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"Experts and adversarialism, a non-partisan solution: Queensland's draft rules"

Chief Justice Paul de Jersey AC

The Rules Committee established under s 118(c) of the *Supreme Court of Queensland Act* 1991 is an extremely active hard-working committee. It meets almost every Monday evening during court term. Its members are, from the Supreme Court, Justice Williams of the Court of Appeal as Chair, and Justices Muir and Wilson and me, from the District Court Judges Robin and McGill, Magistrates Gribbin and Thacker, the Principal Registrar Mr Toogood and Mr Terry Ryan, the Director of the Strategic Policy Division of the Department of Justice and Attorney-General.

The Committee's primary responsibility is to monitor the working of the Uniform Civil Procedure Rules, identifying and rectifying any wrinkles and continuing to streamline this set of rules which has already proven beneficial and progressive in operation.

Since the latter half of last year, the Committee has been carefully and comprehensively engaged in the production of a set of expert evidence rules appropriate to contemporary conditions. Those which have been produced are at least interesting and ground-breaking. While their potential value is for others to assess, I believe – if unsurprisingly – they comprise a beneficial blueprint for the future.

From my own aspect, the initiative is firmly justified by the need to address two particular aspects of this region of the litigation landscape. The first is persisting concern about the partisanship of some supposedly "expert" evidence. The second is the heightened need of courts these days to rely on complicated expert evidence in abstruse fields.

As to the former, this is not of course a newly emerging concern. Courts have long feared that an expert witness retained and paid by one party will inevitably, if subconsciously, tend to support that party's cause, albeit that strains a completely objective approach. In a paper delivered last year ("Experts and assessors: past present and future", 27 May 2002), the Chairman of the English Expert Witness Institute, Sir Louis Blom-Cooper QC voiced "a general underlying suspicion that the expert witness is a "hired gun" and will fire off expertise ammunition to promote the client's cause". Rather more colorful, as reported by the American Professor John Langbein ("The German Advantage in Civil Procedure", University of Chicago Law Review, Vol 52 No 4, p 835) is the view of the American trial bar, where expert witnesses are known as "saxophones": "The idea is that the lawyer plays the tune, manipulating the expert as though the expert were a musical instrument on which the lawyer sounds the desired notes." That writer says he has "experienced the subtle pressures to join the team – to

shade one's views, to conceal doubt, to overstate nuance, to downplay weak aspects of the case that one has been hired to bolster. Nobody (he says) likes to disappoint a patron; and beyond this psychological pressure is the financial inducement. Money changes hands upon the rendering of expertise, but the expert can run his meter only so long as his patron litigator likes the tune. Opposing counsel undertakes a similar exercise, hiring and schooling another expert to parrot the contrary position. The result is our familiar battle of opposing experts. The more measured and impartial an expert is, the less likely he is to be used by either side."

Justice Davies of our Court of Appeal expressed similar concern last year in a paper ("The reality of civil justice reform: why we must abandon the essential elements of our system") delivered at the 20th Australian Institute of Judicial Administration annual conference. His Honour said:

> "Expert witnesses, as much as or perhaps even more than lay witnesses, are subject to adversarial pressure. Many of them make their living primarily from giving reports for and evidence in litigation. Almost all of them derive substantial fees from giving such reports and evidence, in many cases fees which are substantially higher than those which they derive from their other professional work. There is therefore, at the outset, an incentive for them to be chosen by a party to give evidence; and they must know that that party will not choose them unless their evidence supports that party's cause. The likelihood that an expert's evidence will be biased in favour of the client is then increased by the pressure which all witnesses feel to join the team."

(Davies JA is kindly assisting the Rules Committee in its work on this matter.)

Judges have not always expressed these concerns in such measured language. In *Vakauta v Kelly* (1989) 167 CLR 568, the High Court had to consider remarks made by a Judge of the Supreme Court of New South Wales while hearing a personal injury claim. That Judge colourfully observed, as recounted by Dawson J (p 574):

> "…the GIO's usual panel of doctors "think you can do a full week's work without any arms or legs" and that the three doctors involved in this case…expressed opinions which were "almost inevitably slanted in favour of the GIO by whom they have been retained, consciously or unconsciously". His Honour also expressed views about the GIO, the real client instructing the defendant's counsel. Those views were to the effect that that organization was notoriously inefficient in the conduct of personal injury litigation and that it would "have to carry the can" or that it may be "necessary to tip the can on the GIO" for its failure to maintain worker's compensation payments in the case of the plaintiff."

The High Court held those utterances established ostensible bias.

I cannot resist also mentioning the jaundiced observations of Sir George Jessel MR, now so long ago, in *Lord Abinger v Ashton* (1873) 17 LR Eq 358, 374:

> "In matters of opinion I very much distrust expert evidence, for several reasons. In the first place, although the evidence is given upon oath, in point of fact the person knows he cannot be indicted for perjury, because it is only evidence as to a matter of opinion…but that is not all. Expert evidence of this kind is evidence of persons who sometimes live by their business, but in all cases are recommended for their evidence. An expert is not like an ordinary witness, who hopes to get his expenses, but he is employed and paid in the cause of gain, being employed by the person who calls him. Now it is normal that his mind, however honest he may be, should be biased in favour of the person employing him…Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you."

Those remarks have been regarded over subsequent years as somewhat over the top, but I agree with their thrust.

One should be circumspect about drawing too heavily on American experience, but the recently revealed "candid confession" of an economist who frequently gave expert evidence was disturbing (S Moss: "Opinion for sale", Legal Affairs, the magazine at the intersection of law and life). That author described his introduction to the field in the following terms:

> "I was in the office of an upscale Washington, DC law firm, in a strategy meeting for a big legal case involving a dispute over patent rights. Also present were three associates, two partners, and six "facts" written on a dry-erase board. The facts didn't prove anything – they were a bunch of unrelated assertions. They certainly didn't represent economic analysis.
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> "What do these facts prove?" a lawyer asked. "Nothing," I said. "The facts you've listed don't demonstrate anything." There was a moment of silence, and I thought about the $150 an hour I was being paid, knowing that I'd probably blown my chances for a significant role in the case. One of the two other experts in the room, a Harvard economist, spoke up. Pointing at one of the assertions, he made a statement that had nothing to do with it and told the lawyers that what was written on the board could be used to prove their case. The meeting adjourned, and I headed to the airport to fly home to California. Over the next several months, a few small assignments from the DC law firm came my way, but nothing substantial, nothing that would put me on the witness stand. I had answered incorrectly.
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> …
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> As my experience at the DC firm taught me, experts, who are hired and paid by one side in a case, get compensated for saying what the lawyers want to hear. The lawyers invite potential witnesses to their offices for

> interviews and pepper them with questions, but the question they care most about is: "Can you prove my case?"
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> With such a big paycheck on the line, it's easy to find yourself looking for ways to answer "yes". The expert's thought process goes something like this: In most cases, both sides have experts, so it's perfectly ethical for me to focus on demonstrating that my client is right and that the opposition is wrong. After all, the opposing side will have an expert to do the same, and everything will balance out."

A feeling of inclination to the view of the client paying the fee has been raised directly in recent times, in relation to the passive smoking inquiry paid for, in part apparently, by tobacco companies, the results being published in the august British Medical Journal. It is this sort of suspicion which burdens judges regularly as they come to assess expert evidence of significance.

I want to make it plain there is no doubt most expert witnesses seek in upright fashion to formulate views and give evidence in a truly independent way. The worry is that subconscious pressure, and whether a lay observer would perceive them as other than "hired guns".

The second aspect of the contemporary legal landscape motivating the Rules Committee in this exercise is the increasing complexity and abstruseness of the problems coming before the courts, and which may be expected to enter our doors over coming years. The rate of advance in medical and other sciences is exponential, and the nature of the problems coming before the courts is correspondingly more varied and difficult of lay resolution. Judges are generally not scientists by training, or engineers, or medical practitioners. In this jurisdiction, the complexity of some of the technical conundrums thrown up by competing expert evidence in the Planning and Environment Court, especially, is remarkable.

Judges have traditionally presented themselves as adept in quickly commanding new fields in cases from day-to-day. But such an approach to some current issues would border on irresponsibility. Comprehending the intricacies of DNA is a good example. I understand that before embarking on the "mad cow disease" enquiry in the United Kingdom over recent years, Lord Phillips (now Master of the Rolls) spent considerable time being tutored in the relevant scientific approach. It has been necessary for parties to complex litigation, for example over computers, to spend a substantial amount of the early parts of hearings in effect "educating" the Judge in matters of technical detail.

How, in this environment, is a Judge confidently to resolve particularly complex points of difference between the views of competing experts? As Justice Davies said on another occasion ((1997) 6 Journal of Judicial Administration 179, 189):

> "In many cases, a judge, being unable to fully understand the expert evidence because of its complexity, may be compelled to decide between competing opinions on some wholly artificial basis; who was the more qualified witness; who explained the matter more simply; whose reasoning was apparently more logical or which view is more conservative."

Well, how is the Rules Committee responding to the challenges crystallized by those concerns? We drafted a set of rules, then posted them on the court web page inviting comment. A lot was received, including comprehensive submissions from the Bar Association of Queensland and the Queensland Law Society. We met with representatives of those bodies. We then revised the draft as we considered appropriate and Parliamentary Counsel reviewed it. Parliamentary Counsel then provided a further draft, now being given more consideration by the Committee. The resultant draft will in due course be posted on the court web page, at www.courts.qld.gov.au.

The current draft is comprehensive, and I can this evening do no more than mention its essential elements. In the first place, there is a statement of the purpose of the new rules. That is to:

> "(a) acknowledge that the duty of an expert witness in a proceeding in the court overrides any obligation the expert may have to a party to the proceeding or a person paying a fee to the expert; and
> (b) ensure, if practicable and without compromising the interests of justice, expert evidence is given on an issue in a proceeding by a single expert agreed to by the parties or appointed by the court; and
> (c) avoid unnecessary costs associated with the use of different experts by the parties to a proceeding."

As to the first of those goals, that is, that the expert acknowledge an overriding duty to the court, it is we believe critically important to stipulate that the predominant or overriding duty is indeed owed to the court, a duty to be discharged with objectivity. An expert will be obliged to certify, in his or her report, understanding of and compliance with that overriding duty, and that the author genuinely holds the opinions expressed in the report.

Now it might be said this is hollow and platitudinous, and toothless for lack of an express sanction for breach. It is fair to say that proceedings against an expert who may breach such a duty would be difficult: prosecution for perjury, contempt of court proceedings or civil action would be fraught with difficulty. (The proposed Rules, I should say, would provide that "an expert has the same protection and immunity in relation to the contents of an expert report that is tendered as evidence as the expert could claim if the expert's evidence had been given orally.")

But there have over the years been many cases in which courts have in their judgments criticized expert evidence lacking objectivity. Where a court has harshly criticized an

expert witness, word is likely to get about, affecting the likelihood of further retainers. There is also the prospect of referring a witness believed to have breached the duty to his or her professional body.

Those matters aside, it is important anyway to remind experts of their duty in this formal way, and to have them certify its fulfilment. As put recently by Sir Robert Jacob, a Chancery Judge in England, in relation to a comparable provision ("How is the overriding duty to the court enforced?", Expert Witness Institute newsletter, Autumn/Winter 2002, p 3):

> "…Expert evidence has a vital part to play in our system of justice. Experts who bend the rules pervert it and have to go. In my view although the overriding duty can fairly be said to be a woolly and ill thought out concept, formally adding little or nothing to the requirement to tell the truth and given an honest opinion, it does serve a purpose. That purpose is to help experts to understand, and from the outset, that they are not playing a game, and that they are not negotiating. They are giving evidence."

I turn to the second stated purpose, which is to "ensure, if practicable and without compromising the interests of justice, expert evidence is given on an issue in a proceeding by a single expert agreed to by the parties or appointed by the court". First, may I briefly mention the proposed rules?

After a proceeding has commenced, parties may jointly approach an expert to prepare a report. Unless the court otherwise orders, that expert will be the only expert who give evidence on the relevant issue. Note the words, "unless the court otherwise orders". Of course the court must retain a discretion to permit the calling of other expert evidence, but the power to do that must be qualified by the need for the court's leave.

What if parties cannot agree on a joint appointment, but one party considers a sole expert should be appointed? The court is authorized in those circumstances to make such an appointment, selecting from names submitted by each party and having regard to a list of experts maintained by the court. It is expected, by the way, that respective professional bodies and learned colleges will assist the court by maintaining lists of well-respected prospective appointees with high level expertise in a range of disciplines.

What if those parties do not jointly agree, and neither unilaterally seeks the appointment of a sole expert – but the court nevertheless considers a sole expert should be appointed? The court may proceed to do so.

The system is flexible in that it envisages the court authorizing the appointment of a second expert in certain situations. They are where:

> " (a) there is a substantial body of opinion contrary to the opinion stated in the first expert's report and the contrary opinion is or may be material in deciding the issue; or

(b) the second expert has knowledge in matters the first expert may not have knowledge in and the knowledge may be material in deciding the issue; or
(c) there is another good reason for appointing a second expert."

The professional Associations have queried whether the use of sole experts will likely reduce costs, or necessarily facilitate a more reliable adjudication. Unsurprisingly, if the case warrants it, the parties may still retain their own experts, if only to monitor the performance of the court appointed expert, although as the system beds down, one would hope that may be seen to be unnecessary. But the expense involved with prolonged cross-examination of a succession of competing experts which presently characterizes the system, should be minimized if not avoided, and even that benefit would be worth garnering. As to the issue of reliability, it will remain the fact that the sole expert's evidence will of course, where appropriate, be rigorously tested through cross-examination. I do not accept a view put forward, that the presentation of a sole expert witness on an issue involves withdrawing the decision-making role from the court. It would remain up to the court to decide whether or not to accept the expert's view, once appropriately tested. The court may in some cases decide it needs the assistance of additional expert evidence. Even if – as would be hoped – the court did in most cases confidently adopt the sole expert's view, in reality it is the court which would make the decision, not the witness.

Some commentators have objected in broader principle, on the ground the proposal would deny a litigant a fundamental adversarial right, particularly, the right to call witnesses of that litigant's own choosing. Recent decades have produced a raft of restrictions on the previously largely unfettered, party-driven approach to litigation. The field of disclosure of documents provides a good example. So does an obligation sometimes cast upon parties to mediate before proceeding as necessary to trial. The whole thrust of modern judicial case management is the court's assuming more of the responsibility for ensuring the expeditious and cost effective resolution of disputes, and that has proven necessary in the public interest. There is of course a line beyond which courts should not go. Referring to principles of case management in *Queensland v J L Holdings Pty Ltd* (1996-7) 189 CLR 146, 154, the High Court said they might not "be employed, except perhaps in extreme circumstances, to shut a party out from litigating an issue which is fairly arguable. Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of the court is the attainment of justice and no principle of case management can be allowed to supplant that aim."

It is however very difficult to conceive that confining the evidence on a point to that of a sole court appointed expert, where the parties have a say in his or her identity, the parties have full capacity to instruct the witness, the parties are not restrained from privately engaging their own out-of-court expert, and the parties retain a full capacity to

test the evidence in court, could infringe that reservation. Proceeding this way should be more efficient, should conduce to more reliable adjudication, and should avoid unedifying "gladiatorial matches between partial witnesses" (Butler-Sloss P "Expert Witnesses, Courts and the Law", Expert Witness Institute Newsletter, Autumn/Winter 2002, p 8).

Last year the General Editor of The Australian Law Journal expressed scepticism about the approach basing these new proposed rules (76 ALJ 531). Mr Justice Young said this:

> "Finally, there is the problem of the court expert. It seems to be accepted by most non-lawyers arbitrators that many cases could be solved or, at least processed more cheaply but just as well, if the court appointed one expert to provide the sole expert evidence on a question and so virtually decide it. Lawyers have traditionally shied away from this procedure for two very valid reasons, namely (1) the choice of the expert who invariably comes to the task loaded with preconceptions, will virtually decide the question and (2) there is great difficulty in testing the expert's view. However, the Courier-Mail of 23 July 2002, under the heading "Court clamp on biased experts" reported that the Queensland Rules Committee were seriously considering a scheme whereby Judges would call expert witnesses themselves and rely less on "hired guns" called by lawyers. It will be interesting to see how this progresses."

I confidently expect that scepticism will prove unfounded.

I prefer the view expressed by Justice Davies in his paper delivered at the AIJA Annual Conference last year. He said (p 13):

> "Adversarial bias by experts can be eliminated and the problem of comprehension by Judges of difficult questions substantially resolved by having, as the only experts called in a case, experts called by the court. That does not mean that the parties should not be permitted to choose those experts. If they can agree the expert appointed should ordinarily be the one who is agreed upon; so that the court makes an independent choice only where the parties cannot agree. But the expert then becomes a witness of the court, engaged and called by the court, the parties sharing the cost. I do not mean to imply from this that there should only ever be one expert called on a question. Experts may have biases other than an adversarial one or there may be more than one acceptable view on some questions. But whether one or more are called, if all are court appointed adversarial bias is thereby eliminated. And the Judge may feel greater confidence, not only in accepting the opinion of the expert, but in seeking the expert's help in better understanding the questions in issue and the opinions on those questions. This proposal would generally also reduce costs because it would reduce the number of experts called to give evidence. It would also, necessarily, make our system less adversarial."

The rules have been drafted to reflect those goals.

I come now to probably the most innovative of the currently proposed draft rules. It envisages the engagement by the parties, or the appointment by the court, in advance of the commencement of court proceedings, of an expert to prepare a report on an issue which has arisen, on the basis that if proceedings eventuate, he or she will be the only expert witness on that issue in the proceedings; that is, again, "unless the court otherwise orders". Take the case of a building collapse causing personal injury. There may be great utility in having an expert truly independent of the parties engaged on a formal basis early enough to be able to survey the scene of the disaster and form an assessment while the evidence is fresh, on the basis it will be the evidence admitted in any subsequent proceedings – or, naturally, the evidence which provides a foundation for the reliable compromise of claims short of proceedings.

The Committee appreciates that statutory backing may be necessary for some of the proposed rules, especially these, and is currently proposing to seek that through a miscellaneous provisions bill.

There are many ancillary rules to ensure the framework operates smoothly. There is, for example, provision for the instructing of a sole expert by the respective parties; to facilitate a court appointed expert's obtaining a report from an expert in another discipline; to allow an expert to seek directions from the court; as to the content and preparation of reports; as to the payment of costs and fees; and obliging experts to meet face-to-face to seek to resolve points of difference.

Obviously this regime would not necessarily be appropriate to all cases. Some legislation establishes procedures which would not sit comfortably with the regime. Accordingly, on current thinking the new requirements would apply to a proceeding to which the *WorkCover Queensland Act* 1996, the *Motor Accident Insurance Act* 1994 or the *Personal Injuries Proceedings Act* 2002 applies, but not where application of the rules would operate inconsistently with the procedures for which those Acts provide. Further, the new rules would not apply to a proceeding for a minor claim in a Magistrates Court unless the court, upon application by a party of its own motion, ordered otherwise.

The Committee is still at the consultation stage, although its deliberations are well advanced. I urge you to have recourse to the court web page to read the next draft when it becomes available, as should occur within the next 3 months.

There is no doubt implementing this new regime would require a sharp change of culture, both for the courts and the profession. Acknowledging the potential benefit of the proposal, I am confident that cultural change will be forthcoming. History tends to support this confidence.

Recall the initial scepticism of the Bar especially, for ADR, soon warmly embraced – now entrenched. Recall the profession's acceptance of the radical change to the former Supreme Court Rules worked in 1994, in curtailing what was for litigators a fertile and remunerative furrow – the discovery of documents by reference to the "chain of inquiry" test, substituting the "directly relevant" criterion. Note the more subtly wrought, but nevertheless profound, shift from the oral advocacy once considered the quintessence of the barrister's craft, to the current much more substantial written presentation.

The public expects us, and reasonably, to refine the system, as the years progress, so it will better ensure "justice according to law". The law is the determinant, and justice is the ideal. Where serious doubt about the current approach is, in this area, so persistently expressed, we should, in deference to that public expectation, be prepared to work laterally, and be prepared to entertain new possibilities.

Hence the current initiatives, which I commend to the profession on whose support and cooperation the courts so greatly depend. The independence of the profession is, of course, its critical element. An independent assessment of these drafts is in progress, and will continue. There is, as I hope will now or later be accepted, an overwhelming case for this particular reform. It should produce a system which renders not only justice according to law, but a system more likely than now to uncover and declare what is the truth.