Concurrent Evidence in Perspective

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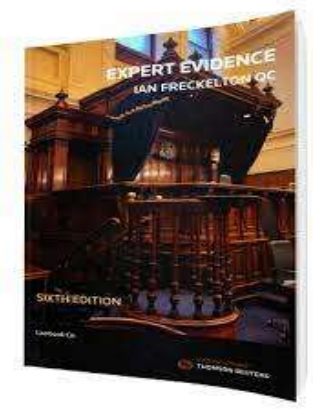
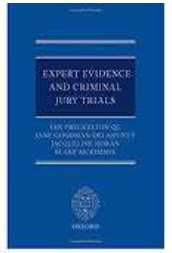




See I Freckelton, *Expert Evidence: Law, Practice, Procedure & Advocacy* (6th edn, Thomson Reuters, 2019, chaps 6.15, 6020 & 6.25)

A Description by McClellan J (2007)

- 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 a public forum.

- http://www.austlii.edu.au/au/journals/NSWJSchol/2007/15.pdf

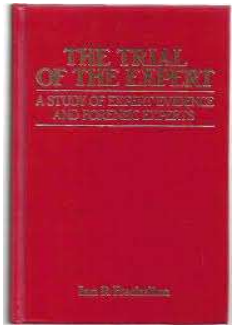
Terminology

- Concurrent evidence is a procedure whereby more than one expert witness gives evidence at the same time
- It is informally known as "hot tubbing of expert evidence"
- It generally follows a conclave of experts in which experts meet and identify the issues upon which they agree and disagree
- It constitutes a variation on consecutive evidence in which experts from opposite sides are called consecutively so as to enhance a focus on what is in dispute without the contamination of a significant gap in time between witnesses

The Expert Evidence Dilemmas

- **Risk of excessive plausibility of impressive experts;**
- **Risk of misunderstanding complex & conflicting evidence;**
- **Risk of bias, partiality and venality;**
- **Risk of poor quality opinion formation &**
- **expression;**
- **Risk of the check and balance of cross-examination not exposing limits of expert evidence**

Encroachment on Traditional Adversarial Approach



- In “The Future of Adversarial Justice”, Sir Anthony Mason commented: “The rigidities and complexity accorded litigation, the length of time it takes and the expense (both to government and the parties) has long been the subject of critical notice.”
- Traditionally each side calls its own expert/s and each expert is cross-examined about what the opposing expert has stated in their report, with the potential for the extent of disagreement or agreement to be obfuscated

Concerns of Rares J about Traditional Adducing of Expert Evidence

- Each expert is taken tediously through all his or her contested assumptions and then is asked to make his or her counterpart's assumptions;
- Considerable court time is absorbed as each expert is cross-examined in turn;
- The expert issues can become submerged or blurred in a maze of detail;
- The experts feel artificially constrained by having to answer questions that may misconceive or misunderstand their evidence;
- The experts feel that their skill, knowledge and, often considerable, professional accomplishments are not accorded appropriate respect or weight;

"Using the 'hot tub': How concurrent expert evidence aids understanding issues" [2010] FedJSchol 20

Concerns of Rares J about Traditional Adducing of Expert Evidence

- The court does not have the opportunity to assess the competing opinions given in circumstances where the experts consider that they are there to assist it ◆ rather experts are concerned, with justification, that the process is being used to twist or discredit their views, or by subtle shifts in questions, to force them to a position that they do not regard as realistic or accurate;
- Often the evidence is technical and difficult to understand properly;
- Juries, judges and tribunals frequently become concerned that an expert is partisan or biased

Adoption by the NSW Supreme Court: McClellan J

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.

History of Concurrent Evidence

- Arguably its origin dates back to *Spika Trading Pty Ltd v Royal Assurance Australia Ltd* (1985) 3 ANZ Ins Cas 60-663, a case involving damage by flood where two parties called evidence from 5 hydrologists.
- Each witness sat in the body of the court and Rogers J permitted experts to comment on and dissent from the views in one another's evidence
- Rogers J commented that the technical problems of hydrology were successfully explained and counsel agreed that the hearing was successfully shortened

History of Concurrent Evidence

Concurrent evidence also used by the Trade Practices Tribunal by Lockhart J with experts being sworn together after all the lay evidence with each giving an oral exposition of their opinion and commenting on the views of the other experts, after which cross-examination took place with questions being asked of individual experts and also of all experts: see *Re Queensland Independent Wholesalers L*td (1995) 132 ALR 225 at 231-232

Uptake by NSW Land & Environment Court

McClellan J adapted the process to the L & E Court and promoted its virtues:

> Experience shows that provided everyone understands the process at the outset, in particular that it is to be a structured discussion designed to inform the judge and not an argument between the experts and the advocates, there is no difficulty in managing the hearing. Although I do not encourage it, very often the experts, who will be sitting next to each other, end up using first names. Within a short time of the discussion commencing, you can feel the release of the tension, which infects the conventional evidence gathering process. Those who might normally be shy or diffident are able to relax and contribute fully to the discussion.

Decision-Making Convenience: McClellan J

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 other's 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.

Strong Wise Ltd v Esso Australia Resources Pty Ltd (2010) 185 FCR 149, Rares J

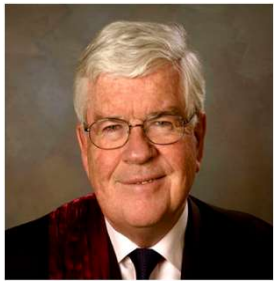
The joint reports were extremely useful in crystallising the real questions on which the experts needed to give oral evidence. Experience in using this case management technique generally demonstrates considerable benefits in practice. Firstly, the experts usually will readily accept the other's opinions on the latter's assumptions. The great advantage of this process is that all experts are giving evidence on the same assumptions on the same point and can clarify or defuse immediately any lack of understanding the judge or counsel may have about a point.

NSWLRC (2005)

Procedure has met with overwhelming support from experts and their professional organisations. They find that, not being confined to answering questions put by the advocates, they are better able to communicate their opinions to the courts. They believe that there is less risk that their opinions will be distorted by the advocates' skills. It is also significantly more efficient in time.

Enthusiasts and Proselytizers

- Justice McClellan
- Justice Rares
- Justice Pepper
- Justice Downes
- Justice Garling
- Justice Heerey
- Justice Rackeman



Cheeseman (2006/2007)

- Evidence on one topic is given at the same time
- The process refines the issues to those that are essential
- Because the experts are confronting one another they are much less likely to act adversarially
- A narrowing and refining of areas in disagreement is achieved before cross-examination
- Experts can be asked to comment on each others' answers

Carson, 2013

- There is great variety in relation to procedures for concurrent evidence
- The ‘hot-tub’ and joint expert evidence do not always go hand in hand
- Experts are often not examined extensively on joint reports after the conclave
- Physical arrangements for concurrent evidence are often inadequate
- Too little information is often given to concurrent evidence participants
- Often experts are not offered the opportunity to make an opening statement

Grant Thornton 2015 Survey of 118 Canadian Lawyers

- Lawyers on each side are required to agree on the hot tub process
- Counsel need to consider not just the expertise of the expert but their debating skills & ability to react quickly in the hot tub
- Experts can appear wrongly to be equal in credentials & experience
- Experts can become advocates in the hot tub
- The personality of some experts can result in bullying
- Subtleties in expert evidence may be glossed over
- The credibility of each expert still needs to be assessed
- The experts may still not agree on key points

Federal Court Rules 2011, Rule 23.15

If 2 or more parties to a proceeding intend to call experts to give opinion evidence about a similar question, any of those parties may apply to the Court for one or more of the following orders:

(a) that the experts confer, either before or after writing their expert reports;

(b) that the experts produce to the Court a document identifying where the expert opinions agree or differ;

(c) that the expert's evidence in chief be limited to the contents of the expert's expert report

(d) that all factual evidence relevant to any expert's opinions be adduced before the expert is called to give evidence;

Federal Court Rules 2011, Rule 23.15

(e) that on the completion of the factual evidence mentioned in paragraph (d), each expert swear an affidavit stating:

(i) whether the expert adheres to the previously expressed opinion; or

(ii) if the expert holds a different opinion;

(A) the opinion; and

(B) the factual evidence on which the opinion is based.

(f) that the experts give evidence one after another;

(g) that each expert be sworn at the same time and that the cross-examination and re-examination be conducted by putting to each expert in turn each question relevant to one subject or issue at a time, until the cross-examination or re-examination is completed;

(h) that each expert gives an opinion about the other expert's opinion;

(i) that the experts be cross-examined and re-examined in any particular manner or sequence.

Procedure Used by Goldberg J in *Qantas Airways Ltd* (2004) A CompT 9

- Parties deliver proposed questions to experts on day before
- Each expert is not to discuss the questions with others before giving evidence
- The questions are made available to all counsel overnight
- The experts are sworn in together
- Each is invited to make opening statement as to how they see the core issues
- The experts are invited to ask questions of each other
- Dialogue is invited amongst the experts
- The experts are given 10 minutes to sum up
- Counsel are given the opportunity to cross-examine

Civil Justice Civil Litigation Review Working Group, 2016

A judicial officer should consider:

- Whether equivalent questions are being addressed to each expert and whether an equal opportunity to address the issues has been afforded to each expert;
- Whether counsel should be invited to address any cross-examination to the opposing expert witness at the conclusion of judge-led questioning on each topic, or at the overall conclusion of the judge-led examination, or not at all;
- Alternating the order in which questions on the agenda are addressed to the experts, so that each expert has the opportunity to answer the question first;
- The physical layout of the courtroom to ensure the experts equal stature and equal opportunity to address the judge;
- The desirability (if any) of opening statements by each expert.

Expert Conclaves & Concurrent Evidence in Criminal Litigation

- Have been utilised from time to time in criminal trials with consent of the parties
- Explicitly contemplated in Victorian Supreme Court Practice Note No 2 of 2014

Victorian Supreme Court Practice Note No 2 of 2014

Pre-hearing discussion of expert evidence

10.2 The Court may direct the experts to (a) discuss the expert issues in the proceedings; and (b) prepare a statement for the Court of the matters on which they agree and disagree, giving their reasons.

10.3 Except for that statement, the content of that discussion must not be referred to at the trial of the accused without the Court's permission.

10.4 The Court may convene a hearing at which (a) the Court or any party may seek clarification of any aspect of the expert evidence; and (b) the Court may direct the experts to narrow the areas of disagreement.

10.5 A party may not introduce expert evidence without the court's leave if the expert has not complied with a direction under 10.2 or 10.4

Victorian Supreme Court Practice Note No 2 of 2014

Consecutive or concurrent evidence

11.1 Where (a) two or more parties have served expert evidence relating to the same issue or relating to two or more closely related issues; (b) the commissioning parties agree; and (c) the Court so orders,

evidence may be given by the experts consecutively (ie one after the other) or concurrently (ie with all of the experts present in court, sworn or affirmed at the same time).

11.2 The procedure to be followed for consecutive or concurrent evidence is to be determined by the Court, with the expectation that the parties will have conferred in advance and attempted to agree on the procedure.

QCAT Advice to Experts Preparing for a Conclave: Useful for Concurrent Evidence

- Do you have all the information you need to give an opinion? List further information you will need.
- What facts or opinions do you think you can agree upon? What facts or opinions are likely to be matters of disagreement?
- Are there any issues where there is an alternative view that might be acceptable to all experts?
- Have you articulated the issues clearly and concisely? Will what you are saying be understandable?

Harnessing Concurrent Evidence

- Concurrent evidence after an effective conclave and joint report has the potential to enhance evaluation of expert evidence and crystallise issues actually in dispute
- However, concurrent evidence is not an answer for all the challenges of expert evidence
- Issues of comprehensibility, credibility and reliability remain
- There is wide (and problematic) variation in procedures employed
- Abrogation of judicial control can render concurrent evidence counter-productive or at least unlikely to fulfil its objectives
- Complex dynamics within the hot tub can influence effectiveness

Harnessing Concurrent Evidence

- Assertive judicial management is essential
  - In respect of the rules for the conclave and the concurrent evidence
  - Ensuring a physical and intellectual environment of authentic, equal & effective involvement by all experts
  - There is a need to avoid domination or intimidation by one expert & to be conscious of gender issues
- There are risks in one expert being allowed to speak for others in the hot tub
- Experts can descend into group-think and abandon subtle but significant differences of approach

Harnessing Concurrent Evidence

- There is a danger that some experts will unhelpfully defer to others: the *Jones v Kaney [2011]* 2 AC 398 phenomenon where the psychologist deferred to the psychiatrist
- It remains important that differences and the reasons for them are articulated in non-jargonistic terms
- Counsel can be often intimidated by the quasi-inquisitorial procedure of concurrent evidence and fail to be as analytical and probing as when undertaking adversarial cross-examination

Concurrent Evidence in Perspective

- No panacea to the challenges of expert evidence

- The key is preparation by judicial officers, expert witnesses and counsel

- With considered input, concurrent evidence can refine issues, sharpen bases of disagreement and save time and money