Reflections on concurrent expert evidence

The following paper was delivered by the Hon Justice Peter Garling at the Australian Insurance Law Association Twilight Seminar Series on 17 August 2011.

Introduction

Concurrent expert evidence in the Common Law Division of the Supreme Court of NSW can no longer be regarded as a radical or dangerous experiment to be looked upon with suspicion.

It is now, and has been for some years, the norm. It is a usual and integral part of the management of any case by the court, so as to ensure that only the real issues in the proceedings are addressed and resolved, and this in a just, quick and cheap manner: s 56 *Civil Procedure Act 2005*.

Contrary to the early doomsayers around the time when the use of concurrent evidence became formalised in 2005 with the introduction of the Uniform Civil Procedure Rules, the sky has not fallen in. The adversarial process continues to thrive and barristers and solicitors have not become irrelevant. Experts have not newly become argumentative advocates and cases continue to be settled or heard in a conventional manner.

Advantages

That there are advantages of concurrent expert evidence over other evidence-taking methods is undoubted. Debate remains as to what they are and the extent of the advantage.

I venture to suggest that the advantages which are identified will vary from individual to individual. Those identified advantages will depend upon the particular piece of litigation, or pieces of litigation in which the individual has been involved. No doubt it also depends upon the role in the proceedings of the observer and their perception.

As a barrister, I saw a number of advantages, principally:

- a concentration of the process of cross-examination of experts which reduced the time spent in the process of cross-examination, including the preparation for it;
- being able to rely upon one or other expert to do some of my work in confronting the other expert with the defects in their opinion; and
- being able to blame either an expert or the process when unfavourable evidence was given in the course of cross-examination.

From my perspective as a judge, I see different advantages. They include;

- the whole process, including the joint conference and joint report, generally narrows the issues which remain in dispute to a significant extent;
- the evidence of each expert on a particular issue is taken together so that when considering the evidence for the purpose of writing a judgment, opinions on similar issues are easily identifiable and little room for doubt exists as to what the opinion is;
- extreme expert opinions and 'pseudo-experts' have become very rare; and
- there are considerable time savings in the hearing component of a case in which expert evidence is taken concurrently.

Contrary to the early doomsayers around the time when the use of concurrent evidence became formalised in 2005 with the introduction of the Uniform Civil Procedure Rules, the sky has not fallen in.

Practical disadvantages

I have encountered some practical disadvantages with concurrent expert evidence.

The first is that it is often difficult, if not impossible, to find a time when a number of busy experts can confer together to prepare a joint report. There are a number of possible ways to deal with this, including:

- openly disclosing to the expert at the time of retainer the essential steps in which they will be required to participate;
- ensuring that arrangements for joint conferences are made at an early stage with more than adequate time to find a suitable conference time;
- while less desirable than personal meeting, the use of audio-visual links, including Skype facilities and teleconferencing, provide significant flexibility in the arrangements for a joint conference;
- combining the joint conference, the joint report and the evidence into a single multi-day session can, in exceptional cases, prove useful.

The second disadvantage, and one which I suspect

is likely to diminish over time, is that judges are not uniform in their approach to the conduct of the concurrent evidence session. Some judges prefer to control and conduct the concurrent session themselves. Others leave it almost entirely to counsel to conduct the examination. The extent of counsel's participation, and the need for counsel to prepare, will vary accordingly. The answer to this dilemma is to explore with the trial judge, at the earliest opportunity, how he or she intends to conduct the session. Ground rules can be explored and adequate time reserved for preparation.

The third disadvantage is said to be that the conduct of a cross-examination about credit is, practically speaking, very difficult. That is so, but I do not regard this necessarily as a disadvantage. In fact, I see this, generally speaking, as an advantage. Experience suggests that by the time that experts have participated in the process of joint conference, joint report and concurrent evidence, with careful adherence to the Code of Conduct, issues of credit rarely arise.

But if they do, then such an issue can be dealt with in an entirely conventional manner by organising the concurrent expert evidence session so that some issues, such as those relating to credit, are not dealt with during the concurrent session, but are dealt with at the conclusion of the session, on an individual basis, in an entirely conventional manner.

Developments in practice

Although the Supreme Court Practice Note – Gen 11: Joint Conference of Expert Witnesses has been in effect since 17 August 2005, in my experience little, and certainly not adequate, attention is paid by practitioners to the requirements of clauses 6-11 (inclusive) of the practice note. Those clauses deal with the documents which are to be provided to experts in advance of the joint conference.

Justice Allsop, when a member of the Federal Court of Australia, described expert evidence in this way:

> ...the taxonomy of expert evidence [as] of fact, assumptions, reasoning process and opinions [is] an accepted (indeed necessary) framework...

ACCC v Liquorland (Australia) Pty Ltd [2006] FCA 826 at [840].

The first development which requires comment is this. In my experience, because of inadequate attention to these clauses of the practice note, in the course of my management of cases, I insist upon the following approach to the documents to be provided to each expert:

- an index of the documents, together with a paginated folder of the documents which is to be put before each expert participating in the joint conference and the giving of concurrent evidence;
- a complete list of the factual assumptions which are agreed, or else for which each party contends, as the appropriate basis for the joint expert opinion; and
- the questions which each party contends are appropriate for the experts to be asked to answer.

Some short explanation of these is necessary. Although it may be self-evident that the experts should have the same material, often, and surprisingly, they do not. It is obviously necessary that they each have access to all the same material upon which to express the joint opinion. It is not always necessary, and often irrelevant, for the experts to be given copies of pleadings. Experts usually are not engaged to form conclusions about pleadings. As the practice note says, statements of witnesses can be provided. However, it is necessary in the event that statements of witnesses are provided for the parties to formulate an assumption about those statements which the experts are to be asked to make. Unless that is done, there is a real risk that the experts will engage in the interpretation of statements, choosing for themselves which part of the statement to accept and which to reject. This process is not always clearly revealed in the joint expert report.

A complete list of the factual assumptions, which are either agreed or else for which each party contends, does seem on its face to be rather tedious. However, as Justice Allsop has made plain, with few exceptions, experts do not determine facts. Experts are asked to express opinions upon the basis of facts which are proved otherwise than by the expert. There will be some exceptions to this. If an expert is retained to establish the facts, for example, of a forensic accountant's report based on documents which are provided, then it may be necessary to ask the experts to assume the correctness of those facts which are found. The mere fact, without more, that an expert has found the facts

does not of itself mean that they are correct.

I do not expect in cases before me that all of the factual assumptions will be agreed, although I would hope that a good number of them could be. Where agreement is not reached or is incomplete, I permit parties to put alternate assumptions of fact to the experts. The experts are then asked to assume the facts in version A or version B and express their opinions accordingly. In this way one avoids a debate between the experts about factual findings, which are ultimately a matter for the court.

The questions that the experts are to be asked to answer are critical to the successful outcome of concurrent evidence sessions. It is very easy to ask a question which says something like 'Was the defendant negligent?' This however wholly misunderstands the role of the expert. The experts who are bringing to bear their knowledge and experience of common professional or industry practice generally accepted as appropriate, ought properly be asked whether, if the relevant assumptions are made, what the defendant did accorded with professional practice which was common at the time. Alternatively, experts might be asked whether what the defendant did accorded with common industry practice. But experts should not ordinarily be asked to express opinions about, or answer questions which require them effectively to express opinions on, matters of law.

What I have noticed as a progressive development is that counsel have become more astute to invite the experts themselves to join issue with the other expert and identify the differences or features which would support one view or the other.

There are some important ramifications of the way in which documents of this kind tease out the issues to be considered by experts.

If in a typical personal injury matter, one party wishes to show surveillance film, and obtains an expert opinion about that surveillance film and the way in which it affects the conclusions of their expert, then that surveillance film will need to be made available to all experts for their viewing at or prior to the joint conference. Alternatively, a very careful set of assumptions of fact needs to be fashioned which a party is satisfied will be proved by the surveillance film.

In my experience, effort in preparing and settling the documents to which I have just referred is rewarded by sensible expert opinion.

The second matter which in practice has become a more regular feature of the process, is the techniques which are being used to facilitate and support the holding of an expert conference. This is particularly important where there are more than two or three experts who need to confer and produce a joint report, but it is equally applicable where there are only two or three experts.

There are a number of important techniques which have come to prominence. They include:

- the provision of appropriate meeting facilities including technological capacity to enable the experts to adequately discuss all of the matters necessary. The ability to project electronic files from an expert's computer onto a larger screen so that all experts can view and discuss the content of the electronic files is a considerable advantage;
- the provision of secretarial assistance to experts to prepare the report. Particularly where time is limited, it can be of considerable benefit to the experts to have an administrative assistant provided whose job is to record the questions, record whether there is any joint opinion and if so what it is, and to record the differing opinions. This is to be encouraged provided that the administrative assistant does no more than provide administrative assistance and does not seek in any way to participate in the substance of the conference; and
- the use of an independent chair to oversee and ensure the conduct of the conference and the proper and adequate expression of each person's opinion. The chair is then responsible for ensuring that the joint report is prepared, signed and submitted. The independent chair should not participate in answering the questions in the joint report. The independent chair should be a person who has the respect of the experts and who has

some knowledge of the process sufficient to enable them to ensure the efficient discharge of the task of joint meeting. Sometimes it is necessary to have a chair who is knowledgeable in the expert area. However, more often than not, an entirely independent chair is desirable.

The third development in practice which I have observed has been a better understanding among counsel and experts as to how to conduct and participate in examinations of experts in concurrent sessions. Experience shows that counsel is both a questioner of the experts, and also a manager of the process (subject to the supervision of the presiding judge). By that I mean this, that in the conduct of the concurrent evidence session it will obviously be necessary for counsel who asks a question of one or other witness, to give each other witness an adequate opportunity to also respond to the question asked. What I have noticed as a progressive development is that counsel have become more astute to invite the experts themselves to join issue with the other expert and identify the differences or features which would support one view or the other.

This development is, as I said, a maturing of the process and of the participants in it. It is in fact what the process is designed to achieve.

Conclusion

I detect a greater familiarity among experts and lawyers with the process of concurrent expert evidence. It is essential that the whole process, by which I mean the adequate briefing of experts with appropriate documentation, assumptions and questions; sufficient time being allowed for a joint conference to occur with such assistance as may be necessary; and then the giving of evidence concurrently; all combine to provide the court and the parties with an efficient way to determine the real issues in dispute.