Conclaves and concurrent expert evidence: a positive development in Australian legal practice?

Many medical practitioners are called up to provide expert evidence in court. Some medical practitioners do so frequently, such as in personal injury litigation, including claims asserting medical negligence.

Traditional expert evidence sees testimony given sequentially by expert witnesses for one side and then the other, with the experts being examined and cross examined by the legal representatives for each side. The change to pre-hearing meetings of experts (conclaves) being convened to prepare joint reports to identify areas of agreement and disagreement, followed by concurrent expert evidence at trial, appears to have been driven by judicial preference, with the underlying rationale being the desirability of facilitating the “just, quick and cheap resolution of the real issues in proceedings”: s 56 of the Civil Procedure Act 2005 (NSW) and, for some matters, Supreme Court Practice Notes (SC CL 5 and SC CL 7).

Judicial comment on concurrent expert evidence seems almost universally favourable. For example, in Halverson v Dobler [2006] NSWSC 1307, a medical negligence case, after hearing concurrent evidence from medical experts including four cardiologists (one by satellite from the United States) and five general practitioners, the trial judge observed:

This process proved both highly productive and efficient and has been of great benefit to me in resolving this case. The discussion was sustained at a high level of objectivity by all participants, each of whom displayed a genuine endeavour to assist the court to resolve the problems. The fact that ultimately they disagreed on critical issues was not due to anything other than a genuine difference of opinion about the appropriate conclusion to be drawn from the known facts.

Concurrent expert evidence is currently most well developed in the civil disputes arena, where courts are required to determine private disputes, usually with financial outcomes. The State Coroner’s Court of New South Wales has accepted concurrent evidence for some time, and some examples have begun to appear in criminal trials. Concurrent evidence is being increasingly adopted in medical negligence trials.

Summary

- Many Australian courts now prefer pre-hearing meetings of experts (conclaves) being convened to prepare joint reports to identify areas of agreement and disagreement, followed by concurrent expert evidence at trial. This contrasts to the traditional approach where experts did not meet before trial and did not give evidence together.
- Most judges, lawyers and expert witnesses favour this as a positive development in Australian legal practice, at least for civil disputes.
- This new approach affects medical practitioners who are called on to give expert evidence, or who are parties to disputes before the courts.
- Arguably, it is too soon to tell whether the relative lack of transparency at the conclave stage will give rise to difficulties in the coronial, disciplinary and criminal arenas.

Practical considerations

In preparation for the conclave, the parties are required to agree on matters such as which experts should attend, the questions to be answered, and the materials to be placed before the experts. While the conclave may be held without legal representatives, in practice it is rare for legal representatives to be present.

Perhaps predictably with a new process, especially one existing in the context of disputes that have resulted in litigation, disagreements have arisen regarding logistical matters and more substantive issues, such as which experts should meet and in what groupings. Although there may be delays and expense associated with resolving such disagreements in the early adoption phase, a body of case law is now developing which will guide parties into the future.

In most cases, the courts have expressed preference for the experts to decide between themselves matters which could be labelled procedural in nature, such as the format of the meetings and secretarial support. The courts have had somewhat more input in relation to which experts should be present and in what groupings — mostly on a pragmatic basis by reference to areas of comment, subject to suitable expertise. If lawyers cannot agree on the form of questions to be asked, the courts will also intervene.

Expert witness immunity and conclaves

Expert witnesses in Australia appear to remain immune from civil suit in respect of what is said or done in court, and in preparatory steps, as stated by the High Court in D’Orta Ekenaike v Victoria Legal Aid [2005] HCA 12. The application of the expert witness immunity rule to expert witnesses participating in conclaves of experts was affirmed by the NSW Court of Appeal in Young v Hones [2014] NSWCA 337.
There is perhaps some potential for expert witness immunity to be revisited in a matter presently before the High Court for hearing in 2016, *Attwells v Jackson Lalic Lawyers Pty Limited*. It was revisited in the United Kingdom in *Jones v Kaney* [2011] UKSC 13, where a majority of the Supreme Court held that a retained expert witness was not entitled to the benefit of immunity from actions brought by his or her own clients for professional negligence. However, even if the High Court does not modify the current immunity law, where an expert purports to give expert evidence beyond his or her area of competence, he or she may be vulnerable to disciplinary proceedings.4

### Advantages and disadvantages

The use of conclaves and concurrent expert evidence has the potential to advance the objective of the just, quick and cheap resolution of the real issues in the proceedings before a court. Further, the efficient and effective management of expert evidence has an important role to play in enabling the parties to engage meaningfully in alternate dispute resolution as evidence emerges before a final hearing.

Despite these advantages, there has been anecdotal concern expressed that fairness and integrity in the trial process might be compromised by widespread adoption and implementation of the concurrent expert evidence process. For example, unless experts are required to give reasons for their conclusions, the interests of open and transparent justice may be compromised. Most commonly expressed concerns include fears that experts will simplify their analysis of complex evidence to enable lawyers and judges to understand it and to meet time constraints, and that dominant experts will overshadow others such that not all opinions will be fully heard and taken into account.7

However, it should be noted that conclaves lack transparency unless experts are required to give reasons for their conclusions.

The balance of opinions from judges, lawyers and expert witnesses favours conclaves and concurrent evidence as a positive development in Australian legal practice, at least for civil disputes. While only positives seem to flow from concurrent evidence at trial, it is arguably too soon to tell whether the relative lack of transparency at the conclave stage will give rise to difficulties in the coronial, disciplinary and criminal arenas.

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2 Avery v Flood [2013] NSWSC 996.

3 Porter v Le; Porter v Western Sydney Local Health District [2014] NSWSC 883.
