By Justice Peter McClellan

Sworn together

A discussion of concurrent evidence

Society is in constant change. Legal systems respond to those changes. The response is often reserved and comes when many in the community express the demand for change. In many cases the need for change is only apparent when a retrospective assessment confirms that what may have been first thought to be an irritant has become an entrenched problem. Sometimes it is the courts which respond by changing their procedures, adapting and altering the rules by which litigation is conducted. Other times when the problem develops a political dimension the legislature intervenes.

Many judges, practitioners and users of the court system have drawn attention to the burdens imposed on parties by the cost of litigation. The adversarial system is designed to give the parties control of the litigation. However, the well-resourced litigant can use their resources to complicate and delay the litigation, imposing an unacceptable burden on other parties. Sir Anthony Mason has commented, the 'rigidities and complexity accorded litigation, the length of time it takes and the expense (both to government and the parties) has long been the subject of critical notice'.[1]

In almost every common law jurisdiction in the last 30 years a detailed and critical examination of the civil justice processes has been undertaken. This has led to significant change, particularly in case management of cases by the courts. Initially perceived as an unacceptable intrusion into the adversarial system, it is now almost universally adopted. From this change others have followed.

Expert evidence has proved an increasing problem. As our knowledge in all areas of learning has expanded, and the expansion in the latter part of the 20th century has been unparalleled in human history, litigants have increasingly been advised to engage experts, sometimes multiple experts, to assist in the resolution of their disputes. The multiplication of experts has not only come as a response to the expansion of knowledge but also out of the concern by practitioners that the judicial decision maker requires a complete 'education' if he or she is to fairly resolve the dispute. Experts are costly and the time taken in a conventional trial to resolve their differences can be significant.

There has also been concern expressed with the integrity of the expert evidence upon which judges are required to adjudicate.[2] The phenomenon, known as 'adversarial bias' among experts, has been talked about for many years. The bias may be inadvertent or deliberate. An expert inevitably becomes part of the litigation team. Nobody wants to be associated with a team that loses. Nobody is comfortable with their ideas being diminished or discarded, particularly when a client has paid significant monies for the professional's advice. These problems are emphasised by the adversarial process which sets up a contest where the lawyers lead a team with the objective of winning a 'battle'. I have on many occasions heard strident criticism of experts as 'guns for hire' and the adversary process as providing 'winners' and 'losers' in which scientific objectivity is a secondary consideration.

Many professional bodies have expressed concern about the ability of the conventional methods to provide the experts with an effective opportunity of communicating their views to the court. Experts have increasingly resented the process of examination and cross-examination. Many highly qualified professional people will quite simply not accept a retainer to give evidence in court.

In response to these concerns, a number of changes have >>

been made to the procedures in the Common Law Division of the Supreme Court in New South Wales. In particular, changes have been made to the way expert evidence is dealt with in civil litigation. The aim of the changes has been to enhance the integrity and reliability of expert evidence and to 'facilitate the just, quick and cheap resolution of the real issues in the proceedings'.[3]

The revised General Case Management Practice Note for the Common Law Division of the Supreme Court took effect from 29 January 2007. It makes a number of significant changes to the pre-trial management of civil cases, particularly in claims for damages for personal injury or disability. The changes include single experts appointed by agreement between the parties, the option of court-appointed experts, powers in the court to control the number of experts and the manner of the giving of their evidence. The amended rules allow the judge to order the sequence for the giving of evidence and require the defendant to call lay or expert evidence in what would otherwise be the plaintiff's case. Perhaps the most significant change in relation to expert evidence is the use of the concurrent method of hearing their evidence. Paragraph 37 of the Case Management Practice Note provides:

> 'All expert evidence will be given concurrently unless there is a single expert appointed or the Court grants leave for expert evidence to be given in an alternate manner.'

How does it 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 courts, the experts are required to meet to discuss those reports. This may be done in person or by telephone. The experts are required to prepare a short point document which incorporates a summary of the matters upon which they are agreed, 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 the subject of disagreement. The process provides an opportunity for experts to place their view before the court on a particular issue or sub-issue. The experts are encouraged to ask and answer questions of each other. Counsel may also 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 process the judge will ask a general question to ensure that all of the experts have had the opportunity of fully explaining their position.

Concurrent evidence allows the experts, the advocates and the judge to arrive, where possible, at a common resolution of the issues in the case. Where agreement is not possible the discussion 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 adviser but has the benefit of multiple advisers who are rigorously examined in public.

It is a mistake to think of concurrent evidence as an attempt at peer review. Its object is to provide the court with an understanding of the available learning in a particular field so that the dispute between the parties can be resolved. Of course, integrity of the outcome is of fundamental significance. A court cannot claim that the answer it gives to any particular problem will be the answer which the scientific community might ultimately give after all necessary research has been undertaken and the scientific debate completed. Nevertheless, the resolution of the litigation is invariably enhanced if the experts can give their evidence in an atmosphere of structured discussion, where their views are respected, rather than in an aggressive encounter where the object of the advocate is simply to destroy the opposition witness, whatever be the merit of his or her opinion.

I have utilised the process of concurrent evidence on many occasions, both when I was in the Land and Environment Court, and in the Supreme Court. Concurrent evidence is the means by which we can provide in the courtroom the decision-making process which professional people conventionally adopt. If someone suffers a traumatic injury which required hospitalisation and the possibility of major surgery to save their life a team of doctors would come together to make the decision whether or not to operate. There would be a surgeon, anaesthetist, physician, maybe a cardiologist, neurologist or one of the many other specialities which might have a professional understanding of the problems. They would meet, discuss the situation and the senior person would ultimately decide whether the operation should take place. It would be a discussion in which everyone's views were put forward, analysed and debated. The hospital would not set up a court case. If this is the conventional decision-making process of professional people, why should it not also be the method adopted in the courtroom?

The 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 convey their own views and respond to the views of the other expert or experts. Because they must answer to a professional colleague rather than an opposing advocate, they 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.

These findings are not based solely on my own experience. The Commonwealth Administrative Appeals Tribunal (AAT), where concurrent evidence is used extensively, published research on the use of the procedure in its hearings in 2005 'An Evaluation of the Use of Concurrent Evidence in the Administrative Appeals Tribunal'.[4] As one expert commented:[5]

> 'I think it keeps the expert opinions more honest. I think it's much more difficult for people to say things that they find difficult to defend and perhaps wouldn't say with their colleague there ...'

The AAT research concluded that concurrent evidence was effective in the majority of cases particularly with respect to:[6]

- defining and presenting critical issues;
- clarifying each party's position'; and
- ensuring the parties were treated fairly and producing a fair outcome.

It was also found to have influenced the conduct of the parties' representatives. One representative said:[7]

> 'I felt that concurrent evidence may be influencing settlement. At the initial preparation stage when the parties are first notified that concurrent evidence will be used there is a flurry of activity back and forth.'

Concurrent evidence 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 20 per cent of the time which would otherwise have been required. I have had cases where eight witnesses gave evidence at the one time.[8] I know of one case where there were 12. There have been many cases where four experts have given evidence together. 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 have the expert's views expressed in his or her own words. There are also benefits when it comes to writing a judgment. The judge has a transcript where each witness answers exactly the same question at the same point in the proceedings.

I am often asked whether concurrent evidence favours the more loquacious and disadvantages the less articulate witness. In my experience, the opposite is true. Since each expert must answer to their professional colleagues in their presence, the opportunity to divert attention 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 more reticent person, becomes a more competent witness in the concurrent evidence process. In my experience, the shy witness is much more likely to be overborne by the skilful 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. I can also report that concurrent evidence has now been used in three criminal trials in New South Wales with the consent of the parties and in the absence of the jury. It proved to be entirely successful.

Contemporary courts recognise that they must continue to develop practices and encourage procedures which meet community expectations for the justice system. Unless those expectations are met, distrust will emerge from individuals, corporations, contracting parties and the ordinary person for whom the courts presently provide an avenue to redress perceived wrongs. There will be impacts upon the efficiency of commercial transactions. A fundamental quality of our system of justice has been the confidence invested in it by both the powerful and the weak in our society. Should this be replaced by a pervasive sense of injustice the ethical structure of the community is threatened. Effective and efficient utilisation of the evidence of experts is one fundamental issue which the courts must carefully supervise. ■

Notes: **1** Sir Anthony Mason, 'The Future of Adversarial Justice', a paper given at the 17th AIJA annual conference on 6-8 August 1999. **2** M Nothling, 'Expert Medical Evidence: The Australian Medical Association's Position', available from: http://www.aija.org.au/info/expert/Nothling.pdf, viewed 20 May 2009, at 1. **3** *Civil Procedures Act 2005* (NSW) s56(1) 4 **5** AAT, "An Evaluation of the Use of Concurrent Evidence in the Administrative Appeals Tribunal", November 2005, http://www.aat.gov.au/SpeechesPapersAndResearch/Research/AATConcurrentEvidenceReportNovember2005.pdf, viewed at 20 May 2009, at 52. **6** *Ibid* at 55. **7** *Ibid* at 39. **8** *Ironhill v Transgrid* [2004] NSWLEC 700.

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