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LITIGATION – SOME CONTEMPORARY ISSUES

**The Hon Justice Peter McClellan
Chief Judge at Common Law
Supreme Court of New South Wales**

The Rule of law requires a just process for the resolution of disputes. It must be fair and cost effective. It must have the confidence of the public both in its processes and outcomes. As Charles Dickens correctly identified and our legal history exemplifies the expectations of the justice system in one generation may not be appropriate for a later generation. Our litigation processes must be continually reviewed and, where necessary, refined.

The 1980s brought a strong public reaction in America to what was seen to be excessive litigation. Lawyers were depicted as “ambulance chasers” that preyed on emotionally weak plaintiffs. In 1991, Justice Warren E. Burger, former Chief Justice of the United States Supreme Court commented that American society was “drowning in litigation”. He noted that “suits against hospitals and doctors, which went up 300-fold since the 1970’s, increased doctors’ medical premiums more than 30-fold for some. We have more lawyers per 100,000 people than any other society in the world. We have almost three times as many lawyers per capita as Britain, with whom we share the common law system... The United States stands alone as the

glorifier of lawyers and litigation.”¹ In America in the year 2000, there was 1 lawyer for every 267 American citizens; in Australia there was one lawyer for every 700.²

Whilst the American experience may have been more extreme than that of Australia, there is no doubt that at the time a strong public resentment against the legal profession developed in Australia. This public resentment reached a peak in New South Wales in 2001-2002 and led to the expansive tort reforms through the *Health Care Liability Act 2001 (NSW)* and the *Civil Liability Act 2002 (NSW)*. In the second reading speech, the then premier Bob Carr stated that the “reforms were vital to the survival of our community... the approach of the courts to public liability is unsustainable... We need our roads and schools to operate free from unrealistic standards—standards imposed by the courts with hindsight and with no regard for the cost to the community.”³

A concern developed that litigation was a threat to the viability of doctors, especially those in ‘high risk’ specialities such as gynaecology and obstetrics. There were concerns that many may be forced out of the profession due to the rise in insurance premiums.⁴ The Medical Defence Association of Victoria’s subscription rate for

¹ The Honourable Justice Warren E. Burger, “*Too Many Lawyers: Too Many Suits*”, The New York Times, 12 May 1991 at 12.

² The Honourable Michael Kirby, “*Litigation, past and present: Book review*” (2004) <http://www.highcourt.gov.au/speeches/kirbyj/kirbyj_br03.html>, accessed 31 July 2008.

³ New South Wales, *Parliamentary Debates*, Legislative Assembly, Civil Liability Bill, 2085 (Bob Carr, Premier).

⁴ K Clarke, “*Litigation: A threat to obstetric practice?*”(2002) 9 *Journal of Law and Medicine* 303 at 303 and 308. The author cites many newspaper articles reflecting this fear, for example, D Cameron, “Soaring costs forcing obstetricians out” *Sydney Morning Herald*, 29 March 1993 and N Wilson, “Litigation threat kills patients, says doctor”, *The Age* (Melbourne). 29 August 1995.

obstetrics and gynaecology was \$100 in 1980. By 2001 this had risen to \$35,530, and significantly increased the following year to \$58,500.⁵

In 1985 Professor Clive Schmitthoff delivered a paper in which he identified an increasing reluctance in Americans to have the court resolve the disputes.⁶ The trend, confirmed by other studies, became known as the “vanishing trial”.⁷ Between 1962 and 2002, the number of civil trials in the United States dropped by more than 20 percent, despite the number of dispositions increasing by more than 5 times.⁸ Whilst the rate of dispositions carried through to trial was 11.5 percent in 1962, this figure had dropped to 1.8 percent in 2002. The drop in civil trials was recent and steep, with the number of federal trials dropping by more than sixty percent from 1985 to 2002.⁹ In his article “The hundred-year decline of trials and the thirty years war” Galanter noted a similar trend in state courts.¹⁰

In 2005, David Spencer of Macquarie University posed the question, “Are we experiencing a ‘vanishing trial phenomenon’ in New South Wales?”¹¹ Spencer analysed data from the District Court of New South Wales and found that given the variations in the data from year to year, it was “difficult to discern any stable pattern

⁵ J Burdon, “*Medical Indemnity Insurance 2006*”, paper presented at the Australian College of Legal Medicine’s Annual Scientific Meeting held in Melbourne, 14-15 October 2006.

⁶ C M Schmitthoff, “*Extrajudicial dispute settlement*”, paper delivered to the Forum International at The Hague in July 1985, reproduced in C J Cheng. “*Clive M Schmitthoff’s Select Essays on International Trade Law*” (1988) Kluwer Academic Publishers, The Netherlands at 637.

⁷ M Galanter, “*The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*”, (2004) 1 *Journal of Empirical Legal Studies* 459.

⁸ M Galanter, “*The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*”, (2004) 1 *Journal of Empirical Legal Studies* 459 at 461.

⁹ M Galanter, “*The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*”, (2004) 1 *Journal of Empirical Legal Studies* 459 at 461.

¹⁰ M Galanter, “*The hundred-year decline of trials and the thirty years war*” (2005) 57 *Stanford Law Review* 1255 at 1260.

¹¹ D Spencer, “*Litigation: The vanishing trial phenomenon*” (2005) 43(8) *Law Society Journal* 58.

in the number of trials as a percentage of disposals".¹² In 1990, disposals by hearing accounted for 34% (3,028) of all hearings. In 2003 this had dropped to just 13% (1,021) but had again risen to 22% (1,148) in 2004. This figure remained steady in 2005 but rose to 33% (1,251) in 2006.¹³ The author could find no conclusive evidence that trials were vanishing in the District Court, and suggested that a possible explanation could be found in the fact that the District Court was better at managing its case load than the US Federal Courts, with the median time taken to trial averaging 11 to 14 months. In such circumstances, Spencer argued that the time period "probably would not act as a significant disincentive for litigants to proceed to trial, and therefore may have no bearing on the slight downturn in trials in the court."¹⁴

The statistics from the Supreme Court of New South Wales are also inconclusive. This is largely due to the significant statutory intervention affecting an individual's right to sue in the courts. The latest annual review issued by the Supreme Court indicates that since 2004, the proportion of cases heard has risen whilst the proportion of settled cases has fallen.¹⁵ However recent experience, that is since 2008, indicates that with a change in the pre-trial management processes the rate of settlement of the more complex civil trials has risen markedly. All but two of the trials listed for hearing in 2008 were concluded without the need for a judgment from the court.

¹² D Spencer, "*Litigation: The vanishing trial phenomenon*" (2005) 43(8) *Law Society Journal* 58.

¹³ District Court of New South Wales, *Annual Review 2005* at 19; District Court of New South Wales, *Annual Review 2006* at 20.

¹⁴ D Spencer, "*Litigation: The vanishing trial phenomenon*" (2005) 43(8) *Law Society Journal* 58.

¹⁵ Supreme Court of New South Wales, *Annual Review 2006 (2007)* at 25.

In December 2003, the Section of Litigation of the American Bar Association held a symposium to determine the cause and consequences of the vanishing trial. The Association identified that one of the significant driving factors was cost.¹⁶ There was a feeling in the community that the trial process is too long and expensive. This includes the significant time and expense in coming to a hearing in addition to the trial itself.

Over 90% of actions commenced in England settle prior to trial.¹⁷ A study conducted in 2006 referred to an “apparent avoidance of litigation” in England and Wales.¹⁸ The English authors noted that it is “more probable that courts are not being brought cases to try rather than the courts simply trying fewer cases.”¹⁹ It is possible that English parties are avoiding the courts completely. It is important to determine why this may be so.

Arbitration rather than litigation in the courts is widely adopted by the construction, shipping and commodities industries.²⁰ Commercial parties can also choose from a range of resolution procedures. Whilst mediation and arbitration remain very popular, independent expert appraisal, where an expert provides an opinion on a disputed issue of fact or law, is increasingly utilised.²¹ The American insurance industry has

¹⁶ PL Refo, “*Opening Statement: Trial Rescue*” (2004) 30(3) *Litigation* at 3.

¹⁷ Lord Phillips of Worth Matravers, Lord Chief Justice of England and Wales, “*Alternative Dispute Resolution: An English Viewpoint*”, delivered in India on 29 March 2008.

¹⁸ R Dingwall and E Cloatre, “*Vanishing Trials? An English Perspective*” (2006) *Journal of Dispute Resolution* 51 at 62.

¹⁹ R Dingwall and E Cloatre, “*Vanishing Trials? An English Perspective*” (2006) *Journal of Dispute Resolution* 51 at 62.

²⁰ H Astor and C Chinkin, “*Dispute Resolution in Australia*” (2002), 2nd Ed, LexisNexis Butterworths, Chatswood at 298.

²¹ H Astor and C Chinkin, “*Dispute Resolution in Australia*” (2002), 2nd Ed, LexisNexis Butterworths, Chatswood at 292.

effectively used mediation for some time.²² Writing in 2000, Michael Mills, partner at the then Freehill Hollingdale & Page, noted that the Australian “*insurance industry has not yet been involved in ADR and mediation to the same extent.*”²³

This appears to be changing. The Insurance Ombudsman Service is an independent national dispute resolution body which was established in 1991. The Service provides a number of channels, including an adjudicator for less complex matters, an insurance panel and a referee, through which disputes may be settled between an insurance company and the consumer. The Service is free for consumers, and can make determinations of up to \$280,000, which are binding on the insurance company but not the consumer. In 2006, the Service reported a 30% increase in the number of disputes between consumers and general insurance providers which went to internal dispute resolution from the previous year.²⁴

Medical negligence presents particular problems. In one survey of patients, 41% indicated that they might not have taken legal action if their doctor had responded to the initial complaint.²⁵ In my own experience plaintiffs who have been injured, on occasions severely, have told me that they would not have sued if the true position had been explained and the doctor had apologised. This situation has been addressed by the *Civil Liability Act 2002* (NSW) which provides that an apology does not constitute an admission as to fault or liability.²⁶ There may be financial

²² M Mills, “*Mediation of Insurance Disputes – Or, Insurers: Mediate Now, Litigate Later!*” (2000) 11 *Alternative Dispute Resolution Journal* 54 at 57.

²³ M Mills, “*Mediation of Insurance Disputes – Or, Insurers: Mediate Now, Litigate Later!*” (2000) 11 *Alternative Dispute Resolution Journal* 54 at 58.

²⁴ Insurance Ombudsman Service, *Annual Report 2006* at 10.

²⁵ R Travers, “*Litigation and the medical indemnity crisis*” (2004) 12 *Journal of Law and Medicine* 178 at 179, citing C Vincent et al, “*Why do people sue doctors? A study of patients and relatives taking action*” (1994) 343 *Lancet* 1609.

²⁶ s 69 *Civil Procedure Act 2002* (NSW).

advantages in adopting alternative dispute resolution in conjunction with more traditional methods.

A different approach by doctors, hospitals and insurance providers in the United States has already had a direct impact on the number of medical malpractice claims. Doctors are now encouraged to apologise and provide explanations to their patients and to offer fair compensation upfront. As a result, hospitals in the United States are reporting decreases in claims and savings in legal costs. A study by the University of Michigan Health System reported a drop in existing claims from 262 in August 2001 to 83 in August 2007 as a result of full disclosure.²⁷ The NHS Litigation Authority in the United Kingdom has also issued guidelines promoting the use of apologies to patients.²⁸ In addition, a joint venture between the NHS, the Department of Health, the Lord Chancellor's Board and other legal organisations have formed a "Clinical Disputes Forum" to find alternative and less adversarial methods of resolving medical disputes.²⁹ In the year following the introduction of the NHS guidelines, legal defence costs dropped from 13% of damages paid to 10%.³⁰ These costs are significantly below those incurred in Australia.

Traditionally, Australian medical defence organisations were mutual funds which provided members with assistance on a discretionary basis. Subscriptions, rather than premiums were paid and the relationship was not governed by a contract of

²⁷ K Sack, "Doctors say 'I'm sorry' before 'See you in court'", *The New York Times Online*, 18 May 2008 <<http://www.nytimes.com/2008/05/18/us/18apology.html>>, last accessed 19 August 2008.

²⁸ R Travers, "Litigation and the medical indemnity crisis" (2004) 12 *Journal of Law and Medicine* 178 at 182.

²⁹ R Travers, "Litigation and the medical indemnity crisis" (2004) 12 *Journal of Law and Medicine* 178 at 183.

³⁰ R Travers, "Litigation and the medical indemnity crisis" (2004) 12 *Journal of Law and Medicine* 178 at 180.

insurance.³¹ However these funds tended to operate as professional interest bodies, and were “inclined to treat litigation by a patient claiming to have suffered a medical injury as an attack on the professional character or interest of the member involved, rather than as a claim for compensation for injuries which may have been caused by poor treatment. What drove their response to claims was the perceived need to defend the medical profession from attack.”³² This approach was directly opposed to that which a professional negligence insurer would have taken.³³ Following the collapse of United Medical Protection in 2002, legislative reforms dictated that medical indemnity insurance could only be offered as an insurance product.³⁴

All of these developments reflect the changing perspectives and expectations of those who require an independent person to assist in the resolution of a dispute or the vindication of a right. Nevertheless, our adversary system of trial within the courts remains. But it is not without criticism. Two forces are at work. As the standard of living in the community has risen the unit cost of labour for any task has also risen. This is as true of litigation as it is of manufacturing or agriculture. The consequence has been an increasing demand for efficiency of process to ensure that the cost of the ultimate product remains affordable. Although the price of a refrigerator, motor car, or bottle of wine has in real terms reduced over the last 30 years the same is not true of our system of justice. The result as Sir Anthony Mason commented has been

³¹ J Burdon, “*Medical Indemnity Insurance 2006*”, paper presented at the Australian College of Legal Medicine’s Annual Scientific Meeting held in Melbourne, 14-15 October 2006.

³² R Travers, “*Litigation and the medical indemnity crisis*” (2004) 12 *Journal of Law and Medicine* 178 at 180.

³³ R Travers, “*Litigation and the medical indemnity crisis*” (2004) 12 *Journal of Law and Medicine* 178 at 180.

³⁴ J Burdon, “*Medical Indemnity Insurance 2006*”, paper presented at the Australian College of Legal Medicine’s Annual Scientific Meeting held in Melbourne, 14-15 October 2006.

an “erosion of faith”³⁵ in the adversarial system. In a paper titled “The Future of Adversarial Justice”, Sir Anthony commented “The rigidities and complexity of court adjudication, the length of time it takes and the expense (both to government and the parties) has long been the subject of critical notice.”³⁶

Many judges, practitioners and users of the court system have acknowledged the burdens imposed on parties by the cost of litigation. It is thought, probably correctly, that many disputes settle before judgment because of a fear that the costs of judicial resolution will be excessive. It is equally common to learn of cases where the parties have been unable to compromise and the ultimate cost of the proceedings exceeds the amount claimed. The dispute evolves into a dispute about the costs in which the sum originally at stake is of lesser significance. In practical terms once litigation has commenced both parties must agree before the proceedings can be brought to an end. The litigation process becomes for many an unmanageable, and ultimately an unsatisfactory experience.

There are other issues. The adversarial system allows the parties control of the litigation. The well resourced litigant can use those resources to complicate the litigation using pre-trial processes to escalate the costs of all parties. Problems may emerge from burdensome discovery or obfuscation of the true issues. If the assumption is that the litigation process is designed to elicit the truth, an assumption which I venture the lay person makes, a system which allows either the plaintiff or the defendant to withhold relevant information or their account of relevant events

³⁵ Sir Anthony Mason, “The Future of Adversarial Justice”, a paper given at the 17th AIJA annual conference on 6-8 August 1999.

³⁶ Sir Anthony Mason, “The Future of Adversarial Justice”, a paper given at the 17th AIJA annual conference on 6-8 August 1999.

until the trial, is replete with opportunities for abuse. We used to call it “trial by ambush.”

Expert evidence raises critical concerns. 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 out of the concern 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.

The first response by the courts from which many others flow has been for the judges to take control of the litigation. We refer to it as case management. Initially perceived as an unacceptable intrusion into the adversarial system it is now almost universally adopted. But it must be utilised with care. Not every case is appropriate for intensive management. Many will be more efficiently managed by experienced litigators without intervention by the court. However, experience demonstrates that many cases benefit from the hand of a judge whose intervention can confine the cost by reducing the issues and ensuring that only matters really in dispute are litigated. A judge’s intervention may also be necessary to ensure that the weaker party is not required to forgo a trial because the litigation process is manipulated by the stronger. To ensure management is effective judges with the necessary skill and relevant experience must be tasked with the pre-trial management function.

As well as ensuring that the litigation is confined to resolving the issues which matter judges must also accept the obligation of managing the trial itself. This may require the use of costs orders to limit the issues to be resolved to those which are critical and control the time taken to debate those issues in the courtroom. Although spoken of on many occasions the stopwatch approach to trials is rarely used. The parties are generally allowed to estimate the time for the trial and courts in most cases accommodate their schedules to allow the parties the time which they request. This is no longer acceptable. The courts must acknowledge a role in the management of court time and require the parties to accept the obligation of managing the trial to conclude within a reasonable time. This approach has more commonly been adopted by appellate courts and must be accepted by trial courts if there is to be a genuine attempt to confine the costs of litigation. Proportionality must not only be talked about - it must be the reality.

The quality of judicial decision-making has been called into question when the evidence of experts is involved. The judges are not the subject of the criticism. The concern is with the integrity of the evidence upon which they are required to adjudicate.³⁷ The virtual abolition of the jury as the decision-maker in civil trials in this State means that there is now a reasoned judgment from a judicial officer in most cases. Those reasons will disclose the impact upon the judge of the evidence of individuals, including the experts, and the part their evidence has played in the resolution of the problem. It provides a capacity in the parties and others to judge whether the judge's reasoning is sound and assess whether the judge has

³⁷ M Nothling, "Expert Medical Evidence: The Australian Medical Association's Position", available from: <http://www.ajja.org.au/info/expert/Nothling.pdf>, viewed 28 June 2006, at 1.

misunderstood or been misled by the evidence. Those with special knowledge of areas of learning critical to the decision are able to assess whether “the science” applied by the judge is consistent with that accepted by leaders in the particular field. If the judge has got it wrong members of the profession can identify the error. Any error has the potential to erode confidence in the judicial process. Repeated errors will lead to considerable disquiet.

Both because of the cost to the parties of the receipt and scrutiny of expert evidence and because of questions about its integrity, many professional bodies have expressed concern about whether our conventional approach to expert evidence is acceptable. The concerns are widespread.

Experts have increasingly resented the process of examination and more particularly cross-examination. Many highly qualified professional people will quite simply not accept a retainer to give evidence in court as they do not accept that the adversarial process elicits the truth or provides them with an effective opportunity of communicating their views to the court. 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. The consequence has been that many experts, often the most qualified, simply refuse to become involved in litigation. The phenomenon labelled “adversarial bias” has been recognised for decades. This concept includes deliberate mis-statement, although hopefully this is rare. Adversarial bias is a far more significant problem when the expert, as very often occurs, 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 adversary process which sets up a contest where the lawyers lead a team with the objective of winning a "battle".

As many in this room would be aware lectures and sometimes intensive courses are provided to people who wish to be engaged as expert witnesses in the courtroom. Sometimes referred to as training in "how to beat the barrister" techniques for dealing with the difficult question and effectively supporting the client's case are discussed. One common technique when an expert is asked a difficult question is to respond with a part answer which does minimum damage to the client's position in the expectation that the advocate will not know, and those instructing him will not be quick enough to tell him or her, that the balance of the answer might bring the witness undone. Although the advocate may be highly skilled in the art of cross-examination he or she will not have the learning of the expert they are required to question.

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.

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.

The use of single joint experts in the UK following the Woolf Reforms³⁸ has been controversial. They have been described as “arguably the most significant and controversial recommendation of Lord Woolf's Report concerning expert evidence.”³⁹ Single experts, agreed by the parties and appointed by the court have been extensively and successfully used in the New South Wales Land and Environment Court for more than four years. They are now widely used in the Family Court where although initially controversial, they are now generally accepted.

The amended rules in the Supreme Court provide that the court may order at any stage of proceedings that an expert be engaged jointly by the parties.⁴⁰ A “parties' single expert”, is engaged and selected by agreement of the parties.⁴¹ The parties take the initiative. The selection of the expert by the parties is integral to the concept of the joint expert witness.⁴² The amended rules also preserve the role of the “court-appointed expert” who is the court's witness and different from the “parties' single expert”. Where a parties' single expert has been called in relation to an issue, the rules prohibit the parties from adducing further expert evidence on that issue, unless with the leave of the court. The rules provide a similar control in respect of the evidence of a court-appointed expert in relation to an issue. The rules provide a presumption in favour of one expert per issue. Perhaps the most significant change

³⁸ “Access to Justice: Final Report to the Chancellor on the Civil Justice System in England and Wales”, July 1996.

³⁹ “Expert Witnesses”, NSWLRC Report 100 at [4.16].

⁴⁰ *UCPR* r 31.37(1).

⁴¹ *UCPR* r 31.37(2).

⁴² “Expert Witnesses”, NSWLRC Report 100 at [7.57].

in relation to expert evidence is the use of the concurrent method of hearing their evidence.

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 each expert 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 is essentially a discussion chaired by the judge in which the various experts, the parties, advocates and the judge engage in an endeavour to identify the issues and arrive where possible at a common resolution of them. In relation to the issues where agreement is not possible, a structured discussion, with the judge as chairperson, 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 advisor but has the benefit of multiple advisors 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. I emphasise that 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. In 2006 I sat as the trial judge in relation to a claim by a young lad who was aged 18 at the time he had a cardiac arrest and suffered catastrophic and permanent brain damage. He sued his general practitioner.⁴³ The issues required evidence from other general practitioners about the duty of a doctor given the plaintiff's circumstances. There was also a major cardiological issue.

As it happened, the parties called a total of five general practitioners. They gave evidence concurrently. They sat at the bar table together and in 1½ days discussed

⁴³ *Halverson v Dobler* [2006] NSWSC 1307.

in a structured and cooperative manner the issues which fell within their expertise. They had previously conferred together for some hours and prepared a joint report which was tendered. In all likelihood if their evidence had been received in the conventional manner it would have taken at least 5 days. I would not have had the benefit of the questions which they asked each other, and, of even greater value, the responses to those questions.

Four cardiologists also gave evidence together – one by satellite from the USA, the others sitting at the bar table in the courtroom. Their evidence took one day. The doctors were effectively able to distil the cardiac issue to one question which was identified by them and although they held different views, their respective positions on the question were clearly stated. The reports to me indicate that the process was welcomed by the cardiologists and the parties' advocates.

I have been a lawyer for in excess of 35 years. That day in court was the most significant I have experienced. It was a privilege to be present and chair the discussion between four doctors – all with the highest level of expertise, discussing the issues in an endeavour to assist me to resolve the ultimate question.

Concurrent evidence is the means by which we can provide in the courtroom the decision-making process which professional people conventionally adopt. If one of us suffered a traumatic injury on our way home this afternoon which required hospitalisation and the possibility of major surgery to save our lives 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 specialities which might have a professional understanding of our 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 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." A comment from one expert, typical of many to whom I have spoken:

"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 ..." (at 52 of report)

The AAT research concluded that concurrent evidence was effective in the majority of cases particularly with respect to (at 55):

- 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 (at 39):

“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.”

The process 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% of the time which would otherwise have been required. I have had cases where eight witnesses gave evidence at the one time. I know of one case where there were twelve. 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 for diversion of 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 shy person, becomes a far 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. Although alternative dispute resolution mechanisms are important and will be increasingly utilised they are, and must be recognised as, part of a comprehensive

structure underpinned by the courts. Unless that underpinning is itself built on secure foundations a distrust will emerge between 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. There will be a loss of confidence between members of the community in their ordinary dealings. 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.
