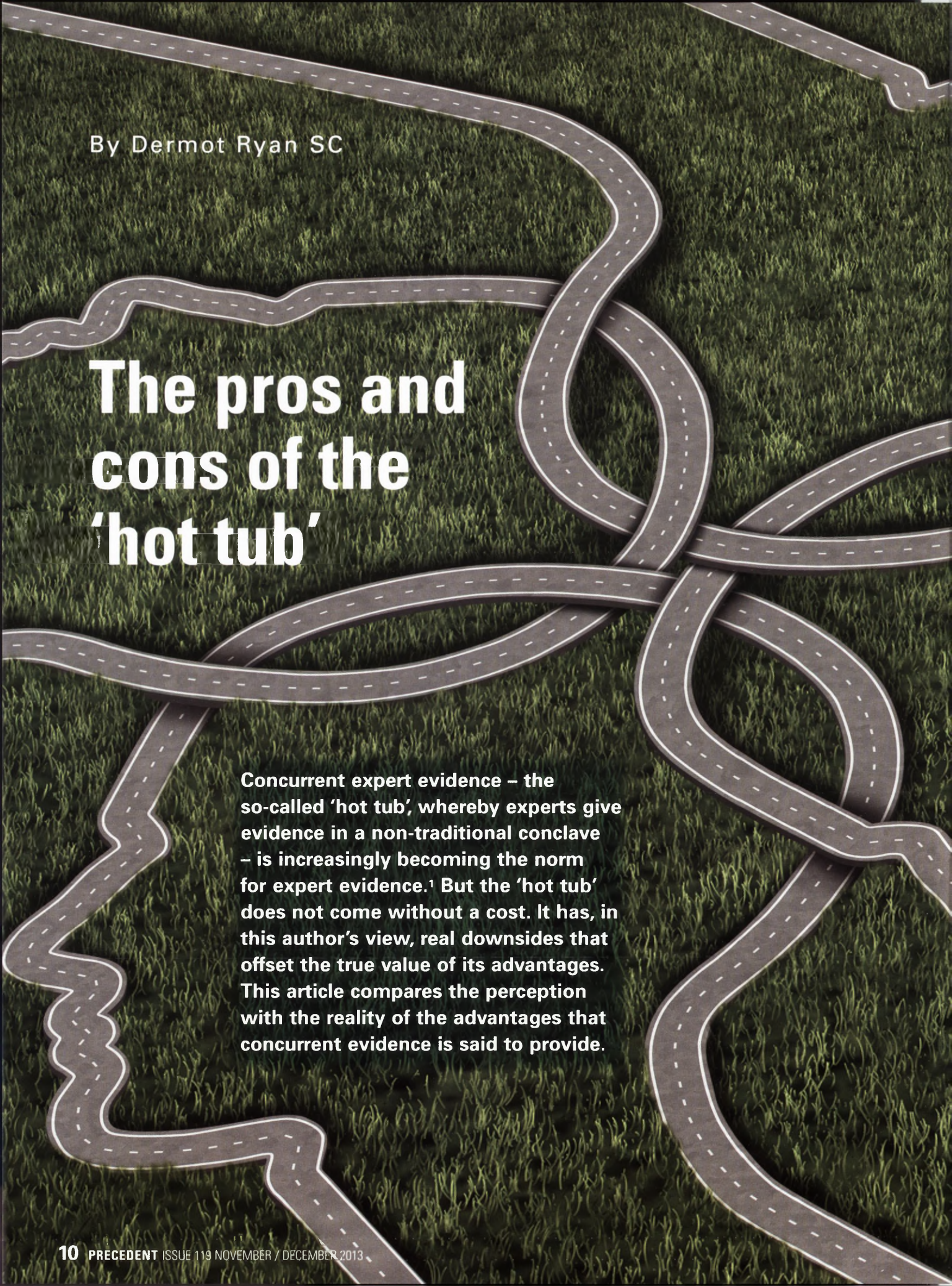

By Dermot Ryan SC

The pros and cons of the 'hot tub'

Concurrent expert evidence – the so-called 'hot tub', whereby experts give evidence in a non-traditional conclave – is increasingly becoming the norm for expert evidence.[1] But the 'hot tub' does not come without a cost. It has, in this author's view, real downsides that offset the true value of its advantages. This article compares the perception with the reality of the advantages that concurrent evidence is said to provide.

The use of expert evidence has increased exponentially. Experts now play a critical role in many civil and criminal trials,[2] and in relation to matters that would have surprised our forensic ancestors. As Justice McClellan has put it, 'new scientific disciplines have emerged on the fringes of recognised science'.[3] At the same time, there are 'well-known and widely documented' problems with expert evidence;[4] in particular, the issue of bias and partiality.

THE ROLE AND REGULATION OF THE 'HOT TUB'

Concurrent evidence is an Australian creation.[5] It has, however, been adopted in the UK and Canada, and to a more limited extent in the US. It is becoming a common way for experts to give evidence in NSW. Concurrent evidence emerged from practices in the Australian Broadcasting Tribunal, the Trade Practices Tribunal and in the Commercial List from the 1980s onwards.[6] Such evidence only really took off, however, from the mid-2000s. Justice McClellan introduced it to the Land and Environment Court (2003) and developed its use in the Common Law Division when Chief Judge at Common Law.

The perceived advantages of concurrent evidence are:

- Hearings take a lot less time.
- The court takes an active – indeed, leading – role in the giving of the evidence by the experts.
- The experts prefer the process.
- Cross-examination is limited and closely controlled.
- The free exchange of views between the experts will promote impartial and honest evidence.

The perceived disadvantages of concurrent evidence are:

- The savings as to time come at the expense, in the main, of the parties' lawyers, whose role in what remains an adversarial exercise is considerably reduced.
- The reduction in the scope for cross-examination is a retrograde step. Cross-examination has been at the core of common law trials for the very good reason that it is a tried and true method of reaching the truth.
- The perception that the model will produce more impartial and honest evidence is not soundly based.
- There is a risk that the more aggressive experts take command of the process.[7]
- The lack of uniformity in procedures adopted for the receipt of concurrent evidence.

The reaction of the judiciary has been that concurrent evidence is very valuable and preferable to the conventional approach. A review in the Administrative Appeals Tribunal showed that it can reduce hearing times.[8] An example is the *Coonawarra Case*,[9] where a case with an original estimate of a six-month hearing, largely due to the number of experts to be called, was completed in five weeks, largely due to the use of concurrent evidence.[10]

There are no fixed rules as to the order or procedure to be adopted in relation to concurrent expert evidence, and orders can be crafted to meet the exigencies of a particular case. This is a disadvantage.[11]

THE JUDGE'S ROLE

The role of the trial judge in dealing with concurrent evidence is very different from that in relation to conventional expert evidence. Where concurrent evidence is given, the trial judge will be expected to lead the examination of the experts.

This requirement is one reason why the effectiveness of concurrent evidence 'can differ significantly from one court or tribunal to another and from judge to judge'.[12] One of the keys to the success of concurrent evidence is the degree of preparation by the trial judge and the conduct of his/her more active role, more inquisitorial than that of a 'referee'.[13] In large cases this can represent a considerable 'ask'. Expert reports can be very voluminous.

As Neil Young QC has said, the judge should not 'take over the process' by unduly or excessively interfering, which can raise issues of judicial impartiality and procedural fairness.[14] This is especially so where the intervention by the judge can come at the expense of time permitted for counsel to cross-examine. >>

The judicial role in a hot tub is still ill-defined. But he/she can be a 'chairperson', interlocutor or even inquisitor; the 'age of the managerial judge has arrived'.[15]

CROSS-EXAMINATION IN THE HOT TUB

Confining cross-examination appears, in the eyes of its proponents, to be one of the desirable consequences of concurrent evidence.[16] But this is, in the context of the adversarial trial, with its recognition of cross-examination as (as Wigmore put it) the 'great engine ever invented for the discovery of the truth' (cited in *Lilly v Virginia* 527 US 116 (1999)), a very significant development.

Cross-examination in the hot tub:

- differs from conventional expert evidence. Even the physical setting – of experts in a conclave – is different.
- takes place after a pre-hearing conclave, the statements and discussions between the experts *inter se* and with the trial judge, leading to pressure on counsel to deal only with the issues as they have been refined by that process.
- reduces the scope for cross-examination.[17]

These are all very significant changes. Furthermore, the precise (or even general) limitations on counsel's traditional role are not defined. Much will depend on the directions given for conduct of the hot tub.

In an adversarial system, the erosion of the role of counsel and lawyers and the elevation of that of the expert is one that should be greeted with considerable caution. This is especially so in light of the popular view that there is a real problem with partisanship, bias and the 'gun for hire' syndrome among expert witnesses. Instinctively, where such a problem is seen to exist, pressure to reduce or even eliminate cross-examination of the experts seems counter-intuitive.

Justice Rares has written that '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.'[18] This, too, is a very considerable change. While, of course, a trial judge has always had the right to intervene and question a witness, cross-examination is left, and should be left, to the professional judgement of counsel. Cross-examination also has a tempo and order chosen by counsel.

All of this is altered by judicially chosen interruptions and the interposition of comments by experts other than the cross-examinee. It is further altered if the cross-examiner can appeal to his/her, or another expert, for instant commentary on the answer just given, or if another expert can simply interject.

What is clear is that many experts do not like cross-examination, some 'come away from the forensic process justifiably scarred and disdainful of it as a process for eliciting intelligent and appropriate examination of expert opinion'.[19] They prefer the hot tub.[20]

Of course, the key word here is *justifiably*. No doubt where an expert emerges sore and bruised from cross-examination it is because he/she has been unfairly treated. But this would be the exception rather than the rule. Cross-examination is a testing mechanism to reveal the truth. It can be unpleasant. However, the courts are armed with the power to prevent unfair and improper questioning.[21]

DOES THE HOT TUB REALLY REDUCE PARTISANSHIP?

The hot tub is a judicial innovation designed to reduce expert partisanship and disagreement.[22] But does it? Professor Gary Edmond has put forward a number of well-reasoned 'critical reflections' on the assumptions underlying the perceived advantages of the hot tub. In particular, he questions the cardinal virtue generally advanced for such evidence, that it 'embodies the scientific ethos: it provides a discursive, co-operative environment and facilitates peer review'.[23] In turn, this is said to reduce partisanship and 'adversarial bias'.

Professor Edmond concludes that the justifications for 'hot tubbing' are 'predicated upon romanticised images of expertise and expert disagreement'.[24]

He makes the point that in conventional evidence it is very common for the opposing expert to be in court, assisting counsel and thereby exerting whatever peer pressure can be brought to bear. On this basis, Professor Edmond concludes that moving the experts 'a few yards...and allowing them to respond during the same session rather than in a day or a week later'[25] cannot be expected to produce a demonstrable change in behaviour by experts.

Since the mid-19th century there has been considerable concern about 'the use of partisan expert evidence', to the extent that the issue had become 'a persistent thorn in the side of the common law'.[26] The reality of such risks will not be cured by a simple co-location of experts.

It is a brutal truth that parties do not want experts who politely cave in and agree with the other side while in the 'tub'. As a result, the process of expert selection may well reflect the 'track record' of an expert and thus, indirectly, the ability of lawyers to influence the conduct of the hot tub.[27]

Another, allied, disadvantage is that although judges record not having found experts trying to bully or overbear each other in the hot tub, the author's experience and that of other lawyers anecdotally is that stronger and more forthright personalities do tend to dominate the discussion. A quiet, retiring but technically brilliant expert may not do nearly so well in the tub as the confident, outgoing expert.

HOW EXPERTS REGARD CONCURRENT EVIDENCE

As noted above, a perceived benefit of concurrent evidence is that it 'provides expert witnesses with a considerably more comfortable and professional experience than the traditional method of taking expert evidence'.[28] As Parry explains, the new method of taking their evidence 'enables expert witnesses to maintain their roles as experts and seek to assist the decision-maker…rather than having to participate in a forensic battle with counsel'. The premise is that such a forensic battle is the opposite of 'a helpful discussion and debate of expert issues':[29]

> 'At its worst, the traditional approach transforms an expert, who enjoys the privileged position of expressing opinion evidence…into a "gun for hire".'[30]

The author does not accept this view. The idea that cross-examination, even penetrating and aggressive cross-examination, transforms an expert into a gun for hire is untenable. While the absence of such cross-examination will make the expert's position more 'comfortable', it will do nothing to reduce the risk of bias and lack of impartiality that is present whenever parties themselves select the experts to give evidence on their behalf.

The NSW Law Reform Commission has found that the concurrent evidence procedure 'has met with overwhelming support from experts and their professional organisations'.[31] The experts, apparently:

> 'find that, not being confined to answering questions put by the advocates, they are better able to communicate their opinions to the court. They believe that there is less risk that their opinions will be distorted by the advocates' skills.'

Of course, one person's 'distortion' is another person's 'truth'.

REDUCING THE LAWYERS' ROLE

The proponents of concurrent evidence explicitly or implicitly regard a reduced role for lawyers in the >>

deployment of expert evidence as a desirable thing and as assisting the court's task.

Equally, at trial, the perceived advantage in terms of time is at the expense of the role of the parties' lawyers. To say that evidence can be taken in half, or even 20 per cent of the time necessary under the traditional approach shows the extent to which that role has been constrained and reduced.[32] Although the NSW LRC concluded that the saving of time by concurrent evidence was important, it went on to say that 'perhaps more importantly, the process moves somewhat away from lawyers interrogating experts towards a structured professional discussion between peers in the relevant field'.[33]

CONCLUSION

While the hot tub is here to stay, its real advantage lies in its reduction of the time required for expert evidence to be received. But that advantage depends heavily on reducing the role and autonomy of the parties' lawyers in that process. In this author's view, that trade-off is a considerable downside to the concurrent evidence regime. ■

Notes: **1** *Gunnerson v Henwood* [2011] VSC 440; see also PN SC CL 5, paras [36]-[40] which mandates concurrent expert evidence in cases involving claims for personal injury. **2** P McClellan, 'Admissibility of expert evidence under the *Uniform Evidence Act*', paper delivered at the Judicial College of Victoria, 2 October 2009. **3** *Ibid*, p1. **4** R Sackville, 'Expert Evidence in the Managerial Age', paper delivered to the Forensic Accounting Conference, 14 March 2008, Sydney, pp4-5. **5** S Rares, 'Using the "hot tub" – how concurrent expert evidence aids understanding issues', originally a Bar Association CPD paper, 25 August 2010, retrieved 3 August 2013 from www.fedcourt.gov.au/__data/assets/rtf_file/0004/ .../Rares-J-20100823.rtf. **6** See, generally, D Parry, 'Concurrent Expert Evidence', 31 May 2010, retrieved 28 July 2013 from http://www.sat.justice.wa.gov.au/_files/Concurrent_evidence_31%20May_2010.pdf. **7** Or that, as in *Perpetual Trustees Victoria Ltd v Ford* [2008] NSWSC 29; (2008) 70 NSWLR 611, at [43], the hot tub can degenerate to 'an interdisciplinary brawl' (reversed on other grounds, (2009) 75 NSWLR 42). **8** G Downes, 'Concurrent Expert Evidence in the AAT: The NSW experience', paper presented at the Australasian Conference of Planning and Environment Courts and Tribunals, Hobart, 27 February 2004, retrieved 3 August 2013 from http://www.aat.gov.au/Publications/SpeechesAndPapers/Downes/concurrent.htm, p4. **9** *Coonawarra Case* [2001] AATA 844. **10** Downes, see note 8 above, p5. The case also illustrates the use of more than one hot tub per case. Experts were grouped into panels covering various disciplines, ranging from viticulture and soil science to history and marketing. It is not, therefore, essential that the experts' disciplines be exactly the same. **11** P Garling, 'Concurrent Expert Evidence, Reflections and Development', paper delivered to the Australian Insurance Law Association Twilight Seminar Series on 17 August 2011, retrieved 3 August 2013 from http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/garling170811.pdf. **12** N Young QC, 'Expert Witnesses: On the Stand or in the Hot Tub – How, When and Why?' Commercial Court Seminar, 27 October 2010, retrieved 3 August 2013 from http://www.commercialcourt.com.au/PDF/Speeches/Commercial%20Court%20CPD%20Seminar%20-%20Expert%20Witnesses%20-%20Paper%20by%20Neil%20Young%20QC.pdf. **13** As a barrister interviewed by Professor Edmond put it: '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.' G Edmond, 'Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure' (2009), 72, *Law and Contemporary Problems* 159 ,p183. **14** Young, see note 12 above, para [21]. **15** Sackville, see note 4 above, pp5-6. **16** Certainly cross-examination of experts is seen as part of the problem. As Sackville J put it, see note 4 above (p5): 'the testing of expert opinion evidence by cross-examination can be extremely lengthy and thus can contribute not only to disproportionate expense, but to substantial delays in resolving the proceedings'. For an example of limits imposed on cross-examination of experts giving concurrent evidence, see *X v Sydney Children's Hospitals Specialty Network (No. 7)* [2011] NSWSC 1360. **17** Young, see note 12 above, para [22]. **18** Rares, see note 5 above, at [33]. **19** *Ibid*, at [10]. **20** *Ibid*, at [45]. **21** Section 41, *Evidence Act* 1995 (NSW). **22** Edmond, see note 13 above, at p160. **23** *Ibid*, p169 & ff. **24** *Ibid*, p170. **25** *Ibid*. **26** NSW Law Reform Commission, *Report 109 Expert Witnesses*, (2005) para [2.24]. **27** 'The introduction of concurrent evidence may encourage lawyers to select experts who are unlikely to make damaging concessions or to be manoeuvred into compromising concessions by the experts retained by other parties…marginalising lawyers may actually encourage the use of more experienced expert witnesses', Edmond, see note 13 above, p175. **28** Parry, see note 6 above, at 7; see also the discussion in KordaMentha Forensic, 'Some like it hot! Expert views on judicial orders to hear expert evidence concurrently', Publication No. January 2013, retrieved on 3 August 2013 from http://www.kordamentha.com/docs/for-publications/issue-13-01-some-like-it-hot. **29** *Ibid*, at 11. **30** *Ibid*, at 12. **31** NSW Law Reform Commission, Report 109, see note 26 above, para [6.51]. **32** *Ibid*, para [6.51]. **33** *Ibid*, para [6.56].

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