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Standing together Assisting the court with concurrent evidence

In Adelaide recently, the Australian Institute for Judicial Administration conducted a debate involving several medical experts, a judge and barristers. The forum debated the merits of using concurrent evidence, based on their experiences in a recent medical negligence case.

The case in question was the first time the process had been applied in the Supreme Court in South Australia, although it has been used in the Administrative Appeals Tribunal (AAT) since about 2000¹. The consensus of the debate was that more training on the process needs to be adopted.

In the concurrent evidence process, two or more experts give their evidence at the same time in a discussion chaired by a judge. Known colloquially as “hot tubbing”, the concurrent evidence process has become a hot topic nationally, but opinions on its usefulness remain divided.

The Victorian Law Reform Commission’s “Civil Justice Review” Report, issued in May 2008, contained several recommendations about changing the role of experts. The Report also reinforced other recommendations made in similar law reform reports. One of the



recommendations involved changing the court rules in Victoria to permit the taking of expert evidence in a panel format.

In 2007, Justice McClellan, of the NSW Supreme Court, stated “the effective and fair use of expert evidence is one of the most significant issues which the courts now face”. The scrutiny of the process of taking and receiving of expert evidence has

¹Readers may also be interested in the results of an AAT study on the topic – refer “Concurrent Expert Evidence in the Administrative Appeals Tribunal: The New South Wales Experience”, paper presented by Justice Downes AM, February 2004 and the final report, “An Evaluation of the Use of Concurrent Evidence in the Administrative Appeals Tribunal”, November 2005.



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continued unabated in Australia since 1999², and experts are again in the “hot tubbing” spotlight.

The purpose of concurrent evidence is to enable the evidence and opinions of experts to be better tested by a Court or Tribunal (and each other) with the aim that such evidence is more comprehensively explained, and better understood and analysed. In that regard, hot tubbing also allows experts to fulfil their “duty to assist” that Court or Tribunal.

Development of joint conferencing

The VLRC report cites NSW Chief Justice Spigelman’s views that expert evidence has been identified “as one of the principal sources of expense, complexity and delay in civil proceedings.” Not everyone agrees that expert evidence per se is to blame. The question is why the Courts allow a system whereby two or more experts can be instructed to independently form an opinion, but whose instructions are not agreed by the Court, nor agreed between the parties. If those experts received the same instructions – even if they differ between the parties – wouldn’t the experts at least be pursuing the same issues and comparing apples with apples? Even if their opinions still differed, the task of reconciling those differences would be simpler.

When appointing a single expert in the Family Court, the parties often cannot agree on the joint instructions. So why blame the experts for cost and delay when they are faced with divergent instructions resulting in divergent opinions “brought about by the complexity of the matter under consideration³” ?

²Freckleton, Reddy & Selby, “Australian Judicial Perspectives on Expert Evidence: An Empirical Study”, Australian Institute of Judicial Administration, 1999

³Refer ICAA’s Forensic Accounting Special Interest Group’s submission to the NSWLRC concerning “adversarial bias”; see Ch7 VLRC Report, pg 487

Pros and cons of concurrent evidence

Why has the use of concurrent evidence gained bi-partisan support between some jurists and experts?

The answer lies in the outcome. From the judges’ point of view, they get to hear all of the expert debate in answer to the questions the judge wishes to ask. From the expert’s point of view, they get to debate the answers to questions they believe ought to be asked.

The additional benefits are that technical competence and independence are part of that debate. Any perception that getting to the truth of an issue overall incurs less cost or arrives at the answers at less cost is debateable. Perhaps within the confines of the courtroom that may be true.

What needs to occur for concurrent evidence to work? Ferrier Hodgson participated in giving concurrent evidence in the Federal Court late last year. The fact that the experts had met face to face and prepared a joint report, which identified few matters of disagreement but highlighted material assumptions that needed to be proved, set the tone for the giving of concurrent evidence at trial.

It should be the areas of disagreement and material assumptions that ultimately set the agenda – as between counsel and the judge. In this particular case, it was so effective that in the end counsel didn’t need to raise any additional questions.



For this process to work involves the following considerations:

- There must a common level of expertise between experts – ie: some experts' fields of knowledge are very specialised, whereas others are not so.
- The experts must be commenting on the same issues.
- Prior to giving concurrent evidence, experts must have been instructed to meet within a reasonable period before any trial (and not just before the hearing!).
- Conferencing of experts seems to work better when it occurs face to face, rather than via phone or email, but practicalities prevail.
- As a prelude to giving concurrent evidence, experts need to prepare a joint report.
- The joint conference is not a process whereby experts should necessarily moderate their views solely for the purposes of achieving a consensus. Rather, the experts should understand that the joint report should summarise areas of agreement and each should articulate why there are any areas of disagreement.
- Experts should be specifically asked whether after the joint conference, their views have altered.
- The experts must be available to give evidence concurrently.
- There ought to be a limit on the number of experts giving evidence concurrently.
- The venue must be able to accommodate the number of experts so that each expert can be heard.



- Last but not least, judges, barristers and experts need further training in the practical aspects of managing the process in the courtroom.

There may be situations where bringing the experts together, whilst helpful in each expert gaining a better understanding, may still yield divergent opinions, and thus proceeding to concurrent evidence may not be more efficient than the usual cross-examination process (concurrent evidence was rejected by the respondents in the C7 case, for example). Alternatively, in at least one case, a concurrent evidence session occurred after the usual cross-examination of experts⁴.

Overall, to date concurrent evidence has met with overwhelming support from the experts and their professional organisations. According to Justice McClellan at the ALA conference in July 2007, it makes them: “better able to communicate their opinions... and more effectively respond to the views of the other expert or experts”.

⁴Alphapharm Pty Ltd v H Lundbeck Pty Ltd [2008] FCA 559



Conclusion

The concurrent evidence process is already in play. It is widely practiced in the various Land & Environment courts and the AAT. It is provided for in the NSW Uniform Civil Procedure Rules (r 31.35), SA Supreme Court Civil Rules (r 213), and WA Supreme Court Practice Direction No 4 of 2006. It is only a matter of time before these courts adopt it as a matter of practice.

Some experts may fear diving into the “hot tub” together. However, experts should not fear the concurrent evidence process. If anything, they should be comforted by a process that requires experts to meet and confer beforehand, and which ought to involve a less hostile examination in the witness box.

Instructing solicitors might see concurrent evidence as a natural process consequent upon the joint conferencing of experts, and more of it should occur. This is where the real cost saving can be made.

The other benefits of the process potentially support better outcomes than the single expert or Court Appointed expert process - topics and areas of disagreement are openly explored and reasoned simultaneously, rather than narrowly or singularly stated, and any adversarial bias is immediately exposed and corrected by peer experts.



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