction of a presumption in favor of court-appointed single experts, adopted by

8. Hon. Mahla L Pearlman AM, *The Role and Operation of the Land and Environment Court*, 37 L. SOC'Y J. 58, 58-59 (1999) (N.S.W.).

the Court in March 2004. I have spoken of the benefits of this change elsewhere.[9]

The most significant procedural change however was the introduction of the concurrent method of receiving expert evidence. Adopted by many other courts, concurrent evidence is one of the most important recent reforms in the civil trial process in Australia. It was first used in a few cases in the Australian Trade Practices[10] and Administrative Appeals Tribunals. Apart from its use in the Land and Environment Court,[11] concurrent evidence is now utilized extensively in the Common Law Division of the New South Wales Supreme Court,[12] the Queensland Land and Resource Tribunal, the Federal Court of Australia,[13] and, to a lesser extent, in many other Australian courts and tribunals.

To facilitate the use of concurrent evidence, provision has been made in the Uniform Civil Procedure Rules 2005 (N.S.W.). Those rules apply to all courts in New South Wales. In the Land and Environment Court, concurrent evidence is now the default procedure for all matters requiring evidence from more than one expert in the same field.[14] The same is true of the Common Law Division of the Supreme

9. *See, e.g.*, McClellan CJ at CL, *Expert Witnesses – The Experience of the Land & Environment Court of New South Wales*, Paper presented at the XIX Biennial LAWASIA Conference, Gold Coast (Mar. 20-24, 2005).

10. The Australian Trade Practices is now known as the Australian Competition Tribunal.

11. *See, e.g.*, Jamison Investments Pty Ltd v. Penrith City Council [2010] NSWLEC 1194; Scarf v. Randwick City Council [2010] NSWLEC 1205; Reavill Farm Pty Ltd v. Lismore City Council [2010] NSWLEC 1207; Marana Developments v. Botany Bay City Council [2010] NSWLEC 1237; Berringer Road Pty Ltd v. Shoalhaven City Council [2010] NSWLEC 1140; O'Keefe v. Water Administration Ministerial Corporation (No 2) [2010] NSWLEC 89.

12. *See, e.g.*, Harris v. Bellemore [2010] NSWSC 176; Thompson v. Haasbroek [2010] NSWSC 111; Hollier v. Sutcliffe [2010] NSWSC 279; Reeves v. State of New South Wales [2010] NSWSC 611; Wallace v. Ramsay Health Care Ltd [2010] NSWSC 518; Konstantopoulos v. R & M Beechey Carriers Pty Ltd [2010] NSWSC 753; and SW v. State of New South Wales [2010] NSWSC 966.

13. *See, e.g.*, Seven Network Limited v. News Limited [2007] FCA 2059; Ackers v. Austcorp International Ltd [2009] FCA 432; Peterson v. Merck Sharpe & Dohme (Austl.) Pty Ltd & Anor [2010] FCA 180; Strong Wise Ltd v. Esso Austl. Resources Pty Ltd [2010] FCA 240; Danisco A/S v. Novozymes A/S [2010] FCA 995.

14. *See, e.g.*, Land and Environment Court of New South Wales, *Practice Note – Class 1 Development Appeals*, 14 May 2007, [56]; Land and Environment Court of New South Wales, *Practice Note – Classes 1, 2 and 3 Miscellaneous Appeals*, 14 May 2007, [44]; Land and Environment Court of New South Wales, *Practice Note – Class 3 Compensation Claims*, 14 May 2007, [39]; Land and Environment Court of New South Wales, *Practice Note – Class 3 Valuation Objections*, 14 May 2007, [48]; Land and Environment Court of New South Wales, *Practice Note – Class 4 Proceedings*, 14

Court of New South Wales.[15]

Concurrent Evidence: How does it Work?

Concurrent evidence is essentially a discussion chaired by the judge in which the various experts, the parties, the advocates and the judge engage in a cooperative endeavor to identify the issues and arrive where possible at a common resolution of them. Where resolution of issues is not possible, a structured discussion, with the judge as chairperson, allows the experts to give their opinions without the constraints of the adversarial process and in a forum which enables them to respond directly to each other. The judge is not confined to the opinion of one advisor but has the benefit of multiple advisors who are rigorously examined in public.

How does concurrent evidence work? Although variations may be made to meet the needs of a particular case, concurrent evidence requires the experts retained by the parties to prepare a written report in the conventional fashion. The reports are exchanged and, as is now the case in many Australian courts, the experts are required to meet without the parties or their representatives to discuss those reports. This may be done in person or by telephone. The experts are required to prepare a bullet-point document incorporating a summary of the matters upon which they agree, but, more significantly, matters upon which they disagree. The experts are sworn together and, using the summary of matters upon which they disagree, the judge settles an agenda with counsel for a "directed" discussion, chaired by the judge, of the issues in disagreement. The process provides an opportunity for each expert to place his or her view on a particular issue or sub-issue before the court. The experts are encouraged to ask and answer questions of each other. The advocates also may ask questions during the course of the discussion to ensure that an expert's opinion is fully articulated and tested against a contrary opinion. At the end of the discussion, the judge will ask a general question to ensure that all of the experts have had the opportunity to fully explain their positions.

Some Personal Reflections on the Use of Concurrent Evidence

May 2007, [48]; Land and Environment Court of New South Wales, *Practice Note – Class 2 Trees*, 23 July 2010, [43].

15. Supreme Court of New South Wales, *Practice Note - SC CL 5*, 5 Dec. 2006.

I have utilized the process of concurrent evidence on many occasions, both when I was in the Land and Environment Court and in the Supreme Court. In 2006, I presided over a trial involving an eighteen-year-old male who had suffered cardiac arrest, resulting in catastrophic and permanent brain damage.[16] He sued his general practitioner. The claims required expert testimony regarding the defendant doctor's duty of care to the plaintiff as well as a major cardiological issue.

Five general practitioners were called to give expert opinion and they gave their evidence concurrently. Sitting together at the bar table for a day and a half, they discussed in a structured and cooperative manner the issues falling within their expertise. Prior to this court-room discussion, the doctors had conferenced together for some hours and prepared a joint report which was tendered to the Court. In all likelihood, if the expert evidence had been received in the conventional manner, it would have taken at least five days. More importantly, the Court would not have had the benefit of the questions which the experts asked of each other, and, of even greater value, the responses to those questions.

Four cardiologists also gave evidence together – one by satellite from the United States, the others sitting in the courtroom at the bar table. This evidence took one day. Under the conventional adversary process, it would probably have taken at least six. The doctors were able to distill the cardiac issue to one question which they identified and, although they held different views, their respective positions on that question were clearly stated. Later discussion with the advocates indicated that the process was welcomed by both the doctors and the parties' advocates.

Concurrent evidence provides the means by which the decision-making process conventionally adopted by professionals can be utilized in the courtroom. If a person suffered a life-threatening injury which required hospitalization and the possibility of major life-saving surgery, a team of doctors would come together to make the decision as to whether or not to operate. The team would include a surgeon, anesthetist, physician, and other related specialists who had a professional understanding of the particular problems. They would meet, discuss the situation and the senior person would ultimately

16. Halverson v. Dobler [2006] NSWSC 1307.

decide on the appropriate response. It would be a discussion in which everyone's views were put forward, analyzed and debated. The hospital would not set up a court case, much less an adversarial contest. If this is the conventional decision-making process of professionals, why should it not also be the method adopted in the courtroom?

Experience shows that, provided everyone understands the process at the outset, in particular that it is to be a structured discussion designed to inform the judge and not an argument between the experts and the advocates, there is no difficulty in managing the hearing. Although not encouraged, very often the experts, who will be sitting next to each other, address each other informally by first names. Within a short time of the discussion commencing, you can feel the release of the tension, which infects the conventional evidence-gathering process. Those who might normally be shy or diffident are able to relax and contribute fully to the discussion.

I have had the opportunity of speaking with many witnesses who have been involved in the concurrent process and with counsel who have appeared in cases where it has been utilized. Although counsel may be hesitant about the process initially, I have heard little criticism once they have experienced it. The change in procedure has been met with overwhelming support from the experts and their professional organizations. They find that they are better able to communicate their opinions and, because they are not confined to answering the questions of the advocates, are able to more effectively convey their own views and respond to those of the other experts. Because they must answer to a professional colleague rather than an opposing advocate, experts readily confess that their evidence is more carefully considered. They also believe that there is less risk that their evidence will be unfairly distorted by the advocate's skill. Additionally, the process is significantly more efficient than conventional methods. Evidence which may have required a number of days of examination in chief and cross-examination can now be taken in half or as little as twenty percent of the time which would otherwise have been required.

Under concurrent evidence, the number of experts who can effectively give evidence together varies. The most common number

is four but I have had eight witnesses at one time[17] and know of a case where there were twelve.[18] From the decision-maker's perspective, the opportunity to observe the experts in conversation with each other about the matter, together with the ability to ask and answer each others' questions, greatly enhances the capacity of the judge to decide which expert to accept. Rather than have a person's expertise translated or colored by the skill of the advocate, and as we know the impact of the advocate can be significant, the experts can express their views in their own words. There also are benefits which aid in the decision-writing process. Concurrent evidence allows for a well-organized transcript because each expert answers the same question at the same point in the proceeding.

I am often asked whether concurrent evidence favors the more loquacious and disadvantages the less articulate witnesses. In my experience, this does not occur. Since each expert must answer to their professional colleagues in their presence, the opportunity for diversion from the intellectual content of the response is diminished. Being relieved of the necessity to respond to an advocate, which many experts see as a contest from which they must emerge victorious, rather than a forum within which to put forward their reasoned views, the less experienced, or perhaps shy person, becomes a far more competent witness in the concurrent evidence process. In my experience, the shy witness is much more likely to be overborne by the skillful advocate in the conventional evidence gathering procedure than by a professional colleague with whom, under the scrutiny of the courtroom, they must maintain the debate at an appropriate intellectual level. Although I have only rarely found it necessary, the opportunity is of course available for the judge to intervene and ensure each witness has a proper opportunity to express his or her opinion.

Conclusion

As increases in "scientific" knowledge are expected to accelerate, it seems likely that courts will have to reconsider whether professionals, assessors or advisers should be available to assist the

17. Ironhill Pty Ltd v. Transgrid [2004] NSWLEC 700; Attorney-General (NSW) v. Winters [2007] NSWSC 1071.

18. Note that the case referenced here was settled, and consequently, no citation is available.

judge's understanding of the "scientific" evidence to provide greater public confidence in the decision-making process. Concurrent evidence is a significant innovation which moves in that direction, by providing a more efficient process to receive expert evidence and improve its quality. It has many advantages for the parties, the witnesses and the decision-maker.

MERTON AND THE HOT TUB: SCIENTIFIC CONVENTIONS AND EXPERT EVIDENCE IN AUSTRALIAN CIVIL PROCEDURE

GARY EDMOND*

> The *ethos of science* in that affectively toned complex of values and norms which is held to be binding on the man of science. The norms are expressed in the form of prescriptions, proscriptions, preferences, and permissions. They are legitimized in terms of institutional values. . . .
>
> . . .
>
> Four sets of institutional imperatives—*universalism*, *communism*, *disinterestedness*, *organized skepticism*—are taken to comprise the ethos of modern science.[1]
>
> Robert K. Merton, *Science and Technology in a Democratic Order* (1942)

> hot tub *n*
>
> A large round bathtub filled with hot water for one or more people to relax, bathe, or socialize in; Jacuzzi *trademark*.
>
> ENCARTA WORLD ENGLISH DICTIONARY (2008)

I
INTRODUCTION

This article explores the continuing influence of scientific conventions on legal practice and law reform. Focused on the introduction of "concurrent evidence," it describes how changes to Australian civil procedure, motivated by judicial concerns about the prevalence of partisanship among expert witnesses,

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This Article is also available at http://www.law.duke.edu/journals/lcp.

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1. Robert K. Merton, *Science and Technology in a Democratic Order*, 1 J. LEGAL & POL. SOC. 115 (1942), *reprinted as* ROBERT K. MERTON, *The Normative Structure of Science*, *in* THE SOCIOLOGY OF SCIENCE: THEORETICAL AND EMPIRICAL INVESTIGATIONS 267, 268–70 (Norman W. Storer ed., 1973) (emphasis added).

may have been enfeebled because they were based upon enduring scientific conventions such as the "ethos of science."[2]

Historically, adversarial legal systems have left the selection and refinement of evidence to the parties. This devolution, sometimes referred to as "free proof," applies to all kinds of evidence, including expert evidence.[3] Recently in Australia, common-law judges began to modify the way expert evidence is prepared and presented. Judges from a range of civil jurisdictions have conscientiously sought to reduce expert partisanship and the extent of expert disagreement in an attempt to enhance procedural efficiency and improve access to justice. One of these reforms, concurrent evidence, enables expert witnesses to participate in a joint session with considerable testimonial latitude. This represents a shift away from an adversarial approach and a conscientious attempt to foster scientific values and norms.

This article describes the environment out of which concurrent evidence emerged as well as the operation of concurrent evidence and related pretrial activities. It then reproduces the primary justifications for concurrent evidence before undertaking a more critical review based on observations, interviews, and engagement with specialist literatures.

II

PROBLEMS WITH EXPERT EVIDENCE: ADVERSARIAL BIAS, COST, AND DELAY

It is not only U.S. litigants and commentators who have attributed serious socio-legal problems to expert evidence.[4] Over the last decade, English and Australian judges have become increasingly anxious about the quality of expert evidence appearing in courts, particularly in their civil-justice systems. An influential survey of judges and magistrates undertaken at the turn of the millennium identified bias and partisanship as the most pressing problems with expert evidence in Australia.[5] According to its authors, judges "identified partisanship or bias on the part of expert witnesses as an issue about which they were concerned and in respect of which they thought that there needed to be change."[6] In response, Australian judges and law-reform agencies have focused their attention on "adversarial bias," the partisanship associated with the

2. *See* MERTON, *supra* note 1, at 268–70.

3. ANDREW LIGERTWOOD, AUSTRALIAN EVIDENCE (4th ed. 2004).

4. *See, e.g.*, Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 50–55 (1901) (examining the various methods of utilizing expert evidence). *See generally* PETER HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM (1990) (polemical account of the negative impacts of dubious scientific evidence and practices on legal and social outcomes).

5. IAN FRECKELTON, PRASUNA REDDY & HUGH SELBY, AUSTRALIAN JUDICIAL PERSPECTIVES ON EXPERT EVIDENCE: AN EMPIRICAL STUDY (1999).

6. *Id.* at 113. For criticism of this study, see Gary Edmond, *Judging Surveys: Experts, Empirical Evidence and Law Reform*, 33 FED. L. REV. 95, 127–35 (2005).

alignment or identification of an expert with a party and its interests.[7] Concerns about adversarial bias have led senior judges to change the rules of civil procedure in an attempt to discipline expert witnesses.

In order to understand the Australian legal context in which these developments occurred, it is useful to describe developments in England and to distinguish them from those in the United States. Like the United States, Australia is a federation composed of states and adversarial jurisdictions. Since European settlement, Australians have, with a few exceptions, looked to England for legal authority and law-reform initiatives. One reform, in particular, dramatically changed the Australian civil-justice landscape. By the late 1980s, most Australian jurisdictions had followed the English lead and effectively abolished the civil jury.[8] Consequently, the vast majority of civil litigation in Australia is now heard and decided by a single judge. The elevation of legally trained judges to fact finder has changed many of the rules and trial dynamics in civil litigation.[9]

During the last decade, in the wake of a prominent inquiry into civil justice undertaken by Lord Woolf and subsequent, substantial procedural reform in England, Australian judges began to modify their rules of civil procedure. Concerns with expert evidence, particularly concerns about partisanship and the costs associated with adversarial legal procedures, were prominent in Woolf's *Access to Justice* report and subsequent reforms to the English Civil Procedure Rules.[10] Throughout his inquiry, Woolf openly expressed dissatisfaction with the proliferation of expert witnesses and the growth of a "litigation support industry."[11]

Following the English example, Australian law-reform commissions and senior judges recommended and instituted a range of generic reforms in an attempt to reduce adversarial bias as well as the costs and delays widely attributed to the provision of expert evidence. These aims were embodied in legislation such as the *Civil Procedure Act*, enacted in 2005 in New South Wales, which provides that "the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the costs to the parties is proportionate to the importance and complexity of the subject-matter in dispute."[12] The objectives of the Act aspire

7. NEW SOUTH WALES LAW REFORM COMM'N, EXPERT WITNESSES (REPORT 109) 71 (2005); *see also* AUSTL. LAW REFORM COMM'N, MANAGING JUSTICE: A REVIEW OF THE FEDERAL JUSTICE SYSTEM (REPORT 89) ¶ 1.121 (2000) (discussing the advantages and disadvantages of the adversarial system).

8. There is no constitutional guarantee of a civil jury in Australia. *See* BERNARD CAIRNS, AUSTRALIAN CIVIL PROCEDURE 506–536 (6th ed. 2005).

9. Also, in most Australian civil jurisdictions, costs are normally awarded against the unsuccessful party. *Id.* at 469–471.

10. Civil Procedure Rules, 1999 (Eng. & Wales).

11. HARRY WOOLF, ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES Ch. 13, ¶¶ 1–2 (1996).

12. Civil Procedure Act, 2005, § 60 (N.S.W.).

to the "just, quick and cheap resolution of . . . proceedings."[13] The formal rationale behind concurrent evidence links this new procedure to an institutional ethos motivated by the need for more-efficient legal practice and more-impartial expert advice. Though not adopted from England, the practice of introducing concurrent evidence corresponds with an express commitment to improving legal processes and public access to law.[14]

Notwithstanding apprehension about bias, Australian judges have maintained a more liberal posture toward expert evidence than have most U.S. courts. They have not, for example, developed a particularly exclusionary approach to admissibility decisionmaking.[15] As the primary fact finders in civil litigation, Australian judges retain considerable influence over expert evidence even after admission. Unlike their U.S. counterparts, Australian judges have not had to develop an exclusionary jurisprudence to manage their dockets or become gatekeepers to prevent juries from hearing marginal expert evidence.[16] They can, for example, moderate the interpretation and weight they attach to expert evidence in their written decisions.[17] In consequence, the *Daubert* trilogy and concerns about the reliability of expert evidence have exerted very limited influence in Australia (and England).[18]

III

WHAT IS CONCURRENT EVIDENCE?

Basically, concurrent evidence (also known by the sobriquet, "hot tub") is a civil procedure employed when parties have secured the services of experts and those experts disagree about one or more issues pertinent to the resolution of a dispute.[19] Concurrent evidence enables experts from similar or closely related fields to testify together during a joint session. The openings of these sessions tend to be more informal than examination-in-chief (that is, direct) and cross-examination, which are associated with conventional adversarial proceedings. For at least part of their testimony, experts are freed from the constraints of formally responding to lawyers' questions. During concurrent-evidence

13. *Id.* § 56.

14. *See* Peter McClellan, Chief Judge at Common Law, Supreme Court of N.S.W., Address Before the Expert Witness Institute of Australia and the University of Sydney Faculty of Law: The New Rules (Apr. 16, 2007), *available at* http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mcclellan160407.

15. *See* Gary Edmond, *Specialised Knowledge, The Exclusionary Discretions and Reliability: Reassessing Incriminating Expert Opinion Evidence*, 31 U. N.S.W. L.J. 1, 1–2 (2008) (examining Australian judges' reluctance to exclude or limit expert evidence).

16. *Id.* at 49–55.

17. *Id.*

18. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993); Gen. Elec. Co. v. Joiner 522 U.S. 136 (1997); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). For Australian cases, see, for example, R v. Tang, (2006) 65 N.S.W.L.R. 681. For England, see, for example, R v. Gilfoyle, [2001] 2 A.C. 57 (Crim. Div.); R v. Dallagher, [2003] 1 A.C. 195 (Crim. Div.).

19. *See* King v. Military Rehab. and Comp. Comm'n (2005) 83 A.L.D. 322, ¶ 22 (Admin. App. Trib.).

sessions, expert witnesses are usually presented with an opportunity to make extended statements, comment on the evidence of the other experts, and are sometimes encouraged to ask each other questions and even test opposing opinions.

The extracts below illustrate some of the ways in which concurrent evidence operates in practice. In the Land and Environment Court of New South Wales,

> [a]t trial, the experts are sworn in and give evidence at the same time. It is often useful to have a written agenda of matters to be dealt with in oral evidence. The experts have an opportunity to explain their position on an issue and to question the other witness or witnesses about their position. Questions are also asked by counsel for the parties and the judge. In effect, the evidence is given through *discussion* in which the experts, the advocates and the judge participate. Questions and *discussion* on a particular issue by all experts can be completed before moving on to the next issue.[20]

A second description, taken from a decision by Justice Lockhart in the Trade Practices Tribunal, is one of the earliest documented examples of a concurrent-evidence procedure in operation.

> Four expert witnesses in the field of economics furnished statements and were examined orally before the Tribunal at the hearing. The Tribunal adopted the following procedure with respect to expert witnesses, for the purpose of obtaining the maximum benefit from their evidence and removing them from the adversary process as far as possible:
>
> - At the conclusion of all the evidence (other than the evidence of the experts) and before the commencement of addresses, each expert was sworn immediately after the other and in turn gave an oral exposition of his or her expert opinion with respect to the relevant issues arising from the evidence.
> - Each expert then in turn expressed his or her opinion about the opinions expressed by the other experts.
> - Counsel then cross-examined the experts, being at liberty to cross-examine on the basis (a) that questions could be put to each expert in the customary fashion (i.e. one after the other completing the cross-examination of one before proceeding to the next), or (b) that questions could be put to all or any of the experts, one after the other, in respect of a particular subject, then proceeding to the next subject. Re-examination [re-direct] was conducted on the same basis.
>
> In the result we gained assistance from the evidence of the experts. Their oral expositions and examinations occupied only three and one-half hours.[21]

Concurrent evidence sessions usually involve two to four experts, although they can be considerably larger. It is not uncommon to hold several concurrent-evidence sessions during a single proceeding, each featuring different types of experts. It is also not uncommon for experts from different fields to be joined in the determination of a single issue. The following examples are drawn from the Administrative Appeals Tribunal (AAT), a federal body responsible for merits reviews of administrative decisions. The case involved a challenge to the

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20. Peter Biscoe, Judge, Land & Env't Court of N.S.W., Address at the Australasian Conference of Planning and Environment Courts and Tribunals, Expert Witnesses: Recent Developments in New South Wales (Sept. 16, 2006), ¶ 15, *available at* http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Speech_16Sept06_BiscoeJ_Expert_Witness.doc/$file/Speech_16Sept06_BiscoeJ_Expert_Witness.doc (emphases added); *see also* Stockland Dev. Pty Ltd. v. Manly Council, No. 10428, 2004 WL 1926821 (N.S.W. Land & Env't Ct., Aug. 3, 2004); BGP Prop. Pty Ltd. v. Lake Macquarie City Council, (2004) 138 L.G.E.R.A. 237, 263.

21. Re Queensl. Indep. Wholesalers Ltd. (1995) 132 A.L.R. 225, 231–32.

determination of the geographical boundary for the Coonawarra, one of Australia's most prestigious wine regions. Experts in viticulture, horticulture, hydrology, and wine production comprised the first panel in the "hot tub." The second panel of experts likewise included viticulturists, but had as well experts in cartography, geography, and soil science.[22] Other panels were composed of historians and those with expertise in the marketing of wine.[23] The large number of experts and range of their specializations may not be entirely representative, but these examples provide some indication of how the concurrent evidence sessions can combine experts from a range of disparate, though contextually related, specializations.

Most of the concurrent-evidence sessions I have observed break down into two quite distinct parts. The first stage represents a major shift from conventional adversarial proceedings. During this stage, all of the experts are asked to comment, sometimes in very general terms, about the case, the issues, their opinions, and the differences between them. These comments can be protracted and are sometimes punctuated by questions from the lawyers, the judge, and even the other experts participating in the session. The questions, at least initially, tend to be of an elucidatory nature. Once each of the experts has explained her position, she usually supplements her initial testimony with comments on the opinions and testimony of the other experts. The judge, rather than the lawyers, often presides over this first stage. Sometimes the judge suggests topics and directs the experts to comment on legally relevant issues. It is common for judges to ask questions and not uncommon for them to ask lots of questions. At the end of this first stage (or sometimes at the end of the entire concurrent-evidence session), the experts are usually asked if there is anything they would like to add, qualify, or clarify.

The second stage of the concurrent-evidence session more closely resembles the conventional adversarial trial. Here, the lawyers reassert control by directing questions to the expert witnesses. Usually, there is little need for examination-in-chief and the lawyers begin by cross-examining the opposing experts in the usual order. The presence of several expert witnesses allows questions to be put to more than one witness, and witnesses can be asked to comment on the other experts' answers. During the second stage, because of the attempt to produce a less adversarial environment, the lawyers (usually barristers) are not always sure about their entitlement to vigorously cross-examine, and experts are sometimes uncertain about the extent of their constraint.

Variations in practice reflect not only institutional traditions and rules (or lack of rules) associated with the different courts and tribunals in which

22. Re Coonawarra Penola Wine Indus. Ass'n Inc., No. S2000/182, ¶¶ 61, 65 (Admin. App. Trib., Oct. 5, 2001), *available at* http://www.austlii.edu.au/au/cases/cth/AATA/2001.

23. *See* Gary Edmond, *Disorder with Law: Determining the Geographical Indication for the Coonawarra Wine Region*, 27 ADEL. L. REV. 59, 158–60 (2006) (documenting a contentious dispute over geographical boundaries and the application of scientific-expert evidence).

concurrent evidence is received, but also differences between cases, the predilections of judges and lawyers, as well as the number, type, and experience of experts. Depending on how concurrent-evidence sessions are operationalized, varying degrees of control are retained by lawyers or obtained by the experts and the judge (at the expense of the lawyers).

The introduction of concurrent evidence has been supplemented by a number of interrelated reforms.[24] The most significant of these reforms are the pretrial joint meeting (also known as a joint conference or conclave), which leads to the production of a joint report, and the imposition of a formal code of conduct.

Aspiring to make trials run more efficiently, many Australian courts now require experts from related fields to meet, preferably face-to-face and usually in the absence of lawyers, prior to the trial.

> Before giving evidence, experts of the same discipline confer and produce a joint report which sets out the matters on which they agree, the matters on which they disagree and their reasons for disagreement. This enables the Court to identify the differences which remain between them and which require resolution through their oral evidence.[25]

These meetings are intended to enable the experts to identify the extent of their agreement or disagreement, resolve or narrow differences, and reduce their respective positions to writing in the form of a joint report that they are required to endorse. This joint report, it is hoped, will help to procure settlement. Ordinarily, only the areas of disagreement will be "live" should the case proceed to trial.

During the joint conferences "an expert witness must exercise his or her *independent, professional judgment* . . . and must not act on any instruction or request to withhold or avoid agreement. An expert should not assume the role of advocate for any party during the course of discussions at the joint conference."[26] The expectation that experts will be independent and professional servants of the court (and justice) is longstanding.[27]

In Australia, these expectations are now formally elaborated in a related series of reforms. In the late 1990s, in response to Woolf's review and domestic concerns about the detrimental effects of bias, Australian judges began to impose codes of conduct on expert witnesses.[28] These codes represent an attempt to eradicate the partisan culture widely associated with expert witnessing. Now expert witnesses in most Australian jurisdictions are required

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24. Several Australian jurisdictions have embarked on more-fundamental reforms, which include encouraging parties to select a joint (or single) expert between them or risk the court appointing one. *See, e.g.*, Geoffrey Davies, *Current Issues—Expert Evidence: Court Appointed Experts*, 23 CIV. JUST. Q. 367 (2004) (describing disadvantages of the adversarial system).

25. Biscoe, *supra* note 20, ¶ 15; *see also* Uniform Civil Procedure Rules, 2005, § 31.26 (N.S.W.).

26. Uniform Civil Procedure Rules, 2005, § 31.23 (N.S.W.).

27. *See* TAL GOLAN, LAWS OF MEN AND LAWS OF NATURE: THE HISTORY OF SCIENTIFIC EXPERT TESTIMONY IN ENGLAND AND AMERICA 18–22 (2004).

28. *See, e.g.*, Federal Court Rules, Order 34 A.3 (Austl.).

to comply with a formal protocol and to sign a declaration to that effect in every case. These codes explicitly and unambiguously emphasize that "an expert witness is not an advocate for a party."[29] Rather, an "expert witness's paramount duty is to the court and not to any party in the proceedings."[30] In addition, the codes require expert witnesses to work cooperatively; "endeavor to reach agreement"; list facts and assumptions on which their opinions are based; identify any literature, materials, "examinations, tests, or other investigations" relied upon; specify any limitations of their opinions; and indicate if their opinion is inconclusive or requires further research or data.[31]

Although codes of conduct and formal declarations represent an attempt to regulate the performance of experts that predates the institutionalization of concurrent evidence, the codes are now used in conjunction with all procedures pertaining to expert witnesses. The duties emanating from the codes, along with the underlying model of expertise, are consistent with the expectations for conduct in pretrial meetings, the production of joint reports, and the concurrent-evidence sessions.

IV

MARKETING "HOT TUBS"

The basic concurrent-evidence technique emerged out of experiments in the 1970s.[32] Since that time, with the support of judges like Lockhart, Lindgren, and Heerey, this technique was used intermittently in tribunals and very occasionally in the Federal Court of Australia.[33] The institutionalization of concurrent evidence, however, is a far more recent development.[34] In the last five years, concurrent-evidence procedures have been formally adopted in the Federal Court, the Administrative Appeals Tribunal, the Supreme Courts of New South Wales and the Australian Capital Territory,[35] and the Land and Environment Court of New South Wales; it has also been used selectively in the superior courts of New Zealand.[36]

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29. FEDERAL COURT OF AUSTRALIA, PRACTICE DIRECTION: GUIDELINES FOR EXPERT WITNESSES IN PROCEEDINGS IN THE FEDERAL COURT OF AUSTRALIA (2008), *available at* http://www.fedcourt.gov.au/how/prac_direction.html#current.

30. Uniform Civil Procedure Rules, 2005, § 3.13 (N.S.W.).

31. *Id.* at Schedule 7, § 31.23. These were derived from English cases, such as: Ikerian Reefer, [1995] 1 A.C. 455; R v. Harris, [2005] 1 A.C. 5; R v. B, [2006] 2 A.C. 3.

32. *See, e.g.*, Re Queensl. Indep. Wholesalers Ltd. (1995) 132 A.L.R. 225, 231–32.

33. *See, e.g.*, Re Rosenthal and Repatriation Comm'n, No. N2000/378, 2002 WL 31256991 (Admin. App. Trib., Oct. 9, 2002).

34. *See, e.g.*, Federal Court Rules, Order 34A.3 (Austl.); Uniform Civil Procedure Rules, 2005, § 31.35 (N.S.W); Supreme Court Rules, 2006, (Austl. Cap. Terr.).

35. *Id.*

36. Prominent case law examples include Alphapharm Pty Ltd. v. H. Lundbeck A/S, No. 1120, 2008 WL 1891368, ¶ 58 (Austl., Apr. 24, 2008); Int'l Fund for Animal Welfare (Austl.) Pty Ltd. v. Minister for Env't and Heritage (2006) 93 A.L.D. 625, ¶¶ 43–45 (Admin. App. Trib.); Walker Co. v. Sydney Harbour Foreshore Auth., No. 30024, ¶¶ 1–13 (N.S.W. Land & Env't Ct., Apr. 19, 2004), *available at* http://www.austlii.edu.au/au/cases/nsw/NSWLEC/2004; Powerco Ltd. v. Commerce

The institutionalization of concurrent evidence has been accompanied by a publicity campaign dominated by senior members of the Australian judiciary (also described as "proponents"). The extracts below present the major arguments advanced in support of the new procedures. The ability to comprehensively reproduce the primary justifications seems to outweigh the limited inconvenience of a little repetition.

> Experience shows that provided everyone understands the process at the outset, in particular that it is to be a structured discussion designed to inform the judge and not an argument between the experts and advocates, there is no difficulty in managing the hearing. Although I do not encourage it, very often the experts who will be sitting next to each other, normally in the jury box in the courtroom, end up referring to each other on first name terms. Within a short time of the discussion commencing, you can feel the release of the tension which normally infects the evidence gathering process. Those who might normally be shy or diffident are able to relax and contribute fully to the discussion.
>
> This change in procedure has met with overwhelming support from the experts and their professional organisations. They find that they are better able to communicate their opinions and, because they are not confined to answering the questions of the advocates, are able to more effectively respond to the views of the other expert or experts. They believe that there is less risk that their expertise will be distorted by the advocate's skill. It is also significantly more efficient. Evidence which may have required a number of days of examination in chief and cross-examination can now be taken in half or as little as 20% of the time which would have been necessary.
>
> As far as the decision-maker is concerned, my experience is that because of the opportunity to observe the experts in conversation with each other about the matter, together with the ability to ask and answer each others questions, the capacity of the judge to decide which expert to accept is greatly enhanced. Rather than have a person's expertise translated or coloured by the skill of the advocate, and as we know the impact of the advocate is sometimes significant, you actually have the expert's own views expressed in his or her own words.[37]
>
> Peter McClellan, Chief Judge at Common Law, Supreme Court of N.S.W.

> One assumption of the adversarial system is that argument between people (even heated argument) is the most satisfactory means of resolving a controversy. It accepts that parameters of the debate and the management of the process will be controlled by advocates for whom the intellectual integrity of the outcome is not imperative. Their concern is to advance the interests of the client. We accept this approach to resolving factual questions, which involve a challenge to a witness's recollection, credibility or reliability. We have, I suggest, without much thought, accepted the same approach to experts.
>
> One consequence of the adversarial system is that witnesses, including many experts, consciously or unconsciously perceive themselves to be on one side or the other of the argument. Apart from the inefficiencies involved, the process discourages many of the most qualified experts from giving evidence. It is commonplace to hear people who have much to offer the resolution of disputes—doctors, engineers, valuers, accountants and others—comment that they will not subject themselves to a process which is not efficient in using their time. It is equally common to be told that the

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Comm'n, No. 2005 485 1066, ¶ 74 (N.Z., June 9, 2006), *available at* http://www.austlii.edu.au/nz/cases/NZHC/2006.

37. Peter McClellan, Chief Judge at Common Law, Supreme Court of N.S.W., Address at the LAWASIA Conference: Expert Witnesses—The Experience Of The Land & Environment Court Of New South Wales (Mar. 21, 2005), *available at* http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Speech_21Mar05_CJ.doc/$file/Speech_21Mar05_CJ.doc.

> person will not give evidence in a forum where the fundamental purpose of the participants is to win the argument rather than seek the truth. A process in which they perceive other experts to be telling "half truths" and which confines them to answering only "the questions asked" depriving them of the opportunity, as they see it, to accurately inform the court is rejected as "game playing" and a waste of their time.[38]
>
> Peter McClellan, Chief Judge at Common Law, Supreme Court of N.S.W.

> In my experience, the Hot Tub procedure brings a number of benefits which include the following. First, the experts give evidence at a time when the critical issues have been refined and the area of real dispute narrowed to the bare minimum. Secondly, the judge sees the opposing experts together and does not have to compare a witness giving evidence now with the half-remembered evidence of another expert given perhaps some weeks previously and based on assumptions which may have been destroyed or substantially qualified in the meantime. Thirdly, the physical removal of the witness from his party's camp into the proximity of a (usually) respected professional colleague tends to reduce the level of partisanship. Fourthly, the procedure can save a lot of hearing time.[39]
>
> Peter Heerey, Judge of the Federal Court of Australia

> Concurrent evidence can have a number of virtues over the traditional process:
> 1. The evidence on one topic is all given at the same time.
> 2. The process refines the issues to those that are essential.
> 3. Because the experts are confronting one another, they are much less likely to act adversarially.
> 4. A narrowing and refining of areas of agreement and disagreement is achieved before cross-examination.
> 5. Cross-examination takes place in the presence of all the experts so that they can immediately be asked to comment on answers of colleagues.[40]
>
> Garry Downes, Judge of the Federal Court of Australia and President of the AAT

> Requiring all evidence to be given concurrently reduced the importance of cross-examination by lawyers and increased the importance of questions designed to elicit the common ground, the areas of divergence and the reasons for divergence.[41]
>
> Brian Preston, Chief Judge of the Land and Environment Court of N.S.W.

According to these judges, concurrent evidence transforms the agonistic adversarial trial into a more cooperative enterprise in which scientific attitudes and values are afforded opportunities to manifest and flourish. The main benefits attributed to concurrent evidence (and associated procedural reforms) might be summarized as follows:

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38. Peter McClellan, Chief Judge at Common Law, Supreme Court of N.S.W., Address at the Industrial Relations Commission of New South Wales Annual Conference: Expert Evidence—Aces Up Your Sleeve (Oct. 20, 2006), *available at* http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_mcclellan 201006.

39. Peter Heerey, *Recent Australian Developments*, 23 CIV. JUST. Q. 386, 391 (2004).

40. Garry Downes, Judge of the Fed. Court of Austl., Address at the Inter-Pacific Bar Association Conference: The Use of Expert Witnesses In Court and International Arbitration Processes (May 3, 2006), *available at* http://www.aat.gov.au/SpeechesPapersAndResearch/speeches/downes/UseExpert WitnessesMay2006.htm.

41. Brian Preston, Chief Judge of the Land & Env't Court of N.S.W., Address Before the Australian Environmental Business Network: Ongoing Reforms of Practice and Procedure (June 16, 2006), *available at* http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Paper_14Jun06_Preston_Reforms.doc/$file/Paper_14Jun06_Preston_Reforms.doc.

Virtues	Textual support / Footnote[42]
Concurrent evidence embodies the scientific ethos: it provides a discursive, cooperative environment and facilitates peer review.	19, 20, 36, 37, 38, 39, 40
Experts like concurrent evidence.	36, 37
Concurrent evidence reduces partisanship (i.e., "adversarial bias").	36, 37, 38, 39
Concurrent evidence enhances communication, comprehension, and decisionmaking.	19, 20, 36, 38, 39, 40
Concurrent evidence reduces the influence of the lawyers.	36, 40
Concurrent evidence saves time, money, and institutional resources.	20, 24, 36, 37, 38, 39

V
MORE CRITICAL REFLECTIONS

Now we can start to turn up the heat on the "hot tub" and reconsider some of the assumptions and advantages used to justify its introduction and use. Although many of these issues require further empirical investigation, some observations based on contributions from historians and sociologists, along with the responses of those who have participated in concurrent-evidence sessions, can contribute to the fire.

A. The Scientific Ethos?

Proponents contend that, unlike conventional adversarial procedures, concurrent evidence embodies the values of science or allows the scientific ethos to more readily surface.[43] Codes of conduct, pretrial meetings (without lawyers), and concurrent-evidence sessions are credited with facilitating a cooperative "discussion," which allows the experts to assist the court in reaching a decision more effectively. Settlement and resolution are more readily facilitated because the proximity of peers provides a powerful disciplining

42. "Textual support" refers to extracts reproduced throughout this article and AUSTL. LAW REFORM COMM'N, *Review of The Adversarial System of Litigation: Issues Paper 24*, 7.10 (1998), *available at* http://www.austlii.edu.au/au/other/alrc/publications/issues/24/ALRCIP24.html; *see also* AUSTL. LAW REFORM COMM'N, MANAGING JUSTICE: A REVIEW OF THE FEDERAL JUSTICE SYSTEM (REPORT 89) (2000); ADMIN. APPEALS TRIBUNAL, AN EVALUATION OF THE USE OF CONCURRENT EVIDENCE IN THE ADMINISTRATIVE APPEALS TRIBUNAL (2005).

43. See sources supporting "Virtue 1" in Table, asserting that concurrent evidence embodies the scientific ethos. *See, e.g.*, McClellan, *supra* notes 37–38.

influence.[44] Further, experts may prefer concurrent evidence because of the familiar, cooperative approach to resolving disagreement and uncertainty. Proponents, appealing to scientific norms and the efficacy of peer participation, suggest that concurrent evidence provides a means of securing less-partisan and less-extreme expert advice.[45] Unfortunately, these justifications are predicated upon romanticized images of expertise and expert disagreement.[46] Thus, it is useful to make a few remarks about judicial appeals to the "ethos of science" and peer review.

The sociologist Robert Merton offered an early and highly influential account of scientific norms and their social functions. His work suggested that norms like "universalism," "communism," "disinterestedness," and "organized skepticism" were central to scientific activity.[47] Lacking Merton's sociological and historical sophistication, modern reformers routinely (and unwittingly) promote elements of his sociology—developed in response to the rise of fascism in the 1930s—as some kind of timeless prescription for all authentic scientific activity.[48] This not only caricatures Merton's work on the normative structure of science but removes his scholarship from its historical context. To the extent that Australian legal reforms are based, even loosely, around such normative constructs, they trivialize both modern sociological endeavors and, more importantly, changes to scientific and biomedical practice.

More recent sociological investigation suggests that the norms described by Merton are unlikely to guide scientific practice or assessments of scientific knowledge. Appealing as norms may be, they are not prescriptive, and in many contexts they are open to inconsistent, though potentially legitimate, interpretations.[49] Norms such as "disinterestedness," "communalism," and "organized skepticism" encounter more fundamental difficulties when considered in the context of changes to the organization and funding of scientific and biomedical research in the post-war era. The growth of pharmaceutical companies and the rise of biotech start-ups—in response to

44. *Id.*

45. See sources supporting "Virtue 3" in Table, *supra* p. 160, asserting that concurrent evidence reduces partisanship.

46. *See* Gary Edmond, *Judicial Representations of Expert Evidence*, 63 MOD. L. REV. 216 (2000) (examining inconsistencies in the way scientific evidence is represented in legal proceedings and judgments); *see also* DAVID CAUDILL & LEWIS LARUE, NO MAGIC WAND: THE IDEALIZATION OF SCIENCE IN THE LAW 49, 54–55 (2006) (noting the loose boundaries between social factors and scientific inquiry and practice).

47. *See* MERTON, *supra* note 1, at 266–78. "Communalism" and "communality" are often substituted for "communism."

48. *See, e.g.*, McClellan, *supra* note 38.

49. *See* Michael Mulkay, *Norms and Ideology in Science*, 15 SOC. SCI. INFO. 637–56 (1976) (discussing the roles of norms in scientific activity); Michael Mulkay, *Interpretation and the Use of Rules: The Case of Norms of Science*, *in* SCIENCE AND SOCIAL STRUCTURE: A FESTSCHRIFT FOR ROBERT K. MERTON 111 (Tom Gieryn ed., 1980) (discussing the important role of normative principles on scientific discourse and practice).

technological breakthroughs, changes to intellectual-property regimes, and the availability of private capital—are good examples.[50]

Many of the practical limitations with the normative ethos were explored through empirical investigation. One study, conducted in the early 1970s, concluded that NASA scientists routinely contravened Mertonian-style norms.[51] Derogations from these norms were so pervasive that the investigator, Ian Mitroff, developed the idea of the "counter-norm."[52] Mitroff found that his NASA subjects accounted for their scientific activities using a variety of explanatory resources. When their behavior seemed to contravene popular expectations—such as the norms described by Merton—scientists simply appealed to a range of exceptions and qualifications that helped to legitimize (or excuse) what might otherwise have been considered aberrant (or even deviant). It was these principled derogations that were characterized as counter-norms.[53] Of interest, Mitroff noticed that departures from norms such as "disinterestedness" and "communalism" did not necessarily correlate with poor standing or a lack of credibility.[54] Some of the most eminent and successful scientists—based on the standing of their research and institutional affiliations—were secretive, resented criticism, and adhered to "pet" theories in the face of adverse evidence. A corollary was that knowledge derived through secret, noncooperative, and interested activities was not necessarily understood as pathological or unreliable. These findings are consistent with subsequent investigations.[55]

There are also difficulties with judicial appeals to "organized skepticism" in the guise of peer review. Proponents suggest that the proximity of colleagues will discipline and constrain expert performances, particularly the incidence of partisanship and adversarial bias.[56] There are good reasons, however, for believing that peer participation will be less effective than proponents imply. After all, extensive sociological and biomedical literatures question the value and efficacy of scientific peer review.[57]

Without delving into this vast literature, one illuminating issue merits discussion. While U.S. judges are searching for "reliability" through method

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50. *See generally* PHILIP MIROWSKI, THE EFFORTLESS ECONOMY OF SCIENCE (2004) (discussing the influence of economics on scientific practice); HELGA NOWOTNY, PETER SCOTT & MICHAEL GIBBONS, RE-THINKING SCIENCE (2001) (arguing for a fundamental reexamination of the distinction between society and science).

51. IAN MITROFF, THE SUBJECTIVE SIDE OF SCIENCE 85–88 (1974) (examining the role of subjective factors in scientific research).

52. *Id.* at 77.

53. *Id.*

54. *Id.* at 73–79.

55. *See, e.g.*, HARRY COLLINS, GRAVITY'S SHADOW (2004) (sociological history of the decades-long search for evidence of gravitational waves).

56. *See, e.g.*, Heerey, *supra* note 39.

57. Pervasive assumptions about the efficacy of peer review and publication are critically appraised in Gary Edmond, *Judging the Scientific and Medical Literature: Some Legal Implications of Changes to Biomedical Research and Publication*, 28 OXFORD J. LEGAL STUD. 523, 523–31 (2008).

discourses (for example, testing), general acceptance, publication, and peer review, and while English and Australian judges are endeavoring to reduce adversarial bias through procedural reforms, increasing the proximity of experts, and facilitating a "discussion," the world's leading biomedical journals have resorted to more legalistic solutions to help them assess the value of contributions (that is, research papers submitted for publication). Rather than expose submissions to further peer review or place greater emphasis on formal adherence to method doctrines, members of the International Committee of Medical Journal Editors, for example, require information about conflicts of interest, commercial sponsorship, and the identity of all contributors, and they now mandate the prospective registration of clinical trials to help them identify—if not eliminate—forms of bias.[58] These pragmatic responses to the impact of commercial sponsorship, by well-resourced biomedical journals with technically competent staffs, serve to highlight how the power attributed to scientific norms and the proximity of peers is not only exaggerated but unlikely to help judges reliably assess expert disagreement.

More prosaically, in conventional adversarial proceedings expert advisers and expert witnesses often sit in the courtroom monitoring testimony. These "opposing" experts have access to expert reports and transcripts. Is it realistic to think that the concurrent participation of these experts—effectively moving them a few yards in the courtroom and allowing them to respond during the same session rather than a day or a week later—will produce a demonstrable change in behavior?

Australian judges, concerned about the behavior of experts, seem to be intent on reducing adversarial bias through the provision of a space—in the adversarial trial and pretrial processes—that is shaped by scientific, rather than legal, conventions. To the extent that the new procedures have conflated idealized norms of science with actual scientific practice, this response might be imprudent. Proponents of concurrent evidence seem to believe that temporarily marginalizing the lawyers and facilitating a "discussion" in the midst of an adversarial process will overcome the influence of expert selection and the experts' sensitivity to the parties' causes of action, and, most remarkably, enable the experts to somehow transcend theoretical and professional commitments, as well as personal limitations.

B. Partisanship and Adversarial Bias

When it comes to assessing expert evidence, "partisanship" and "adversarial bias" are not particularly precise or analytically reliable concepts. They tend to be used selectively to privilege (or discount) particular experts and opinions.

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58. INT'L COMM. OF MED. JOURNAL EDITORS, UNIFORM REQUIREMENTS FOR MANUSCRIPTS SUBMITTED TO BIOMEDICAL JOURNALS: WRITING AND EDITING FOR BIOMEDICAL PUBLICATION § II.D (2005). The ICMJE is a group of medical-journal editors, which includes participants from, among others, *The New England Journal of Medicine*, the *Journal of the American Medical Association*, the *British Medical Journal*, and the *Lancet*.

All experts are (and expertise is) more or less aligned, subjective, interested, biased, and dependent. These alignments, interests, and limitations may assume a great variety of forms—be they theoretical, professional, institutional, financial, or personal. Whether (the appearance of) "bias," "interests," or "sponsorship" affects the reliability of expert evidence is a fundamental but complex issue.[59] Although judges and fact finders should seek information about influences and biases, unfortunately this information will not always expedite resolution or simplify decisionmaking.[60]

Procedural reforms based around "objectivity" and "impartiality" offer limited hope for improving the reception and treatment of expert evidence.[61] Not only do these concepts have limited analytical utility, but there is little evidence to suggest that adversarial bias is deliberate or consistently detrimental to civil practice. Although experts selected by the different parties may well take on aspects of a case, based *in part* on their contractual relationship, these experts will often be selected because they already adhere to particular assumptions and commitments or employ methodologies considered valuable. Even if not conspicuously or predictably aligned, experts (including court-appointed experts) do not enter disputes without professional, institutional, and ideological "baggage."[62] Expert selection may be far more important than any pressures or importunity brought about by adversarial alignment and interactions with parties and their lawyers.

These observations have serious implications for concurrent evidence, and for the utility of codes of conduct and expert declarations. Without a reliable means of identifying deliberate partisanship—as opposed to genuinely held beliefs and opinions—and its impact on expert evidence, codes of conduct become abstract formulations with primarily symbolic value. Codes of conduct affirm the role of the expert as a servant of the court but fail to explain what that might mean to an expert with theoretical commitments, professional prejudices, particular visions of social justice, and a range of subsidiary obligations.

Moreover, if partisanship is prevalent, then its persistence might be a consequence of the difficulty of appearing impartial along with a widespread realization that judges have practical problems disciplining partisan experts. Without more-sophisticated models of expertise, on what grounds are judges to

59. Steven Yearley, *The Relationship Between Epistemological and Sociological Cognitive Interests*, 13 STUD. HIST. &. PHIL. SCI. 353, 375 (1982). *See generally* Steve Woolgar, *Interests and Explanation in the Social Study of Science*, 11 SOC. STUD. SCI. 365 (1981) (explaining the difficulties of using interests as explanatory resources).

60. Kenneth Rothman, *Conflict Of Interest: The New McCarthyism in Science*, 269 J. AM. MED. ASS'N 2782, 2783 (1993) (a critical response to calls for full disclosure of conflicts of interest in biomedical research).

61. For an account of the socially contingent nature of "objectivity," see generally LORRAINE DASTON & PETER GALISON, OBJECTIVITY (2007).

62. *See* Laura Hooper, Joe Cecil & Thomas Willging, *Assessing Causation in Breast Implant Litigation: The Role of Science Panels*, 64 LAW & CONTEMP. PROBS. 139, 151–54 (Autumn 2001) (describing problems with a court-appointed expert panel in large-scale litigation over breast implants).

apply sanctions against experts who breach their "duty" to the court or who are unable to achieve consensus around their opinions? How should judges determine whether reluctance to agree or to narrow the grounds of disagreement at a joint meeting or in a "hot tub" constitutes legitimate professional differences, or obduracy driven by a party's desire for success at trial? Do judges possess the technical abilities to distinguish between willful breaches as opposed to genuine adherence to idiosyncratic views? When is adherence to a particular "school of thought" partisan and under what circumstances might it be reasonable or objective? What can judges do when experts hold firm opinions in areas widely accepted as uncertain or disagree about the extent of consensus in a field (or even the relevance of the field)? The recent reforms tell us little about possible sanctions for breaches of duties, or how such breaches might be ascertained and proved.[63]

Even if claims about the prevalence of partisanship were not empirically justified, judicial recourse to problems created by "adversarial bias" and "junk science" might nevertheless be comprehensible. Institutional and professional benefits may accrue from the perpetuation of alarm about expert performances, especially the prevalence of bias and departure from the scientific ethos, in contexts where judges have to routinely resolve expert disagreement and explain their reasons for preferring one expert opinion to another.

C. Enhancing Communication and Comprehension

Claims for concurrent evidence are less controversial when restricted to improving communication and judicial comprehension. Disregarding questions about partisanship, evidentiary reliability, and the realities of scientific practice, it would seem difficult to challenge the contention that concurrent evidence has the potential to improve communication and enhance comprehension in court—especially if its use dramatically reduces the volume of expert testimony. If nothing else, concurrent-evidence procedures require the experts to meet and talk, they enable expert witnesses to give longer explanations using their own words, they encourage experts to comment directly on the testimony of others, and they provide a forum where judges are less restricted in their questioning of witnesses and enable fact finders to observe the interactions between experts.[64]

Provided concurrent evidence retains provision for vigorous cross-examination, even if the witnesses are no longer quite as restrained or servile, then it should help to improve communication and comprehension in the trial and on appeal.[65] There are, however, no guarantees that concurrent evidence

63. Though longstanding, judicial concerns about expert partisanship have produced few disciplinary responses. *See, e.g.*, Lord Abinger v. Ashton, (1873) 17 Ch. D. 358, 374 (noting biases of paid experts).

64. *See generally* MISUNDERSTANDING SCIENCE (Alan Irwin & Brian Wynne eds., 1996) (discussion of socially contingent approaches to expert knowledge).

65. *See* SHEILA JASANOFF, SCIENCE AT THE BAR: LAW, SCIENCE AND TECHNOLOGY IN AMERICA 200–216 (1995) (sociological account of the complex relations between law and science).

will narrow disagreement, encourage cooperation, increase settlement, or render decisionmaking easier, less controversial, or more accurate.

D. Out of Sight, Out of Mind?

Lawyers may lose some control over expert witnesses during the pretrial processes and in the more discursive openings of concurrent evidence. Means of retaining influence and predictability may, nevertheless, be at hand. Procedural efforts to reduce the ability of lawyers to influence expert evidence may actually have effects elsewhere in the process, such as in the choice of experts. If lawyers are excluded from pretrial meetings and marginalized during parts of the trial, then, in order to maintain some semblance of control and predictability, it will become increasingly important to select experts who understand what they need to do in the interests of the case while maintaining professional credibility before the legal institution.

The introduction of concurrent evidence may encourage lawyers to select experts who are unlikely to make damaging concessions or to be maneuvered into compromising concessions by the experts retained by other parties. Many lawyers will be reluctant to cede control to experts unless they are confident that *their* experts understand the tacit rules of the game. Over time it may become even more important to select experts whose contribution to any open "discussion" is predictable and effective. Marginalizing lawyers may actually encourage the use of more-experienced expert witnesses. Ironically, the litigation specialists who seemed to irritate Lord Woolf may be the kind of experts that enable lawyers to maintain most control over pretrial proceedings and the evidence. These experts will be neither swayed nor exposed by codes of conduct.

The reforms also make the production of the joint report particularly important. The need to complete joint reports with attention to detail seems to be an emerging feature of practice. Meeting and completing a binding (practically if not always technically) joint report adds to the costs of the pretrial processes. And, because agreement between the experts will tend to constrain the parties, in practice lawyers will ordinarily have a clear idea of what their expert will say, and there will be considerable pressure on the expert to adhere to the terms of the original advice (or report) or a position consistent with the client's cause of action.

One further implication—which involves crediting experts with agency—is that pretrial meetings provide experts with new opportunities and incentives to manage their participation. Proponents, drawing upon normatively charged visions of expertise and committed to institutional efficiencies, seem to think this is desirable.[66] In so doing they tend to overlook the shared professional interests maintained by groups of experts, such as three neurosurgeons, meeting

66. *See, e.g.*, McClellan, *supra* notes 37–38.

beyond the surveillance of the lawyers and judge.[67] There are, of course, alternative ways to interpret expert consensus. By agreeing on a joint report, experts can dispose of suits, limit their exposure to cross-examination, and still receive substantial compensation for their pretrial activity. To some extent experts may be able to manage the scope of professional liability and even keep some disputes in-house. Away from the pressures of the courtroom and the gaze of the lawyers, experts are empowered to negotiate the terms and limits of the factual dispute. Once opposing experts strike agreement it will be difficult to explore the covert realm of expert negotiations or to reopen settled "facts."

E. Resource Implications and Logistics

In some circumstances, concurrent evidence will reduce the amount of time required of expert witnesses and may clarify, or even resolve, the issues and areas of residual disagreement. Unfortunately, at present there are no ready means to determine which cases will produce these savings or how "quicker" and more "cost effective" justice should be assessed against more-refractory values such as fairness, accuracy, or institutional legitimacy.[68] The only guides currently available are institutional presumptions qualified by issues of proportionality, procedural fairness, convenience, and personal preference.

Concurrent evidence might well reduce costs in large-scale litigation in which many experts are scheduled to testify. Compelling two, but especially more, experts to testify simultaneously will often reduce the length of a trial by allowing them to each give an answer to the same question and to merely endorse or qualify the opinions of other experts. Also, the lawyers do not have to reintroduce the various issues or the opinions of other experts over and over. In some cases, though, having experts provide evidence concurrently will increase the time they spend in court while reducing the overall length and cost of the proceedings, themselves.

When experts achieve consensus on substantial issues during the pretrial stages, more cases may be settled or abandoned. Generally though, the effects of concurrent evidence and pretrial meetings on settlement are unclear. The parties will often have solicited expert assistance before the joint meetings. So, if settlement occurs after these meetings, it will often be more expensive for the parties (if not for the court). If lawyers select more-predictable and intractable experts to compensate for their displacement from the pretrial phases, then it may prove more difficult to narrow the issues or to settle.

A further difficulty arises from the physical layout of Australian courtrooms. Tribunals and most courts are designed to allow a single witness to

67. *See* CAROL JONES, EXPERT WITNESSES: SCIENCE, MEDICINE AND THE PRACTICE OF LAW 165–193 (1994) (socio-legal account of the role of experts in legal processes in England).

68. Admin. Appeals Tribunal, *supra* note 42, §§ 2.1, 2.28, 6.2; *see also* King v. Military Rehab. and Comp. Comm'n (2005) 83 A.L.D. 322, ¶ 22 (Admin. App. Trib.); Flintstones Garden Supplies Centres v. Greater Geelong CC, P1775/2006, ¶¶ 41–42 (Admin Trib. (Vict.), Apr. 19, 2007), *available at* http://www.austlii.edu.au/au/cases/vic/VCAT/2007.

testify, usually from a dedicated witness box. When it comes to concurrent evidence, fitting more than two expert witnesses and the many exhibits and reports associated with expert testimony in these booths is often problematic. Some courts place the experts in the jury box. However, many tribunals and courts have neither jury seats nor even much space for the public. In response, they have improvised, bringing in additional chairs and tables and, in the very smallest courts, seating the expert witnesses at the bar table opposite the lawyers. If concurrent evidence is to continue, then there would seem to be a need to design courts with space for a panel of expert witnesses.

Another logistical difficulty emerges from the potential disorderliness of the "discussion." The chorus of different participants, in conjunction with the free-form structure, makes it difficult for anyone trying to record or transcribe the session to reliably identify speakers.

F. Judicial Independence, Procedural Fairness, and Criminal Justice

Concurrent evidence requires oversight and tends to encourage judicial intervention. It disrupts the adversarial trial and requires the judge to enable the experts to speak and comment on each other's opinions without too much interference from the lawyers. The judge is also encouraged to ask questions. Allowing judges to become more active makes sense from the perspective of communication and comprehension, but increased participation may simultaneously raise concerns about judicial impartiality and procedural fairness within adversarial systems, particularly regarding criminal trials.[69]

Many aspects of concurrent evidence have yet to be considered on appeal. Of particular concern are issues of procedural fairness (due process) and perceptions of fairness arising from the way concurrent evidence is implemented.[70] A range of issues create potential problems: How should judges identify suitable cases? How should judges handle different levels of experience and confidence among the experts? How similar do the types of expertise have to be before the session becomes intellectually suspect? What should a judge do when an affluent party calls several experts against an impecunious litigant with one or even none? Should the length and vigor of cross-examination be limited? What should judges do when lawyers object to experts making long speeches during the first or second stage? What happens if an expert refuses to be constrained in their answers, appealing to their "paramount duty" to the court? If concurrent evidence makes a trial or the preparation for a trial more expensive in a particular case, is it reasonable or fair to expect a party to bear the additional cost? What happens when experts disagree about what was actually said during the pretrial meetings or are unable to sensibly negotiate?

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69. *See* Marvin Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1033–35 (1975) (noting the perspective and limitations of judges in the adversarial system's explication of truth).

70. *See* TOM TYLER, WHY PEOPLE OBEY THE LAW 115–57 (2006) (exploring the public perceptions of law and legal procedure).

Parties and their advocates may also argue about when a concurrent-evidence session should be held.[71] Concurrent evidence disrupts the adversarial trial because it breaks the continuity of the cases developed by the respective parties. Concurrent evidence may change the dynamics of adversarial litigation in some jurisdictions. Unavoidably, concurrent evidence introduces a range of new strategic decisions.

These issues might not prove insurmountable. Judges and legal institutions, however, may be vulnerable if parties challenge concurrent evidence (and its related procedural developments). We have yet to see what appellate courts will make of concurrent evidence in the absence of much empirical evidence about costs, speed, veracity of outcomes, or public satisfaction.

Lurking in the background of the recent reforms to civil procedure are the implications for criminal justice and, in Australia, the jury. In 2001, a senior judge in New South Wales proposed the cautious extension of pretrial joint conferences to criminal proceedings. Although Justice Wood recognized that "it is not always the case that the defense can assemble a team of forensic experts of equivalent experience and expertise to those who work full time for forensic science laboratories or police services," he nevertheless commended pretrial conferences.[72] Wood even provided an example of the advantages: "[D]oubts entertained by a defense expert may be dispelled by the additional information or explanation provided in a joint conference, allowing the accused more comfortably to offer an early plea of guilty, and thereby receive the benefit of the discounting attaching to that circumstance."[73]

The disparity in the resources and experts available to the state provides one reason for resisting the wholesale extension of pretrial conferences and concurrent evidence to criminal proceedings.[74] Additional concerns arise from the presumption of innocence and the burden of proof. Is it appropriate or desirable, in adversarial proceedings, to require the defense experts to meet with the state's forensic scientists and consultants prior to trial? Should the defense be obliged to reveal its "hand" or disclose weaknesses in the prosecution case if such notice will allow the state to repair or change its expert evidence? There is also a danger that experts, testifying in the more free-form, concurrent-evidence session, might inadvertently disclose inadmissible or highly prejudicial information.

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71. *See* Uniform Civil Procedure Rules, 2005, § 31.35 (N.S.W.) (listing possibilities for the presentation of expert evidence).

72. James Wood, Chief Judge at Common Law, Supreme Court of N.S.W., Address at the 8th Greek Australian International Legal & Medical Conference: Expert Witnesses: The New Era (June 2001), *available at* http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_wood_010601.

73. *Id.*

74. *See generally* Michael Saks & Jonathan Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, 309 SCIENCE 892 (2005) (explaining how many longstanding forensic science techniques have not been empirically tested).

VI

EMPIRICAL EVIDENCE FROM EMERGING PRACTICES

Some of the emerging responses to concurrent evidence merit consideration. It might not come as a surprise to find that the experiences and impressions of lawyers, experts, and a wider selection of judges and commissioners, present more variegated impressions than those of the proponents.

A. Case Lore

Representations of concurrent evidence in published decisions are generally positive. The most familiar refrains among the growing number of Australian decisions documenting the use of concurrent evidence (and "hot tubbing") refer to the assistance obtained by the fact finder and to the savings in time and, implicitly, resources. Comments by the Tribunal in *Ironbridge Holdings Pty Ltd. and WA Planning Commission* are typical:

> The experts are to be commended for having participated in this process in a professional and diligent manner. While significant professional disagreement remained between them, their endeavours enabled the Tribunal to quickly grasp complex issues of traffic engineering involving a number of variables. Had this evidence been received in the way in which it is in most courts and tribunals, it is likely to have taken a week or more. In contrast, the concurrent evidence in the Tribunal took less than a day.[75]

Similarly, the use of case-management techniques and concurrent evidence in *Uniting Church Homes, Inc. and City of Stirling* meant that the "final hearing which might well have occupied up to two weeks, took the equivalent of one hearing day."[76] Taken at face value, the selective use of concurrent evidence seems to have the potential to radically reduce hearing times.

In other reported decisions, concurrent evidence is linked to cooperative interactions, concessions, and even agreement. Consider *Gangemi and the Shire of Margaret River*:

> [D]uring the course of the hearing, [two experts] were requested to confer with each other to determine the extent to which they agreed as to matters of land capability, and to identify the issues in respect of which they disagreed. They were then called together, and gave concurrent evidence. As it happened, the process of consultation ultimately gave rise to agreement of all issues of land capability, and [the experts] together prepared a plan depicting the different areas of productive agricultural land within the lot. Counsel for both sides were *extremely co-operative* in this process *and can take much credit for its success*. The process led to a far more effective resolution of the matter the subject of the witness's expertise than might have been expected by the traditional process of tender of reports and cross examination of each of the witnesses at length on those reports.[77]

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75. Ironbridge Holdings Pty Ltd. and WA Planning Comm'n, DR 345, ¶ 44 (Admin. Trib. (W. Austl.), Nov. 28, 2007), *available at* http://www.austlii.edu.au/au/cases/wa/WASAT/2007.

76. Uniting Church Homes Inc. and City of Stirling, RD 6, ¶ 31 (Admin. Trib. (W. Austl.), Aug. 19, 2005), *available at* http://www.austlii.edu.au/au/cases/wa/WASAT/2005.

77. Gangemi and Shire of Augusta-Margaret River, RD 126, ¶ 26 (Admin. Trib. (W. Austl.), June 2, 2005), *available at* http://www.austlii.edu.au/au/cases/wa/WASAT/2005 (emphases added); *see also* Brescia v. QBE, No. 50082/05, LEXIS BC200705312, ¶¶ 160–61 (N.S.W., July 6, 2007); Gumana v. N.

In cases like *Gangemi*, when counsel and experts are "extremely cooperative," it may be that concurrent evidence will help to narrow or resolve the dispute. Indeed, in some types of litigation—such as in a planning jurisdiction (for example, the Land and Environment Court of New South Wales) where there is considerable scope for creativity, discretion, and cooperative compromise—pretrial meetings and concurrent evidence might be especially helpful. One should, however, be careful equating collegiality, cooperation, and consensus with the absence of partisanship or inferring that expert agreement or compromise produces accurate or reliable evidence. The kinds of compromises that can be negotiated between town planners or geographers in relation to the size of a building or the uses of land, for example, might not be appropriate in professional negligence proceedings or between forensic scientists in criminal matters.

Notwithstanding its apparent successes, concurrent evidence does not invariably save time or help to clarify, or even narrow, areas of disagreement. It certainly does not guarantee concurrence, compromise, or even civility. In *Perpetual Trustees Victoria Ltd. v. Ford*, Justice Harrison explained that the concurrent evidence served "to highlight the absence of any likelihood of agreement between [the expert witnesses] on important issues" and "degenerated . . . into an interdisciplinary brawl."[78] In *Jetset Properties v. Eurobodalla Shire Council*, the proximity of the experts did not generate concessions, compromise, or moderation.[79] In that case, the proximity of peers seemed to exert little influence, at all:

> The opinions of the two sets of experts were far apart. They relied on different methodologies, used different data and reached different conclusions. Each believed that the methodology and data used by the other was useless. I detected no hint of recognition on either side of the professional competence of the other.[80]

In *Synergy Environmental Planning v. Cessnock City Council (No. 2)*, the experts could not even agree on what was said during the pretrial meetings.[81] "In this case, the evidence during the hearing showed that the experts, who could not even reach agreement on a true record of their joint conferences, remain far apart on technical matters, necessitating a Court decision on the facts and merits of those issues."[82] In *Morrison and Repatriation Commission*, the applicant relied upon the assistance of an expert witness who had limited familiarity with the medical specialization deemed relevant to the case.[83]

Terr. (2005) 141 F.C.R. 457, ¶ 173; Winters v. Att'y Gen. of N.S.W., No. 40730/07, 2008 WL 715461, ¶ 167 (N.S.W. Ct. App., Mar. 18, 2008).

78. Perpetual Tr. Vict. Ltd. v. Ford, No. 15045, 2008 WL 278422, ¶ 43 (N.S.W., Feb. 1, 2008).

79. Jetset Prop. v. Eurobodalla Shire Council, No. 10685, ¶ 42 (N.S.W. Land & Env't Ct., May 9, 2007), *available at* http://www.austlii.edu.au/au/cases/nsw/NSWLEC/2007.

80. *Id.*

81. Synergy Envtl. Planning v. Cessnock City Council (No. 2), No. 11353, ¶ 9 (N.S.W. Land & Env't Ct., Mar. 21, 2005), *available at* http://www.austlii.edu.au/au/cases/nsw/NSWLEC/2005.

82. *Id.*

83. Morrison and Repatriation Comm'n, No. N2005/47 (Admin. App. Trib., Aug. 2, 2006), *available at* http://www.austlii.edu.au/au/cases/cth/AATA/2006.

According to the Commission's decision, this seemed to create confusion and complexity that was not reduced by concurrent evidence.[84]

Trial judges have also encountered resistance to the use of concurrent evidence when the stakes are large and new procedures introduce uncertainty and risk. In "mega-litigation" over the rights to televise Australian Rules Football, a federal judge encouraged the parties to use concurrent evidence to "reduce the areas of disagreement and limit the hearing time required for exploring the remaining differences."[85] This proposal was "strenuously resisted by the Respondents"[86] and, to the limited extent it was used, did not prevent one of the experts from displaying "a tendency to argue the case on behalf of Telstra [a respondent], rather than confine herself to her area of expertise" despite the presence of other experts.[87]

Nor can one be confident that concurrent evidence will ease decisionmaking. Even when the process is orderly and constructive, the decisionmaker is required to weigh "the differing opinions." At the hearing in *Rezk and Australian Postal Corporation* the experts gave their evidence concurrently: "Neither expert compromised on [his] initial diagnosis.... The concurrent evidence clarified some elements of the different diagnosis but still left the tribunal with the task of resolving the differing opinions."[88]

Finally, in *Halverson v. Dobler*, a professional-negligence action, the concurrent evidence sessions were publicly valorized.[89] The main question at trial was whether the failure to perform an electrocardiogram was negligent and causally linked to the catastrophic brain injuries suffered by the plaintiff. The presiding judge, Peter McClellan, the leading proponent of concurrent evidence, thought the concurrent-evidence sessions proceeded in a "highly productive and efficient" manner.

> Each cardiologist prepared at least one written report and they met prior to giving their evidence in order to refine the issues falling within their areas of experience. They gave evidence concurrently, [one expert] participating by way of video link. This process proved both *highly productive and efficient* and has been of great benefit to me in resolving this case. The discussion was sustained at a high level of objectivity by all participants, each of whom displayed a genuine endeavour to assist the court to resolve the problems. The fact that ultimately they disagreed on critical issues was not

84. *Id.*

85. Seven Network Ltd. v. News Ltd., No. 1223, 2007 WL 2137775, ¶ 23 (Austl., July 27, 2007).

86. *Id.* ¶ 25.

87. Seven Network Ltd. v. News Ltd. (2007) 151 F.C.R. 450, ¶ 14.

88. Rezk and Austl. Postal Co., No. N2002/1720, 2005 WL 165614, ¶¶ 49, 51 (Admin. App. Trib., Jan. 18, 2005); *see also* Reardon and Repatriation Comm'n, No. N2002/1115 ¶ 30 (Admin. App. Trib., June 26, 2003), *available at* http://www.austlii.edu.au/au/cases/cth/AATA/2003/ (stating that experts' individual positions did not change as a result of the concurrent-evidence approach). *Contra* Gibbins and Austl. Postal Co., No. N2002/1655, 2003 WL 22073351, ¶ 69 (Admin. App. Trib., July 31, 2003) (noting experts' courtesy and professionalism).

89. Halverson v. Dobler, No. 20182/03, LEXIS BC200609964, ¶¶ 17, 104, 145 (N.S.W., Dec. 1, 2006); *see also* Wilson v. Tier, No. 20622/2001, LEXIS BC200800781, ¶ 119 (N.S.W., Feb. 22, 2008) (transcript from the concurrent-evidence session is reproduced in the judgment).

> due to anything other than a genuine difference of opinion about the appropriate conclusion to be drawn from the known facts.[90]

Halverson, perhaps, represents the apogee of concurrent evidence. McClellan is a senior judge with considerable experience using the technique. It might not be surprising, therefore, to find that concurrent evidence generally works well in his court. This does, however, raise an important point for the extension of concurrent evidence (and law-reform initiatives more generally). How do the new procedures work in situations with less-accomplished, less-experienced, and less-enthusiastic judges and commissioners? Although the emerging case law provides a partial answer, it might not be appropriate to evaluate concurrent evidence according to particular cases or to extrapolate from the impressions and experiences of undoubtedly able, but perhaps not entirely representative, judges.

Halverson, however, is also interesting for other reasons. The case demonstrates how the decisionmaker used conventional models of science for assessing witnesses and rationalizing the decision. Consider, for example, the summary of the concurrent evidence of the general practitioners:

> There were significant differences between the responses of the general practitioners to some critical questions . . . . Although all of the doctors brought a useful perspective to the various problems to my mind Dr Mackey's evidence was of the greatest assistance. . . . I was also impressed by Dr Bunker, who was prepared to make reasonable and appropriate concessions which tended to qualify his primary position. This was not always the case with Drs. Ford and Walsh.[91]

Considerations such as willingness to make concessions, clarity of opinion, reasonableness, relevant experience, and the ability to quickly and credibly respond to alternative perspectives may help judges to choose between divergent opinions. They can be used to attribute "objectivity" to specific cardiologists and privilege particular performances—like those of Dr. Mackey and Dr. Bunker—but they do not necessarily address the bases for holding opinions: the reliability of the opinions, assumptions, and underlying facts, the relevance of the expertise, the representativeness of the experts, or the extent of support in authoritative literatures.

Overall, when concurrent evidence works, its success seems to be limited to reducing the length of the trial and possibly to helping the decisionmaker understand the expert evidence. The case law tells us little, though, about partisanship, objectivity, the proper rate of concessions, or the deleterious effects of adversarial bias.

B. Listening to Lawyers and Experts

Limitations with the civil-procedural reforms, and some of the strained relations with adversarial justice, emerge more clearly from the experiences of lawyers (barristers and solicitors) and expert witnesses. The following

90. *Halverson*, LEXIS BC200609964, ¶ 101 (emphasis added).
91. *Id.* ¶¶ 67–68.

perspectives, which do not require much explanation, were selected because they introduce ambivalence and provide insights conspicuously absent from the judicial encomium. They are extracted from dozens of semi-structured interviews, discussions, and months of court observation conducted during 2007 and 2008.[92]

1. Interviews with Lawyers: Concurrent Evidence

"Concurrent evidence is . . . a bit like communism, good in theory but it doesn't work in practice." (*Solicitor*)

"If you've got more than two witnesses it just becomes hellish." (*Barrister*)

"The concurrent evidence deficiency, I see, is that people are thrown in the deep end and perhaps the force of the personality rather than the logic of the evidence is going to win the day." (*Barrister*)

"I think it leads to a less efficient and a less forceful presentation of evidence." (*Barrister*)

"Firstly . . . the ideal of them sitting in the witness box and having this discourse with each other never happens. . . . To the extent that they do talk to each other in the witness box it's usually, 'Have you got a pencil' rather than, 'I think you've got that wrong.' They don't cross-examine each other." (*Barrister*)

"If I want to examine, I will cross-examine in concurrent evidence even if some commissioners or judges think it's undesirable, because you are still entitled to test that person's evidence." (*Barrister*)

"The judges miss being barristers half the time because cross-examination is the best part of the job and so they sit up on the bench and have a bit of a go." (*Barrister*)

2. Interviews with Lawyers: Pretrial Meetings and Joint Reports

"Joint meetings [are] probably honest and good." (*Barrister*)

"Barristers [and judges] don't actually see all the shit that goes on before it gets to, you know [court] . . . they are sort of living in a slightly elevated stratosphere." (*Solicitor*)

It wasn't quick, it wasn't cheap, and it wasn't just. (*Solicitor*)

3. Interviews with Lawyers: Partisanship

"I'm not saying that there aren't some people out there who are hired guns but people knew who they were. The commissioners knew who they were and the judges knew who they were and nobody would pay any attention to them, and if you wanted to go to court and your client turned up with somebody who was one of those people, you would say "I'm not going to court with that expert because that expert is not somebody whose opinion is valued." (*Barrister*)

"This whole idea that people make up their mind because of the check that they're getting is offensive." (*Barrister*)

92. The author conducted more than fifty formal interviews with experts, lawyers, judges, and court workers in N.S.W.

"Credibility is the main thing I'm looking for. You don't want an advocate for your case.... You want... someone who is going to give an opinion that can be relied upon." (*Barrister*)

"I never really found there were hired guns." (*Barrister*)

"I think the judiciary gets overly concerned about trying to find an expert that doesn't exist." (*Barrister*)

4. Interviews with Lawyers: Other

[On the procedural reforms] "[I]t's wrong if it's solely directed to save court time and expense. I think that's a sad reflection on justice if we have to have to have systems imposed on us simply to save time and money." (*Barrister*)

"Judges want to initially appear progressive and they want to come up with rules that speed things up. I would be in favour of judges that come up with rules that slow things down. Because it might be a truism to say that justice delayed is justice denied, but it's certainly true that to say that cases that are rushed through are not doing the ends of justice much of a favour either." (*Barrister*)

"My experience and the experience of all my fellow practitioners is that it doesn't save costs." (*Barrister*)

"They want it to be just quick and cheap, not 'just, quick, and cheap.'... Justice requires that the parties feel they've had a fair hearing." (*Solicitor*)

5. Interviews with Expert Witnesses: Concurrent Evidence

"In a lot of cases it's unpredictable as to how it's going to go.... The questions, the issues that arise, the ability to cross-examine."

"[E]xperts, you would hope, know more about the issues than the barristers or the judge. So if you're allowed to ask some questions of the other experts then you might bring something out that no one otherwise will bring out."

"It does give you a bit more of an opportunity to talk, only when the, generally when the commissioner asks.... In my case, anyway, it's very rare that I would unilaterally offer some information."

"I don't think your client's case is best served by pillorying the other expert.... I don't think it's appropriate to challenge the beliefs of the other expert."

"Cross-examination should come back into it."

6. Interviews with Expert Witnesses: Pretrial Meetings and Joint Reports

"I think they are incredibly important to the whole process.... I find it astounding. Every time I go into a joint conference I say 'I'll write it.' And the other person says 'I'm happy for you to write it and you send it to me and I'll put in my comments.' That sounds just mind-blowing to me because you take control of the whole process."

"[I]f you've had a joint meeting one of you has to produce a document, a document's produced and by a large each of the parties are able to add something else in which they wish to emphasise. Where it gets difficult is if a person makes a particular point and the person makes an edit and the other person responds to it.... It's endless."

"The system now is not perfect by any stretch of the imagination. Because some times I've been involved in joint conferencing with other experts who have raised issues that even the solicitors haven't raised and wanted to raise issues that no one else had raised

at all. I kept saying you can't do that. You can't raise issues that aren't being raised. And, they'd just ignore me."

"Totally dependent on the attitudes of the participants."

"It's hideous, it's absolutely hideous."

7. Interviews with Expert Witnesses: Partisanship

"Give me the material and I will tell you whether or not I can support your case .... And quite often the advice will be, 'No, I can't support your case.' ... That process of saying up front whether I can or can't support your case means that I'm not getting instructions saying you've got to say this or say that."

"Clearly my role is to express my views and to test the views of the other person. So, both of us are being impartial but we're representing views that we genuinely hold which align with the views of our respective clients."

"Certainly, when you act for a party, and they're present, and you know you're being paid, you feel a little bit more heat to give the evidence that you've prepared."

"I don't ever want to be taking anything on [so] that I end up thinking that 'I wish I wasn't here.'"

8. Interviews with Expert Witnesses: Other

"I think some of the other reforms, particularly the focus now on time, is just that it's a focus on a measure of efficiency, because its measurable, rather than a measure of quality."

"There's been a move towards focusing on dispensing with things quickly which has not necessarily created quality outcomes and better decisions."

"Well that, of course, is the process that the court's been going through. It's been reducing the time spent in court, it's been reducing its own costs, but the costs I think tend to be higher external to the court .... So, I mean the court ought to be looking at both sides of the coin not just one.... It's all very well to improve the system but you've got to improve it in a way that's going to benefit all the parties not simply one."

"[M]y experience with my clients is that while the cost to the court may seem to have decreased, the cost to my clients has increased by one hundred and fifty per cent."

C. Overview

These perspectives introduce complexity. The case law and empirical research suggests that experience with concurrent evidence is, in reality, quite varied. The responses of other judges, lawyers, and experts are not altogether negative, but they do not consistently align with the claims made by proponents. These perspectives, in conjunction with discussions and court observations, enable some generalization.

On average, lawyers tend to dislike the concurrent-evidence procedures, especially the idiosyncratic ways in which they are implemented by the various institutions and individual judges. As *Seven Network Ltd. v. News Ltd.*[93] suggests, to the extent that they introduce or accentuate uncertainty, new rules

93. (2007) 151 F.C.R. 450 (Austl.).

and procedures tend to be unwelcome. That these reforms were twinned—temporally and ideologically—with substantial revisions to tort law served to heighten the misgivings of many legal practitioners.[94] Even though lawyers tended to dislike these reforms to civil procedure, those lawyers most familiar with concurrent evidence were not always the most critical. Criticism could also be divided according to the division of legal labor. Solicitors were more inclined to criticize reforms to pretrial processes and barristers to speak against changes to the adversarial character of the trial.

Experts, on the other hand, were generally favorably disposed toward concurrent evidence, though they tended to be a little more ambivalent about the pretrial joint conferences. They doubted their ability to substantially reduce disagreement or reach agreement, in or out of court. Nor did they frame their interactions with other experts in terms of partisanship or idealized norms. Rather, recognizing that there could be genuine disagreement, several suggested that opposing experts were sometimes incompetent and unprofessional. Interestingly, these experts favored concurrent evidence because it afforded an opportunity to express their views and the potential to make opposing experts publicly accountable for their purported incompetence. Alternatively, some expert witnesses, as the extracts reveal, were reluctant to speak unilaterally, let alone express skepticism about the opinions of opposing experts.

These findings, along with the discussion in Section V, suggest that the conventional models of science and expertise underpinning the rationalization of concurrent evidence and pretrial meetings seem to be misconceived and misleading.

VII

CONCLUSION: A USEFUL TOOL WITH LIMITED POTENTIAL

Concurrent evidence is not a panacea for partisanship, adversarial bias, or the difficulties created by expert disagreement and decisionmaking in the face of uncertainty. Even when experts and lawyers cooperate and the procedures reduce the length of proceedings, concurrent evidence can leave the fact finder with a messy transcript and conflicting reports, and it can require more pretrial activity and impose higher costs on the parties. Nevertheless, concurrent evidence is not necessarily a bad thing. The procedure has the potential to improve communication and comprehension and the conditions under which lay fact finders make decisions about the evidence before them. The marketing of the recent reforms, closely linked to the invocation of inappropriate models of expertise, along with a general disinterest in empirical evidence about the domestic litigation landscape and the value of the recent reforms, are of concern. Notably, there seems to be little evidence to support the contention

94. *See, e.g.*, Civil Liability Act, 2002 (N.S.W.).

that concurrent evidence "tends to reduce the level of partisanship."[95] On the whole, the potential of concurrent evidence seems to have been exaggerated.

The disjuncture between the models of science motivating the public rationalization and implementation of concurrent evidence on the one hand, and what we know about science and expertise on the other, is rather stark. The Australian reforms seem to be predicated on antiquated and tendentious, if pervasive, ideas about scientific conventions.[96] The specter of Merton's norms haunts the Australian reform agenda, just as the ghost of Karl Popper manifested in the judicial necromancy associated with *Daubert*.[97] It might come as a surprise to some judges, but communalism, collegiality, disinterestedness, and skeptical attitudes do not seem to be prerequisites for contemporary scientific activity.[98]

Sociologically, the origins of the Australian reforms are interesting because the proponents, it seems, are the main beneficiaries. Under the auspices of producing more impartial expertise, improving access to justice, and improving in-court communications, Australian judges have unilaterally devised and imposed procedures *intended* to encourage settlement, reduce the number of issues ventilated in the courtroom, reduce costs, and render (judicial) decisionmaking easier. The reforms move interactions between experts from the courtroom to private pretrial spheres. They also impose new burdens on the experts, lawyers, and parties. Most significantly, the reforms give trial judges unprecedented control over expert evidence and consolidate judicial influence over the early stages of proceedings. There is no evidence, and apparently limited interest, in the question of whether the procedural reforms have improved access to justice.

We might question the desirability of law reform, emerging fully formed, from the apex of the dispute pyramid. One expert wondered, "Why don't they [the judges] engage with other people before they produce them [the civil procedural reforms]? It just doesn't make sense.... Why would you do that without consultation?" There are good reasons, as this article has endeavored to explain, why law reform should not be a top-down process and should not be dominated by judges. There should have been far more consultation with interested groups. Wider engagement might have helped proponents to recognize some of the weaknesses and limitations with the new procedures. It

95. Heerey, *supra* note 39, at 391.

96. *See* Mike Michael, *Lay Discourses of Science: Science-In-General, Science-In-Particular, and Self*, 17 SCI. TECH. & HUM. VALUES 313, 313 (1992) (exploring the influence of social institutions and norms on the public's understanding of science).

97. *See* Gary Edmond & David Mercer, *Conjectures and Exhumations: Citations of History, Philosophy and Sociology of Science in U.S. Federal Courts*, 14 LAW & LITERATURE 309 (2002) (discussing the use of literature from the history, philosophy, and sociology of science in federal jurisprudence before and after *Daubert*).

98. *See* STEVEN YEARLEY, MAKING SENSE OF SCIENCE: UNDERSTANDING THE SOCIAL STUDY OF SCIENCE (2005); HANDBOOK OF SCIENCE AND TECHNOLOGY STUDIES (Sheila Jasanoff et al. eds., 1995).

might have led proponents to wonder why so much of the reform agenda has been directed toward experts rather than lawyers and judges.

Approaching civil-procedural reform from the narrow perspective of concern about expert partisanship and institutional efficiency tends to marginalize important dimensions of social justice. Does it make sense, for example, to impose new procedures based on concerns about adversarial bias when large civil defendants can simply send their legally acculturated consultants (or employees) to any pretrial conference? More fundamentally, focusing on local incidents of partisanship detracts from macroscopic social and policy considerations such as the commercialization of biomedical research, regulatory capture, the lack of publicly funded health research, questions about who should bear the risk when profitable new products are marketed, and what these should mean for tort and product-liability law, practice, and reform.[99]

At this point I want to reiterate an important, if controversial, claim. In the absence of much empirical information or legal theorizing about expert partisanship and bias, it is possible that they do not present particularly serious problems in most civil matters. One of the major advantages with free proof is that, apart from enhancing satisfaction with the legal system, it keeps the issue of partisanship in focus. Adversarial procedures—which include scope for vigorous cross-examination—constantly remind us of the limitations of expertise; the intractable nature of expert disagreement; the prevalence of alignments, commitments, and interests; and other potential biasing factors. Expert disagreement creates problems primarily because there are no simple means of resolving disagreement in socially legitimate ways. Attributions of bias (and objectivity and impartiality) are unlikely to produce bright lines for understanding or assessing particular proffers of expert evidence. They are of limited value in determining the reliability of expert-opinion evidence or the authenticity of disagreement and, without more, do not present constructive bases for law reform.

For those who believe in the possibility of obtaining unbiased expertise, the failure to obtain genuine expert evidence, along with the appearance of bias, may represent very serious threats to legal institutions and social order. However, more-theoretically and empirically plausible models of expertise make simplistic models of bias (and, implicitly, objectivity and impartiality) both less tenable and less threatening. Once we realize that strong forms of objectivity are not attainable, we can begin to craft more-principled models of expertise that are *adequate* for forensic purposes. Inevitably, there will be ongoing debates about the meaning of adequacy, appropriate standards for

99. *See* Margaret Berger, *Upsetting the Balance Between Adverse Interests: The Impact of the Supreme Court's Trilogy on Expert Testimony in Toxic Tort Litigation*, 64 LAW & CONTEMP. PROBS. 289, 291 (Spring/Summer 2001) (noting the ability of federal district courts to use the *Daubert* trilogy to shape procedural and substantive law of toxic-tort litigation); CARL CRANOR, TOXIC TORTS: SCIENCE, LAW AND THE POSSIBILITY OF JUSTICE (2006) (a critical assessment of judicial responses to scientific evidence in toxic-tort litigation).

admissibility, who should bear the burden of proof, the technical competence of fact finders, and the extent to which rules and procedures should be uniform across different legal domains.

At its most modest, concurrent evidence has the potential to improve communication and comprehension in the courtroom. Concurrent evidence *may* reduce costs, encourage settlement, and expedite legal proceedings, and the presence of opposing experts *may* exert some discipline on witnesses. Pretrial meetings *may* help to identify the main areas of difference between the experts and reduce the time expert witnesses eventually spend in court. Simultaneously, its use may create difficulties and introduce new risks. Whether potential improvements in the provision and reception of testimony outweigh hurdles and dangers is a question that probably depends on the circumstances of individual cases, the proclivities of the participants, and the way in which different legal systems value rights, efficiency, fairness, accuracy, public confidence, and empirical evidence.[100]

Recent Australian reforms reveal much about legal conventions generally. Legal models of science and expertise tend to be simplistic and highly idealized. They tend to be invoked strategically in judgments and law reform to support the predilections and interests of judges. Like their counterparts in many common-law jurisdictions, Australian judges continue to believe that *genuine* expertise thrives just beyond the courtroom and the lawyer's office. For them, the problem has become how to configure rules of evidence and procedures to encourage genuine experts to produce trustworthy opinions in court.

Unfortunately there are few operational means for resolving expert disagreement, demarcating science from nonscience, or readily determining whether partisanship detrimentally affects the validity or reliability of particular expert opinions. That judges believe they can implement procedural solutions to these perennial epistemic difficulties is perhaps the most interesting aspect of recent developments in Anglo-Australian civil procedure.

100. *See* Sheila Jasanoff, *Law's Knowledge: Science for Justice in Legal Settings*, 95 AM. J. PUB. HEALTH (SUPPLEMENT 1) S49, S49–S58 (2005) (arguing that the *Daubert* trilogy misconstrues scientific practice and its relationship with the law).

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USING THE "HOT TUB" – HOW CONCURRENT EXPERT EVIDENCE AIDS UNDERSTANDING ISSUES

Steven Rares*

INTRODUCTION

1. Australian courts and agencies have been acknowledged as having the most experience with the "hot tub" method in which experts give their evidence concurrently. This is not a parochial boast, but recently appeared in the American Journal *Anti-Trust*[1]. Another recent article in the *Oregon Law Review* stated that the innovation itself is attributable to Australia[2]. The purpose of this paper is to explain, first, a little bit of history about expert evidence, secondly, the purposes and technique of concurrent evidence, and thirdly, perhaps concurrently, the technique's virtues.

2. Expert evidence is not a new phenomenon. However, some experienced commentators have observed that in contemporary times, the use of expert evidence "has increased dramatically … both in its frequency and its complexity"[3]. When expert evidence is tendered in contested proceedings, traditionally each party will call one or more expert witnesses whose evidence in chief supports that party's case. Cross-examination is the traditional common law method for testing that evidence. Experience of the forensic use and testing of expert evidence in this way has often produced a number of concerns:

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* A judge of the Federal Court of Australia

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1 Lisa C Wood, *Experts In The Hot Tub* (2007) 21 Anti-Trust 95

2 Megan A. Yarnall, 'Dueling Scientific Experts: Is Australia's Hot Tub Method a Viable Solution for the American Judiciary?', 88 Or. L. Rev 311 (2009) at p 312

3 The Hon Geoffrey L Davies, *The Changing Face of Litigation*, (1997) 6 J. Jud Admin 179, 188

- each expert is taken tediously through all his or her contested assumptions and then is asked to make his or her counterpart's assumptions;
- considerable court time is absorbed as each expert is cross-examined in turn;
- the expert issues can become submerged or blurred in a maze of detail;
- the experts feel artificially constrained by having to answer questions that may misconceive or misunderstand their evidence;
- the experts feel that their skill, knowledge and, often considerable, professional accomplishments are not accorded appropriate respect or weight;
- the court does not have the opportunity to assess the competing opinions given in circumstances where the experts consider that they are there to assist it[4] – rather experts are concerned, with justification, that the process is being used to twist or discredit their views, or by subtle shifts in questions, to force them to a position that they do not regard as realistic or accurate;
- often the evidence is technical and difficult to understand properly;
- juries, judges and tribunals frequently become concerned that an expert is partisan or biased.

3. In 1999, an empirical study of Australian judges found that 35% considered bias as the most serious problem with expert evidence[5]. And another 35% considered that the presentation or testing of the expert was the most serious problem. This was manifested in their differing concerns about poor examination in chief (14%), poor cross-examination (11%) and the experts' difficult use of language (10%).

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4 see too the Hon Sir Laurence Street AC KCMG, *Expert Evidence in Arbitrations and References* (1992) 66 ALJ 861

5 Ian Freckelton, Prasuna Reddy & Hugh Selby, *Australian Judicial Perspectives on Expert Evidence: An Empirical Study*, Australian Institute of Judicial Administration Incorporated, 1999 p 37

4. The "hot tub" offers the potential, in many situations calling for evidence, of a much more satisfactory experience of expert evidence for all those involved. It enables each expert to concentrate on the real issues between them. The judge or listener can hear all the experts discussing the same issue at the same time to explain his or her point in a discussion with a professional colleague. The technique reduces the chances of the experts, lawyers and judge, jury or tribunal misunderstanding what the experts are saying.

5. In this paper, I will review the use of concurrent expert evidence generically. As will appear, the technique is of general application. I have seen it used to deal with topics as diverse as accounting, quantity surveying, fire protection requirements, wildlife paths, metallurgy, naval architecture, expert navigation of Panamax size (230m) container ships in a gale, mechanical engineering, the appropriate flooring for elephant enclosures in zoos and the mating of those mammals. Even in copyright, it is not difficult to imagine the utility of concurrent evidence where expert questions of similarity, economics or copying arise. And like all forensic tools, things can go wrong, such as asking one question too many.

A Short Historical Excursion

6. Courts have struggled for a long time with the consequences in the adversarial system of the use by each party of an expert whose evidence, at least in chief, favours that party. Prof Wigmore suggested that the remedy lay in "… *removing this partisan feature*: i.e. by bringing the expert witness into court free from any committal to either party"[6]. There was a fear in judges that this object is not easy to achieve. Sir George Jessel MR observed in a patent case that sometimes the Court had appointed its own expert under an inherent power to do so. He lamented[7]:

> "It is very difficult to do so in cases of this kind. First of all the Court has to find out an unbiased expert. That is very difficult."

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6 *Wigmore on Evidence* (Chadbourn Revision) Vol II §563 at 762

7 *Thorne v Worthing Skating Rink Company* (1876) 6 Ch D 415n at 416

7. Earlier he had discussed the way parties searched for experts to find one or more who would give evidence in support of that party's case, leaving the rest as discards, about whom the Court would know nothing. He said that he had been counsel in a case where his solicitor had consulted 68 experts before finding one who supported their client's case; hence his mistrust of the system of "opposing" experts.

8. Expert evidence has been a provocative topic, both among lawyers and experts. In the twelfth edition of *Best on Evidence* published in 1922 the learned authors, who included Sidney L Phipson, said[8]:

> "… there can be no doubt that testimony is daily received in our courts as 'scientific evidence' to which it is almost profanation to apply the term; as being revolting to common-sense, and inconsistent with the commonest honesty on the part of those by whom it is given."

9. On the other hand, Prof Wigmore[9] evoked a vision that giving expert evidence was akin to coming to a graveyard or indeed the calvary, saying:

> "Professional men of honorable instincts and high scientific standards began to look upon the witness box as a golgotha, and to disclaim all respect for the law's method of investigation. By any standard of efficiency, the orthodox method registers itself as a failure, in cases where the slightest pressure is put upon it."

10. No doubt many have had the experience of seeing an eminent and reputable expert in their field subjected to a cross-examination calculated to evoke the very response which Prof Wigmore noted. Such persons come away from the forensic experience justifiably scarred and disdainful of it as a process for eliciting intelligent and appropriate examination of expert opinion. They can be so discouraged by their forensic experiences that they no longer wish to be involved in assisting courts.

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8 S.L. Phipson, *Best on Evidence*, 12th edition, London: Sweet & Maxwell Ltd, 1922 at 438-439: see also Sir Louis Blom-Cooper QC, 'Historial Background' in Sir Louis Blom-Cooper (ed) *Experts in the Civil Courts* (2006) at 1-8 [1.01]-[1.22]; Carol Jones, *Expert Witnesses: Science, Medicine and the Practice of Law* (1994) at 97–102

9 *Wigmore* above n 3, §563 at p 760. See too Blom-Cooper, above n 3, at 6–7 [1.15]-[1.17]; Tal Golan, *Laws of Men and Laws of Nature* (2004) at 110–118

11. Experts have long been used in court cases. Sometimes the expert is a person appointed by the court to assist it. In admiralty matters, judges in England have sat since the sixteenth century with (usually two) elder brethren of Trinity House to assist and advise them in assessing who was at fault in cases concerning marine casualties. The elder brethren were usually skilled, experienced master mariners[10]. One set of whom advised the trial judge, another set advised the Court of Appeal, and yet another set, the House of Lords. Although Sir Winston Churchill also was made an elder brother, as a result of his having been First Lord of the Admiralty, I doubt he assisted in any proceedings in the Probate, Admiralty and Divorce Division. More recently, Justice Heerey, appointed an expert as a court assessor to sit with him in a patent case under the provisions of s 217 of the *Patents Act 1990* (Cth)[11]. The parties paid for the cost.

12. Lord Sumner once cautioned about courts deferring to assessors' opinions. They, like experts, have a place that he appositely described[12]:

> "Authority for the proposition that assessors only give advice and that judges need not take it, but must in any case settle the decision and bear

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10 See the discussion of the role of the elder brethren in English Admiralty trials and appeals in *Jones*, above n 5, at 38-45; *Owners of the SS Australia v Owners of Cargo of the SS Nautilus ("The Australia")* [1927] AC 145 at 150 per Viscount Dunedin, at 150-153 per Lord Sumner, with whom on this issue at 157 Lords Carson and Blanesburgh agreed.

11 *Genetic Institute Inc v Kirin-Amgen Inc (No 2)* (1997) 78 FCR 368; affirmed *Genetic Institute Inc v Kirin-Amgen Inc* (1999) 92 FCR 106 at 117–118 [36]–[37] per Black CJ, Merkel and Goldberg JJ at 117-118 [35]-[37]. Sir Louis Blom-Cooper QC suggested that a movement for reform of expert evidence grew in the mid-19th century, spurred on by two scientists who were deeply scarred by the experience of giving evidence in an adversarial forum. One of the key proponents, Mr Robert Angus Smith, a sanitary chemistry, wrote in 1859 that when giving expert evidence in court:

> "the scientific man in that case simple becomes a barrister who knows science. But this is far removed from the idea of a man of science. He ought to be a student of the exact sciences, who loves whatever nature says, in a most disinterested manner. If we allows him or encourage him to become an advocate, we remove him from his sphere; we destroy the very idea of his character; we give him duties which he never was intended to perform."

His proposed solution was, among others, to give the judge an assessor who examined the expert and made an independent report to the judge: S Blom-Cooper QC, above n 5, at 7. This solution drew on the practice of the Courts of Admiralty.

12 *The Australia* [1927] AC 145 at 152

> the responsibility, is both copious and old. It is for them to believe or to disbelieve the witnesses, and to find the facts, which they give to their assessors and which must be accepted by them. If they entertain an opinion contrary to the advice given, they are entitled and even bound, though at the risk of seeming presumptuous, to give effect to their own view[13]."

13. By leaving the questioning entirely in the control of counsel, who may or may not fully understand the subject matter, an expert can be made to look as bad as the engineer and fire assessor cross-examined by Norman Birkett KC on the cause of a fire in a motor vehicle. Birkett's first question to the expert was the memorable line: "What is the coefficient of the expansion of brass?". The "expert" was destroyed by his inability to even understand the question let alone respond to Birkett in an appropriate way. Some criticisms have been advanced subsequently of the line of questioning, including Birkett's failure to identify the inherent assumption in the question as to the proportions of copper and zinc making up the particular specimen of brass to which the question was supposed to relate. Perhaps a true expert may have been able to respond immediately that he needed that information before being able to answer the question, in which case Birkett may have been thrown back on his resources or been shown up himself[14].

14. Concurrent evidence is a means of eliciting expert evidence with more input and assistance from the experts themselves in lieu of their, perhaps unfairly, perceived

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[13] *The Alfred* (1850) 7 Notes of Cases, 352, 354; *The Swanland* (1855) 2 Spinks, 107; *The Magna Charta* (Privy Council) (1871) 1 Aps. M.L.C. 153; *The Aid* (1881) 6 P.D. 84; *The Beryl* (1884) 9 P.D 137,141, per Brett M.R.; *The Koning Willem II.* [1908] P. 125, 137, per Kennedy L.J.; *The Gannet* [1900] A.C. 234, 236, per Lord Halsbury.

Lord Sumner continued:

"Such being the position of the judges, what is that of the assessors? In Admiralty practice they are not only technical advisers; they are sources of evidence as to facts. In questions of nautical science and skill, relating to the management and movement of ships, a Court, assisted by nautical assessors, obtains its information from them, not from sworn witnesses called by the parties (*The Sir Robert Peel* (1880) 4 Asp. M.L.C. 321; *The Assyrian* (1890) 6 Asp. M.L.C. 525), and can direct them to inform themselves by a view or by experiments and to report thereon (24 Vict. c. 10, s. 18, sub-s. 1)."

[14] see the account of *R v Rouse* (1931) given by JW Burnside QC in (2003) 124 *Victorian Bar News* 55-56

role as being inherently, even if not consciously, biased to the case of the party calling them. This is not my perception, but has developed as Jessel MR once described through a distrust of expert evidence[15]:

> "… not only because it is universally contradictory, and the mode of its selection makes it necessarily contradictory, but because I know of the way in which it is obtained. I am sorry to say the result is that the Court does not get that assistance from the experts which, if they were unbiassed and fairly chosen, it would have a right to expect."

15. It is not inherently bad that experts might not reach the same conclusion. As Justice Downes has stated extra-judicially "the fallacy underlying the one-expert argument lies in the unstated premis[e] that in fields of expert knowledge there is only one answer"[16]. Contradictory evidence can assist the tribunal of fact, simply because it elaborates the alternatives.

16. The task for a judge, or a jury, in assimilating the differing views of persons eminent in their fields and then arriving at their assessment of the evidence is no easy one. As LW Street J noted, in some forensic disputes, the Court does not choose between the experts, preferring one opinion over another, but uses their differing views to assist in reaching its own conclusion[17]. Valuation and issues of similarity in copyright cases are examples that readily spring to mind, as well as expert economic evidence[18].

17. Often in my experience at the Bar, the real dispute between experts did not lie in their conclusions at all. Rather, it was that they had proceeded on different assumptions. Because they were briefed by the particular litigant paying them, they were not asked to opine as to whether, if they accepted the other experts' assumptions, they would come to the same conclusion as the other expert.

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15 *Thorne* 6 Ch D at 416n

16 Hon. Garry Downes, *Problems with Expert Evidence: Are Single or Court-Appointed Experts the Answer?*, 15 J Jud Admin 185 (2006)

17 *Archer, Mortlock Murray & Woolley Pty Ltd v Hooker Homes Pty Ltd* [1971] 2 NSWLR 278 at 286E-F

18 *Visa International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300 at 438-439 [663]-[666] per Tamberlin J

Instead, the experts debated the assumptions. This was largely a sterile exercise for them, since they did not have knowledge of the primary facts.

18. One feature of the process of conventional expert evidence is that the cross-examiner often will spend a great deal of time asking about the assumptions on which the opposing expert has based his or her conclusions. Then there will be a lengthy time interval until the defendant's or respondent's expert gets into the witness box and the context in which the second expert's evidence is given will be different and, perhaps, significantly so, to that earlier.

19. In the Federal Court of Australia, and in other tribunals presided over by Federal Court judges, concurrent evidence is also used. Indeed, Lockhart J, when President of the Trade Practices Tribunal, was credited with being instrumental in introducing the technique to Australian jurisprudence[19]. One of the first uses of the "hot tub" in court proceedings in Australia was by Justice Rogers in an insurance case in 1985[20]. By 1992 Sir Laurence Street AC KCMG was using the technique in arbitrations and court references and had published his standard directions[21].

20. Concurrent expert evidence is used extensively in the Land and Environment Court of New South Wales, principally as a result of the enthusiasm of the Hon Justice McClellan, when Chief Judge of that Court. His Honour's enthusiasm spilled over into the Common Law Division of the Supreme Court of New South Wales where he is now Chief Judge at Common Law[22]. In addition the

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19 In the DVD "*Concurrent Evidence – New Methods with Experts*" produced by the Judicial Commission of New South Wales and the Australian Institute of Judicial Administration, the Hon John Lockhart AO QC outlined his involvement with the history.

20 *Spika Trading Pty Ltd v Royal Insurance Australia Ltd* (1985) 3 ANZ Insurance Cases 60-663 (in the Commercial List of the Supreme Court of New South Wales)

21 *Expert Evidence in Arbitrations and References* (1992) 66 ALJ 861

22 see also his keynote address to the Medicine and Law Conference, Law Institute of Victoria: *Concurrent Expert Evidence* (29 November 2007)

Administrative Appeals Tribunal uses the technique robustly and its President, Justice Downes, has written extensively on the topic[23].

Concurrent Evidence in Practice

21. Initially, and my own experience is to this effect, uninitiated counsel are highly suspicious of concurrent evidence. That suspicion evaporates once they participate. Why is this so? It is because of the efficiency and discipline which the process brings to bear.

Pre-trial Directions

22. The way concurrent evidence generally works, though individual judges or tribunals may have their own variants, is that after each expert has prepared his or her report, there is a pre-trial order that they confer together, without lawyers, to prepare a joint report on the matters about which they agree and those on which they disagree, giving short reasons as to why they disagree. Sometimes this process will identify that the experts agree on everything that each has said in his or her reports, on the basis that the opposing expert accepts the assumptions which the other has used. Thus, the role of the expert evidence is finished, and the question resolves into one of dry fact proved by lay witnesses or other evidence. That was my experience in a previous case where I ordered the experts to prepare a joint report: *Australasian Performing Right Association Ltd v Monster Communications Pty Ltd*[24].

23. On most other occasions, the range of difference between the experts, which had been apparently vast if one put their two reports side by side, reduces to a narrow point or points of principle. In *Strong Wise Ltd v Esso Australia Resources Ltd*[25] I explained the way in which I had taken the concurrent expert evidence from groups of experts in different fields.

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23 see also Administrative Appeals Tribunal, *An Evaluation of the Use of Concurrent Evidence in the Administrative Appeals Tribunal* (November 2005); Downes J, *Concurrent Expert Evidence in the Administrative Appeals: The New South Wales Experience* (29 February 2004)

24 (2006) 71 IPR 212; [2006] FCA 1806

25 (2010) 267 ALR 259 at 284-285 [92]-[97]; [2010] FCA 240

24. Another forensic benefit from the preparation of joint expert reports before the trial is that counsel can be made aware of any relevant factual issues that are contentious between the experts. This can focus and narrow the need for cross-examination of lay witnesses because the joint reports may show that some factual differences do not matter.

In the Courtroom

25. Generally, at the conclusion of both parties' lay evidence or at a convenient time in the proceedings, the experts are called to give evidence together in their respective fields of expertise. It is important to set up the court room so that the experts (there can be many on occasion) can all sit together with convenient access to their materials for their ease of reference. One microphone is then made available for all of the experts.

26. The judge explains to the experts the procedure that will be followed and that the nature of the process is different to their traditional perception or experience of giving expert evidence. First, each expert will be asked to identify and explain the principal issues, as they see them, in their own words. After that each can comment on the other's exposition. Each may ask then, or afterwards, questions of the other about what has been said or left unsaid. Next, counsel is invited to identify the topics upon which they will cross-examine. Each of the topics is then addressed in turn. Again, if need be, the experts comment on the issue and then counsel, in the order they choose, begin questioning the experts. If counsel's question receives an unfavourable answer, or one counsel does not fully understand it, he or she can turn to their expert and ask what that expert says about the other's answer.

27. This has two benefits. First, it reduces the chance of the first expert obfuscating in an answer. Secondly, it stops counsel going after red herrings because of a suspicion that his or her own lack of understanding is due to the expert fudging. In other words, because each expert knows his or her colleague can expose any inappropriate answer immediately, and also can reinforce an appropriate one, the

evidence generally proceeds directly to the critical, and genuinely held, points of difference. Sometimes these differences will be profound and, at other times, the experts will agree that they are disagreeing about their emphasis but the point is not relevant to resolving their real dispute.

28. The experts are free to ask each other questions or to supplement the other's answers after they are given. The only rule is that the expert who has the microphone has the floor. Generally the experts co-operate with one another and freely and respectfully exchange their views. Often one will see them arriving at a consensus which becomes clear through the process.

29. A great advantage of concurrent evidence is that all the experts on the topic are together in the witness box at the one time, answering the one question on the same basis. Everyone is together on the same page. This is a world away from a traditional cross-examination of each expert in the various parties' cases, sometimes happening days, if not weeks, apart with a raft of other evidence having interposed. The judge is able, just as the lawyers, to understand the issue. The experts feel capable of explaining the matters to the judge and putting their points of view in a way in which they feel free to use their knowledge and experience. Justice McClellan described the process as[26]:

> "… essentially a discussion chaired by the judge in which the various experts, the parties, advocates and the judge engage in an endeavour to identify the issues and arrive where possible at a common resolution of them. In relation to the issues where agreement is not possible a structured discussion, with the judge as chairperson, allows the experts to give their opinions without constraint by the advocates in a forum which enables them to respond directly to each other. The judge is not confined to the opinion of one advisor but has the benefit of multiple advisors who are rigorously examined in a public forum."

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[26] The Hon P McClellan: *Concurrent Expert Evidence* (29 November 2007) at 19; see also *Strong Wise* (2010) 267 ALR 259

Some Examples of Concurrent Evidence

30. In *Strong Wise*[27], there were eight expert witnesses who gave oral evidence over five separate areas of specialised knowledge. I will briefly describe the process and my experience of it. Each had prepared at least one principal report, some prepared a responsive report. In the pre-trial phase, I directed that the experts in each relevant discipline should confer together, without the parties or their lawyers, and prepare a joint report that set out the issues on which they agreed and those on which they disagreed, giving brief reasons for their differences. I also directed that the experts, in each discipline would give evidence concurrently. Here, the experts and their fields were 3 master mariners; 2 naval architects; 2 structural engineers; 2 metallurgical engineers; and 2 mechanical engineers. A number of other experts gave written reports that were accepted without the need for cross-examination.

31. The joint reports were extremely useful in crystallising the real questions on which the experts needed to give oral evidence. Experience in using this case management technique generally demonstrates considerable benefits in practice. First, the experts usually will readily accept the other's opinion on the latter's assumptions. This position is often lost in long reports that debate, not that opinion, but the assumptions which, in turn, usually depend on the facts that need to be found. Secondly, the process then usually identified the critical areas in which the experts disagreed.

32. When each concurrent evidence session began, I explained that the purpose of the process was to engage in a structural discussion. Each expert was asked to summarise what he (all were male) thought were the principal issues between him and his colleague(s). Each was free to comment on or question his colleague on what he had said both during the introductory part and throughout the process. After each expert had outlined the principal issues (usually one did this and the other agreed that it was a fair summary or added some brief further remarks), counsel identified the issues or topics on which they wished to cross-examine. I

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[27] 267 ALR 259 at 284-285 [93]-[97]

then invited whichever counsel wished to begin questioning to do so. The experts sat at a table where they had ample room to place their reports and materials. They had a single microphone for whomever was speaking, so that the transcript would record the relevant evidence and they would exercise self-discipline in responding. Often when one had given an answer, the other would comment, or agree, thus narrowing the issues and focussing discussion. From time to time counsel could and would pursue a traditional cross-examination on a particular issue exclusively with one expert. But, sometimes when one expert gave an answer, counsel, or I, would ask the other about his opinion on that same question.

33. The great advantage of this process is that all experts are giving evidence on the same assumptions, on the same point and can clarify or diffuse immediately any lack of understanding the judge or counsel may have about a point. The taking of evidence in this way usually greatly reduces the court time spent on cross-examination because the experts quickly get to the critical points of disagreement. At the end of his second session of concurrent evidence, one witness from London said that he had been in court before but that this had been a very different and positive experience for him.

34. Another significant benefit of the process is generally a substantial saving of court time and costs. In my first experience of the technique, a valuation case in the Land and Environment Court before the then Chief Judge, Justice McClellan, there were many experts in various fields[28]. The evidence in their reports amounted to over one metre in height. Yet most of the expert evidence, apart from that of the four valuation experts was, ultimately, the subject of joint reports on which all points were agreed. In the remaining few reports where there was disagreement, the area of dispute was narrowed to one, two or three small points of principle that were dealt with in concurrent evidence in blocks of between 10 and 30 minutes. The two valuers for the applicant asserted that the value of the easement was between $20 million and $30 million. The two for the resuming

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[28] *Ironhill Pty Ltd v Transgrid* (2004) 139 LGERA 398; [2004] NSWLEC 700

authority argued that it was worth in the order of $1 million or a little more. Their concurrent evidence concluded in a day and a quarter.

35. In such a dispute, in a conventional trial, an individual valuer would have been cross-examined probably for over a day, and four would have been likely to take well over six days. There would have been extensive attacks on the selections of comparable properties, the varying assumptions of the land's development potential and the like. And, in that case the only reason the valuation evidence went longer than a day, was that one of the experts changed his evidence because of newly agreed expert evidence from another field that affected the costs of development. That change required further cross-examination.

36. The Judicial Commission of New South Wales and the Australian Institute of Judicial Administration jointly produced a DVD of that experience entitled "*Concurrent Evidence – New Methods with Experts*". It is the largest selling publication of the Judicial Commission. It provides a good example of how the technique works. Modesty prevents me from identifying the other counsel whose participation with Bernie Coles QC in the re-enactment, directly from the transcript, is partly featured on the DVD.

37. Justice McClellan has observed, as have I, that the process removes the ordinary tension that exists in a conventional trial where expert evidence is led. The experts feel that they are able to explain their views, and if need be, defend them, in an intellectual discussion with their fellow expert or experts. Each of the experts presence with the other or others induces them to be precise and accurate. Generally, they are less argumentative than in a normal confrontational cross-examination process. Each knows that the other expert is able to understand exactly what he or she is saying and, so cannot rely on the technique so criticised in the passage I quoted earlier from *Best on Evidence*.

Criticisms of Concurrent Evidence

38. Concurrent evidence, like the curate's egg, is only good in parts. The decision whether to proceed or continue with taking evidence concurrently may be

influenced by the need to ensure fairness in the trial process. Some critics, including the prominent economist, Henry Ergas, and Justice Davies formerly of the Court of Appeal of the Supreme Court of Queensland, have expressed concern that "hot tubs" may result in the more persuasive, confident or assertive expert winning the judge's mind, by, in effect, overshadowing or overwhelming the other's.

39. Mr Ergas suggested that the "hot tub" was a response to a perceived problem that experts, in giving complex economic evidence, would "dumb down" their analysis into accounts that were little more than analogies to their underlying reasoning so as to enable the lawyers, or decision-makers, to understand the concepts. He feared that this would result in economists, not trained in or familiar with the forensic analysis involved in cross-examination, rarely approaching the "hot tub" in a structured and systematic way. He thought that "hot tubs" were especially at risk of being dominated by participants who were more confident or assertive, traits which were unrelated to the merits of the analyses being presented. He also considered that time constraints could often mean that the discussion remained at a relatively superficial level, thus further limiting its value[29].

40. Justice Davies echoed similar criticism. He expressed a concern that the judge could be left with two opposed, but comparatively convincing, opinions by equally well qualified experts neither of whom had been shaken in the process. He suggested that the "hot tub" protracted, rather than shortened proceedings and that it was too cumbersome, expensive and "too adversarial"[30]. He was obviously suspicious of the likely integrity of the whole process[31]. He speculated like, Sir George Jessel MR more than a century before, that the parties' solicitors or counsel would audition the best expert to give evidence in court (as if that would be a new consideration). Justice Davies also argued that the parties' lawyers

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29 Henry Ergas, 'Reflections on Expert Evidence' (2006–2007) Summer *Bar News* 39 at 42-43

30 Geoffrey L Davies, 'Recent Australian Development: A Response to Peter Heerey' (2004) 23 *Civil Justice Quarterly* 388 at 398-399

31 Ibid at 377-398

would see the experts in conference before giving evidence and suggest how best to answer questions in a way consistent with the respective expert's stated opinion and the party's case.

41. Those criticisms have not been validated in practice. Contrary, to those spectres, experts generally take the various courts' expert codes of conduct very seriously[32]. After all, in general they value their reputations and integrity. But more fundamentally, the joint report process often reveals that one party's case on a critical point will succeed or fail. This is because the experts are able to understand, through professional exchanges, what each has said and on what assumptions. The frequency of experts in joint reports agreeing on critical issues shows that the experts retain their independence and cut through the parties' different instructions to each, to reach the core question which they then answer.

42. Additionally, Justice Davies' fear of the experts being coached does not appear to be related only to the possibility of an expert giving concurrent evidence. Coaching is equally possible where traditional forms of expert evidence are to be used. Giving evidence can be daunting. Provided that the discussion remains at the level of assisting or familiarising the expert with the task of giving his or her own actual opinion in evidence, there can be no criticism. However, a lawyer or other person must not interfere with the integrity of the expert's evidence or seek to manipulate it. The rules of professional conduct for lawyers still apply.

43. Another legitimate concern is that "hot tubs" are controlled idiosyncratically by the individual judge or tribunal[33]. Indeed, the structure of the concurrent evidence process may vary from case to case with the same judge or tribunal member as it can, from topic to topic during the one "hot tub" session.

44. However, the same may be said of a conventional cross-examination. Horses need to suit courses. Not every set of expert witnesses on every issue will proceed with a topic in the same way. That may be because the issue in dispute

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32 The Federal Court's Code is in *Practice Note CM7: Expert Witnesses in the Federal Court of Australia*, issued by the Chief Justice on 25 September 2009

33 Gary Edmond, "'Secrets of the 'Hot Tub'": Expert Witnesses, Concurrent Evidence and Judge-led Law Reform in Australia' (2008) 27 *Civil Justice Quarterly* 51 at 68

between the parties, or one set of experts, or on one topic between experts, may be of a character that requires a particular approach, while other issues require different approaches. My experience has been that where it is necessary to engage in a rigorous, structured cross-examination of an aspect of the expert opinions, it is possible to do so in a conventional way. Conventional and effective cross-examination as to credit is also, equally, possible. One example is shown on the DVD to which I referred earlier.

Overall Experience of Concurrent Evidence

45. Concurrent evidence, in general, greatly reduces the hearing time. It efficiently and effectively identifies the issues. By the judge allowing each expert to explain himself or herself, both at the beginning and at the end of the whole process, it is possible to allow them to feel they have done justice to themselves even where a cross-examination has occurred during the "hot tub" in a conventional way. Where, as sometimes happens, the expert does not feel he or she had been treated fairly in cross-examination, they can then explain what they think their point was. Whether the judge or tribunal accepts the explanation is a different question. Even at this final stage the basis of what the expert is then saying may be revealed to be self-serving as opposed to giving a true explanation. And if the parties' lawyers consider that something arises which, in fairness, they wish to pursue out of any final explanation, they can then have a further opportunity to test it by cross-examination.

46. No system is perfect. There are many flaws in each of our systems for obtaining evidence in court, but like Sir Winston Churchill's analysis of democracy, it may be the worst possible system, but it is the best that anyone has yet invented. At the end of the process one or more of the experts on occasion has volunteered that he or she have found this to be a much more satisfactory way of giving evidence than in a conventional cross-examination. Gary Edmond criticised such responses by suggesting that they should be viewed with caution given the power

relationship between the judge or tribunal member and the witnesses appearing before them[34]. I agree that caution is appropriate but not determinative.

47. Experts participating in the two cases I had at the bar using concurrent evidence, expressed satisfaction to me, in my then role, that they had found this to be a better experience than that in conventional trials. There does not appear to be much written adverse criticism by experts who have participated in the process of concurrent evidence suggesting that any felt they were not able to get their points across, were overawed, overborne or outperformed by another "hot tubber". Again, one cannot draw too much from this since people rarely wish to explain publicly why they felt inadequate in a previous performance. Nor am I aware of anecdotal discussion of actual instances of these suggested problems occurring.

Conclusion

48. Litigation is an expensive, lengthy, stressful, and not always exact, means of undertaking a decision-making process. At the end of the day the judge or jury must select whether they are satisfied or persuaded that one of the competing versions is to be preferred or accepted. Like other witnesses, experts will leave impressions on judges based on demeanour, including their apparent persuasiveness, whether giving evidence alone or in a "hot tub".

49. Nonetheless, at least where judges are the tribunals of fact, the modern approach of courts was summarised by Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy*[35]. It is that courts are cautious about the danger of drawing conclusions too readily concerning truthfulness and reliability solely or mainly from the appearance of witnesses. They pointed out that in recent years scientific research has cast doubt on the ability of judges or anyone else to tell truth from falsehood accurately on the basis of such appearances. They said that considerations of this kind have encouraged judges both at a trial and on appeal to limit their reliance on the appearance of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the

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34 Edmond, above n 22 at 74.

35 (2003) 214 CLR 118 at 128-129 [30]-[31]

apparent logic of events. Their Honours cited[36] an incisive observation of Atkin LJ[37]:

> "… I think that an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour."

50. Because the experts have conferred and produced joint reports before going into the "hot tub", the field of dispute is generally narrowed. Not all cases will suit the process. It may be that in patent cases, where the whole case revolves around conflicts within fields of expertise, concurrent evidence is not likely to assist a judge. Heerey J's expedient of an assessor may prove a better alternative. But concurrent evidence allows advocates to focus on the critical differences, with the assistance of their respective experts in the box, and, at the same time to hammer home the strengths of their own, and the inadequacies in the other, expert's reasoning processes. In the end, concurrent evidence is generally likely to produce more ounces of merit which will be worth more to a judge than pounds of charisma or demeanour.

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36 *Fox* 214 CLR at 129 [30]

37 *Société d'Avances Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co (The "Palitana")* (1924) 20 Ll L Rep 140 at 152; see also *Coglan v Cumberland* [1898] 1 Ch 704 at 705

CONCURRENT EXPERT EVIDENCE IN THE ADMINISTRATIVE APPEALS TRIBUNAL: THE NEW SOUTH WALES EXPERIENCE

The Hon. Justice Garry Downes AM
President of the Administrative Appeals Tribunal

Paper presented at the Australasian Conference of Planning and Environment Courts and Tribunals in Hobart

27 February 2004

A BRIEF HISTORY OF CONCURRENT EVIDENCE

Difficulties with expert evidence

The difficulties with obtaining objective evidence of expert witnesses have been identified by a number of sources. Lord Woolf in the interim report, *Access to Justice*[1] said:

> Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients.

The problem is recognised by Australian judges, many of whom have expressed concern about a tendency on the part of some experts toward a lack of objectivity. In their study, *Australian Judicial Perspectives on Expert Evidence*, Dr Ian Freckleton and colleagues found that more than a quarter of judges report having encountered bias on the part of experts[2]. This lack of objectivity extended from an unwitting lack of neutrality to overt bias. Similarly, over one third of judges ranked expert bias as the most serious problem with expert evidence.

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[1] Lord Woolf MR, *Access to Justice, Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales,* HMSO, London, 1995, p. 183.
[2] I Freckleton, P Reddy and H Selby, *Australian Judicial Perspectives on Expert Evidence: An Empirical Study*, Australian Institute of Judicial Administration, 1999, pp. 2–3; 23–29; 37–38.

Are Court appointed experts the solution?

One method of responding to these concerns is the use of court appointed experts. However, this solution seems to me to create its own problems:

It is wrong to imagine that the only cause for differences in expert opinion is partisanship. Thirty five years of dealing at the bar with experts and experts' reports causes me to think that few experts will agree on everything however, neutral they try to be.

Where disputes involving expert opinion give rise to litigation there is usually an area of expert disagreement. The risk of choosing an expert who is satisfied how a controversy within a discipline should be resolved is obvious, as are the problems associated with trying to select an expert who still holds an open mind. No impropriety is involved here. The first expert has simply moved to a concluded opinion before others. He may be right. But he may be wrong.

Experts are not generally trained in assessing or adjudicating upon differing views within their discipline. However, that is the expertise of judges and members of courts and tribunals. They have no baggage. Even expert tribunal members will often only have sufficient expertise to better understand the dispute because their expertise will be related to the discipline generally rather than the particular aspect being placed under the microscope. Expert tribunal members who do fully understand the expert issues will be better able, by training and experience, to put aside any concluded views and take a fresh look.

There are other, more practical problems with court experts, such as their selection. In a case which warrants it, the parties will have their own experts anyway. And if they are advised to do so they will make every effort to adduce evidence from their experts. Two experts are replaced by three.

In my experience, where there are no legitimate competing expert views parties will usually agree. I may be naïve but, unlike Lord Woolf, I do not think there are many cases where expert witnesses seek deliberately to present unsustainable opinions.

I will be interested to hear our Chairman's comments on these remarks because I believe I recently read newspaper reports that the NSW Land and Environment Court was proposing a system for appointment of single experts in less significant cases. I can understand, however, that court appointed experts might be appropriate in some non-controversial areas, areas where agreement is likely ultimately to be reached, such as in counting and measuring.

The Courts' Experience

As part of an attempt to overcome these difficulties, the Federal Court Rules were amended in 1998 to facilitate the use of "hot tubs"[3]. In that year, the Federal Court also issued a practice direction, developed in co-operation with the Law Council, providing guidelines for expert witnesses. The guidelines detail the form and content of expert evidence. The guidelines also specify the general duty of expert witnesses to the Court:

- an expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise;
- an expert witness is not an advocate for a party; and
- the expert witness' paramount duty is to the Court and not to the person retaining the expert.

About this time, similar procedures were introduced in other jurisdictions. For example, joint conferences between experts were introduced in the NSW Supreme Court in the Professional Negligence List in 1999 and were incorporated into the Supreme Court Rules in 2000.[4] The Supreme Court

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[3] *Federal Court Rules 1979* Order 34A, Rule 3.
[4] *Supreme Court Rules 1970* Part 36, Rule 13CA.

also introduced a Code of Conduct[5], similar to the Federal Court's expert guidelines. The NSW Land and Environment Court has taken the same approach.

It has been reported that the Federal Court's experience is that the hot tub procedure narrows the issues in dispute, is beneficial for all of the expert evidence to be presented whilst fresh in the mind of the decision maker, reduces the level of partisanship of experts and results in a saving in hearing time.[6] For example, in the report *Managing Justice: a Review of the Federal Justice System*, the Australian Law Reform Commission (ALRC) quoted the Federal Court as follows:

> It has been the judges' experience that having both parties' experts present their views at the same time is very valuable. In contrast to the conventional approach, where an interval of up to several weeks may separate the experts' testimony, the panel approach enables the judge to compare and consider the competing opinions on a fair basis. In addition, the Court has found that experts themselves approve of the procedures and they welcome it as a better way of informing the Court. There is also symbolic and practical importance in removing the experts from their position in the camp of the party who called them.[7]

Australian Law Reform Commission Report 89 Recommendation 67

In their report the ALRC made the following recommendation:

> **Recommendation 67.** Procedures to adduce expert evidence in a panel format should be encouraged wherever appropriate. The Commission recommends that the Family Court and the Administrative Appeals Tribunal establish rules or practice directions setting down such procedures, using the Federal Court Rules as a model.

USE OF CONCURRENT EVIDENCE IN THE AAT

Administrative Appeals Tribunal Act 1975 s 33(1)

Concurrent evidence procedures have been used in the Tribunal for approximately four years now. As you are probably aware, the Tribunal has some flexibility in the manner in which it can hear evidence. The rules of evidence do not apply (section 33(1)(c)). Section 33(1) of the *Administrative*

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[5] *Supreme Court Rules 1970,* Schedule K.
[6] Justice P Heerey, *op cit.*, p. 9 and I Freckleton, P Reddy and H Selby, *op cit.*, pp. 109 & 161.
[7] http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/alrc/publications/reports/89/ch6.html.

Appeals Tribunal Act 1975 provides that a proceeding before the Tribunal shall be conducted with as little formality and technicality and with as much expedition as possible, subject to an overriding argument that proper consideration must be given to the matters before it. This provision was drafted with a view to maximising access to justice for the parties and minimising cost, delay and complexity. The Tribunal currently uses CE procedures where it is believed that the process will achieve these aims.

Coonawarra Case [2001] AATA 844

Anecdotally, the benefit to the Tribunal and parties in using CE procedures is that it can reduce hearing time. A clear example of this in the Tribunal is of *Re Coonawarra Penola Wine Industry Association Inc and Others and Geographical Indications Committee*[8], in which the then President, Justice O'Connor, chose to use CE procedures. That matter involved review of a decision of the Geographical Indications Committee determining a geographical indication called "Coonawarra", pursuant to s 40Y of the *Australian Wine and Brandy Corporation Act 1980*. There were a very large number of parties representing different wine interests. The initial estimate of hearing time was six months, due to the number of expert witnesses who were to give evidence at the hearing. Using CE procedures, the hearing was completed in five weeks. As stated in the decision:

> At the hearing of this matter, the oral evidence of the experts (to supplement their voluminous written statements) was given and their views tested by way of a panel session called a "hot tub". Each of the experts was invited to make a presentation addressing their statements and identifying the important issues. The experts were able to consult, be challenged and discuss their views with the other experts on the panel. The Tribunal asked questions of the experts as necessary. Finally, counsel for the parties were given the opportunity to ask questions of the experts in relation to any matters raised during the "hot tub" interchange and from the written material (including the T documents). We found this method of dealing with such a large volume of expert material very helpful.

Purposes of using concurrent evidence

The purposes of using CE procedures in hearings in the Tribunal are to:

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[8] [2001] AATA 844 (on appeal *Beringer Blass Wine Estates Ltd v Geographical Indications Committee* (2002) 125 FCR 155).

- enable the evidence and opinions of experts to be better tested by the Tribunal, legal representatives and other experts, with the aim of the evidence being comprehensively explained, understood and analysed, thereby enhancing the Tribunal's capacity to make the correct or preferable decision;

- assist experts in fulfilling their role as independent advisers whose primary role is to assist the Tribunal; and

- enhance the efficient operation of Tribunal proceedings by reducing the time taken to resolve matters. This may also lead to a reduction in cost to the Tribunal and parties of each proceeding.

THE CONCURRENT EVIDENCE STUDY

The Purpose of the Study

To the best of the Tribunal's knowledge, no empirical studies have been conducted of the effectiveness of CE. The Tribunal therefore decided to implement a properly designed study to assess the criteria that should be used to select cases that are suitable for CE, to refine the proposed procedures for taking CE, and to assess the effectiveness of CE procedures within the Tribunal.

The main aims of the study are to:

- assist in determining and/or finalising the criteria to select cases suitable for CE;
- refine the proposed procedures for taking CE, including determining whether the same procedures should be used for all types of experts;
- enable a preliminary assessment to be made as to whether the CE procedures are consistent with, or achieve, the intended purposes;
- finalise the objectives of the CE process;

- assess whether CE procedures increase the likelihood of an early settlement;
- develop survey tools which may be used for future evaluative purposes; and
- evaluate the satisfaction, delay and cost variables in a group of Tribunal cases.

"Hot Tubs" in the Federal Court v Concurrent Evidence in the Administrative Appeals Tribunal

The so called "hot tubs" in the Federal Court are really devised to enable cutting edge controversies in big cases to be resolved. The idea was that the leading experts in the field would debate the current big issues in a way in which the judge and counsel could understand. That is not what concurrent evidence in the AAT is about. We are using it for the first time in ordinary cases – assessment of injuries and medical conditions and the like. What the AAT is discovering is whether the technique is useful in run of the mill cases.

Jurisdiction and venue for study

The Tribunal will examine the quantitative and qualitative outcomes of a number of matters, from a range of jurisdictions. It was anticipated (and seems to be the case) that most cases will come from the Veterans' Affairs and Compensation jurisdictions, although cases from all jurisdictions may be considered as suitable for the CE study (including taxation and customs matters).

Although CE procedures are used in the Tribunal throughout Australia, the CE study is being conducted only in New South Wales.

Research sample and criteria for inclusion

A sample of at least 50 cases is to be included in the study. Quantitative and qualitative data are being collected from the parties, their representatives, experts and Tribunal members to evaluate the identified purposes.

Only matters where both parties are represented are being included in the study. However, consideration will be given to how to measure the anticipated benefits and shortcomings of the process for unrepresented parties.

Tribunal Members may select cases that are considered suitable for CE at any stage prior to the hearing. In deciding if a matter is suitable to use CE procedures, Members take into account the following criteria:

- whether the major issues in the case turn upon the expert evidence;
- if some of the facts are in dispute, whether it is possible for CE to be given by presenting different possible fact scenarios to the experts;
- whether the experts are commenting upon the same issues;
- whether the experts are from "like disciplines"; and
- whether the experts have similar levels of expertise.

The Tribunal considers the parties' consent or objection to the CE process, but makes the final decision itself.

Procedures for the use of concurrent evidence

The procedure for expert witnesses giving CE is along the following lines, albeit with some flexibility in individual hearings:

Concurrent Evidence procedures: Prior to Hearing

- Prior to a callover, parties are requested to confer with each other and to submit hearing certificates which list the dates on which all expert witnesses are available to give evidence concurrently. Additionally, a pamphlet about CE is sent to the parties' representatives with the callover notice.
- Parties are expected to come to a callover with dates when their experts are available to give evidence concurrently.

- After a callover, members select cases which are suitable to use CE, based on the above criteria. Members then complete a "selection sheet" which provides data as to why a case was, or was not, selected for CE.
- The member's support staff then notify the parties that the case has been selected for CE and the background paper on CE is sent to those parties.
- Parties' representatives are asked to notify the expert witnesses of the CE procedures, and they are encouraged to give the experts a copy of the CE pamphlet for their information.
- Parties are requested to exchange expert written reports prior to the hearing. The parties' Statements of Facts and Contentions are sufficient to identify agreed facts and therefore no extra statement of agreed facts is required to be filed and served.

Concurrent Evidence procedures: On the Day

- Expert witnesses should arrive in time to confer before evidence is taken.
- The Tribunal welcomes and swears the expert witnesses.
- At the outset of the expert evidence, the Tribunal summarises orally, or in writing, the agreed and disagreed facts.
- The applicant's expert witness gives a brief oral exposition.
- The respondent's expert witness then gives a brief oral exposition.
- Alternatively, the Tribunal may proceed to ask questions of the expert witnesses.
- The respondent's expert is invited to ask the applicant's expert witness questions, without the intervention of counsel.
- The process is then reversed, so that a brief colloquium takes place.

- Each expert witness is invited to give a brief summary (including his or her view on what the other expert has said and identifying areas of agreement and disagreement).
- The parties' representatives may then ask any relevant or unanswered questions of the expert witnesses.
- At any appropriate time in the process the Tribunal may intervene and ask questions.

Evaluation of use of Concurrent Evidence

To evaluate the use of CE, data are being collected from cases finalised by the Tribunal where CE procedures were used. Survey tools have been developed to evaluate satisfaction, delay and cost variables in the empirical study group. These survey tools include:

Members' Selection Sheet:
When deciding whether a matter will use CE procedures, the presiding member completes a selection sheet. The information obtained from the selection sheet will enable the construction of a profile of cases Tribunal Members considered suitable and cases considered unsuitable for using CE. It will also provide reasons for case suitability or unsuitability.

Members' Evaluation Survey:
Once the case is concluded, each Tribunal Member completes an evaluation survey. The survey is designed to provide an account of the member's perspectives on the use of CE generally and how CE operated in the specific case.

For example, the evaluation survey covers:

- details of the case, such as its complexity and whether it was difficult for the Member to decide whether or not to use CE;
- details of case resolution and, in cases where settlement was achieved, details of the perceived influence of CE on the settlement process;

- the perceived impact of CE on the time it takes to hear cases, for example, whether the use of CE affected the amount of hearing time required and the amount of time experts took to give evidence;
- the perceived impact of CE on the evidence provided by experts during the hearing, for example, whether the expert evidence was more objective and whether evidence comparison was easier or more difficult using CE;
- whether the decision-making process was enhanced through CE, and if it was, in what way(s);
- whether the use of CE procedures had an impact on the writing and handing down of the decision (that is, was it easier or harder, faster or slower); and
- whether Members were satisfied with the use of CE in that case.

Parties' representatives and experts

Finally, there will be evaluation of CE by the parties' representatives and the experts themselves. Representatives and experts are being asked to provide feedback rating their satisfaction with the CE procedures, the quality of the evidence presented to the Tribunal and their perceptions of the fairness of the process and outcome. They are being asked for any suggestions that they may have for improving the process.

SOME PRELIMINARY RESULTS

- Small number of finalised matters that used Concurrent Evidence (to date) – c. 22
- Approximately half of matters chosen for CE did not go to hearing (majority settled)

Number of matters that have used concurrent evidence at hearing to date

To obtain sufficient data for the study it is necessary to have at least 50 cases that have used CE at hearing. As at the end of January 2004, CE has been used in approximately 30 hearings. However, some 8 matters where CE was

used are still reserved and, as we only obtain data from the files once the matter has been finalised, we currently only have data in relation to 22 cases.

Forty-five matters that met the criteria for consideration for the use of CE (that is, both parties are represented and each party has at least one expert) have been identified by Members as unsuitable to use CE.

Number of matters that have settled

Finally, at least 37 matters chosen for CE, were resolved without CE being used. Most of these cases were settled. CE may improve prospects of settlement.

PRELIMINARY FEEDBACK FROM MEMBERS

Where CE was chosen and where CE was not chosen

The small number of finalised cases that have so far used CE means that at the moment we can only generate qualitative, anecdotal information on the use of CE. The results are therefore of limited statistical importance, but may reflect some trends.

Feedback from Members who chose CE

- *Why matters are chosen to use CE*

  The most often stated reason for choosing a matter for CE is that the experts will be commenting on the same issues.

  Other main reasons given include that:

  – CE will clarify complex issues;

  – the experts have the same expertise; and.

  – CE will improve the objectivity of the evidence presented.

- *Jurisdiction and types of experts in matters chosen for CE*

  As far as I am aware, the matters chosen by Tribunal Members to date for CE have been in the Compensation and Veterans' Affairs jurisdictions. Approximately 60 per cent of matters chosen fir CE are from the

Compensation jurisdiction and the remaining 40 per cent of matters are from the Veterans' Affairs jurisdiction.

Although we would like to have a variety of experts giving CE, during the study to date the only experts that have given CE, that I am aware of, have been medical specialists. This obviously reflects the jurisdictions of the matters that are chosen for CE.

Orthopaedic surgeons are well represented, particularly in the Compensation jurisdiction. Psychiatrists are also well represented, particularly in the Veterans' Affairs jurisdiction. Rheumatologists and neurologists are the next most common experts in the cases selected by Members for CE.

- *Many matters do not go to hearing*
  Anecdotal reports from some Members suggest that CE contributes to settlement. Two examples of comments that we have received so far include:

> This matter settled the day before the hearing. ... It is my view that the closeness of the medical experts' opinions combined with the prospect of having the doctors provide CE influenced both parties to settle rather than go through the lengthy and costly Tribunal hearing. ... It is my view, however, that without the factor of the prospect of CE, the matter would probably have commenced on the day of the hearing and the matter in all probability would have settled on the actual day of hearing. This would still have been a more costly exercise than that of the matter settling early, prior to hearing. Hence, it is my opinion that with the individual circumstances of this case ie, narrowness of issues, closeness of medical experts' opinions and prospect of CE, the "minds" of the parties were turned to a more careful and expeditious consideration of the issues involved and a costs benefits analysis led to settlement.
>
> This case settled after the first date of hearing and at the commencement of the second (of a three day hearing). CE was to occur on the day it actually settled. I believe the applicant's evidence on the first day, combined with knowledge of CE, exercised the parties' mind to settle. ... I am convinced that the prospect of CE ... [was a factor] leading to settlement.

Where Members did not choose to use CE

Data obtained for 32 matters:

- *It is worth looking at reasons given why matters have not been chosen for CE*

  The main reasons given to date are:

  - the experts do not have the same level of expertise (10);
  - the experts would not be commenting on the same issues (7);
  - the experts do not have the same area of expertise/different specialities (for example, rheumatologist and orthopaedic surgeon) (6);
  - CE would unduly increase costs (6);
  - CE would extend hearing time (5); and
  - the experts were not available to give evidence concurrently (5).

  Other reasons include:

  - the parties object to CE;
  - the experts object to CE;
  - one expert may dominate the process;
  - there were too many experts (for example, in one matter there were 7 doctors from 5 disciplines, in another there were 5 doctors from 3 disciplines); and
  - finally, on three occasions CE was not chosen by the Member because not enough detail was provided by the parties (for example, it was not disclosed whether the parties were calling experts, how many experts would be called and in which specialities the experts practised).

Members who have used CE at hearing

Data obtained for 26 responses:

What is the response from members who have conducted cases with CE?

- *Satisfaction with the use of CE*

The majority of Members (18 out of 26) stated that they were very satisfied with CE in the specific matter. The remaining 8 Members stated that they were satisfied. No Members stated that they were dissatisfied with CE.

- *Effect on hearing time*

  The majority of Members (17 out of 26) stated that the hearing took the same amount of time as it would take if CE had not been used. Eight Members stated that the hearing took less time. One Member stated that the hearing took more time.

- *Effect on time required for experts to give evidence*

  Just over half of the Members (14 out of 26) stated that when using CE the experts took about the same amount of time to give their evidence. Ten Members stated that the experts took less time and two Members stated that they took more time.

  Where the Members stated that the experts took less time to give their evidence, the time saved was estimated to be from one hour or less to two hours.

  Both of the Members who stated that the experts took longer to give their evidence estimated the extra time to be one hour or less. In one case, the cause of the extra time appeared to be counsel using traditional examination-in-chief and cross-examination when much of the material had already been covered by the experts while giving their evidence concurrently. The material was therefore repetitive.

- *Advantages of using CE in appropriate cases*

  All Members found that CE allowed the experts to provide their opinion on the facts as adduced in evidence rather than on notes taken in consulting rooms months earlier. Similarly, nearly all Members found that CE made it easier for them to compare the evidence of each expert and that it enhanced the decision-making process (24 out of 26 in both cases). The majority of Members stated that CE improved the objectivity of the expert's

evidence (21 out of 26) and CE improved the quality of the expert's evidence (19 out of 26). One great advantage of CE may be simply that each expert has to answer in a hearing on oath while facing a professional colleague and not merely answer to lawyers doing their best to appear to have a level of expert knowledge they plainly do not have.

Members who found that CE enhanced the decision-making process stated that it identified areas of contention, made the technical issues easier to understand, and distilled the issues more quickly.

For a majority of Members, CE made it easier for them to write and hand down their decisions (17 out of 26) and for a large number of the Members (11 out of 26) CE made it faster to write and hand down their decisions.

- *Feedback from legal representatives*

  Legal representatives have largely responded in a positive manner to CE. Indeed, Members report that a number of legal representatives have requested that CE be used in their hearings.

- *Feedback from expert witnesses*

  It appears that expert witnesses are also responding favourably to the use of CE procedures in Tribunal hearings. In particular, experts seem to appreciate the opportunity to expand on their opinions and answer fully the questions put to them. They report that this is in contrast to giving expert evidence in court, where they are often required to respond with "yes" or "no" answers only and their ability to expand upon, or more fully explain, their responses is severely curtailed by the traditional methods of adducing evidence.

CONCLUDING COMMENTS

Our study is raising some interesting data in relation to the use of concurrent evidence. Although the study is progressing at a slower pace than was initially anticipated, we expect the study to finish in the next couple of months and a final report will be generated shortly after that.

The experience of the AAT members to date is that when used in appropriate cases, concurrent evidence seems likely to become a very useful method to achieve our goal of reaching the correct or preferable decision in the matters that come before us.

Tendering of expert's evidence at trial

280. (1) Unless the Court orders otherwise, evidence in chief of an expert witness may be tendered at trial by

(*a*) the witness reading into evidence all or part of an affidavit or statement referred to in paragraph 279(*b*); and

(*b*) the witness explaining any of the content of an affidavit or statement that has been read into evidence.

Présentation à l'instruction

280. (1) Sauf ordonnance contraire de la Cour, la déposition d'un témoin expert dans le cadre d'un interrogatoire principal peut être présentée en preuve à l'instruction :

a) par la lecture par celui-ci de tout ou partie de l'affidavit ou de la déclaration visé à l'alinéa 279*b*);

b) par son témoignage expliquant tout passage de l'affidavit ou de la déclaration qu'il a lu.

Other evidence with leave

(1.1) Despite subsection (1), an expert witness may tender other evidence in chief with leave of the Court.

Déposition avec autorisation

(1.1) Malgré le paragraphe (1), le témoin expert peut présenter toute autre déposition au cours de l'interrogatoire principal avec l'autorisation de la Cour.

Affidavit taken as read

(2) With leave of the Court and the consent of all parties, all or part of an affidavit or statement referred to in paragraph 279(*b*) may be taken as read into evidence by the witness.

Lecture de l'affidavit

(2) L'affidavit ou la déclaration visé à l'alinéa 279*b*) ou tout passage de l'un ou de l'autre peut, avec l'autorisation de la Cour et le consentement des parties, être considéré comme ayant été lu par le témoin à titre d'élément de preuve.

Prohibition on pre-trial cross-examination

(3) Except with leave of the Court, there shall be no cross-examination before trial on an affidavit or statement referred to in paragraph 279(*b*).

Aucun contre-interrogatoire avant l'instruction

(3) Sauf avec l'autorisation de la Cour, il ne peut y avoir, avant l'instruction, aucun contre-interrogatoire sur un affidavit ou une déclaration visé à l'alinéa 279*b*).

SOR/2006-219, s. 7; SOR/2010-176, s. 8.

DORS/2006-219, art. 7; DORS/2010-176, art. 8.

281. [Repealed, SOR/2006-219, s. 8]

281. [Abrogée, DORS/2006-219, art. 8]

Evidence at Trial

Preuve à l'instruction

Examination of witnesses

282. (1) Unless the Court orders otherwise, witnesses at trial shall be examined orally and in open court.

Témoins interrogés oralement

282. (1) Sauf ordonnance contraire de la Cour, les témoins à l'instruction sont interrogés oralement, en séance publique.

Witnesses to testify under oath

(2) All witnesses shall testify under oath.

Serment

(2) Les témoins déposent sous serment.

Expert witness panel

282.1 The Court may require that some or all of the expert witnesses testify as a panel after the completion of the testimony of the non-expert witnesses of each party

Formation de témoins experts

282.1 La Cour peut exiger que les témoins experts, ou certains d'entre eux, témoignent à titre de groupe d'experts après la déposition orale des témoins des faits de

or at any other time that the Court may determine.

SOR/2010-176, s. 9.

chaque partie ou à tout autre moment fixé par elle.

DORS/2010-176, art. 9.

Testimony of panel members

282.2 (1) Expert witnesses shall give their views and may be directed to comment on the views of other panel members and to make concluding statements. With leave of the Court, they may pose questions to other panel members.

282.2 (1) Chaque témoin expert donne son point de vue et peut être contraint à formuler des observations à l'égard des points de vue des autres experts du groupe et à tirer des conclusions. Avec l'autorisation de la Cour, il peut leur poser des questions.

Témoignage des membres du groupe

Examination of panel members

(2) On completion of the testimony of the panel, the panel members may be cross-examined and re-examined in the sequence directed by Court.

SOR/2010-176, s. 9.

(2) Après le témoignage du groupe d'experts, tous les membres de ce groupe peuvent-être contre-interrogés et réinterrogés selon l'ordre établit par la Cour.

DORS/2010-176, art. 9.

Interrogatoires subséquents

Interpreter

283. Rule 93 applies, with such modifications as are necessary, to the use of an interpreter at trial.

283. La règle 93 s'applique, avec les adaptations nécessaires, à l'utilisation d'interprètes lors de l'instruction.

Interprètes

Failure to appear

284. (1) Where on the day of a trial, a party who intends to call witnesses does not produce them or justify their absence, the Court may declare the party's proof closed.

284. (1) Si, le jour de l'instruction, la partie qui entend produire des témoins ne les produit pas et ne justifie pas leur absence, la Cour peut déclarer close la preuve de cette partie.

Sanctions en cas de non-comparution

Adjournment

(2) Subject to subsection (3), where a party demonstrates due diligence and the Court is satisfied that an absent witness is necessary and that the absence of the witness is not due to any contrivance on the party's part, the Court may adjourn the hearing.

(2) Sous réserve du paragraphe (3), si une partie a fait preuve de diligence raisonnable et que la Cour estime que la déposition d'un témoin absent est nécessaire et que son absence ne tient pas à une manœuvre de la partie, la Cour peut ajourner l'audience.

Ajournement si la partie a fait preuve de diligence

Avoidance of adjournment

(3) An adverse party may require a party seeking an adjournment under subsection (2) to declare, or to produce some other person to declare, under oath the facts that, in the opinion of the party seeking the adjournment, the defaulting witness would have stated, and may avoid the adjournment by admitting the truth of those facts or that the witness would have stated those facts.

(3) Une partie adverse peut exiger de la partie qui demande l'ajournement de l'audience selon le paragraphe (2) qu'elle déclare ou produise une autre personne pour déclarer, sous serment, les faits qui, de l'avis de la partie demandant l'ajournement, auraient été énoncés par le témoin défaillant et elle peut éviter l'ajournement en admettant soit la véracité de ces faits,

Ajournement évité