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PERSONAL INJURY QUEENSLAND 2005 CONFERENCE
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"Expert witnesses in Queensland court proceedings"

The Hon P de Jersey AC,
Chief Justice

After a long period of gestation marked by extensive consultation, Part 5 of Chapter 11 of the Uniform Civil Procedure Rules commenced last year in July. The new expert evidence Rules were produced by the Rules Committee. They established three important directions: declaring the obligation of an expert witness; encouraging the appointment of a sole expert, by agreement or court order; and contemplating the appointment of an intended sole expert even before litigation is commenced. The Rules presently apply only in the Supreme Court. If my forecast they will operate in a worthwhile way is borne out, their extension to other State courts, including the Planning and Environment Court, will have to be considered. The Rules apply to proceedings, commenced before the Rules commenced, other than in relation to an expert already appointed (r 996).

The point of these Rules is to enhance the credibility of expert evidence given in the Supreme Court. The word "credible" embraces the concepts of truthfulness and reliability. The prospect of the slanting of an expert's opinion, even if subconsciously, with a view to promoting the position of a client who meets his or her fees, is obviously repugnant. Yet over decades, claims this occurs have become deafening.

In a paper delivered in the year 2002 ("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 colourful, 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."

The then Justice Davies of our Court of Appeal expressed similar concern 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 such reports and evidence, in many cases at 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."

A regime similar to that set up by our new Rules was applied to proceedings in the New South Wales Land and Environment Court as from March last year. The proposed introduction of that regime met, as here, with resistance from the legal profession. The President of that court Justice McClellan has expressed the view that the quality of expert evidence in his court has subsequently improved. In a paper delivered to the AIJA in September last year, His Honour observed:

> "Although the move to appoint court experts initially met significant resistance from the legal profession, I believe that resistance is now diminishing. With the change has come a clearer understanding of the

> deficiencies of the old approach and the benefits which change can bring. For the experts, it is about giving back to them the opportunity to use their expertise without obligation to a client and the ability to express their views without the distortions that can come from the adversarial process."

His Honour expressed the same sentiments very recently, on 21 March this year at the LAWASIA Conference on the Gold Coast. He also then gave this account of his court's experience:

> "In recent weeks, I have received reports from members of the Court, practitioners and experts themselves about their opinion of the quality of the evidence given by court appointed experts. The consistent comment from the judges, commissioners and legal practitioners is that the evidence from persons appointed as court experts reflects a more thorough and balanced consideration of the issues than was previously the case, even when the evidence came from the same person. This is not surprising when discussions with the experts confirm the pressure that they feel as the 'court expert' is to ensure that the report they produce considers all relevant matters and, most importantly, provides a balanced analysis of the situation.
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> It was made plain to me at a seminar some weeks ago, where a number of experts spoke, that at least some experts are prepared to publicly acknowledge that when engaged by a particular party, their evidence has previously been structured to favour that party but, when appointed by the Court, greater objectivity and balance return. The preparedness to publicly confirm that which we have previously suspected is no doubt a result of the pressure which experts now feel to put forward their credentials for appointment as an expert capable of unbiased assessment of a particular problem. When we made changes, I anticipated that the appointment of court experts would raise the quality of all expert evidence. That expectation is being confirmed."

Significantly also, the New South Wales Law Reform Commission has been enquiring into expert evidence in that jurisdiction, including as to the prospect of a single or joint court appointed expert witness, and the accreditation of experts and their accountability. That report was due by the end of last month. At the end of last year, the Chief Justice of New South Wales issued a practice direction establishing a comparable regime with respect to personal injuries claims in the Supreme Court of New South Wales. While at the forefront

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of progress in this area, the Supreme Court of Queensland may therefore be seen not to stand alone.

Sir Thomas Bingham MR (now Lord Bingham of Cornhill) in *Abbey National Mortgages plc v Key Surveyors Nationwide Ltd* [1996] 1 WLR 1534, spoke of the attraction of this sort of regime:

> "We feel bound to say that in our opinion the argument (that the appointment of a court expert under Rule 40 of the Supreme Court [now defunct] was 'pointless', since it only added an opinion whose evidence carries no more weight than any other) ignores the experience of the courts over many years. For whatever reason, and whether consciously or unconsciously, the fact is that expert witnesses instructed on behalf of parties to litigation often tend, if called as a witness at all, to espouse the cause of those instructing them to a greater or lesser extent, on occasion becoming more partisan than the parties. There must be at least a reasonable chance that an expert appointed by the court, with no axe to grind but clear obligation to make a careful and objective evaluation, may prove a reliable source of expert opinion."

A century earlier, Sir George Jessel MR, in *Abinger v Ashton* (1873) 17 Eq 358, 373-4, was rather more withering:

> "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 remunerated 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 sense of gain, being employed by the person who calls him. Now it is natural that his mind, however honest he may be, should be biased in favour of the person employing him, and accordingly we do find such bias…Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you."

The impartiality of expert evidence is one thing. Another is its accuracy, its reliability, such that the court may confidently rely upon it. Yet how can the Judge necessarily test the quality of such evidence?

An aspect of the contemporary legal landscape which motivated the Rules Committee in this exercise was 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.

As long ago as 1935, Rich J in the High Court drew attention to this problem, in *Adhesives Pty Ltd v Aktiesselskabet Dansk Gaeringindustri* (1935) 55 CLR 523, 580, when he said that "it is becoming more and more apparent that the courts as now constituted can barely reach such just conclusions when new and complicated scientific facts must be interpreted. Judges, once they have scientific data recorded by experts in the course of the trial and have them interpreted for them, will they make the correct decision? The parties will call their experts. The Court will look to its advisor for an unbiased, knowingly

competent expert, whose advice should not need to be given confidentially or in an intimate capacity".

How, in this environment, is a Judge confidently to resolve particularly complex points of difference between the views of competing experts? As the then 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."

Hence the imperative need for expert evidence of undoubted reliability. How do the Rules seek to attain that goal? They begin (r 423) with a statement of purpose, which is to:

> "(a) declare the duty of an expert witness in relation to the court and the parties; and
> (b) ensure that, if practicable and without compromising the interest 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 parties retaining different experts; and
> (d) allow, if necessary to ensure a fair trial of a proceeding, for more than 1 expert to give evidence on an issue in the proceeding."

As to the first of those purposes, the Rules express the expert witness's duty in these terms (r 426):

> "(1) A witness giving evidence in a proceeding as an expert has a duty to assist the court.
> (2) The duty overrides any obligation the witness may have to any party to the proceeding or to any person who is liable for the expert's fee or expenses."

There is no stated sanction for breach of this duty. 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 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 give 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."

Accordingly, an expert must in his or her written report, confirm understanding of that duty to the court, and compliance with it (r 428(3)).

I turn to the second stated purpose, which is to "ensure that, 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".

After a proceeding is commenced, an expert may be appointed (r 429G) by the following processes:

(a) If 2 or more parties agree that expert evidence may help in resolving a substantial issue in the proceeding, they may, in writing, jointly appoint an expert to prepare a report on the issue;

(b) If parties cannot agree on the appointment of an expert, any party who considers that expert evidence may help in resolving a substantial issue in the proceeding may apply to the Court for the appointment of an expert to prepare a report on the issue;

(c) Regardless of the parties' wishes, the Court may, on its own initiative and at any stage of a proceeding, if it considers that expert evidence may help in resolving a substantial issue in the proceeding, appoint an expert to prepare a report on the issue.

An expert witness appointed by any of those means will, unless the court orders otherwise, be the only witness to give evidence on the issue in the proceeding (rr 429H(6), 429N(2)). There is facility for the appointment of an additional expert witness in specified circumstances (r 429N (3)), such as the existence of a different view, which is material, but not held by the originally appointed expert.

The Rules constrain the court to approach the appointment of an expert carefully, having regard, for example, to the complexity of the issue, impact on costs, issues of expedition or delay, and the interests of justice generally (r 429K(1)). It is up to the parties to produce a list of proposed appointees (r 429I, J), and the court does not accredit particular experts. Any connection between a person proposed and a party must of course be disclosed (r 429I(2)(c), J(1)(b)). The court is ultimately however not confined by such lists (rr 429I(4), 429J(2). The court appointed expert furnishes the report to the Registrar, who passes on copies to the parties (r 429L).

Naturally the worth of an expert witness's report depends on acceptance by the court of its factual basis. As observed by Justice Margaret Wilson in a paper delivered in October last year to the Australian Insurance Law Association:

> "Too often an expert is asked to provide an opinion without any clear indication of the facts of the case. Documents provided to him or her when the report is commissioned by a party are inevitably somewhat

> one-eyed and the expert does not know what conflicting facts the Court will eventually hear."

I am grateful to adopt Her Honour's following summary:

> "The new rules deal with this problem in two ways:
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> (i)) by requiring the expert to set out in his or her report a statement of all material facts, whether written or oral, on which the report is based (r 428(2)(b)); and
> (ii) in the case of a jointly appointed expert, requiring the parties to agree in writing on the issue to be put to the expert (r 429H(1)(a)(i) and to provide the expert with an agreed statement of facts on which to base the report (r 429H(3)). If the parties do not agree on a statement of facts, then, unless the Court directs otherwise, each of them must give the expert a statement of facts on which to base the report, and the Court may give directions about the form and content of the statement of facts to be given to the expert (r 429H(4)). An expert faced with competing versions of the facts should set out both versions, and express an opinion on each scenario. If the competing versions turn on credibility, he or she should not try to choose between them, but there may be cases where the expert can use his or her expertise and experience to express an opinion on which sequence of events is the more likely – for example, the lead up to an explosion or its sequelae."

I turn finally to the third and fourth purposes of the Rules, avoiding unnecessary costs associated with parties' retaining different experts, while allowing more than one expert witness if necessary to ensure a fair trial.

Critics of the Rules have doubted that costs will be saved, because of the circumstance the parties will often retain their own experts, if only to brief them to facilitate testing of the evidence of the court appointed expert witness. A successful party in the litigation may not end up recovering the costs of doing that.

But this is where cultural change will hopefully occur. As the system beds down, one hopes parties in dispute will come to accept the early appointment of a single expert as desirable.

That aside, under this new system, 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 remains 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 makes the decision, not the witness.

The clearest answer to the issue of multiple experts and the unnecessary incurring of costs, is for the court to intervene early in the proceedings, with managerial type directions.

While some orders for sole court appointed experts have already been made, the new system remains in its infancy. The Rules Committee has considered ways of ensuring that the Rules are properly and comprehensively utilized. Early managerial intervention on the part of the court will form an important part of the strategy adopted.

I am accordingly about to issue a practice direction which will oblige a party, as soon as it is apparent that expert evidence on a substantial issue in a proceeding will be called at the trial or hearing, to file an application for directions. At the hearing of that application, the party will have to inform the court of steps taken to comply with the expert evidence rules.

This requirement – for a directions application – will not apply to proceedings falling within the *Motor Accident Insurance Act* or the *Workers' Compensation and Rehabilitation Act*.

That is because those Acts establish their own sufficiently comprehensive regimes, which we do not want to complicate by further burdens.

Additionally, the "request for trial date", form 48, is being amended, to require certification that the application of the expert evidence rules has been "attended to", in all cases; and complied with – in cases not within the scope of those two particular pieces of legislation.

It would be unsatisfactory were the court's approach to be confined to denying parties costs where the failure to utilize these mechanisms was unreasonable (r 429D). Hence the practice direction and, in tandem, the complementary amendment of the form. The application for directions, and that amended form 48, should ensure proper attention to Part 5 of Chapter II at an appropriately early stage.

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

The public expects us, and reasonably, to refine the adversarial 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 responsibly to pursue new possibilities. That is what we are doing.