

**Index to compilation of speeches delivered by
the Hon. Justice A R Abadee, RFD**

Date speech delivered	Description	Page number reference within pdf compilation
2 September 2000	The Expert Witness in the New Millennium	Page 2 of 49
3 March 2000	Update on the Professional Negligence List and Expert Evidence: Changes for the Future	Page 13 of 49
16 October 1999	Professional Negligence Litigation: A New Order in Civil Litigation - the Role of Experts In a New Legal World and in a New Millennium	Page 24 of 49
13 May 1999	Commentary: The Professional Negligence List in the Common Law Division of the Supreme Court	Page 42 of 49

[Print Page](#)[Close Window](#)

The Expert Witness in the New Millennium

Paper Delivered by the Honourable Justice A. R. ABADEE, RFD, Supreme Court of New South Wales, to the GENERAL SURGEONS AUSTRALIA, 2nd Annual Scientific Meeting - 2 September 2000, Sydney

Introduction

The courts are continuing to accept and invite greater participation in the justice system by experts.

Witnesses who claim to be and are treated as experts come from many disciplines and appear in ever widening areas of litigation. With the ever increasing claims against professionals the range of expertise has increased and with it their numbers: *Stanton v Callaghan* (1999) 2 WLR 745 per Otton LJ at 771.

As Lord Woolf MR too has observed:

“A large litigation support industry generating a multi-million pound fee income, has grown up among professions” (**Access to Justice: Final Report, Chapter 13, p 137**). Again, one might postulate whether the situation is different in Australia. Further, on the subject of cost and costs of experts in medical litigation similar concerns as to costs were also expressed in an interesting article in the Australian, 19 January 2000 headed “Psychiatry in the dock”. The article too noted an increase in nervous shock claims in Australia and referred to the divide between the so-called hard and soft sciences. In 1992 a Victorian report on the cost of civil litigation in the County Courts also found that the cost of expert evidence placed a serious financial burden on litigants.

The role of expert witnesses in Australian courts and tribunals, particularly in the Supreme Court of NSW, is changing. So too are experts' duties and obligations. Active case management by the courts is the order of the day with costs associated with litigation involving expert witnesses, hopefully being contained and to be contained. There is an expectation that experts will need to adapt and be re-educated in these new procedures, standards and obligations affecting them. Also, what should not be overlooked is the fact that the expert is not merely retained or engaged to express an opinion necessarily or solely for purposes of litigation in the ordinary courts. The expert's opinion may be relied upon or needed for the purpose of assisting parties who have embarked upon alternative dispute resolution procedures such as mediation. Indeed, in the Professional Negligence List, established in 1999 dealing with professional negligence actions against doctors and lawyers it has long been the practice for the parties to consent to a matter being referred to a mediator. Since the 1st August 2000 the Court now possesses the power to refer proceedings or even part of the proceedings to mediation, with or without the consent of the parties. Further, the expert once involved in litigation and subject to court expert rules may also be directed by the court to participate in such matters as conferences of experts. The Professional Negligence List when established in 1999 contained provision for such joint meetings. It is now addressed in the new general court rules. Joint conferences in my view will increase in number and frequency of use. In some ways conferences of experts are an alternative way of resolving disputes. In the event of joint experts agreeing on a matter there may be little left to litigate. Thus, the expert's role is no longer to be perceived as merely a participatory role in the adversarial system of litigation.

Lord Woolf expressed the view that the expert's role should be that of an independent adviser to the court, “with lack of objectivity” being a serious problem. Further, Lord Woolf also, interestingly enough, singled out the area of medical negligence for most intensive examination observing “that it had become increasingly obvious that it was in the area of medical negligence that the civil justice system was failing to meet the needs of the litigants in a number of respects.” Lord Woolf, in expressing the view that medical negligence litigation too was the most difficult area of personal injury law, observed that one significant problem in medical negligence litigation was the “polarisation of experts”.

This problem has been addressed in a significant way in New South Wales by the establishment of the Professional Negligence List in 1999 with the main objective "to reduce delay and costs and increase the number of settlements and improve communications between the parties". Experience of the List suggests that such objective, I believe, is being fulfilled and met. The introduction of the List proved to be a successful innovation in the Supreme Court, meets a need and has been welcomed by parties involved in litigation of cases in the List. Again, as Lord Woolf also particularly noted, "the difficulty of proving causation and negligence" which arises more acutely in medical negligence than in other personal injury cases, accounts for much of the excessive costs including costs of involving experts.

The United Kingdom

In the United Kingdom new **Civil Procedure Rules ("CPR")** came into force in April 1999 and reflect significantly the implementation of changes recommended by Lord Woolf in his **Access to Justice: Final Report to the Chancellor on the Civil Justice System in England and Wales** (July 1996). That report too has provided a basis for change, indeed an impetus to make changes in civil litigation practices in Australia. Both in England and in New South Wales (where changes have been made in civil procedures) the new reforms reflected in expert witness rule changes will enhance the quality and independence of expert opinion and produce greater economy in reporting: see my article "**Streamlining the court process for medico-legal cases - the Professional Negligence List (NSW) and expert evidence**" to be found in the **Australian Health Law Bulletin: of May 2000**.

There have also been specific recent changes to court rules and procedures affecting expert witnesses in Australia, particularly in NSW. These are reflected in, inter alia, recent amendments to the **Supreme Court Rules (NSW) ("SCR")** dealing with expert witnesses Part 36 rule 13C; Conference between Experts Part 36 rule 13CA, and in the new expert witness Code of Conduct (Schedule K), to which I will return in greater detail in due course.

In addition, the other new rules of the Supreme Court introduced this year will also affect experts. Part 26 (Case management by the court) provides that the court may make orders and give directions for the providing of evidence at the hearing, to be either orally, or by affidavit or statement, or both (Pt 26 r 3(j)). Provision is made for the use of telephone or video conference facilities, video tapes, film projection, computer and other equipment and technology (Pt 26 r 3(b)). I have had the actual experience of audio visual evidence being taken from a London "expert". The procedure proved to be most satisfactory and effective. I am also aware that in Queensland medical expert evidence in court proceedings is from time to time now being taken over the telephone, with no necessary perceived detriment being observed. Next, provision is made by Part 26 r 3(f) for the delivery and exchange of experts' reports and the holding of conferences of experts. Other relevant new rules to be noted, provide that the court may by direction limit the time to be taken in examining, cross-examining and re-examining a witness (Part 34 r 6AA(1)(b), and also to limit the number of witnesses (including expert witnesses) that a party may call (Pt 34 r 6AA(1)(b)). I also note in passing the rule that "any person" who fails to comply with a rule, judgment, order or direction may be ordered to pay another person's costs of such failure (Pt 52A r 25).

As to recommendations for change inter alia in relation to experts evidence in the Federal Courts, there is also a recent report containing a number of recommendations relating to expert witnesses and their role by the **Australian Law Reform Commission ("ALRC")**: "**Managing Justice: a review of the federal civil justice system**" (Report No. 89: February 2000). The Federal Court, as I understand it, is reviewing its Guidelines for Expert Witnesses which were introduced to reflect in significant respects Lord Woolf's: **Access to Justice Report** recommendations.

Under the reforms in New South Wales, the new rules will encourage an economy in the use of experts, and a less adversarial culture (including that of the participation of experts in that culture). It should not be forgotten that obtaining expert evidence will often be an expensive step, and will sometimes be difficult in some specialised areas where there are perhaps a limited number of experts. There will also be a need by lawyers to consider how best to obtain necessary expert evidence quickly and cost

effectively. In litigation there is always the risk of parties unnecessarily calling expert evidence which may prolong and increase the length and cost of trials, and indeed, even shift the focus from evidence as to facts and issues in dispute to a conflict between competing views and theories of experts. The courts are aware of such risk. Next, in the adversary system the role of the court is to resolve issues formulated by the parties. They choose the issues, the ground on which to fight and the witnesses to call. That said, the adversary system is being increasingly modified by court rules with the court too increasingly moving from a reactive role to a pro-active role in civil litigation and its management.

In an earlier paper delivered by me to the Australian College of Legal Medicine Annual Conference, October 1999, headed "**Professional Negligence Litigation - A New Order in Civil Litigation - The role of Experts in the New Legal World and in New Millennium**" I addressed the matter of changes to the civil justice system, and specifically in the area of medical negligence practice. In particular, I addressed matters relating to what I perceived to be the changing role and responsibilities of expert witnesses in the civil procedure context. In respect of the matter of experts I concluded by stating:

"The expert is living in an interesting time. He/she will face the new millennium accepting as he/she must, change and further changes as to his/her responsibilities, duties and obligations as an expert involved in litigation or legal disputes ... A "hired gun" philosophy will become a thing of the past."

Since my statement the new Supreme Court Rules introduced earlier this year have reinforced this view.

In his **Access to Justice Report (1996)** Lord Woolf considered that a new system of active case management "could do much to reduce cost and delay in medical negligence cases and encourage a more co-operative approach enabling cases to settle at an earlier stage. In England the new Civil Procedure Rules (1999) introducing a new system of case management, too has addressed in significant ways the court control of experts in litigation and the role of experts under the rules.

Such approach has also been applied in NSW both in the establishment of the Professional Negligence List and in respect to the introduction of new expert witness rules this year.

New Supreme Court Rules (NSW) relating to expert witnesses

For a commentary on the new Supreme Court Rules relating to experts, once again I might refer to my article in the Australian Health Law Bulletin.

As I have indicated, pursuant to the **Supreme Court Rules (NSW)** ("the new rules") (which commenced on 1 March 2000), Part 36 was amended and a new rule 13C was introduced dealing with the subject of "Expert Witnesses". Also implemented was rule 13CA dealing with "Conference Between Experts". A new Part 39 - "Court Appointed Expert and Assistance to the Court" has also been introduced.

Under the rules a new Schedule "K" - "Expert Witness Code of Conduct" has also been brought into existence. It is a most important Code and one of great significance for all expert witnesses or those who propose to be involved in civil litigation as expert witnesses. The Schedule Code has a number of parts appearing under different headings. The subject headings are: being: "**Application of the Code**"; "**General Duty to the Court**"; "**The Form of Expert Reports**" and "**Experts' Conference**". The amendments to Part 36 of the Rules adding the new rules 13C and 13CA provide a code of conduct for experts engaged for the purpose of providing a report as to his or her opinion for use as evidence; or giving opinion evidence in proceedings or proposed proceedings. The rules make it clear that the rules only apply to an expert witness who is engaged for one of the stated purposes: rule 13C(1). They (and the Code) do not apply to what might loosely be called "advisory opinions". Those persons who are in effect providing an advisory report to a litigant, and those persons who are reporting for

example in a treating capacity as a treating doctor, or even as a named defendant (who was involved in the actual care of the plaintiff) are not apparently caught up by the new rules. As to the various roles played by an expert, there is some interesting discussion in the English Court of Appeal case of **Stanton** (supra).

These new Supreme Court rules have a number of clear objectives. They are: to ensure that an expert is engaged to provide a report as to his or her opinion for use in proceedings or proposed proceedings; to ensure that an expert engaged to provide such a report observes an overriding duty to assist the court impartially on matters relevant to the expert's area of expertise; to observe a paramount duty to the court and not to the person retaining the expert; not to act as an advocate for a party; to make a full disclosure of all matters relevant to his or her report and evidence; to facilitate the appointment of expert witnesses by the court; and to extend the existing power of the court to obtain assistance from an expert in proceedings in the Equity Division (other than the Admiralty List) and to proceedings in the Common Law Division (other than in proceedings tried with a jury).

Experts

The role of the expert witness

At common law, it is generally regarded as trite law that witnesses must speak only of that which was directly seen or observed by them. They cannot, in general, give opinions. That said it is well settled that expert opinion is admissible to furnish scientific information likely to be outside the experience and knowledge of the judge or jury.

The role of the expert in the trial process is somewhat anomalous in a number of ways. An expert is entitled to express opinions which is something no other witness generally is entitled to do. So long as the opinion is bona fide, or involves a matter squarely falling within the expertise of the expert, it contributes to the administration of justice and the efficient disposition and resolution of litigation. For example, at common law merely because a person is a legally qualified medical practitioner, it does not follow that he/she is to be regarded as an expert to express an opinion upon any matter of medical science: **Commissioner for Government Transport v Adamcik** (1961) 106 CLR 292 and 298. A similar view applies in situations under s 79 of the **Evidence Act**. Merely because a person is an expert in one area of science does not of itself make him/her a multi-purpose expert or an expert for all purposes: **HG v The Queen** (1999) 197 CLR 414. Although being an expert for one purpose does not make him the multi-purpose expert, there is always the danger of an expert being tempted consciously or unconsciously to express opinions on matters not falling within his expertise or specialised knowledge. An expert should keep within his expertise. Another problem or anomaly associated with the expert witness is that unlike other witnesses the expert is paid and remunerated for their evidence and hence cannot perhaps resist the temptation to act and/or feel like a hired gun and become an advocate for the party paying him. That is in many respects a problem arising from the traditional adversary system itself. It is a problem being addressed by court rules and codes of conduct. Indeed, it is very difficult to charge an expert with perjury for the simple reason that his/her evidence is evidence as to a matter of opinion only and not as to fact. In relation to admissibility, care must be exercised by courts, lest the improper admission of expert opinion gives it an unwarranted and unjustified authority, let alone conveying to the tribunal of fact that without such expert opinion the lay tribunal of fact is or might be ill-equipped to decide the issue: **Murphy v The Queen** (1988) 167 CLR per Dawson J at 131; see **HG** per Gleeson CJ.

Again, where an expert issue lies at the heart of the case and the evidence of the particular expert is accepted, there is a risk that it may in a practical sense, usurp the function of the fact finder, in effect leaving the fact finder with no choice but perhaps to endorse it. There is the risk of an expert perhaps, imposing in effect an opinion on the court, leaving it with little to decide. The courts are alert to this danger as well. Judges decide cases experts do not.

Admissibility of expert opinion

It is well settled that expert evidence/opinion is admissible to furnish scientific information which is likely to be outside the experience and knowledge of a judge or jury (or the ordinary understanding of the court) or whenever the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance. In other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study in order to the attain a knowledge of it: **Clark v Ryan** (1960) 103 CLR 486 at 491; **Farrell v The Queen** (1998) 194 CLR 286.

That said, it is also true to say as Kirby J, observed in **Farrell** (in the context of the study of human behaviour, including the study of psychology) that such study is not only an accepted scientific discipline but "it is one upon which the frontiers of expert knowledge are constantly expanding". As expert knowledge (generally) is always expanding, presumably litigation will always provide a role for the expert witness in the litigation process. The expansion of knowledge has also led to an expansion of the class of case (particularly in the criminal area) where the calling of psychological and psychiatric expert opinion evidence is to be seen as markedly on the increase. Indeed, as long ago as **Murphy's** case (in 1988) Dawson J expressed the view that the "modern attitude" towards expert evidence is perhaps "less exclusionary than in the past". Further, what too should not be overlooked is that new provisions such as s 80 of the **Evidence Act** provides that evidence of an opinion is not inadmissible merely because it is about a matter of common knowledge or an ultimate issue matter.

This is not the occasion to address in any detail issues arising or relating to the kind considered by the Supreme Court of the United States in such cases as **Daubert** (1993) and later in 1999 in **Carmichael**. Those cases touch upon the "gatekeeper" function of the judiciary in cases involving the United States Federal Court Rules in determining admissibility of expert scientific testimony (**Daubert**) or, as in **Carmichael**, expert witness testimony (generally). In those cases the United States Supreme Court considered questions relating to the matter of field of knowledge, and as to the basis for determining whether an opinion had sufficient validity and reliability to be admitted into evidence as expert opinion. In **Daubert**, the Supreme Court held that in considering whether a theory or technique is scientific knowledge that will assist the trier of fact the criterion of the scientific status of a theory is its falsifiability, refutability or testability. In doing so it applied the Sir Karl Popper principle of falsification as to the determinant of scientific knowledge. In **HG** (supra) Gleeson CJ said that it was not necessary to consider **Daubert** type issues since it was the language of s 79 of the Evidence Act (NSW) that had to be applied. He also observed that warnings have been expressed as to the care to be taken in such cases as **HG** of certain aspects of the behavioural sciences.

All this said, it is important to note that there is a distinction to be found between evidence rules relating to admissibility of evidence on the one hand and the weight to be given to such evidence, if and when admitted. Almost 40 years ago in **Adamcik** (supra) (a motor accident case where there was conflicting expert testimony in the case of leukaemia), it was held that where there was such conflicting evidence under the adversary system it was for the tribunal of fact (the jury) to determine which body of expert evidence it should accept. Indeed, despite the plaintiff's expert's opinion not being supported by scientific or statistical investigation or by other members of the profession, such opinion was held to be admissible in evidence. As Menzies J said (at 303) "the giving of **correct** expert evidence cannot be treated as a qualification necessary for giving expert evidence" (my emphasis). One may also pose the question what is meant by correct evidence in any event in the context of expanding frontiers of knowledge.

The acceptance under the adversary system of the jury's right to prefer one body of expert medical opinion as opposed to another involves as a famous American Jurist Judge Learned Hand observed "setting the jury to decide while doctors disagree". However, someone has to decide a case presented in an adversary context. Who better than the tribunal of fact.

The new Supreme Court rules re expert - Some further elaboration

The new Supreme Court expert witness rules provide a general definition of "expert". It inter alia reflects in part the general meaning of an expert to be found in Section 79 **Evidence Act (NSW)**. The definition is: "'expert' means a person who has specialised knowledge based on the person's training, study or experience." (**SCR**, Pt 1 r 8). That said, experts do not always have or need to have formal academic qualifications. Generally speaking, a person's academic qualifications, on the job training or work experience in a practical sense, will be used to determine whether an expert has the relevant knowledge. In terms of admissibility of an expert's opinion, such opinion also should be expressed in admissible form. An expert whose opinion is sought to be tendered should differentiate between the assumed facts upon which the opinion is based and the opinion in question. Thus, in cases where s 79 of the **Evidence Act** operates the importance of presenting an opinion in proper form cannot be ignored. It is necessary, and required in order for the court to be able to answer the question whether an opinion is wholly or substantially based on specialised knowledge based on training, study or experience.

In general terms, it can be said that from this requirement of "specialised knowledge", the witness must actually have that specialised knowledge and his/her opinion must be "wholly or substantially" based upon his/her specialised knowledge. The expert must be able to identify the expertise he/she can bring to bear and his or her opinions must relate to his/her expertise. This last criterion is also present to avoid the situation where an opinion is based upon a combination of speculation, inference, personal or second hand-views. (see **HG** per Gleeson CJ at 428).

Further, under Part 36 r 13(C)(1) as soon as practicable after the engagement of an expert as a witness to provide a report for use as evidence or to give oral evidence, the engaging solicitor is required to furnish the expert with a copy of the Code of Conduct (Schedule K). The expert witness report furnished must contain a written acknowledgment by the expert that he/she has read the Code of Conduct (Schedule K) and agrees to be bound by it. Absent such acknowledgment neither the report or oral evidence will be admitted into evidence. The rule does not apply to an expert engaged before the rule commences (1 March 2000).

Under Pt 36 r 13CA the Court may on application of a party or of its own motion direct expert witnesses to confer; specify the matters on which to confer; endeavour to reach agreement on outstanding matters and to provide the Court with a joint report specifying matters agreed and not agreed and reasons for non-agreement.

An expert directed to attend such a conference may apply to the Court for further directions. The Court may direct that the conference between experts be held with or without legal representatives of the parties. The content of the conference between the expert witnesses shall not be referred to at the hearing or trial unless the parties affected agree. An agreement reached at such a conference shall not bind the parties affected except insofar as they agree. The Code of Conduct requires that an expert must abide by a direction of the Court to confer and do other matters that are specified. Another very important provision (to be found in clause 11 of the "**Expert Witness Code of Conduct**"), is that which provides that at any experts' conference an expert witness must exercise his or her independent professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement. The Code is thus in terms directed to experts, not to those who engage them. That said, I say nothing as to the possible consequences for a solicitor who sought to give the instructions or request in breach of para 11. I shall leave that to the vivid imagination of solicitors who might seek to do so in a particular case!

"Working Party" - Guidelines/Protocol for Expert Witnesses and/or Joint Expert Conferences

In March this year a "Working Party" (representing diverse interests, including medical and legal) was established under my Chair, to prepare in effect a practical "Guidelines" or "Protocol" in respect to the new expert witness rules of the Supreme Court of NSW as they applied to cases in the Professional Negligence List. Perhaps when finally prepared

they will ultimately become a prototype or a guide for experts involved in civil litigation cases generally and perhaps even in other parts of Australia. The formation of the Working Party is novel and so far as I am aware the first of its kind at least in Australia. It is intended that the "Working Party" will address and provide practical guidance for experts (especially medical experts), in respect of the new expert witness rules, as they in turn apply to cases in the Professional Negligence List. I would add that the "Working Party" has the strong support of a variety of "stake-holder parties". The participants include representatives from the Australian Medical Association, the Royal Australasian College of Surgeons, and from the United Medical Protection, as well as senior partners from the plaintiffs and defendants firms of solicitors. The Government Insurance Office (the insurer of most hospitals), the Law Society and Bar Association too are represented.

The Working Party Guidelines/Protocol upon completion will in a practical way seek to assist and complement relevant experts (and those who engage them) in the practical application of provisions of the **Supreme Court Rules** relating to experts. Matters concerning engagement are also expected to be considered and addressed. The process of preparation is well advanced.

A similar type Working Party (under the Chair of Sir Louis Blom-Cooper QC and former Chairman of the Expert Witness Institute) has been established by the Vice Chancellor in England to prepare a Draft Code of Guidance to assist experts (and those instructing them) in respect to their new **CPR (Civil Procedure Rules)**. The Code is designed to help experts, and those who instruct them, in all cases where the **CPR** applies. This draft was prepared in 1999 and when finally settled and adopted will become a Court Practice Note, in England.

A "Protocol" or "Guidelines" for experts in Australia too would inter alia reflect some of the approaches recommended by the **ALRC** in its recent report. For example, it was recommended (Rec. 65) that the Australian Council of Professions should develop a generic template code of practice for expert witnesses (and encourage its constituent bodies to supplement this code with any disciplinary provisions where appropriate). I have reservations about such a code being prepared by such a body. This is perhaps because inter alia, I declare an interest and very much favour the establishment of an autonomous Australian Expert Witness Institute similar to that of the Expert Witness Institute in England. With new expert witness rules, new codes of conduct and greater court controls of experts the need for the establishment of such a body is, I believe, desirable and apparent. It's establishment is being considered and is currently under discussion.

Court Appointed Experts & Assistance to the Court

The Australian Institute of Judicial Empirical Study (1999) did not suggest that judges were using the court appointed expert with any regularity. The ALRC Report too noted that court appointed experts were infrequently used in Federal Courts. In the Professional Negligence List since its establishment I have not been requested to appoint a court expert. Indeed, in the Professional Negligence List cases I have considerable reservations about the value of appointing such an expert. A conference of experts seems to be a preferred approach.

If I may say so with respect to other further or alternatively views, I believe there is little support to be found for the use of court appointed experts. That is a private assessment. I personally do not generally favour their use save perhaps, in cases where "new science" may be an issue or perhaps in some cases where a joint experts' conference as directed has not produced any consensus because of competing scientific differences, that cannot be reconciled.

Under Part 39 of the NSW Supreme Court Rules (which applies generally to all trials), where a question for an expert arises in any proceedings the court **may** appoint an expert to inquire and report upon certain matters and report to the court at "any stage of the proceedings" on application by a party or of its own motion. Whilst not a new rule, it has been recently amended to reflect a new approach. A party affected has a right to be heard before an order is made. The Court too may appoint an expert selected by the parties. Indeed, the Court may appoint an expert as selected in a manner directed by the

Court.

The rule as to selection (whether by the parties affected, or by the court, or in a manner directed by the court) is discretionary. The Code of Conduct (Schedule K) binds a court-appointed expert in the same way as any other expert witness is bound.

A significant rule provides that the report shall be **deemed** to have been admitted into evidence in the proceedings unless the court otherwise orders. (**SCR**, Pt 39 r 3(3)) By this provision there is an elimination of argument as to who should tender it, whether it has been tendered, and if so, by whom.

Turning to Division 2 of Part 39 - "**Assistance to the Court**", rule 7 permits the court in proceedings other than those proceedings tried with a jury (or in Admiralty) to obtain the assistance of any person specially qualified to advise on any matter arising in the proceedings may act upon the adviser's opinion and may make orders for the adviser's remuneration. This rule reflects, retains and extends the existing power of the court to obtain assistance.

The expert's report furnishes material for the information and guidance of the court and evidence in opposition to the report may be received. The court is able to act upon the adviser's opinion. The court is able to make orders as to the adviser's remuneration.

I have made no order for "assistance" under Pt 39 in respect of a matter in the Professional Negligence List, nor have I been asked to do so. As I have said I have yet to see a case in the List where I have thought it appropriate even necessary to consider seeking such assistance. That is not to say that a case may not arise one day where such assistance may not be thought desirable.

Next, the power dealing with reference by a court to a **referee** for inquiring and report by the referee on the whole of the proceedings or an any question or questions arising in the proceedings still exists. (**SCR**, Pt 72). Again, I have never had a need to appoint a referee in the Professional Negligence List.

I would also note in the United Kingdom, provision is made for the joint instruction by parties of a single expert. (**CPR**, R 35.7). This matter has not found appeal in Australia or in terms reflected in the New South Wales Rules. Nor do the new Supreme Court Rules provide (as in England) a procedure whereby in cases where an expert produces a report the opposing party may put written questions to the expert witness which must be answered. As to the operation of such rule(s) in England: see Lord Woolf's judgment in **Daniels v Walker** (2000) 1 WLR 1382. I should add that the ALRC too has addressed the desirability of a similar rule in the Federal jurisdiction areas relating to pre-trial written questions to experts about their expert reports.

Expert Witness Code of Conduct

As I have already indicated, the new rules, through Schedule K, have introduced a Code of Conduct for expert witnesses relating to proceedings in the Supreme Court of NSW. The Code applies to any expert engaged to provide a report as to their opinion for use as evidence (or giving opinion evidence) in proceedings or proposed proceedings.

Many of the obligations and duties of an expert witness referred to, are picked up from the common law. (see: **The Ikarian Reefer** (1993) 2 Lloyd's Reports 68 at 81 per Creswell J): **Stanton v O'Callaghan** (supra at 734-775). As to a summary of the English decisions about expert witnesses: see Cooper J in (1998) 16 **Aust.Bar Review** 205-209.

The Code is one solution to the problem of asserted bias where the parties in a proceeding call their own expert who gives an opinion partial to the party instructing them. Justice Sperling (Supreme Court of NSW) recently said (in a speech to the Australian Insurance Law Association, April 2000) on this point:

"The aim of [the code] is to encourage objectivity, to bring the expert witness closer to what courts want, rather than being the advocate for a party on the technical aspect of

the case.” (p. 10)

Perhaps another way of voicing the same view is that adherence to the Code will contribute to the elimination of the hire gun expert and return the expert to the traditional role of being an objective witness furnishing independent opinion for the Court's benefit.

As regards the experts “General Duty to the Court” to be found in Expert Witness Code of Conduct, let me just say a few brief words. In the Code it is spelt out in clear unequivocal terms that an expert witness has an overriding duty to assist the Court impartially on matters relevant to the expert's area of expertise; has a paramount duty to the Court and not to the person retaining the expert; and is not an advocate for a party. This has always been the common law but perhaps has either not been “enforced”, fallen into disuse or been “honoured in its breach”. The position is now clearly and unequivocally stated in the Code. There is no room for misunderstanding. The Code rule reaffirms the duty already laid down in the law.

The Code too will serve a utilitarian purpose. It will help the expert to respond to or be relieved of attempted outside influences by those who engage him /her, and also better enable him/her to assert full independence and impartiality. The Code (and new rules) will assist in keeping experts within their true expertise, and compliance will also assist in ensuring that the Courts obtain the best expert assistance.

Indeed, in the medical expertise area criticism too has been thought of doctors in semi-retirement or retirement or in their twilight years furnishing expert opinion in cases calling for medical expert views. (See the article *The Australian*, 19 January 2000). As to the validity of those criticisms I leave it to others to decide. As a matter of interest, in the United States, the Professional Liability Committee of the American College of Surgeons has issued a statement (an adaptation of guidelines developed by, inter alia, the Council of Medical Speciality Societies) as to the recommended qualifications for the physician expert witness. That statement prohibits those who are retired from being an expert witness. It states, inter alia, that: the expert must have a current, valid and unrestricted license to practice medicine in the state in which he or she practises; and the expert should be *actively involved* in the clinical practice of the speciality or the subject matter at the time of giving testimony or opinion. (emphasis added) (see: “**Statement on the Physician Expert Witness**” (2000) 85(6) *Bulletin of the American College of Surgeons* 22 at 24). In the same *Bulletin* there too is an interesting article “The Expert Medical Witness & concerns, Limits and Remedies” addressing problems associated with inaccurate, misleading or biased testimony from expert witnesses. In Australia, England and the USA there appears to be similar problems and concerns in relation to experts. It might be thought much is shared in common.

Before leaving this subject and of “General Duty to the Court”, I would mention another matter. In ***Whitehouse v Jordan*** (1981) 1 WLR 246, Lord Wilberforce said: “expert evidence presented to the court should be and should be seen to be, the product of the expert uninfluenced as to form or content by the exigencies of litigation. This passage was recently referred to by Callinan J in ***Boland v Yates Property Corp Pty Ltd*** (1999) 74 ALJR 209 when discussing the relationship between solicitors and valuer experts (including as to their respective roles). His Honour said (at 266-267):

“For legal advisers to make suggestions (to an expert) is a quite different matter from seeking to have an expert witness give an opinion which is influenced by the exigencies of litigation or is not an honest opinion that he or she holds or is prepared to adopt.I will be the valuer and not the legal advisor who is under oath in the witness box and bound to state his or her opinions honestly and the facts accurately. The lawyers are not a valuer's or indeed any “expert's keepers”.

I make no detailed comment as to the above passage save to mention an expert may not always go into the “witness box” to be tested. His report may be tendered! I would add that the other judgments did not in turn discuss the point or at least did so in the terms stated by Justice Callinan.

Accreditation

The matter of accreditation of the expert is almost the subject of a separate paper. For those interested in the subject, may I commend a reading of Mr Justice Williams paper "**Accreditation and Accountability of Experts**" presented by his Honour at the recent Medico-Legal Conference (Queensland) at the Gold Coast on 5 August 2000.

I generally share his Honour's views.

There is no ground swell of support for accreditation of experts by the Courts. The litigants, the parties, the Courts, in my view, would oppose such, legal problems aside. It is true that currently many experts are perceived by trial judges to be to a significant extent a partisan-hired gun or biased: see Freckelton **Australian Judicial Perspectives on Experts' Evidence: An Empirical Study** and a comment on Freckelton's study to be found in (1999) 73 **Australian Law Journal**. In the latter the author observed that of the different types of experts, both judges and juries found accountants and psychiatrists the most difficult to understand or accept! That said, there are legal and practical difficulties in the path of any suggestion that the Court be responsible for any accreditation list of experts.

Indeed, in a practical sense the Courts are and would be ill-equipped for the task. There could be perceptions of bias if an accredited expert was accepted in place of a non-accredited expert. There too are legal problems in the adversarial system associated with the right of the parties to select the ground to fight on and in the freedom of choice of expert selection. There are legal problems because the matter of admissibility of expert evidence is governed by the common law or by such provision as s 79 of the **Evidence Act**. Lord Woolf in his **Access to Justice Report** was against an exclusive system of accreditation inter alia for reasons that it could exclude potentially competent experts who choose for good reason not to take it up. He also thought it could foster an uncompetitive monopoly and might encourage the development of professional experts out of touch with current practice in their field of expertise. The current view of the EWI in England is also one opposed to accreditation, because it might inter alia result in a closed shop, be anti-competitive and be contrary to the right of a party to engage an expert of his/her own choice. The idea of accreditation finds little favour.

There is, of course, another issue, that is accreditation by professional bodies of experts. Much depends upon the meaning of accreditation and what it might involve. Accreditation as such, by professional bodies too finds generally little favour. Accreditation is a different matter to that exercise involving a professional body's development of an appropriate set of professional standards, with such being associated with specialist training. In such case, compliance with such standards sends out its own message "and signal". I believe that Courts cannot and should not restrict expert evidence to those who receive a form of "accreditation" as such from a professional body.

All that said when a person has received specialist training and met a set of standards set by a professional body will find that such specialist training might strengthen proof of qualifications, and specialised knowledge and impact upon the weight of his/her evidence.

Conclusion

The new reforms and the new rules will, I believe, encourage an economy in the use of experts, and a less adversarial expert culture. It is to be remembered that obtaining expert evidence will often be an expensive step, and sometimes difficult to obtain in specialised areas where there are limited numbers of experts. There will be a need by lawyers to consider how best to obtain necessary expert evidence quickly and with cost effectiveness. There will need to be a degree of flexibility in the approach to the employment of experts and in their numbers.

Those who wish to be experts will need to adjust to new cultural thinking. They will need to be educated and re-educated. Training of experts will be required in the new ways in the discharge of expert obligations in the new orders in civil litigation, if they are to participate in it. Welcome to the new millennium.

Update on the Professional Negligence List and Expert Evidence: Changes for the Future

Paper Delivered by the Honourable Justice A. R. ABADEE, RFD, Supreme Court of New South Wales, to the AUSTRALIAN PLAINTIFFS LAWYERS ASSOCIATION BRANCH CONFERENCE, 3 March 2000 SYDNEY.

In April 1999 the Professional Negligence List ("the List") was established in the Common Law Division of the Supreme Court of New South Wales. As to a commentary on the List see my article: "The New Professional Negligence List: A Hands-on Approach to Case Management" *Judicial Officers Bulletin*: May 1999, Vol. 11 No. 4. In a statement made at the end of October 1998 the Chief Justice said that the main objective of the List "is to reduce delay and costs and increase the number of settlements and improve communication between the parties." In my article in the *Judicial Officers Bulletin* I said:

"The establishment of the new [Professional Negligence] List with the support of the profession carries with it an opportunity to implement some new ideas including court control and case management from the time of institution of proceedings to the time of trial. Indeed it reflects a need that the class of case to be dealt with in the List receives specialised management and early intervention by the Court."

Cases in the List are subject to their own Rules - Part 14C and to its own Practice Note 104 **Supreme Court Rules (NSW)**. That said, the Practice Note has in part been changed and superseded by amendments to Part 36, which commence on 1 March 2000 omitting Rule 13C and adding new Rules 13C and 13CA which inter alia provide a code of conduct for experts engaged for the stated purposes referred to in S13C(1). Further, the new Part 39: "Court Appointed Experts and Assistance to the Court", will as a general rule and, like other general rules, be applicable to cases in the Professional Negligence List. A new Schedule K "Expert Witness Code of Conduct" is also added. So too will be Part 15A - "Limiting Issues". This new Part includes rules dealing with reasonableness of issue, overriding purpose of rules, case management of the Court, rules relating to disobedience of rule, judgment, direction or order, liability of a solicitor and barrister and cost rules including powers to order maximum costs.

Not overlooked are the new case management rules Part 26 rule 3. Under that rule the Court also has power to give orders and directions relating to matters 3(a) to (m) inclusive in that part.

In the List great emphasis has been placed on the matter of consents to mediation and mediation. The importance of a consent mediation is emphasised from the inception of proceedings including at first conferences. Indeed in the initial "Notice of Conference Hearing" it is a matter particularly emphasised. Mediation need not wait until the final preparation stage and should be considered at every List Conference held by the Court. The recent increase in consent mediations shown by the statistics reflects I believe the Court's active case management of cases in the List from April 1999 onwards. This in turn has impacted upon their state of preparation and readiness for hearing or referral to mediation. The December 1999 - January 2000 figures also show a pleasing number of settlement of actions in the Professional Negligence List. Already a considerable number of cases are to be the subject of mediation in the first quarter of this year, including both medical and legal professional negligence cases. A point to be made is the high level of consensus as to the desirability for consent mediation under the consent mediation provisions of section 110K **Supreme Court Act (NSW)**. In cases to which section 110K applies the parties have agreed on the mediator, who need not be on the Court list of mediators under section 110O. A small specialised group of mediators has emerged as acceptable to the parties. I have not referred or been asked to refer any cases for neutral evaluation under section 110K. The medical and legal insurers, and the plaintiffs and their advisers have come to recognise the real merits of mediation. I have frequently expressed the view in the Court that "generally speaking there is no such thing as a useless mediation" and I am becoming more and more convinced that this is correct. Even a failed mediation may bridge differences and identify or limit the real issues for

trial. A failed mediation may cause the parties to pause, reflect and later settle before trial. The Court has no compulsory power to refer a matter to mediation without the parties' consent. The mediation matter is specifically addressed by paragraph 13 of Practice Note 104.

Mediations involving children are taking place. Any settlement still has to be approved of by the Court. It is hard to envisage problems in this area. The Court however must perform its duty.

I have not sent any matter to a referee. No party appeared to have shown an interest in having a referee appointed under Part 72. I have not felt any need or considered it appropriate to do so, nor have been requested by a party to do so. I would mention in passing that the recent **Australian Institute of Judicial Administration Empirical Study** in respect of Expert Witnesses (to which reference may be found in (1999) 73 ALJ 612 supra) does suggest that the responses of the judges as to the use of referees generally revealed that 37 percent of the judges found them useful, 37 percent disagreed, and 26 percent had no opinion. I have considerable reservations as to the desirability of referring matters in the List to referees because of concerns that List cases are either not suitable for such a referee or I am not satisfied as to benefits to be obtained. Indeed in its recent report: "Managing Justice: a review of the federal civil justice system" (February 2000) the **Australian Law Reform Commission** (at para 6.130) observed that submissions and consultations did not suggest that referees should be used in federal courts. There may also be a constitutional problems. The Commission made no recommendation on the issue. Generally in respect of Alternative Dispute Resolution ("ADR") indeed I generally have favoured the mediation approach as has the party litigants. I still do so. Experience has confirmed such as a very good way to go in respect of cases in the List. In any event, the increasing attraction of having joint meetings of experts on disputed matters and issues is becoming an important means of further or alternatively addressing expert differences. In a loose sense a joint meeting is perhaps a "form" of ADR because I believe such meetings and joint report will also contribute in its own way to resolution of matters. The joint meeting of experts practice is still very much evolving and in its infancy.

The management of the List is carefully regulated. It is Court control of the litigation that is important and enforced. No case is stood over generally. Every matter is adjourned to a fixed date which ensures the maintenance of Court control and compliance by the parties with Court orders.

What the Court is also seeing, particularly in the January 2000 figures, and encouragingly so, is the reduction in median time from time of commencement of action to a finalisation.

The efficiency of running the List has also been contributed too by several other particular factors. A policy decision was made that new cases from inception would be subject to active case management by the Court, with the Court playing a pro-active role and not just a traditional reactive one. A policy decision was made that the List would be specially administered and managed only by Professional Negligence List Judges, Justice Sperling and myself. Two groups of what I might loosely call "class actions" involving several defendants have been entered into the List to be specially case managed and dealt with by other judges of the Division.

Strict compliance with orders and directions has been required and proved to be generally the order of the day. From day one all the parties have been led to understand that generally excuses for non-compliance with orders and directions will not be tolerated. If a breach is anticipated there has been encouragement to the parties to act before the breach and come back to Court rather than not comply and seek to explain to the Court later. A strict but fairly administered regime has led to very high levels of compliance with orders and directions, and with the provisions of Part 14C and Practice Note 104. Breach is "punished" in various ways. There are wide ranging powers. By making it clear from the early days that there would be little tolerance shown (absent very good cause) to those who did not comply with orders and directions, the compliance level has been high, and has contributed to both resolution of litigation, and if I may say so to efficient case management. Even without the new **Supreme Court Rules** (Amendment No 337) 2000, soon to commence, there are already in existence

also general rules of court and powers permitting issues of non-compliance with orders and directions to be addressed in a variety of ways. Under the range of "new" rules (inter alia making it clear that the overriding purpose of the rules is to facilitate just, quick and cheap resolution of the real issues in civil proceedings) cost sanctions may be imposed on parties to assist in achieving such overriding purpose and objectives: cf the new Part 52A Rule 43 and Rule 43A.

Confidence and efficiency in the List has I believe been contributed to by perhaps the "less" formal manner in which the conferences have been conducted. The parties' representatives have helped encourage an atmosphere of efficiency and goodwill and I believe led to high levels of cooperation, and contribution to consent orders, mediations and case resolution. Indeed in my view the litigants' approach in the List has, in respect of both medical and legal negligence cases, become less confrontational. This can only be for the good and contribute to greater efficiency and more efficient dispute resolution with facilitation of just, quick and cheaper resolution of some or all issues.

Another matter that is very significantly for the good is the fact that the parties have been and are represented by lawyers who must "know and have authority" to speak on behalf of their real client: see para 12 of Practice Note 104 which was deliberately inserted to contribute to ensuring such. It provides that each party not appearing in person **must** be represented at any conference hearing by a barrister or solicitor familiar with the subject matter of the proceedings and with instructions sufficient to enable all appropriate orders and directions to be made. Failure to attend at a conference is a serious matter unless capable of reasonable explanation.

In February 1999 and in my written paper or commentary on the List I said:

"The court will not accept indeed tolerate "messengers" or inadequate representation..." I also referred to the fact that the requirements of the representation rules by those with knowledge and authority will be rigidly enforced. I have implemented in spirit and substance what I mentioned and foreshadowed.

There are "adverse" consequences for non-appearance or inadequate representation. The Court has a number of powers to address a multitude or variety of unfortunate situations. Non appearance of a party's legal representative (absent good cause) not only impacts on the efficiency of a busy List and conduct of conferences but it reflects rudeness not merely to the Court but to lawyer opponents. It causes delay. It adds to cost. I say nothing as to the possible further litigation stress to a client whose case may not be able to be dealt with or properly dealt with at a List conference. Fortunately there have been few examples of such happenings.

I also believe that proper, even high level, representation in practice is well supported by all parties. Not only does it lead to greater efficiency in addressing issues but the Court's expectation that lawyers will have authority to speak or act I believe permits the Court making substantial and significant decisions and orders on the spot. However there is even a more significant benefit flowing from the Court requirements of proper representation at conferences and the like. That rule and its practice, compels lawyers with responsibility and authority to actually talk and meet each other "face to face" and discuss matters and case issues, whether or not they are the subject of the specific conference. The face to face procedure is I believe also an efficient method of doing and talking "business" in connection with all cases that fall within the List.

Let me now mention the matter of listing for hearing. In February 1999 I indicated that when a case is ready for trial proceedings will be entered into the Holding list. Indeed two points may be made. First, I have in fact when able (on limited occasions) actually fixed Professional Negligence List cases ready for trial, for actual hearing without placing them in the Holding List. Further, I have directed that a number of cases ready for trial be placed in the Holding List to be called up at the next available call-up date. I have placed some cases in the next or in a specific call-up. I do not believe that the preparation of cases under the Practice Note has resulted in any delays "at the other end" that is, in the obtaining of a trial date. My experience is to the contrary. In fact there have been no delays and perhaps the opposite has occurred in respect of cases actively case managed in the List. Next, the mediation process also does not delay cases being given hearing dates.

From time to time it has emerged that clearly some cases in the List should be in the District Court and the Court's powers under section 143 **District Court Act (NSW)** have been used to effect a transfer. This practice will continue in the future in respect of appropriate cases.

A number of other matters should be mentioned and I deal with them briefly. Applications and motions, in respect of matters in the List (save for some **Limitation Act (NSW)** issues and other matters), are and have been dealt with by Justice Sperling or myself, and not by other Common Law Judges. The fixing of dates for such has been accommodated and done by arrangement. There is no regular application day. The past practice will continue. Some cases have been the subject of Part 31 (separate trial orders), with liability issues to be determined separate from the damages issues. In the appropriate case, this too is beneficial for reasons previously articulated by me in earlier papers, and which need not be here repeated.

Part 14C and the Practice Note deals with the matter of entry into or removal from the List.

The situation of avoidance of the List has been addressed in Part 14C. Entry into the List cannot be improperly avoided or circumvented. For example, in one medical negligence case which was commenced in the general Common Law Division (without the filing and serving of a supporting expert report) in breach of the rule, such was quickly picked up and an order in Chambers was made by the Court of its own motion for the matter to be transferred to the Professional Negligence List. As I have indicated, "avoidance" and circumvention of the list will not be tolerated. Next, Practice Note 88 does not apply to matters commenced in the List and matters which came into the List from inception: Practice Note 104. For the purpose of the List "professional negligence" is defined by reference to a breach of duty of care or of a contractual obligation in the medical and health care professions, and to cases of legal professional negligence. It also includes certain classes of indemnity or contribution cases involving the issues described. There is the clear intention to bring into the List the proceedings of the type defined whether framed in tort or contract: see **Johnson v Perez** (1988) 166 CLR 351; **Chappel v Hart** (1998) 195 CLR 232; and the recent decision of the High Court in **Astley v Australia Ltd** (1999) 73 ALJR 403 (where it was held that a duty of a solicitor to exercise reasonable care and skill lies both in contract and tort). It has been the practice to also manage in the List those professional negligence cases filed in country registries. Litigants will have their actions transferred to Sydney for active case management in the List. In the event of non-resolution, such actions may be returned to the local country registry to be heard and dealt with accordingly. The numerous old professional negligence actions in the Common Law Division have been transferred to the new List by the Court of its own motion.

From time to time at meetings concerns have been expressed about potential difficulty in plaintiffs obtaining access to copies of medical or hospital records before suit. Anecdotal stories are cited. In my view and experience these concerns have not been supported by practical experience. Indeed I have not identified any difficulty in this area.

I believe that the presence of such provision of paragraph 9 of Practice Note 104 ("Indemnity Costs") and the presence of extensive powers under paragraph 10 ("Action at Conference Hearings") of the Practice Note have proved to be an effective discouragement to those who might seek not to make available notes before suit. At "the end of the day they will be produced." Also there is the new spirit of cooperation that I have discerned since the establishment of the List. To reluctantly decline production would in realistic terms be counter-productive. Further, an award of indemnity costs in accordance with paragraph 9 if necessary would not depend on the result of the litigation and could be made at any time. This too is a sanction for encouraging production. I now turn to the matter of **Experts** and the **new Court Rules** in respect of such.

In the paper delivered by me to the Australian College of Legal Medicine Annual Conference October 1999 headed "Professional Negligence Litigation - A New Order in Civil Litigation - The Role of Experts in the New Legal World and in New Millennium" I addressed the matter of changes to the civil justice system, and particularly in the area of medical negligence practice. I also addressed issues concerning Alternative Dispute Resolution. In particular I addressed matters relating to what I perceived to be the changing role and responsibilities of expert witnesses in the civil procedure context. In

respect of the matter of experts I concluded by stating:

“The expert is living in an interesting time. He/she will face the new millennium accepting as he/she must, change and further changes as to his/her responsibilities, duties and obligations as an expert involved in litigation or legal disputes... A “hired gun” philosophy will become a thing of the past.”

In his **Access to Justice Report** (1996) Lord Woolf expressed the view that medical negligence litigation was the most difficult area of personal injury negligence law. One significant problem in medical negligence litigation was the polarisation of experts. He said that a new system of active case management “could do much to reduce cost and delay in medical negligence cases and encourage a more cooperative approach enabling cases to settle at an earlier stage.”

Recently, pursuant to the **Supreme Court Rules (NSW)** (Amendment No. 337) 2000, the new rule 13C has been introduced dealing with the subject of “Expert Witnesses”. Also a further rule 13CA deals with “Conference Between Experts”. A new Part 39 - “Court Appointed Expert and Assistance to the Court” has also been introduced. Division 1 of Part 39 deals with the matter of “Court Appointed Expert” and Division 2 deals with “Assistance to the Court” (in non-jury cases).

A new Schedule “K” - “Expert Witness Code of Conduct” has also been introduced. The code is defined in Rule 13C(1) and means the expert witness code of conduct in Schedule K. The Schedule falls into a number of parts under different headings being “Application of the Code”; “General Duty to the Court”; “The Form of Expert Reports” and “Experts’ Conference”.

In introducing the new rules inconsistency between the amendments and Practice Note 104 has been sought to be avoided. That said, there have been changes introduced by the new Rules and Schedule K which are of general application. The amendments to Part 36 which commence on 1 March 2000 adding new Rules 13C and 13CA provide a code of conduct for experts engaged for the purpose of providing a report as to his or her opinion for use as evidence; or giving opinion evidence in proceedings or proposed proceedings. Paragraph 18 of the Professional Negligence List Practice Note 104 will be superseded by the new rules 13C and 13CA: see also the new Practice Note 109.

The new rules have a number of objectives. They are to ensure that an expert is engaged to provide a report as to his or her opinion for use in proceedings or proposed proceedings; to ensure that an expert engaged to provide such a report observes an overriding duty to assist the court impartially on matters relevant to the expert's area of expertise; to observe a paramount duty to the Court and not to the person retaining the expert; to not act as an advocate for a party; to make a full disclosure of all matters relevant to his or her report and evidence; to facilitate the appointment of expert witnesses by the court; and to extend the existing power of the Court to obtain assistance from an expert in proceedings in the Equity Division (other than the Admiralty List) and to proceedings in the Common Law Division (other than in proceedings tried with a jury).

Some remarks about the new rules

There is a new general definition of “expert”. For the purposes of the Professional Negligence List the definition of “expert” in Part 14C rule 1 is omitted. The new definition provides the same general meaning of “expert” referred in the introductory words of section 79 **Evidence Act (NSW)** (“specialised knowledge based on a person's training, study or experience”). As to who is an expert and the admissibility of expert opinion see recent decisions of the High Court in such cases as **HG v The Queen** (1999) 73 ALJR 281 (a case dealing with inter alia section 79 **Evidence Act**); **Farrell v The Queen** (1998) 194 CLR 286; **Murphy v The Queen** (1989) 167 CLR 94.

There is nothing new about the new rule objectives. Some of the reasons for such (and having their source in the “pure” adversary system are not new either. cf **Clark v Ryan** (1960) 103 CLR 486 per Windeyer J at 509. The rules are not new in the sense that they

reflect the earlier common law views as to the role of the expert, perhaps which over time have in many instances been "honoured in their breach." Even prior to the new rules supra such was accepted as reflecting the law: see **Whitehouse v Jordan** (1981) 1 WLR 246; applied in the English case **The Ikarian Reefer** (1993) 2 Lloyd's Reports 68 at 81 by Creswell J; see **Stanton v Callaghan** (8 July 1998), a decision given prior to the new English **Civil Procedure Rules** 1999 - Part 35 "Experts and Assessors". That there is a wide agreement that the expert's role should be that of an independent adviser to the court - lack of objectivity can be a serious problem. In his 1996 Final Report Lord Woolf (pp 143-144) observed:

"The expert's responsibility is to help the court impartially on matters within his expertise. This responsibility will override any duty to the client. This rule will re-affirm the duty which the courts have laid down as a matter of law in a number of cases, notably **Whitehouse v Jordan**."

The provisions of Schedule K of the new **Supreme Court Rules** under the heading "General Duty to the Court" reaffirm and restate in the rule in the form that was perceived to be the common law.

The observations of Lord Wilberforce in **Whitehouse v Jordan** have been recently referred to by Callinan J in **Boland v Yates Property Corporation** (1999) 167 ALR 575. As to the desirability of court control over experts, I also note that Lord Woolf in his Final Report (Chapter 13 p 137, para 2) made the significant observation:

"A large litigation support industry, generally a multi-million pound fee income, has grown up among professions ..."

One might fairly ask whether it is any different in Australia with increasing claims against professions not only as to the range of expertise but also as to numbers. His Lordship also noted that particularly in medical negligence cases the cost of litigation was high, a matter presumably contributed to by the cost of experts. Indeed there has been recent proliferation and growth in the range of expertise. As Lord Justice Otton said in **Stanton** supra at 23-24:

"Witnesses who claim to be experts come from many disciplines and appear in ever increasing areas of litigation...with ever increasing claims against professionals the range of expertise has increased and with that their numbers."

The new reforms and the new rules will I believe encourage an economy in the use of experts, and a less adversarial expert culture. It is to be remembered that obtaining expert evidence will often be an expensive step, and sometimes difficult to obtain in specialised areas where there are limited numbers of experts. There will be a need by lawyers to consider how best to obtain necessary expert evidence quickly and with cost effectiveness. There will need to be a degree of flexibility in the approach to the employment of experts and in their numbers.

Those who wish to be experts will need to adjust to new cultural thinking. They will need to be re-educated, educated and trained in new ways. Training of experts will be required in the new ways in the discharge of expert obligations in the new orders in civil litigation, if they are to participate in it.

I believe that an issue that will need to be addressed and should be is the establishment of a Working Party (representing diverse interests) to prepare in effect a practical Code of Guidance for Experts in respect to the new civil procedure rules of the Supreme Court. This has been done in England where the Vice Chancellor set up a Working Party to prepare a Draft Code of Guidelines for experts in respect to the new **Civil Procedure Rules** (particularly Part 35 "Experts and Assessors"). A draft has been prepared (in 1999) and when settled will become a Practice Note in England. Something similar should be addressed. It would reflect too some of the approaches recommended by the **ALRC** in its February 2000 Report.

The matter of the professions addressing a code of practice for expert witnesses and to supplement the profession with appropriate discipline provisions too has been

recommended by the **ALRC (Recommendation 65)** referring to a “template code of practice”.

I believe that such should be considered and that there be expert witness obligations spelt out requiring compliance with court Rules, Practice Note, orders, and directions with professional misconduct similarly for non compliance.

Statutory changes to legislation dealing with expert professional obligations may also need to be addressed.

Indeed, I personally believe that a similar type Working Party (but representing a broad spectrum of representative interests - not merely doctors and lawyers) could be established (and I believe should be) to address the new “Expert Witness” Rules in the Supreme Court and to formulate a similar suitable but appropriately modified practical Code of Guidance in all cases where they apply. I am not necessarily endorsing the draft English Code but such a code perhaps duly modified for Australian conditions could provide a guide.

The new provisions make it clear that the rules only apply to an expert witness who is engaged for a particular stated purpose that is to provide a report as to his or her opinion for “use as evidence” in proceedings or proposed proceedings or to give opinion evidence in proceedings as well as for proposed proceedings.

The new NSW Rule 13C(1) does not apply to what I might also loosely call advisory reports but only to experts who are engaged for one of the stated purposes: Pt 13C(1); Schedule K para 1(a) and (b) of the Rules: see also Practice Note 110. Those who give in effect advisory reports to a litigant; those who are reporting in a capacity as a treating doctor or even, as a named defendant doctor (who was involved in the actual care of the Plaintiff), are not apparently caught up by the new rule even if such a person proffers expert opinion or who in effect, perhaps provides an expert opinion in a way similar to that of the independent retained expert witness.

Next, the new Part 13C(1) also refers to the “code of conduct” in Schedule K; cf Part 36 rule 13C (1) and Part 39 rule 2 (1) (“Court Appointed Expert”). This “Code of Conduct” is different to the “Draft Code of Guidance for Experts” under the English **Civil Procedure Rules** (to become Court Practice Notes) when finally approved and designed as a practical guide to help those who instruct experts (and those instructed) in all cases where the English Rules apply. Part 13C rule 2 provides that unless the Court otherwise orders 2 as soon as practicable after the engagement of an “expert” as a witness whether to give oral evidence or to provide a report for use as evidence, the person engaging the expert shall provide the expert with a copy of the “Code of Conduct” (Schedule K). Similarly where there is a court appointed expert a copy of the code Schedule K shall be provided to the expert by the court registrar.

This rule has some precedent in the sense that under the earlier provisions of paragraph 18 of the Professional Negligence List Practice Note 104, provision was made for the engaging party to provide the expert witness with a copy of the Schedule (to that Practice Note) dealing with some of the matters albeit not in identical terms, to those now addressed and contained in the new Schedule K. The new general rules now apply and paragraph 18 has been superseded.

The new New South Wales Supreme Court Rule 13C(2)(b) requires that an expert witness’s report must contain a written acknowledgment by the expert witness that he or she has read the code of conduct in Schedule K and **agrees to be bound by it**.

That acknowledgment is not as I have said in the same terms as its English counterpart which in turn is perhaps in stronger terms. In England provision is made that expert evidence is to be given in a written report unless the Court otherwise directs and no party may call an expert or put in an expert’s report without the court’s permission. The English **CPR Part 35** goes further than the new code. In dealing with the form and content of expert reporting, provision is made for the expert’s report to be verified by a statement of truth (para 1.3) with the form of statement of truth being as follows:

"I believe that the facts I have stated in this report are true and that the opinions I have expressed are correct"

(cf para 1.4) of the Practice Note.

The acknowledgment terms are not set forth in terms stated, as in England in the form of a statement. Further, in NSW no provision is made for the required acknowledgment to be incorporated into any specific part of the report. That the expert witness's written acknowledgment of the obligation however must be in the report somewhere. (Rule 13C(2)(b)).

Service of the report by the engaging party will not be valid service and the report (without the acknowledgment) will not be admitted into evidence. Further, under Rule 13C(2)(c) nor shall **oral** evidence of the expert be admitted unless he/she has acknowledged in writing (whether in a report relating to the proposed evidence that he/she has read the code and agrees to be bound by it) and a copy of the acknowledgment has been served on all parties affected by the evidence.

Rule 13C(3) deals with furnishing an engaging party with any supplementary report. Service of all and any such is required of all supplementary expert reports. Such service is of all supplementary reports (including those in which there has been a change in opinion).

Conferences Between Experts

I will say but a few words about this matter which is one in its infancy in the Professional Negligence List. That List introduced in NSW this innovative procedure: Professional Negligence List Practice Note 104 Schedule para 5. It provided that the Court may direct the parties to request experts to confer on a without prejudice basis endeavour to agree and make joint statement in writing to the Court specifying matters agreed and not agreed with the reasons for any such disagreement. Paragraph 6 reflected an expectation that an expert witness would exercise his or her independent professional judgment in relation to such a conference and statement and that an expert witness would not be instructed or requested to withhold or avoid agreement.

Paragraph 5 reflected as I have said something new in practice. It was drafted following consultation with parties and practitioners and with an eye to the court's then general rule powers. I have not yet seen any statement that has been prepared due to early days of the operation of the Schedule. That said, a number of directions have been made pursuant to paragraph 5 of the Schedule.

The subject of joint conferences has been raised on a number of occasions and will be the subject of remarks by me at the APLA "Litigation at Sunrise" Seminar on Tuesday 14 March 2000 at the Law Society. I will present an informal paper and participate at that seminar.

Briefly, the position is as follows. Paragraph 18 Practice Note 104 has by now been superseded by the new general Rules 13C and 13CA. Rule 13CA now deals with conference between experts. Items in the following terms.

13CA

(1) "The Court may, on application by a party or of its own motion, direct expert witnesses to:

- (a) confer and may specify the matters on which they are to confer;
- (b) endeavour to reach agreement on outstanding matters; and
- (c) provide the Court with a joint report specifying matters agreed and matters not agreed and the reasons for non agreement.

(2) An expert so directed may apply to the Court for further directions.

(3) The Court may direct that such conference be held with or without the attendance of the legal representatives of the parties affected, or with or without the attendance of legal representatives at the option of the parties respectively.

(4) The content of the conference between the expert witnesses shall not be referred to at the hearing or trial unless the parties affected agree.

(5) An agreement reached during the conference shall not bind the parties affected except insofar as they expressly agree”.

Schedule K “Expert Witness Code of Conduct” contains further provisions as to Experts’ Conference. It provides :

10. “An expert witness must abide by any direction of the Court to:

- (a) confer with any other expert witness;
- (b) endeavour to reach agreement on material matters for expert opinion; and
- (c) provide the Court with a joint report specifying matters agreed and matters not agreed and the reasons for any non agreement.

11. An expert witness must exercise his or her independent professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement.

The objective of the amendments is to inter alia ensure that the expert co-operates with other experts.

Part 39 - Court Appointed Expert and Assistance to the Court

The new Part 39 replaces and re-enacts, with some changes and additions, the existing provision of Part 39 for a Court appointed expert. The new Part applies generally to all trials. Indeed in Australia, the 1999 **AJJA Empirical Study** did not suggest that the judges were using the court expert with any regularity.

It is appropriate to mention that neither the Professional Negligence List Rule or Practice Note deals with the matter of court appointed expert. There was no need to do so since the earlier Part 39 was of general application. I would observe that since the List commenced operation in April 1999 I have not appointed such expert under Part 39. I have rather sought to act under the Schedule to the Practice Note, in terms of encouraging of the joint expert conference and/or the mediation route.

As to appointment by the Court, the rule re-enacts the existing provision of Part 39 for appointment of a Court expert to inquire into and report on the questions and to report on facts relevant to the inquiry. However, there are differences. In new Part 39 rule 1(1) there now are the additional words “after hearing any party affected who wishes to be heard” an important qualification preserving the rights of parties. Next Part 39 rule 1(2) provides that the Court **may** appoint as the expert a person selected by the parties affected **or** appoint a person selected by the Court in a manner directed by the Court. The rule as to selection is discretionary. This additional provision too reflects a consultative approach and controls. One would assume that ordinarily if the parties agree on an expert that such agreement will be implemented. However it is not mandated. There is no qualification to the manner in which the Court may direct the selection of an expert, but the parties are protected by the qualifying words “by the parties affected” in Pt 39 1(2). Next, the provisions of the “code of conduct” are also addressed in relation to Court appointed experts (Pt 39 rule 2). The code of conduct binds a court-appointed expert in the same way as any other expert witness is bound. This includes the written acknowledgment provisions that operates in the same manner as they do in relation to any expert witness.

Pursuant to Part 39 rule 3(1) the expert’s report is to be sent to the registrar who is to send a copy of the report to each party affected. A significant rule is Part 39 rule 3(3) which provides that the report shall be **deemed** to have been admitted into evidence in the proceedings unless the Court otherwise orders. By this provision there is an elimination of argument as to who should tender it, whether it has been tendered and if so by whom.

Part 39 rule 4 precludes the Court from preventing cross-examination of the court-appointed expert. Any party affected may cross-examine the expert and the Court appointed expert shall attend Court for examination and cross-examination if so requested on reasonable notice, by the registrar or by a party affected. A party in thus not automatically required to procure the expert's attendance for example by way of subpoena. By contrast, under the earlier Part 39 rule 4 a Court appointed expert was cross-examinable, only upon application by a party, with leave of the Court.

Provision is made for the remuneration of the Court appointed expert. The remuneration is fixed by the court.

A most important provision (Pt 39 rule 6) deals with the matter of other expert evidence, where an expert has been appointed pursuant to Part 39C rule 1 in relation to a "question" arising in the proceedings. In such case the Court may limit the number of other experts whose evidence may be on that question but not apparently, after questions. The word is "limit" but not "exclude" or "prevent" altogether. This provision perhaps requires that the Court at least should address or consider restricting expert evidence on the question.

I turn now to the new part 39, "Division 2 - Assistance to the Court". Rule 7 permits the Court in proceedings other than those proceedings tried with a jury (or in Admiralty) to obtain the assistance of any person specially qualified to advise on any matter arising in the proceedings may act upon the advisers opinion and may make orders for the adviser's remuneration. This rule reflects and retains and extends the existing power of the Court to obtain assistance from an expert specially qualified to advise on any matter arising in the proceedings to act upon the advisers opinion. The rule does not apply to proceedings tried with a jury.

The Court does not need a formal application to activate or trigger the obtaining of assistance. The Court may do it of its own motion. Further, under Part 39 rule 7 where the assistance of an expert is required he/she presumably will be appointed by an order setting out what he is to do. The subject matter will, I believe, be identified by the court. The expert's report furnishes material for the information and guidance of the Court and evidence in opposition to the report may be received.

The new rules do not omit Part 72 that deals with reference by a court to a referee for inquiring and report by the referee on the whole of the proceedings or an any question or questions arising in the proceedings. Such order may be sought by a party as he made by the court of its own motion, but not in respect of a question to be tried before a jury. I have made no such order in respect of a matter in the Professional Negligence List. I have not been asked to do so. I have reservations about doing so in terms of matters in the List. See my earlier remarks in this paper.

The Code of Conduct - Schedule K

After Schedule J a new Schedule K is inserted. It embodies a "code of conduct" (see Part 36 rule 13C(1)) essentially for expert applying to expert witnesses and not the lawyers who instruct them. Under the code the Court has wider powers in relation to conferences of witnesses than it did under Para 18 of the Professional Negligence List Practice Note 104 (and Schedule J. The paragraph is to be superseded by the new rules.

The new Code of Conduct applies as I have said to experts engaged for the purpose of providing a report as to his or her opinion for use as evidence or giving opinion evidence in proceedings or proposed proceedings.

The Expert Witness Code of Conduct has a number of different sections:

- Application of the Code;
- General Duty to the Court;
- The Form of Experts Reports;

- Experts' Conference;

The matter of the "Form of Experts Reports" is also addressed in Scheduled K as are the requirements of what a report must specify. To what I have said I would also add reference to section 79 **Evidence Act**. In **HG** (supra), Gleeson CJ (at 287) said that an expert whose opinion is sought to be tendered should differentiate between the assumed facts upon which the opinion is based and the opinion in question. His Honour also considered that attention to form was important, in order to answer the question, whether the expert's opinion is based on specialised knowledge based on training, study or experience. He stated that section 79 **Evidence Act** required that the opinion should be presented in a form which makes it possible to answer the question. As to the form of expert evidence; Schedule K is in a more comprehensive detailed form than that earlier found in para 3 of the Schedule to the Professional Negligence List.

Next, Schedule K para 8 deals with change of opinion by an expert on a material matter, the expert shall provide the engaging party a supplementary report to that effect. Schedule K para 10 deals with "Experts Conference". This rule again reflects what has occurred in England and to a lesser extent the Federal Court Guidelines. It is not in identical or similar terms to the former para 5 of the Schedule to Practice Note 104. It is more expansive. It is a much broader and more detailed provision since it provides that an expert **must** (a mandatory provision) abide by any direction of the Court to confer with another expert witness; endeavour to reach agreement on material matters for expert opinion and provide the Court with a formal report specifying matters agreed and matters not agreed with reasons for non-agreement.

Paragraph 11 (an expert witness must exercise his/her independent judgment etc) is more peremptory than the old para 6 of the Schedule to Practice Note 104. The word "expected" is removed. The provision provides that an expert witness **must** exercise his or her independent professional judgment in relation to such a conference and joint report and must not act on any instruction or request to withhold or avoid agreement.

It is to be seen that the duty is imposed on the **expert** rather than on those who provide the instructions. I note that in the Federal Court Guidelines supra reference is made to it being "improper conduct for an expert to be given or to accept instructions not to reach agreement." In England the new "Draft Code of Guidance" provides (para 22) that those **instructing** experts must not give (as well as solicitors) and experts must not accept instructions not to reach an agreement at such discussions between experts under Part 35.12 on areas within the competence of experts. Whether such will be included in the final form intended to become a Practice Note remains to be seen.

Conclusion

The new "Expert Witness" Rules will introduce cultural changes in thinking. Experts will need to be educated or re-educated in the new ways. Certain "habits" will become, like the "hired-gun" approach, a thing of the past. The new **Civil procedure Rules**, the new "Expert Witness" Rules, the Professional Negligence List and its implementation together with the pro-active case management role will, I believe, impact upon the "pure" adversarial system and the adversary process where traditionally the parties were free to choose the ground and manner on which to fight a case (the witness to call) and in contesting the issue.

The Professional Negligence List represents major reform in improving case management, in addressing issues of Alternative Dispute Resolution under the umbrella of the court, and in dealing with expert evidence. It will hopefully assist in the containment of costs of insurance premiums. I believe it will continue to contribute to better relationships, lessening suspicion, and to goodwill between professionals and their patients or clients. I believe that litigation will be resolved sooner, more cheaply, and more expeditiously.

Professional Negligence Litigation: A New Order in Civil Litigation - the Role of Experts In a New Legal World and in a New Millennium

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PROFESSIONAL NEGLIGENCE LITIGATION

A New Order in Civil Litigation - the Role of Experts In a New Legal World and in a New Millennium

Justice A. R. Abadee RFD

INTRODUCTION

In July 1996 Lord Woolf delivered his Final Report on Access to Justice in England and Wales. His brief from the Lord Chancellor some two years before was to overhaul the civil justice system. After reviewing the existing civil justice procedures, he concluded that they were too slow, too expensive and unresponsive to the needs of the parties.

He particularly addressed as part of his Inquiry the matter of clinical negligence, which he described as "an area of difficulty." He made a number of recommendations relating to clinical negligence litigation in particular in respect to case management and the establishment of clinical negligence pre-action protocols aimed to develop a climate of openness between patient and doctor/hospital and to facilitate the exchange of relevant information so as to help resolve disputes without court action. The pre-action clinical negligence protocols are partly referred to in the new Civil Procedure Rules in England and commenced in April 1999. There are sanctions for non-compliance including as to costs where actions are commenced prematurely. A pre-action protocol for solicitor's negligence claims is to be piloted in England in the next few months by the Solicitors Indemnity Fund.

Lord Woolf also suggested that there needed to be changes in the way medical or clinical negligence claims were handled because it was one of the areas of litigation "where it was obvious to everyone involved that the civil justice system was not working satisfactorily" and radical change was desperately needed. He recommended that in the United Kingdom there should be a special list of medical negligence cases. In his **Access to Justice Report** he expressed the view that the Civil Justice System had become slow, complex and expensive especially in relation to litigation over alleged medical negligence in the delivery of health care. He concluded that the Court had a responsibility to remedy the situation through case management. Such a system he considered would also weed out hopeless cases, confine parties to the real issues and control expense. He considered that there should be a pro-active role of the Court in respect of professional medical negligence cases. Some of the arguments for a specialised list are to be found in Lord Woolf's Samuel Gee Lecture delivered to the Royal College of Physicians in May 1997 and printed in "Medical Lawyers and the Courts" (1997) 16 *Civil Justice Quarterly* 302-317.

As to similar matters and the need for a professional negligence list in New South Wales, I would refer to my paper, "**Legal and Insurance Reform - Steps for a more Equitable System - Reflections in the Current Judicial System - The Dawning of a New Era for Trial of Professional Negligence Cases in the Supreme Court of New South Wales**" delivered to the United Medical Protection Conference in October 1998.

It is appropriate to observe that the introduction of the new English Civil Procedure

Rules (in April 1999) have already had significant effects on case management including removing from the control of litigants and their legal advisers the pace and terms of the litigation and the placing of the control of the litigation firmly in the control of the Court. The new rules pay special heed to the issues concerning experts and to experts generally. Such rules arise from Lord Woolf's Report in which he also referred to the large litigation "support" industry and its cost and he referred to the way in which that industry offends against what was said to be "proportionality" to the claim and access to justice. The new Civil Procedure Rules based on Lord Woolf's report thus reflect and create a new culture in which the court takes control of proceedings by way of case management and under which the parties and experts have obligations to co-operate in the process to ensure cost efficient and fair and just disposal of litigation with reduced delay.

Significantly, a new regime of control and the imposition of responsibilities, duties and obligations are imposed upon experts as well. All experienced lawyers both in England and Australia well know that there have been considerable increases in the use of experts in professional negligence litigation. One purpose of the Woolf Report is to redress that trend. As stated in Part 35 of the Civil Procedure Rules, indeed to the forefront, there is a duty to restrict expert evidence to that which is reasonably required to resolve proceedings. It is to be remembered that both in England and in Australia we do not have trial by expert, we have trial by judges. Clearly there are many simple factual cases where the expert evidence contributes nothing to the case but expense.

In respect of the matters mentioned by Lord Woolf in his report it is clear that these problems are experienced not only in England but also in Australia. Against this background, it is not surprising that the matter of a new Professional Negligence List was considered. At the time of the establishment of the new List was being considered, at least Victoria had its own specialised List for medical negligence cases.

The New Professional Negligence List

In April 1999, a new Professional List ("the List") was established in the Common Law Division of the Supreme Court of New South Wales. Cases in the List are subject to their own Rules and Practice Note (Supreme Court Rules Pt 14C - Professional Negligence List and to Practice Note 104). Those cases are not subject to the general case management procedures of the court. The proposal of such a new list to deal with Professional Negligence Cases involving doctors, hospitals and other health carers, as well as lawyers arose in 1998. In a statement made at the end of October 1998, the Chief Justice in announcing the establishment of the List observed that a major objective of the List "was to reduce delay and costs and increase the number of settlements and improve communication between the parties". Other objectives were to produce better management of such cases with court control of those proceedings to operate from the time of their institution and subject to a special procedural regime. It was considered that this would assist in creating an atmosphere conducive to early resolution of disputes by parties. It was also felt that the List would utilise various different procedures including various "alternative dispute procedures" to further this aim. The new List was to create a new regime of case management while also giving the opportunity of exploring some new and novel procedures and innovative ways of doing things and of addressing new and specific issues relating to experts and experts opinions.

The new List in New South Wales and its operation is dealt with in an article written by me in the Judicial Officers Bulletin (NSW) May 1999 Vol 11 Number 4. That article is entitled, "**The New Professional Negligence List - A Hands-On Approach to Case Management**".

The List involves proceedings or claims for damages, indemnity or contribution based on an assertion of professional negligence against a medical practitioner, allied health professional, hospital, solicitor or barrister. "Professional Negligence" is defined in the Supreme Court Rules by reference to a breach of a duty of care or

of a contractual obligation in certain classes of work.

The essential innovation involved in the List is the role undertaken by the Court (through the Professional Negligence List Judge) in controlling and managing the case from the time of institution of proceedings to the time of trial. This is a new approach to case management in the Common Law Division and reflects a need that the class of case to be dealt with in the List receive specialised management and early intervention by the Court.

The operation of the List affects all 'professional negligence' proceedings commenced in the Court on or after 1 April 1999 and any other proceedings that the Court considered suitable to be entered into the List: PN 104(2). Under the Supreme Court Rules, new professional negligence matters are required to be commenced in the List: Pt 14C r 3(1). Existing matters may be transferred to the List by the Court on application by a party or of its own motion. Under this power, it is expected soon that all suitable existing matters will be transferred into the List by the end of the year. The result will be a new universal approach to the case management of all professional negligence matters under the special Rule and Practice Note.

The novelty of the approach of court management under the List has allowed for the implementation of new approaches in many aspects of the preparation of cases. The management of the cases is coordinated through the holding of conferences. Conference days are held on a weekly or fortnightly basis with conferences being held before the Professional Negligence List Judge. Parties are required to be present or represented so that orders and directions may be made: PN 104(12). The aim and intent of the conference hearing is to make orders that enable a 'just, quick and cheap' disposal of the proceedings. For this reason, the requirement that parties be represented by counsel sufficiently familiar with the matter to allow any and all necessary orders to be made is likely to be strictly enforced as vital to the proper operation of the List.

Orders can relate to the filing of pleadings, the provision of further and essential information and particulars, the administration and answering of interrogatories and the service and filing of affidavits or statements of evidence.

Primary conference hearings are scheduled for approximately three months after a matter is entered into the List: PN 14:6(1). Existing matters entered into the list are given a first conference date earlier than three months and in both cases conference hearings are re-scheduled as required: PN 104:6(2) and (3).

The Practice Note provides for a final conference hearing in matters under the List 3 months or so prior to the date for hearing: PN 104, para 15. This is to ensure that the matter is still ready for trial when the date of hearing arrives. As the List helps to reduce waiting time by reducing the scope and number of matters coming up for trial, such a final conference may be increasingly less necessary.

The Role of the Expert under the List

The development of the List has enabled the Court to re-affirm the role of parties and witnesses coming before the Court. The role of expert witnesses particularly has attracted growing comment in recent times. This is particularly so in cases involving medical negligence where reports by medical experts are presented as a matter of course in a plaintiff's case on issues of liability, causation and damage.

The modern approach to expert evidence is less exclusionary than it has been in the past. An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or a jury. In this capacity, experts are expected to serve the Court by bringing to its knowledge matters which may assist in the decisions to be made by the Judge and the tribunal of fact. As to the admissibility of expert evidence under the new Evidence Act and some interesting discussion as to the nature and role of expert

evidence and the need to confine expert evidence under the Act, I would particularly commend the reading of the recent High Court decision in **HG v The Queen** (1999) 73 ALJR 281, particularly Gleeson CJ at 287-8 and the decision in **Murphy v The Queen** (1989) 167 CLR 94 particularly at 130-131.

Under the Practice Note, a party who engages an expert is required to provide the expert at the time of their engagement as an expert with a copy of the schedule to the Practice Note. That schedule in turn sets out the expectations under the List of the role to be played by experts in proceedings.

The Schedule emphasises that the paramount duty of the expert is owed to the Court impartially and that the expert is not to act as an advocate for a party. This is a significant point. The duty of the expert to the Court overrides any duty or obligation to the person from whom the expert has received instructions or by whom they have or are to be paid. In a paper delivered in July 1998 in the United Kingdom headed "**The Judge in the Chair - A Review of the Likely Impact of the Civil Procedure Rules on Medical Negligence Practitioners**", Senior Master Turner of the United Kingdom High Court observed:

"At a meeting of experts last year at Church House, it was astonishing to hear how many of 350 experts believed with great sincerity that they were genuinely entitled to act as "hired guns" by their paymasters. Those beliefs must be a thing of the past".

If such beliefs are held by some experts in New South Wales, the Practice Note is intended to relegate them to the past.

The Schedule also requires the expert to record or annexure in their report their qualifications, their basic assumptions underlying their opinions and to specify any examinations, tests or investigations used and literature relied upon in support of their opinions. Specifying the content of the report in this manner serves to implement the view that an expert's report should reveal matters and reasons behind their opinions and not merely tier opinions. Such reports will assist in facilitating resolution of cases, in confining and identifying issues and in reducing hearing times. They will assist the court in resolving conflicting expert opinions. These requirements will also assist the Court and the parties in determining what experts may or ultimately should be accepted at a trial. The benefits are patent, hence the Court will in many instances be disposed to implement the Schedule obligations.

The contents of the Schedule reflect in part, but do not in terms mirror, the Federal Court Practice Directions relating to an expert witness' general duty to the court. The schedule at para 4 puts the expert under a continuing obligation to notify the engaging party of any change in the opinions contained in their reports which is then to be passed onto the other party or parties in the matter.

With respect to experts, two particular further initiatives have been developed in the List relating to expert reports. Under the first, parties in medical negligence cases are to be required to file expert reports on the commencement of proceedings along with the filing of the statement of claim. This is so as to advance the preparation of material in the proceedings and help to identify and confine early the matters that are in dispute. Plaintiff's in matters transferred into the List are required to file those expert's reports they seek to rely on within 28 days of an order transferring the matter into the List if they have not already been filed: Part 14 C Rule 6(2). Sanctions for failure to comply with these requirements include power in the Professional Negligence List Judge to strike out proceedings, in whole or in part, on its own motion: Part 14 C Rule 6(4).

The second major initiative of the Rules and Practice Note is the power in the Professional Negligence List Judge to direct parties to require their experts to confer for the purposes of discussing their opinions and preparing a report setting out areas of agreement and areas of non-agreement with reasons specified as to

why agreement was not reached.

A few things should be noted. The power is to “direct” and not “request” the parties although the direction is only that the parties “request” their experts to meet. It is not necessary to explore the reasons for this deliberate wording. It is sufficient to say that this was the accepted form adopted in the consultative process leading up to the settlement of the Practice Note. Secondly the meeting is held on a “without prejudice” basis. Thirdly, the expectation under the rules is that such a meeting will be undertaken by the expert in good faith and that the expert will exercise their own independent judgment and not be instructed or requested to withhold or avoid agreement. The requirement that reasons be given for non-agreement is a further means to secure a good faith conference between respective witnesses.

The advantages of such an approach should be obvious. A joint conference, properly conducted in good faith, can produce time saving agreements that spare cost to the parties and court time. Technical issues can be explored and tested and the relative weaknesses of a party's expert evidence can be exposed and addressed prior to any court hearing.

Such a conference also facilitates both parties arriving at legitimate and realistic expectations from the matter before them which can often in turn produce early resolution of disputes. By experts acquitting their duty to the court in such a conference, time and money will be saved by all.

The Potential for ADR under the List

A further central focus of the List is the increased use of alternative methods of resolving and confining disputes especially by means of mediation. It is intended that mediation will play a significant part in the List. This view reflects part of the philosophy behind the establishment of the List including the desire to reduce delay and expense of proceedings, and for early encouragement and resolution of the disputes.

It has already been mentioned that the Practice Note for solicitors involved in the List envisages a pro-active approach to the preparation of matters for court including the early filing of claims and expert reports even before the first conference hearing. Additional to that expectation is the expectation that appropriate and increased use will be made by the parties of mediation as urged by the Court, and no doubt when the culture changes, as urged by the parties themselves in due course.

In its report of August 1999, the Law Society of New South Wales recommended that the Law Society adopt a policy to “encourage the reform of court procedures so that cases are referred to a dispute resolution processes other than litigation to encourage early, effective and consensual resolution of disputes”.

A recognition of the importance of the early referral of matters to alternative dispute resolutions processes is a recognition of the need to confine disputes to their essentials. It is inefficient and costly to parties and to the court to fail to find the common ground in complex litigation such as professional medical negligence cases.

In respect to mediation the court does not yet possess a power to order mediation over the objection of the parties. At the moment the position is not changed from the ordinary powers under ss 110K and 110H of the **Supreme Court Act (NSW)** which allow the court to order mediation with the consent of parties.

In Victoria, after amendments made in 1992, the Supreme Court acquired the power to order a mediation at any stage of proceedings irrespective of whether parties agreed to the mediation. Similar powers exist in South Australia after amendments made in 1993 which allow a judge or master in the Supreme Court to refer matters for mediation at the earliest possible occasion. Again in Queensland

powers of compulsory referral for mediation exist. In the remaining states and territories the position is either unclear or such that no express power for compulsory referral exists. Most states like New South Wales do retain a power to order referrals for mediation on the agreement of parties. The Federal Court has powers in respect of mediation as well.

Referral to mediation serves to increase the communication between parties and increase the potential for agreement and consensus if not in whole then at least in part. Agreements as to liability leaving extant the matter of calculation of damages or alternatively agreements on the heads of damage leaving extant the prior question of liability can significantly reduce case estimates, free up court time and secure earlier hearings. This is particularly so at present where cases with shorter estimates have a heavily reduced waiting List than cases with longer estimates.

The New Way Forward

The desires sought to be achieved by the Professional Negligence List have been those of efficiency, cost reduction and ease in early settlement. As the Professional Negligence List Judge it has been gratifying for me to note the moves towards achieving those goals made in the early operation of the List. As the culture of the Court and parties continues to change I anticipate greater and more lasting benefits to arise out of the approach under the List. The List has been welcomed and well received. No particular problems or concerns of significance have been identified during the short period of its operation. Ongoing monitoring is in place.

The new way forward under the list promotes the possibilities of consensus among parties and parties' experts to confine issues in disputes and pave the way for more efficient dispute resolution. The list also confines the role of experts to their paramount duty to assist the court and not partisan interest. Again, such an approach serves the efficient resolution of disputes between parties.

The increased role of the Court in managing proceedings in these and other ways provides a stable framework in maintaining a forum for dispute resolution. Innovations like the Professional Negligence List provide the vehicles for equipping the Courts and ultimately the parties with the tools to resolve matters in the most appropriate way and at the most reduced cost. In this sense the refinement of legal processes for professional negligence claims should not be seen as a challenge to medicine but as the way forward to achieving the just result to disputes in which neither side want to endure delay and excessive cost.

What the Supreme Court has done in respect of the establishment of the List should come as no surprise. There was a form of list system in place in Victoria particularly in the Court in respect of medical negligence cases. In the United Kingdom, as I have mentioned, since Lord Woolf's Report in **Access to Justice** in 1996 the matter of attention to procedures in respect of dealing with professional negligence cases has been brought into sharp focus.

Even now in the United Kingdom the cost of negligence in the National Health System is at record levels. According to **The Times** (27 July 1999), "In every £12, £1 is spent on negligence cases. More than £300 million pounds in compensation was paid out last year to settle claims - although many were long running and had dragged on for years. The figures prompted an outcry and warnings about a growing compensation culture."

As in Australia, in the United Kingdom a number of questions have been raised as to the place of litigation particularly in medicine with suggestions including having fixed compensation schemes. Various methods have been adopted to in part address the issues particularly in the court system by the introduction of new Civil Procedure Rules (that commenced in late April 1999) consequent upon Lord Woolf's **Access to Justice Report**. Another innovation reflecting that fact that much of the civil works for medical professional negligence is funded by State

Legal Aid funds is that in July 1999, just 200 or so “specialist solicitor officers” who can guarantee a quality assured service will be allowed to do clinical negligence work on legal aid funds. This it is hoped will improve the quality indeed disposition and resolution of medical negligence cases by ensuring that only those professional qualified by expertise to present such cases should be involved in the litigation of medical negligence cases. The proposal has I believe, considerable merit. Solicitors are seeking to have their names included on the list of 200.

I have mentioned that the concerns about the liability of health providers is not a phenomenon confined to the United Kingdom. In Australia too, concerns have been raised that there has been an increase in medical negligence litigation causing an increase in indemnity premiums as well as an increase in defensive medicine with potential costs for health systems and actual or potential for withdrawal of services. Issues arise as to the role of the courts and to whether new duties on the courts are in fact or perceived to have been imposed that has not previously existed following the decision in **Rogers v Whittaker** (1992) 175 CLR 479. There is despite **Rogers** in Australia still some ongoing a debate as to whether the courts in making decisions as to the reasonable standard of care should be obliged to follow and adopt views of common professional practice or to judge conduct as reasonable if it accorded with a practice accepted by a responsible body of medical opinion ie: the test in **Bolam v Friern Barnet Hospital Management Committee** [1957] 1 WLR 582 rejected in **Rogers**: see also a recent discussion in **Naxakis v Western General Hospital** (1999) 73 ALJR 782 of the standard of care owed by person possessing special skills. This debate I consider is one lost, and for reasons stated by the High Court. There are ongoing debates and issues concerning causation in medical negligence cases: see **Chappel v Hart** (1998) ALJR 1344 which involved a “split” decision of the High Court on causation. These are matters to be talked about by others.

Generally concern has been raised in Australia about the ability of courts to properly consider, assess, understand and apply expert evidence particularly in difficult professional negligence cases in determining whether a professional health carer, doctor or hospital was negligent. I am not in this paper concerned with issues of statutory intervention or otherwise altering or changing the rules of bases of liability or involving myself in capping argument or even engaging in arguments concerned with structured settlements. Certainly in England the issue of alternatives to the principle of lump sum damages is being explored by such bodies as the Clinical Disputes Forum not only in respect of structured settlements but further in terms of whether an award of damages should be the subject of change in a particular case if circumstances change (a radical modification of the “once and for all assessment rule”). The Clinical Disputes Forum originated with the Woolf Inquiry and consists of representatives of every group involved in clinical negligence. It consists of key people in the field of clinical negligence litigation working together to improve its procedures and reduce the number of patients who go to law to resolve disputes with health carers. The Forum seeks to develop solutions acceptable to all groups in the clinical negligence field.

That said, civil procedure reforms in litigation both in Australia and overseas, give rise to the implementation of different procedures to aid and assist the resolution of litigation in the court or by way of alternative dispute resolution. These reforms represent part of the court’s answer to the concerns raised by the professions involved in professional negligence cases. Reforms which address the proper role and function of experts and which address the obtaining of proper expert views go part of the way in meeting and addressing issues and concerns by litigants (on “both sides”) in professional negligence litigation.

The Role of the Expert in a New Legal World

The last half of the last decade of this century has revealed considerable attention being paid to the position and role of the expert particularly in the civil justice system. This is not surprising bearing in mind the drive for and implementation of civil procedure reforms both in the United Kingdom and in Australia. These reforms have as overriding objectives the desire to enable courts to deal with cases more justly, with such objectives being furthered by a number of means including active case

management by the courts.

The new measures include recognition of the role of alternative dispute resolution in various forms, the opportunity to explore new ideas in relation to civil court procedures designed to improve the delivery of justice. This said the new civil procedures and proposed reforms of the civil justice system are and will impact considerably on experts, including as regards their role, and court control over the role and issues pertaining to such. Indeed, as part of improving the management and quality of delivery of justice the last decade also reveals in particular a very close study of expert evidence, its nature and role, and of the need on the part of the courts to be in control of it. There is a greater recognition of the court's responsibility to restrict expert evidence to that which is reasonably required to resolve proceedings and of the overriding duty of experts to help the court on matters within his or her expertise.

The reforms to the English Civil Procedures outline significant changes to the role of experts. They have considerable relevance to the issues, the subject of discussion in this paper.

The new rules in respect of experts and assessors are found in Part 35 of the English Rules. New Practice Directions have been implemented to apply what has been called "pre-action protocols", being the Personal Injury Protocols and the Clinical Negligence Protocol. The objectives of these pre-action protocols are to encourage the exchange of early and full information about a prospective legal claim, to enable parties to avoid litigation by agreeing to a settlement of the claim before commencing proceedings and to support the efficient management of proceedings where litigation cannot be avoided. The Civil Procedure Rules enable the court to take into account compliance or non compliance with an appropriate protocol as well.

The medical expert and medico-legal practitioners will find that under the English Civil Procedure Rules and protocols, that their role, their obligations, responsibilities and duties are affected. They will need to be particularly aware of the Civil Procedure Rules and the extent to which they impose obligations and duties on experts, including in respect of report preparation. Lord Woolf's proposals for total transparency with regard to expert reports reflect a major shift in respect of expert's obligations. For a useful discussion of some of these matters: see "**The Impact of the New Civil Practice Rules on Clinical Negligence Claims**" *Medico Legal Journal* (1999) Vol 67 Part 1, 7-8.

In addition, not only has the **Access to Justice** report produced new Rules including rules in respect of assessors and experts but also there will be a new Code of Guidance for Experts which will apply to experts. Indeed, just recently released in England for consultation purposes, is a draft Code of Guidance for experts under the new Civil Procedure Rules 1999 (CPR). This has been prepared by a Working Party (under the chair of Sir Louis Blom-Cooper QC also the Chairman of the Expert Witness Institute) and under terms of reference given to it by the Vice-Chancellor. It is intended that the Code of Guidance as and when approved by the Vice-Chancellor (as it is intended to be after final consultation) will be converted into a Practice Direction with the same status as any other Practice Direction. It will be subject to amendment from time to time as the case law develops on Part 35. I particularly refer to the Preamble in that Code because of its particular relevance in the context not only of this paper and not only because of its particular relevance to those to whom this paper is addressed but also because I believe Codes of Guidance and guidelines for experts are and will have a greater role and significance for experts in this country.

The Preamble is as follows:

"This code of guidance is designed to help those who instruct experts (and those instructed) in all cases where CPR applies. It is intended to facilitate better communication and dealings both between the expert and the instructing party and between the parties. Assistance from an expert may be needed at various stages of a dispute and for different purposes, the expert performing a different role in each of these respects. The duty to the court and the duty to act in the best interests of the party instructing the expert (including the expert's advisory role) will differ depending upon the context. When preparing a report for use in evidence at court or when giving oral evidence, however, the expert has an overriding duty to the court. The expert remains under a duty to comply with any relevant professional code of ethics. The court is likely to take into account adherence to the Code of Guidance in exercising its discretion as to costs."

I believe that the philosophy in the Preamble to an extent will ultimately be

considered in Australia.

In recent years the Federal Court has actually been considering proposed reforms on the use of experts so as to refine court controls over the calling of expert's evidence and to reinforce the duties of experts to the Court. The Federal Court in fact introduced a Practice Directions: **Guidelines for Expert Witnesses in the Federal Court of Australia** (15 September 1998). That Courts original proposals and indeed guidelines were in many respects influenced by and similar to those discussed and recommended by Lord Woolf in his Report: see **Australian Law Reform Commission Background Paper 6** (draft working paper) on Experts published in January 1999. That working paper under its terms of reference includes a very recent and relevant discussion of the role of experts and discusses current practices and perceived problems as well as possible reforms relating to the use of expert evidence and experts generally in proceedings before the Federal Court, Family Court and Administrative Appeals Tribunal (AAT). The matter of the expert and issues concerning them have also been under close scrutiny in the Australian Institute of Judicial Administrations recent report (April 1999) "**Australian Judicial Perspective on Expert Evidence**" **An Empirical Study**. This study was the product of the survey of the views of some 478 judges on expert witness issues in different Australian jurisdictions. Again in a new paper by Justice Sperling "**Expert Evidence: The Problem of Bias and other Things**" delivered most recently at the Supreme Court of New South Wales Annual Conference, Terrigal in September this year the matter was again discussed. Thus it will be seen that particularly in the year 1999 there have been a flurry of activity in terms of producing materials relating to issues concerning experts in the court system. The experts involved in giving views in litigation have in 1999 come very much under the "spotlight".

I have already mentioned that under the new Professional Negligence List in the New South Wales Supreme Court that the Practice Note in particular sets out its own provisions relating to expert witnesses in respect of cases in the List. These obligations are also to be read with court rules relating to experts. It provides that an expert engaged in respect of a matter dealt within the List must be given a copy of the Schedule to the Practice Note. That Schedule which I have earlier discussed contains six special clauses relating to expert witnesses, their obligations, duties and responsibility including the paramount duty to assist the court, with that duty overriding the expert's obligations to the engaging party. As I have mentioned there is the statement and reminder that the expert witness is not an advocate for a party.

I have also already mentioned the Federal Court Guidelines. With all those new developments what does this, to use the expression, all add up to. The legal and medical professions will have to work harder in respect of cases in which they are involved. There are greater court controls over experts and their roles duties and obligations. The changing procedures will involve expert reports being considered not merely in the adversarial context but also in the various alternative dispute procedures available. Such will assist in promoting professional integrity and independence of experts (a benefit to those "hired" by parties), and will assist in making their obligation to the court to be impartial so much the easier.

That said, there are other consequences concerning the matter of education or re-education. Training will be required in the "new ways" of experts in the new order in civil litigation in the new legal world in which they participate. For experts there will be a need to adjust to new "cultures" to changes in cultural thinking and to accept new roles and new court controls. I have identified some of the changes, there will be further changes in the new millennium as a result of debates appearing in some of the work studies and papers to which I have referred. The courts are committed to reducing cost and delay and in producing better case management of cases and speedy resolution of such by various means including alternative dispute resolution. The experts role in the new millennium will be one different to that in the latter part of this century. There is for them as for all of us a dawning of a new millennium.

The need for education and training and the special need for such, will be driven not only by new civil procedures, practice notes and court guidelines affecting

them but also by judicial perceptions and concerns in relation to expert opinion. As the **AIJA Empirical Study** supra reveals (p 3) at the upper end of the judges' concerns was a perceived lack of independence in the views of an unacceptable percentage of forensically commissioned medical practitioners and accountants. Prominent among the concerns was what was described as the phenomenon of the expert functioning principally as a forensic expert - especially the medical practitioner retired or semi-retired from clinical practice. The survey suggests there is a need to re-educate expert witnesses as to their situation and in respect of issues in contemporary litigation.

Of interest is a most recent extract part summary of the AIJA study on expert evidence from 73 ALJ 612:

“Expert evidence

The Australian Institute of Judicial Administration has recently issued a study on judicial response to questions of how far expert evidence impressed them. The study is, of course, limited to the impressions of those who responded and to the categories specified in the questions.

The study shows that the factors which led to judges accepting expert evidence were as follows (the figures for jurors being in parenthesis):

- * clarity of explanation 28% (37%);
- * impartiality 26% (18%);
- * experience with the facts 23% (3%);
- * familiarity with the facts 18% (23%);
- * experience as an expert witness 3% (8%);
- * qualifications 1.5% (3%);
- * appearance 0.5% (8%).

Roughly assessed, in a jury trial a good-looking witness who appears to be familiar with the facts and whom the jury can understand will almost always beat a person who actually knows what he or she is saying.

Of the different types of experts, both judges and juries found accountants and psychiatrists the most difficult to understand or accept”.

I would but add that in relation to the matter of expert evidence and difficulties and concerns with psychiatric evidence given I would refer to my own recent decision in **Williams v The Minister, Aboriginal Land Rights Act 1983 & Anor** (26 August 1999)

The AIJA Survey (p 3) recognised and indeed acknowledged as a reality the tension between the expert being responsive to the party paying his or her fee and at the same time providing assistance to be decision maker. New Court Rules, Practice Notes, Code of Guidance and Guidelines will address and assist in resolving this tension.

In his paper **Expert Evidence**, (limited in scope to civil trials without a jury) Sperling J (at 4) observed that the AIJA survey analysis not merely suggested they encountered bias often, but that about two in five said that partisanship was a significant problem for the quality of fact finding. He also observed that in the adversarial system, experts who will support an opinion at one extreme or the other are selected and that the adversarial system was also calculated to bring forward unrepresentative opinions in cases where a range of opinions exists. He observed that assumptions that the expert is there to help the court did not recognise the practicalities under the adversarial system. He also was of the view (at 7) that modification of the adversarial system was required to enable judges to obtain objective assistance on technical issues as a basis for fact finding.

The matter of the partisan expert and judicial perceptions of such was also addressed by the Law Reform Commission in its Background Paper January 1999 (see also the recent paper by Sperling J). Guidelines such as the Federal Court Guidelines and such as the Schedule to the Professional Negligence Practice Note 104 go some of the way to address this perception seeking not only to make expert evidence more explicable and transparent to both judges and the parties but also to emphasise ethical responsibilities of an expert to the court. There are also suggestions for development of expert's Codes of Practice: Law Reform Paper (at 39-40). Problems of perception of lack of objectivity as will be seen are not confined to Australia" see also the English Civil Procedure Rules and the draft Code of Guidance preamble supra.

The role of training experts against the background of change is becoming increasing more important. Again, in its recent survey the AJA (at 5-6) noted that the perception of many judges as to lack of objectivity among a number of experts, (and sometimes difficulty in evaluating the evidence) gave rise to overwhelming support for training of expert witnesses to communicate their views better and fulfil their role as forensic witnesses more professionally. But who is to play this educational role including in the "new ways". In Australia there is a potential for bodies such as the College to also play similar roles. In England it is done by such bodies as the Expert Witness Institute. Indeed, in its paper the Law Reform Commission considered (p 40) that it may be desirable to consider ways of enhancing the training of experts in providing expert evidence and on the legal systems expectations of them. Indeed, in England, Lord Woolf supported the provision of training of experts but did not favour an exclusive system of accreditation. In its recent working document the Australian Law Reform Commission noted that it would be timely for the peak bodies of the professions and the justice system to co-operate in reviewing training for expert witnesses, or to consider what training needs exist, and whether those needs are being adequately met and how they may be.

One point that may be here made in terms of training and education is the importance of creating not merely an understanding of the new order but also for a new culture of expert thinking.

The Present Position in New South Wales and Lessons from other Jurisdictions

In New South Wales the Supreme Court has a power to appoint a court expert under Part 39 of its Rules in non jury trials. However, it is only in circumstances where a question for an expert witness arises in any proceedings that the Court may on the application by a party or of its own motion on terms appoint an expert to inquire into and report upon the question. An expert appointed by the Court is with leave of the court cross-examinable upon application of a party. Experience perhaps suggests that the use of a court expert is unusual and done in matters involving complex technical issues and generally done on the motion of the parties.

As regards a different approach to the use of court experts by consent of the parties there is the Chelmsford Hospital litigation example involving a large number of claims. There the parties agreed to use a panel of court appointed experts to assist the plaintiffs. With such use of the panel, a range of independent views were presented to the courts which assisted both parties as to realistic views about prospects. Impartiality was preserved by allowing both parties to nominate experts, with one to power over one of the other parties nominations to present their own expert reports.

The Court has powers to refer a question or questions arising in proceedings under Part 72 of its Act. An expert may be appointed under Part 72 as a referee. Under Part 72 the Court may in any proceedings in the Court but subject to the Rules "at any stage of the proceedings or on application by a party of its own motion make orders for reference to a referee appointed by the court for inquiry and report by the referee on the whole of the proceedings or on any question or questions arising in the proceedings. Part 72 facilitates the determination or may facilitate the determination of complex and scientific issues by persons with

appropriate scientific knowledge who should be able to provide answers to the problems thrown up more quickly and conveniently by judges: **Najjar v Haines** (1991) 25 NSWLR 224. The report is prepared for the court after taking evidence from the parties. The court considers the report and may adopt, vary or reject it. The Court thus has a power to appoint a referee against the wishes of both parties. The matter of using a referee has not generally been used in the Common Law Division. The discretion to use a referee is one where the interests of justice make it appropriate. The purpose of the referee provision is to provide an alternative form of dispute resolution. All this said the AIJA study suggests that the responses of the judges as to the use of referees suggested that 37 per cent of judges found them useful, 37 per cent disagreed, and 26 per cent had no opinion.

It is appropriate for me to observe that as yet in respect of matters in the Professional Negligence List no orders have been made for the appointment of a referee under Part 72 or of a court expert under Part 39.

The matter of Court appointed assessors (court advisers) (as in England is argued by Sperling J in his paper of **Expert Evidence**. At the moment in New South Wales whilst there are provisions for such experts to be appointed in the Equity Division there are none in the Common Law Division. He puts a case (at 26-32) that there is a role for assessors to assist judges in understanding technical evidence with a rule rather in terms of making the assessor an adviser. The assessor situation has been addressed in the new Civil Procedure Rules in England. There are assessor "roles" in other States. The increased use of assessors in Federal Courts and Tribunals has been canvassed in the **Law Reform Paper** supra

Next, I would note that under s 76B of its Act, the Supreme Court of New South Wales may of its motion or upon application of the parties may refer personal injury cases to arbitration under the **Arbitration (Civil Actions) Act 1983**. This may be done irrespective of the consent of the parties and is of course an alternative means of dispute resolution. That said, the Court cannot make an order if the matter involves complex issues of fact or law as the proceedings are expected to be lengthy. No such order has been made in respect of matters in the Professional Negligence List. Nor has an application been made. I should add that if a party is aggrieved by an award there must be a hearing. There has been no suggestion that cases in the Professional Negligence List should be sent to arbitration under the power. Their very nature may create difficulties for such course to be followed.

The importance of mediation in the Professional Negligence List is recognised. As I have already indicated there is a general power of mediation and neutral evaluation to be found in Part 7B of the **Supreme Court Act**. I have mentioned that the Court under s 110 has a power to refer a matter arising in civil proceedings for mediation or neutral evaluation if the parties consent to the referral and the circumstances are considered appropriate. There is as yet no compulsory power to so refer, unlike the situation in some State courts in Australia. There are as earlier indicated powers in respect of mediation in the Federal Court and the Family Court. That said, already in a number of cases in the Professional Negligence List there have been no consent mediations followed by referrals. In other instances I have "encouraged" in a number of ways "consent" mediations. In other words the court is playing a pro-active role in encouraging mediation to encourage resolution of disputes.

The new Professional Negligence List also represents a significant reform in improving case management in the utilisation of alternative disputes resolution and dealing with expert evidence.

I would mention that pre-trial clinical negligence protocols as in place in the United Kingdom and recognised in Practice Directions have not been adopted. They were considered and discussed with the interested parties and professions but not accepted as having a role in respect of professional negligence cases in the List because of a different litigious culture in Australia as well as other reasons. No desire was expressed that such should be recognised and have a role to play in the Professional Negligence List. Whether or not the similar type protocols should

be again considered only time will tell. Likewise, in the establishment of the new List, and in the preparation of the Rule and Practice Note consultations and discussions did not suggest the need for example, for the implementation of what is called "medical malpractice" panels which are used in a number of States in the USA and which screen pre-trial medical negligence cases. In those cases panel decisions are not binding or enforceable. However, in those States where they exist and where screening is mandatory neither party may instigate a court proceeding until after a decision has been rendered. Hearings are generally informal.

It is appropriate if I now say something about the Federal Court Guidelines for expert witnesses. As I have said in framing the Practice Note 104 regard has been had to such guidelines. The guidelines also include a statement of the expert's duty to the court. The Federal Court Practice Direction too requires that a party engaging an expert is to provide the expert with a copy of the guidelines. The guidelines appear to "accept" the classic analysis of the duties and responsibilities of the expert in civil cases stated by Mr Justice Creswell in **The Ikarian Reefer** decision in the United Kingdom. The rules of the Federal Court also make provision for the "hot tub" method developed by Lockhart J: **Re Queensland Wholesalers Limited**. The rules inter alia provide for experts to give evidence on the same occasion. The approach has particular value in some cases in the Federal Court.

Neither the Professional Negligence Practice Note nor the Guidelines go so far as the new proposed **English Civil Procedure Code of Guidance for Experts** under the Civil Procedure Rules (1998). Those new rules will impact considerably on clinical negligence claims in England and may influence further developments in Australia particularly in so far as they touch upon and deal with experts and assessors. Indeed, there is a view that they have been drafted to maximally impact on the conduct of clinical negligence actions. The Rules are divided into "Parts" not "Orders". They reflect a cultural change including in respect of experts and assessors. It is worth while referring to some parts of them. They have as a background Lord Woolf's Report, as does in part the Federal Court "Guidelines" and the Professional Negligence List Practice Note 104 (and Rule).

The implementation of the new Civil Procedure Rules in England in 1999 have already caused considerable re-thinking and amendment to previous practices where experts are concerned. The ramifications are still being worked through, with the draft Code of Guidance still to be finally settled and implemented as a Practice Direction. I believe that the Code when settled will be looked at in terms of whether such may be in some respects at least considered relevant in the Australian context.

Part 35 of the English Rules in many respects addresses issues of "total transparency" or the philosophy of "cards on the table" as regards experts and their evidence. There is a shift away from the "hired gun" approach by the Court rule. Under Part 35 there is a threshold stated duty on the court to restrict expert evidence. The draft Code of Guidance emphasises that there is a duty on those intending to appoint experts to actually consider whether there appointment is appropriate. There are many cases where the expert evidence contributes nothing to the case but expense. There is a general requirement for expert evidence to be given in a written report. No party can call an expert or put in as evidence an expert's report without the court's permission. There is a power in the court to limit the amount of the expert's fees and expenses that a party who wishes to rely on the expert may recover from the other party. There is an overriding duty on an expert (overriding an obligation to the person paying and instructing him/her) to help the court on the matters within the expertise; written questions to an expert instructed by another party (or single joint expert appointed) may be put by a party. The court is given discretionary power to direct that evidence may be given by one single joint expert where two or more parties wish to submit expert evidence on a particular issue. Indeed, where parties cannot agree on the expert the Court may select one from a list prepared by the parties or in some other manner. Next, where a direction is given as to a single joint expert each instructing party may give instructions to the expert with copies of such to the other instructing parties. A power is given to the court to direct a party to provide information. The matter of

contents of the report is also addressed in the rules. Significantly the expert's report must comply with the requirements set out in relevant Practice Directions. A significant provision (not found in Australia) is not only must the report comply with the requirements but that at the end of the report the expert must state that he understands his duty to the court and has complied with that duty. This is a significant rule change and will impact considerably on the expert's responsibility to the court, his/her professionalism, independence and objectivity.

A further difference is that the expert's instructions are no longer privileged against disclosure. That said the court will not order disclosure of any particular document unless it is satisfied that there are "reasonable grounds" to suppose the expert's summary of her/his instructions are inaccurate or incomplete. The matter of use as evidence by one party of an expert's report disclosed by another is permitted. The court may at any stage direct a discussion between experts for the purpose of identifying issues and to reach agreement on issues even specifying the issues they must discuss. Where experts reach agreement on an issue during discussions it shall not bind the party absent express agreement of the parties. Where a party fails to disclose an expert's report such may not be used in court nor the expert called absent the court's permission.

An interesting provision permits an expert to fill a written request to the Court for directions to assist him in carrying out his functions as an expert and the court may give directions.

One matter should be here mentioned. Part 35 dealing with experts applies only to experts who have been instructed to give or prepare evidence for the purpose of court proceedings. As the English Draft Code for Guidance makes clear there is a distinction between experts who are instructed to act solely in an advisory capacity, owe a duty to the client (although if the matter proceeds to court the expert's overriding duty is to the court).

Next, the matter of a court assessor, is addressed by Part 35 of the Civil Procedure Rules. In England assessors are appointed under s 70 of the **Supreme Court Act 1981**. On appointment the assessor shall assist the court in dealing with a matter in which he has skill and experience and take such part as the court may direct. This includes preparation of a report on any matter in issue and attending a trial in whole or part. The new Part 35 provides for the Assessor's report if prepared before trial to be sent to each of the parties who may use it at the trial and with their remuneration to be determined by the court and to form part of the proceedings.

A Practice Direction - Experts and Assessors to supplement the Civil Procedure Rules Part 35 has been issued in England. Further, a Practice Direction applying to pre-action protocols approved by the Head of Civil Justice (the Personal Injury Protocol and Clinical Negligence Protocol) have also been issued. The new Civil Practice Rules deal with compliance and the consequences of non compliance with such pre-action protocols.

One other matter may need to be mentioned. As I have said the new rules have focussed attention on the work of experts imposing new procedures, burdens, responsibilities and requirements. The Rules and practice Notes provide little guidance or material touching directly on the terms of engagement and conditions to comply with new rules. The need for an expert to agree on the basis and timing of payment before work is commenced may now need to be addressed in England. For an interesting contribution on this subject: see an article by Mr Brown, Solicitor published in the Expert Witness Institute Newsletter of Summer 1999

As already stated a Code of Guidance for experts under the Civil Procedure Rules 1999 has just been released as a Working Party under terms of reference. It is in the public arena for consultation. The draft code to be converted into a Practice Direction and its contents have not to my knowledge been the subject of study or commentary in Australia by those concerned with such matters. I would mention several matters in respect of it. There is the mention of the expert's report being addressed to the court and not to the parties under the Code. Payments

contingent upon the nature of the expert evidence or outcome must not be offered or accepted. Experts who do not receive clear instructions should request them and if not provided withdraw. In addressing issues of fact and opinion in any advice or report, experts should keep the two separate and discreet. As to this matter in Australia see **HG v The Queen** Gleeson CJ at 287. Parties, their lawyers and experts should co-operate to produce concise agendas for any discussion between experts. The use of audio visual facilities should be relied upon to avoid unnecessary attendance at Court. These are some of the rules in the draft Code of Guidance. Another one is that those instructing experts must not accept instructions not to reach agreement at such discussions on areas within the competence of experts. Next in terms of instructions (dealt with in para 9 of the draft Code of Guidance) there is the positive obligation on experts not to express an opinion outside the scope of their field of expertise nor accept instructions to do so. As to the matter of "field of expertise" in Australia: see also **HG** supra.

There can be little doubt that these new Rules and Practice Note and the final Code for Guidance of experts will in England impact considerably on expert witnesses their role responsibilities and work load. They will lead to cultural changes and a shift from the culture of the "hired gun". They will lead to greater care and obligations in the preparation of reports and the giving of evidence. The adversarial system continues with greater transparency. The judges not the parties through case management will control the pace and content of the litigation and of the role of experts. The extent to which they will apply or be adopted (in whole or in part) in Australia remain to be seen. The potential for their playing an influential role in change I believe is a significant one.

I believe that what has occurred in England based on the Lord Woolf Report has impacted and will further impact on the role of the expert and issues concerning them in Australia and in the various courts. Its impact in part has already been felt and been reflected for example in part in the Federal Court Guidelines for example and in New South Wales in Practice Note 104. But what of tomorrow and the future.

In Australia there are already expressed a number of views designed to address the concerns of bias in expert witnesses and to make better use of experts in assisting fact finding. These include courts promulgating a code of conduct for expert witnesses; amendments to legislation governing professionals to make bias a breach of duty of objectivity professional misconduct; that courts be given rule power to limit expert evidence to that of a single expert selected by the parties or by the courts with a right of cross-examination; that the courts have express power to appoint an assessor; that more use be made of single and appointed court experts and of assessors; that courts be given express power to direct (nor merely request) experts retained by parties to confer and provide a joint report specifying matters agreed and not agreed with reasons for disagreement it is also suggested that more use be made of directions that experts retained by parties confer and produce a joint reports and more use made of the power to refer out technical issues for determination by an expert referee: see also Justice Sperling's paper on **Expert Evidence** particularly pp 44-46. Some of these matters are already being addressed in different ways.

In the **Australian Law Reform Commission Background Paper "Experts"** a number of interesting draft recommendations have been made. Some concern courts and tribunals exercising Federal jurisdiction including the Family Court and the Administrative Appeals Tribunal. I summarise them excluding some that particularly concern only the Family Court. The Commission recommends that the Federal Courts and tribunals develop case management guidelines to control the use of expert evidence for particular case types; encourage communication between relevant experts and order or facilitate conferences and other pre-trial contact between experts where appropriate. The Commission recommends that the Australian Council of Professions develop a code of practice for expert witnesses drawing on Federal Court Guidelines for expert witnesses and that the Council should encourage other professional bodies to supplement this code with discipline specific provisions where appropriate. Recommendations address reviewing training needs of expert witnesses and how such might be further developed. There is the recommendation that as a matter of course a single expert

agreed between the parties or a court appointed expert should be appointed to deal with a particular issue, with the expert wherever possible being chosen by agreement between the parties and not by the tribunal. It is recommended that experts should be appointed with a view to resolving proceedings in a way proportionate to what is at stake in the case and to ensure that parties are on equal footing. To that end it is recommended that the Federal Court should, in consultation with the legal profession and user groups, encourage the development of "pre-action protocols" to encourage parties in particular areas of practice to agree on a single expert before commencing proceedings.

Further, it is recommended that rules should provide that parties who claim that an expert opinion is relevant to an issue be required to refer to the claim and identify the issue for expert evidence in their pleadings. Further, it is recommended that the Federal Court and Federal Tribunal co-operate with user groups and legal professionals to encourage the increased use of assessors in particular categories of case and to permit use of assessors in Federal Court proceedings in cases other than those involving nature title and patents. Recommendation 13 is that the Federal Court, Family Court and AAT promulgate rule or practice directions setting down procedures for adducing expert evidence in a panel format. Again there is the recommendation that those bodies should consider more frequent use of video conferences for adducing expert evidence. The Commission supports consideration of the use of panels of experts to provide independent medical reviews on employee's compensation jurisdictions of the new Administrative Review Tribunal.

Some of these recommendations are already being implemented in one way or another. Some are not new.

One final thing may be said in summary. The expert is living in an interesting time. He will face the new millennium accepting as he must change and further change, as to his/her responsibilities, duties and obligations as an expert involved in litigation or legal disputes. The "hired gun" philosophy will become a thing of the past.

There will be "cultural changes" for the expert in the new legal order. There will be a need for readjustment to new thinking. There is the dawning of a new era for experts. I wish them well!

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ADDENDUM SUPPLEMENT TO PAPER
AUSTRALIAN COLLEGE OF LEGAL MEDICINE (ACLM) CONFERENCE 16 OCTOBER 1999

Judges as "gatekeepers" of Expert Evidence
Justice A. R. Abadee RFD

Over the years the courts have accepted and invited greater involvement in the justice system by scientists and experts. A special category of evidence, opinion evidence as contrasted with fact has been developed which permits the proffering of opinion evidence.

A problem that has troubled the United States Courts is how to determine whether or not an opinion in a specific instance has sufficient validity to be accepted as evidence. This role involves the judge performing a "gatekeeping" role in terms of ruling on admissibility of evidence. In Australia the problem has not been the subject of decisive views. That said in **Commissioner for Government Transport v Adamcik** (1961) 106 CLR 292 (a case concerning an expert's theory as to cause of leukemia) the High Court made it clear that it is within the exclusive province of the jury to determine which of two conflicting bodies of expert opinion they will accept. For them to determine whether a theory advanced by an expert is impressive or "meretricious humbug". Proof of expert qualifications however will permit admission of the opinion. The opinion was receivable even though as Menzies J observed at 303 cross-examination revealed "Dr Haines' experience of leukemia was limited, that his opinion was not supported by scientific or statistical investigation, that his opinion was not accepted by other members of the profession". In **Chamberlain v The Queen No 2** (1983-1984) 153 CLR there was a challenge as to the tests for foetal blood. At p 558 Gibbs CJ and Mason J observed "it is the function of the jury to

consider which of two bodies of conflicting evidence technical or otherwise they will accept. Mr Justice Brennan (at 598) when discussing opposing scientific opinions observed that conflicts of evidence even between experts is to be resolved by the jury as the tribunal of fact. The sufficiency of reasons advanced for impugning a scientific conclusion is a question of fact for the tribunal of fact.

Generally to be admissible the opinion of the supposed expert must derive from a field of experience. In cases where the **Evidence Act (1995)** applies, s 79 of the Act simply requires a person to have "a specialised knowledge" based on the person's training study or experience. There has been no decision that the requirement of specialised knowledge in s 79 should be interpreted as imposing a standard of evidentiary reliability even in respect of novel scientific evidence. Specialised knowledge is not defined in the Act. The Australian Courts have never clearly resolved the field of expertise test at common law: but see **R v Pantoja** (1996) A Crim R 554 per Hunt CJ at CL at 558. **Pantoja** concerned admissibility in criminal trials of DNA testing. Justice Hunt considered that the approach to admissibility of scientific evidence generally was rather to be in accordance with **R v Gilmore** (1977) 2 NSWLR 935 at 939-941 applying in turn the American approach in **Frye v United States** 293 Fed 1013 (1923) and holding that a scientific technique is not admissible unless the technique is "generally accepted" in the relevant scientific community. The principle in **Frye** has been superseded by inter alia the **U.S. Federal Rules of Evidence** particularly r 702.

There is no field of expertise test as such introduced in the **Evidence Acts 1995 (Commonwealth and NSW)**.

Next, even if a standard of test of reliability for evidence of admissibility was introduced the question would still arise under the **Evidence Acts** supra as to whether evidence should be excluded under the general discretion of s 135 (evidence likely to be more prejudicial than probative).

As to the procedure in the USA in which the judge plays a gatekeeping role in determining admissibility such procedure is not only directed to issues of partisanship or bias in expert evidence, but also provides a means of ensuring that judges are not duped or misled by so called "junk science" perhaps advocated by experts in a particular case. The gatekeeping role is thus also a controlling mechanism or provides pre-condition for the admissibility in particular of new novel scientific views. Under the gatekeeping principle the trial judge's task in determining whether expert testimony is admissible under Rule 702 of the **Federal Rules of Evidence (FRE)** is to insure the reliability and relevancy of expert testimony to the task in hand. Under Rule 702 an expert is permitted to give opinion testimony as to scientific technical or other specialised knowledge under some circumstances if it will assist the trier of fact: **Daubert v Merrell Dow Pharmaceuticals Inc** (1993) 509 US 579. Rule 702 of the FRE provides:

"If scientific technical or other specialised knowledge will assist the trier of fact ... a witness qualified as an expert ... may testify thereto in the form of opinion". It is to be noted that it is in different terms to the provisions of s 79 of the **Evidence Acts 1995 (NSW)**.

As I have said **Daubert** lays down a number of specific factors or criteria for determining the admissibility of the expert evidence. The Court observed the criterion of the scientific status of a theory and its falsifiability reputability or testability, and acknowledged the "Popperian" principle (Sir Karl Popper) as the determinant of scientific knowledge. Sir Karl Popper who advanced the concept of falsifiability (specifically quoted in **Daubert**) argues that Freudian theory is unfalsifiable and criticises it. Again in **Daubert** the Court considered that scientific methodology was based on generating hypothesis to see if they can be falsified. Digressing for a moment this is perhaps in contrast for example with the post hoc explanation (Freudian psychoanalytic theory) offers authoritative explanation for human behaviour with noting counting against it. In **Daubert** the court discussed in particular "four" factors-testing, (peer) review, error rates and general acceptability in the relevant scientific community which might prove helpful in determining the particular reliability of a scientific theory or technique. In the recent decision of the United States Supreme Court in **Kumho Tire Co v Carmichael** (1999) 143L Ed 2d, the Court not only reconfirmed **Daubert** but extended it to apply not only to

testimony based on scientific knowledge, but rather to all expert testimony, that is testimony based on technical and other specialised knowledge (in the instant case mechanical engineering). The Court held that the **Daubert** factors may apply to the testimony of engineers and other experts who were not scientists. It further held that the court “may” in determining admissibility consider one or more of the specific **Daubert** factors, which as it observed did not constitute a definitive check list or test. The rule 702 inquiry was said to be a flexible one and the gatekeeping inquiry must be applied to the particular facts.

The High Court in **HG** did not consider it necessary to go into issues of the kind considered in **Daubert** see Gleeson CJ at 287; but see Gaudron J at 289-291. In that case there was no need to determine whether in cases governed by the **Commonwealth and State Evidence Acts 1995** the **Daubert** considerations were excluded by the express provisions of s 79 or otherwise made them irrelevant. The decision in **HG** turned on the language of s 79 of the **Evidence Act (NSW)**. The position at common law in respect of the **Daubert** approach was not addressed nor had to be in **HG**. In **HG** there was no dispute that the particular area of expert opinion psychology was a field of “specialised knowledge” within the meaning of s 79. Section 79 of the **Evidence Act 1995 (NSW)** provides that

“If a person has specialised knowledge based on the person’s training study or experience, the opinion rules does not apply to evidence of an opinion that is wholly or substantially based on that knowledge”.

Under the **Evidence Act (NSW)** putting aside relevance expert evidence is governed by Part 3.3 of the **Evidence Act**. The opinion rule is set out in s 76 with three exceptions including that as found in s 79. What s 79 does further illustrate is that an experts opinion going outside the expert’s field of “specialised knowledge”, or not otherwise wholly or substantially based upon it, is not only inadmissible under that section, but that there are or may be dangers in admitting such: see Gleeson CJ at 287-288. It would seem to me whether an opinion comes within an expert’s field of expertise of “specialised knowledge” will be a live debatable issue in many cases still to be decided in the future.

I would observe in passing that the Australian Law Reform Commission in its background (1999) Working Paper 6 “Experts” supra (at 13) noted that in its consultations it had not heard that there were significant problems caused by the admission of expert evidence from novel scientific or technical fields or disputes over admissibility. Referring to the **AJJA Empirical Study** it said it did not reveal majority support for new exclusionary criteria based on the reliability of expert evidence. The Commission thus stated that it did not propose any changes to the legislation on this point. I would note that some of the arguments for and against the application or non application of the **Daubert** rule are found in the **ALRC (Fed) Working Paper** as well as in the recent paper of Sperling J on **Expert Evidence**. I observe that in his paper Sperling J did not support any introduction of a **Daubert** gatekeeper approach as a means of addressing bias in expert witnesses or otherwise. That said the issue is an open one still to be determined by authoritative decision of superior courts.

As the **ALRC Paper** the effect of **Daubert** approach has been to shift from external (peer) to internal (judicial) examination of science: **ALRC Working Paper of Experts** in January 1999.

Commentary: The Professional Negligence List in the Common Law Division of the Supreme Court

JUSTICE A. R. ABADEE RFD

Commentary

INTRODUCTION

In a statement made at the end of October 1998 the Chief Justice announced that the Supreme Court of New South Wales would establish in its Common Law Division the establishment of a Professional Negligence List (Medical and Legal) ("The List"). The List has been deliberately confined to particular classes of professional negligence action. It reflects a new approach to dealing with civil litigation involving professional negligence actions of the type to be dealt with in the List.

The List will be established as and from 1 April 1999 within the Common Law Division to be administered by a Professional Negligence List Judge, namely myself. In fact, I will be assisted by Justice Sperling. Indeed, I am indebted to Justice Sperling for reading this paper before its printing.

It is not intended that the administration or management of the List will be by other judges of the Common Law Division of the Court. The special list involves proceedings or claims for damages indemnity or contribution based on an assertion of professional negligence against a medical practitioner an allied health professional (eg dentist, chemist, physiotherapist) a hospital, doctor, solicitor or barrister. Proceedings in the Equity Division or entered in the Construction List will not be entered in the Professional Negligence List. The List is in respect of actions instituted in the Common Law Division answering a particular description. The amendments to the Rules provide a mechanism for entry and removal from the List and for identifying court documents as relating to proceedings in the Court. The List has the support of many professional associations and practitioners. Their views have been taken into account both in relation to the establishment of the List and in relation to the new Rules and Practice Note. The legal profession having been consulted, one would expect that compliance with the substance and spirit of the new Rules and Practice Note will be readily forthcoming.

In fact it is appropriate for me to state that the establishment of the list, and the Rules and Practice Note in respect of it also reflects months of negotiations with what I would describe as interested parties including professional bodies. The Rule and Practice Note also reflect new, and in some cases radical concepts and approaches. Since there has been professional input, their implementation should not prove difficult. Indeed, the Rules and Practice Note were developed, not only after consultation with those interested persons, but also after study of both Australian and United Kingdom practices.

The establishment of the List should come as no surprise. There is a system in place in Victoria particularly in the County Court in respect of medical negligence cases. In the United Kingdom a new system is to come into place dealing with medical negligence litigation. There is to be a radical new civil procedure system for the courts generally. Some of the arguments for such a system in the United Kingdom bear a similarity to some of the arguments advanced in support of the establishment of the new List in the Common Law Division of the Supreme Court. In his "**Access to Justice**" report Lord Woolf felt that civil justice system was excessively adversarial slow, complex and expensive especially in relation to litigation over alleged medical negligence. Similar points can be made in respect of the New South Wales system. For those interested in some of the reasons for the establishment of the list, (and for the contents of the Rule and Practice Note) it is appropriate if I refer to a paper delivered by me to the United Medical Protection meeting on Saturday, 31 October 1998 entitled "**Reflection on the current Judicial System - The Dawning of a New Era for Trial of Professional Negligence Cases in the Supreme Court of New South Wales**". As to the arguments for a specialised medical negligence list in the United Kingdom I would draw attention to Lord Woolf's Samuel Gee Lecture delivered at the Royal College for Physicians in May 1997: see "**Medics, Lawyers and the Courts**" (1997) 16 Civil Justice Quarterly 302-317. Thus in the United Kingdom the idea of a pro active judiciary from an early stage taking charge of litigation and directing and monitoring its conduct has been acknowledged and accepted.

The List is aimed at reducing the cost and delay associated with the bringing or prosecuting of certain classes of professional negligence actions involving the medical professionals (and allied health professions and legal professions (both solicitors and barristers) and producing better management of such cases. The special Professional Negligence List judge will take steps to assist in bringing the action to early resolution or by trial. A further aim will be to create an atmosphere conducive to early resolution of disputes by the parties. It is hoped that the new list will weed out hopeless cases, confine parties to real issues and control expense and will assist in resolution of cases by agreement, discussion, negotiations and mediation. Special rules relating to experts, their expected roles have been introduced. The List is designed not only to reduce delay and expense but also to ensure proceedings are fully prepared for hearing. It is intended, and expected that the strengths and weaknesses of the parties' respective cases will be revealed earlier by the implementation of the Rules and Practice Note. Whilst the Court presently does not yet have a power to order compulsory mediations, the real importance and significance of the role of mediation in resolving matters in dispute is clearly recognised and emphasised. I will return to discuss the matter of mediation in due course.

It is appropriate for me to here state that the establishment of the new List, with the support of the profession, carries with it an opportunity to implement some new ideas including court control and case management from the time of institution of proceedings in the List to the time of trial. At the present time the Supreme Court of New South Wales Common Law Division does not control common law proceedings from the time of their institution. Cases in the List are to be subject to their own Rules, Practice Note and procedure and not to general case management procedures of the Court. This Practice Note 104 will apply to the proceedings entered or to be entered in the List and Practice Note 88 shall not apply to proceedings entered in the List.

Let there be no doubt plaintiffs or cross-claimants will not be able to avoid the appropriate proceedings from being commenced in the List (or if not) being placed in the List: see the definitions of professional negligence claim: Part 14C rules 1 and 2. The Rule applies to actions commenced in New South Wales in any Supreme Court Registry within the State. Parties should understand that if proceedings should be in the List that is where they will be. Avoidance and circumvention of the List will not be tolerated. Next, there will be scope for cost and other sanctions in respect of the enforcement and implementation of the Rule and Practice Note. The Court's power to control litigation, indeed if necessary to punish for non compliance will be enforced.

Next, it is appropriate if I here make several other general introductory comments. It is contemplated that after the List is established that a programme of dates for dealing with matters will be worked out in advance and that matters falling within the list will be dealt with on dates in accordance with that programme, either by me or by Justice Sperling. It should be made clear that if a question arises as to why a particular matter should not properly be listed before Justice Sperling or myself then as soon possible, advice in advance should be given to my Associate. There may be very good and valid reasons (eg a relative or friend may be a party, or closely associated or involved) as to why a particular matter should not be listed before Justice Sperling or myself. Any difficulty will be readily addressed and arrangements made between Justice Sperling and myself to overcome any problem.

As I have earlier mentioned the list will be run by me assisted by Justice Sperling. It is not intended other judges will ordinarily be involved in the administration of the list or in respect of proceedings within it. It is hoped that this approach will assist in establishing confidence in the List, and lead to consistency in respect of decisions made in relation to it. Having specialist judges running the List will have benefits. That said it does not necessarily follow that cases falling within the List will ultimately be heard by Justice Sperling or myself or that on a hearing either Justice Sperling or myself will be precluded from hearing any case. Nevertheless, there may be instances where he or I might be. Cases when fixed may be heard by any judge in the Common Law Division. Cases and proceedings within the List will not be given any special priority in terms of being fixed for hearing, over other cases waiting to be tried within the Common Law Division. Nor ordinarily should they be. Thus when a matter in the list is ready for trial, proceedings will be entered in the Holding List with no priority over other proceedings unless an order for expedition is made: Practice Note paragraph 15.

Commentary

Against the background of the above let me now make some comments in relation to some of the Rules and Practice Note. A number of points can be made.

First the definition of professional negligence in the Rules. This is defined by reference to a breach of a duty of care or of a contractual obligation in certain classes of work. The intent is to pick up actions of the type described, whether framed in contract or tort. In **Johnson v Perez** (1988) 166 CLR 351 (an

action in negligence against a solicitor) there was no issue as to whether the liability of a solicitor arose in contract or tort; it was immaterial whether the problem was one of contract or tort. That said, the majority of the High Court observed (at 363) that "the trend of modern authority is to apply the common law of negligence to professional relationships".

Nevertheless, actions may still be brought against "professionals" both in contract and tort where the claims are brought alternatively in the tort of negligence and for breach of contract cf: **Chappell v Hart** (1998) 72 ALJR. The List will not be avoided by framing a cause of action in contract rather than tort.

Definitions

The definition of "professional negligence claim" is not confined to a claim made by a statement of claim. The definition of claim has been deliberately extended to embrace a cross-claim which makes an assertion of professional negligence as defined against a professional who falls within a class defined in "professional negligence".

Application of Part 14C

To avoid any disputes it is made clear that Part 14C Divisional does not apply to certain types of proceedings, that is proceedings commenced in the Equity Division or entered in the Construction List: Part 14C is subject to Part 14A ("Construction List"). Part 14C rule 2; see also Part 14C rule 4(2). Thus, under the latter rule, proceedings in the Professional Negligence List that are entered in the Construction List (usually at the option of the parties) will automatically be removed from the Professional Negligence List, without further order: Part 14C rule 4(2). The Practice Note would in effect cease to apply of its own force in the circumstances postulated

Entry in List

It is appropriate if I make a particular observation about Part 14C rule 3 relating to entry into the List. The rule postulates that proceedings of the type described will be commenced in the List. The situation of avoidance or attempted avoidance is addressed. Equally the rule permits the Court of its own motion or upon an application by a party to enter proceedings in the list in the three different situations: see rule 3(3)(a); 3(b); 3(c). Rule 3(3)(a) addresses a non compliance situation with rule 3 (1). Rule 3(b) is significant. The rule contemplates that actions involving a defined professional negligence claim already instituted before 1 April 1999 may at the Court's discretion be entered in the list. That rule also contemplates a case by case approach to entry in the List in respect of proceedings already on foot in the Court. Rule 3(3)(c) postulates entry of proceedings, for example of proceedings answering a particular description that have been transferred to the Court under s 145 of the **District Court Act**. Such is but an example.

Next, a power given to Registrars to enter proceedings in the List. It is contemplated that a special Registrar will be involved with the List, that person being Registrar Irwin. This appointment will assist in ensuring consistency of approach in dealing with matters in the List.

Removal from List

The Court has a power to remove a matter from the List. This is conferred by rule 5(1). I have already mentioned the matter of proceedings in the Construction List.

In respect of notice of entry in or removal from the List, there is an identification of those parties to whom notice shall be given. What is important is that all parties receive the appropriate notice. No party should be or remain unaware about a relevant entry or removal.

Service of experts' reports

In respect of service of experts' reports under rule 2 it is appropriate if I make some detailed observations.

Rule 6 is new and innovative and reflects in some ways a new cultural change. I make a number of observations about this new and somewhat novel rule. At present Supreme Court actions are commenced without there being filed and served at the same time expert reports (on liability and/or damages).

It was considered by the Court, that particularly in the cases of professional negligence claims (other than against barristers and solicitors), that the filing and serving of an expert's report or experts' reports at the time of institution of proceedings (or at an early stage in the proceedings) and incorporating matters referred to in rule 6(1) would be both highly desirable and of considerable value. A distinction has been made between the filing and serving of reports in professional negligence

cases other than those against solicitors and barristers where reports may be ordered to be served under rule 6(3), because it was thought that in the latter cases, many of the legal professional negligence cases arise out of factual disputes and not from disputes strictly involving different expert opinions. That said even in respect of legal professional negligence cases such reports may be ordered: rule 6(3). It was also considered that the service of such reports would assist in the prompt addressing of issues raised in the proceedings, assist in encouraging early resolution of actions whether on liability or damages, assist in raising estimates by the parties and even provide a basis for early mediation. Again it was felt that the rule will facilitate the reduction of delay and in the assessing of a merits claim. Finally, the rule will also address the matter of precipitate commencement of proceedings and the matter of whether proceedings that should have been commenced at all. What should not be overlooked is that service of the report(s) would also provide some prima facie support for an action brought and also assist in showing it is a bona fide one. The rule goes further than in the United Kingdom see eg **Order 18, rule 12** and in the District Court of New South Wales see for eg **District Court Rules** Part 9 rule 27(2)(c).

The next point to be made in respect of this rule is that a plaintiff or cross-claimant cannot expect to circumvent it by commencing actions without the filing and serving of the required reports. The sanction for non compliance with rules 6(1)(2) and (3) is to be found in rule 6(4). Litigants should be under no illusions that rule 6(4) will be vigorously enforced against those who fail to comply with the rule and its intent. The proviso "unless the Court otherwise orders" in rule 6(1) recognises that there may, in a limited class of case, be some difficulties in filing with the statement of claim or cross-claim and the experts report(s) falling within rule 6(1). The proviso will address problems including a need to commence proceedings without reports because of, for example, a limitation problems. It provides an accommodation, and will address difficulties if any, that may arise in special cases from an inability to promptly serve expert reports of the type described. Rule 6(4) allows 28 days in which to file and serve a report(s) in proceedings which are not instituted under Part 14C, such as proceedings previously commenced and proceedings transferred to the List. Next, whilst I am on the subject of rule 6(2), it is important to notice that the serving of the report or reports is not limited to service upon the party against whom the claim is made but upon all other parties to the proceedings.

In order to meet the situation where for example a doctor, hospital or health carer is reluctant to produce to a plaintiff or his/her solicitor the plaintiff's records which in fact may be required in order to enable the plaintiff's solicitor to comply with Part 14C rule 6, or otherwise, I would draw attention to the new Professional Negligence Practice Note 104 paragraph 9. It provides that indemnity costs may be awarded in respect of work necessitated by an unreasonable failure to provide access to or copies of medical or hospital records "before or after commencement of proceedings". I emphasise that I see no reason as to why such an order cannot be made at any time. It is not to be assumed that the making of a relevant costs order will be dependent upon the result in the proceedings, or will otherwise automatically follow the event! The importance of the notation and its spirit should be recognised. Again in connection with this matter I would mention Practice Note 104 paragraph 10(f) conferring upon the Court a power at a conference hearing to order the provision of documents including medical hospital or legal records. The unreasonable withholding of relevant records will in the result perhaps prove to be somewhat pointless, and potentially very costly to the defaulting party, even if that party ultimately succeeds in the suit.

Validity for Service

This is a significant rule change specifically relating to cases in the Professional Negligence List. The new rule provides for a specific special period of service for the purposes of the List. The period for service of an originating process containing a professional negligence claim is 4 months "unless the Court otherwise orders". This new rule of specific application may be read with **Supreme Court Rules** Part 2 rule 3 dealing with extension and abridgment.

As part of the background to the establishment of the List the matter of having a special time limited for service was explored. It is not necessary to revisit what were considered to be good and valid reasons for a special rule for service in relation to actions to be commenced in the List. The fact is that there were and are. So much is accepted. Hence the rule. It is a rule which encourages prompt service of originating process for proceedings commenced in the List on a defendant or defendants as the case may be. In circumstances where service cannot be effected the Court has discretionary powers to excuse by virtue of the words in rule 7 "unless the Court otherwise orders". Nothing as to what I have said should be taken as suggesting that strict compliance with the rule its spirit and intent, will not readily be excused. Nor is it not necessary to more fully spell out when the Court's discretionary power to extend will be exercised. That said, an indication of considerations relevant to an extension for service is to be found in Practice Note 104 paragraph 17. An order for extension will not ordinarily be made unless all reasonable efforts have been made to serve the statement of claim.

Thus, the rule will give the Court power to deal with situations where, for example, despite reasonable efforts to serve the statement of claim it may not be possible to serve the statement of claim within the prescribed period. All this said, the reduction of one year to 4 months is intended to minimise the length of time for service of the proceedings in professional negligence litigation and encourage prompt service.

I now turn to discuss the Practice Note.

The Practice Note 104

Procedures will be adopted in respect of the List designed to reduce delay and expense and to ensure proceedings are fully prepared for hearing. Practice Note 104 addresses many of these procedures and/or their mode and manner of implementation.

The Practice Note applies to proceedings commenced or entered or to be entered into the List on or after 1 April 1999. It provides that Practice Note 88 (DCM) shall not apply to proceedings entered into the List.

Removal from the List

Paragraph 5 deals with the effect of the Practice Note in relation to removal from the List. There is nothing special I wish to say about this Practice Note paragraph.

Conference Hearings

Proceedings will be managed by conference hearings. The first conference being approximately 3 months after proceedings are entered in the List (not from time of service of such). Paragraph 6 dealing with appointment is important. It deals with proceedings commenced in the List or which are the subject of an order for entry: Part 14C rule 3. It implements inter alia court control of the proceedings from the time of commencement of proceedings even if the process still remains to be served: see Part 14C rule 7 ("service within 4 months"). The conference date will be given at time of filing the proceedings. The matter will come before the Professional Negligence List Judge about 3 months later at the appointed time. If service has not been effected at the time of the conference, or service has taken place just before the time and date of appointed conference such matter can either be dealt with at the conference, or for eg a fresh conference date can be given. The simple point is that court monitoring and control will be implemented from the time of filing of proceedings and problems including that a service addressed at an early stage.

Despite Part 14C rule 7 (dealing with validity of service) paragraph 7 of the Practice Note addresses and contemplates the need for prompt service of the statement of claim. It is intended that such should be served promptly. This should be clearly understood.

Paragraph 8 of the Practice Note addresses the need for action prior to the first conference hearing. It speaks for itself. It addresses matters that ought to have been done and discussed in the event of the statement of claim being served promptly, (as the Court would ordinarily expect). The paragraph should not be treated as all inclusive of matters that may be discussed at the first conference.

Practitioners in what I call medical professional negligence areas (other than legal professional negligence) should particularly take note of paragraph 9. I have already made some remarks about this matter. There is no harm in again emphasising the earlier remarks. The delay or unreasonable failure to provide access to medical or hospital records before or after commencement of action (irrespective of the result of the proceedings) may prove to be costly to defendants. The message is to be forthcoming co-operative and not to unreasonably withhold documents. In reality the documents sooner or later will be produced: see also Practice Note 104 paragraph 10(f) relating to the power of the Court to order the provision of documents at a conference hearing.

Paragraph 10 concerns action at conference hearings. The purpose of paragraph 10 is also to implement the philosophy, or policy, of reducing delay and expense, to assist in achieving a just quick, cheap and early disposal of the proceedings and ensuring that proceedings are fully prepared for hearing at the earliest possible date. Paragraphs 10(i) and (j) are to be particularly noted. In some cases it may be thought appropriate that there be an early hearing on the issue of liability or for the preservation of evidence in cases to be heard in the future. Such orders may in some cases save time and costs. A disposal of the issue of liability may lead to early resolution of the outstanding damages issue. In some cases it may be necessary for the issue of damages to be deferred for the future, eg in cases of infancy or cases involving plaintiffs with very serious or catastrophic injuries which have either not stabilised, or where the consequences are still to be determined before a hearing. An early

hearing on liability may, in some cases enable the parties to know where they stand on liability, indeed, whether there will be a case for damages. Further such may enable cases (particularly in the medical field) to be more readily judged by contemporary "standards", practices and knowledge existing at the time of the alleged wrong and not by current standards of reasonable care. Because professional standards, practices and knowledge, particularly in areas of medicine are, or may be of a changing nature, there is a particular need to ensure that professionals are judged by reference to knowledge at the time of the subject of the cause of action giving rise to institution of proceedings and not retrospective knowledge practices or standards, for example, on foot at the time of a delayed hearing due to infancy of the plaintiff or due to delay because of the suffering of unstabilised serious injuries. Long delays between the date of alleged negligence and the hearing of an action may cause detriment to both plaintiffs and defendants: concerning state of knowledge and professional practices or standards at the time of the alleged wrong see eg **Albrighton v RPAH** (1980) 2 NSWLR 542 particularly at 563. The scope for applying "the retrospect" especially looms large in professional negligence cases. "Hindsight" after the event, in theory at least should form no part of what was reasonable care or skill at the relevant time. The word "reasonable" is an important word: see **Maloney v Commissioner for Railways** (1978) 52 ALJR 292. Further, there may be a need for an expedited hearing or for preservation of evidence, eg in cases where there may be legitimate delay in prosecuting an action brought. There is a further risk that an important witness or even party may die before trial, thus creating problems in eg in defending a proceeding: see cf **Ellis v Wallsend Hospital** (1989) 17 NSWLR 553. Further, evidence may be lost or not preserved particularly in cases involving long delays (actions by infants or seriously injured plaintiffs) who require a lengthy period of stabilisation or because an essential litigant or witness may die or become unavailable in such cases.

Again in respect of paragraph 10 of the Practice Note the Court will not idly make orders or necessarily general orders relating to particulars, filing of documents and administration of interrogatories. A demonstrated need will be required. The approach hopefully will be reflected in cost savings and in reducing unnecessary delay. The system of case management and court control of proceedings will hopefully weed out hopeless cases sooner rather than later, ensure discovery and interrogatories are controlled, confine parties to the real issues and control expense by limited hearings or mediation. A robust "no nonsense" approach by the Court will perhaps have real merit in many instant individual cases.

Representation

I now turn to paragraph 12 dealing with representation. The legal profession will have to work hard at all stages of the case. The Court will not accept, indeed tolerate "messengers" or inadequate representation being sent. The requirement of representation of the type discussed will be rigidly enforced. Attempts to avoid the intent of the paragraph will not be tolerated or accepted. The Court will enforce the requirement and the spirit behind it. Let there be no misunderstandings. Practitioners should be under no illusions about what I have said, or as to the approach the Court will take in relation to the matter of representation. There must be representation by those with both knowledge and authority! Proper and adequate representation at conferences will also facilitate face to face exchanges of views in a court environment atmosphere. I have always felt that there are many advantages in having the appropriate legal representative meeting in such an atmosphere in terms of assisting in a full frank and free exchange of views.

Mediation

It is intended that mediation will play a significant part in the List. Although the Court (at the moment) has no specific power to order a mediation under ss 110 H and 110K of the **Supreme Court Act** it is intended that there should be a pro-active role by the Court in encouraging mediations. This view reflects part of the philosophy behind the establishment of the List including the desire to reduce delay and expense of proceedings, and for the early encouragement and resolution of the disputes.

Whilst s 110O of the **Supreme Court Act** permits the Chief Justice to compile a list of mediators for the purpose of Part 7B dealing with mediation and neutral evaluation, I consider it is desirable that a specialised list of mediators, with specialised skills in the area of professional negligence should be particularly identified. I believe that confidence of litigants in the List in mediation, will be enhanced by the development of specialist mediators in the medical and legal areas of professional negligence, and the establishment of a specialist list of mediators. Further, for the same or similar reasons I believe that the Court should have a particular involvement in the selection and qualifications of such specialised mediators doing mediations in respect of matters in the List.

Next, I would note in connection with mediations ordered by the Court are the privilege provisions of s

110P of the **Supreme Court Act**. Also in respect of the matter of secrecy and confidentiality the provisions of s 131 of the **Evidence Act** may also have relevance.

Applications in respect of Matters in the List

This matter is addressed in Practice Note 104 paragraph 14. Applications touching upon matters in the List will come before the Professional Negligence List Judge. They will not be dealt with by the Common Law Duty Judge or included in the general applications list for the Division. The paragraph sets forth how applications and urgent applications will and should be made.

Listing for Hearing

Next, I consider the matter of listing for hearing. When ready for trial proceedings will be entered into the Holding List (like other common law actions) with no priority over other proceedings in the Common Law Division - see paragraphs 15 and 16 of the Practice Note. As to applications for expedition: see paragraph 15(2). It is contemplated that if a trial date is vacated that the matter will again become the subject of case management and control by the Professional Negligence List Judge. The reasons for such are obvious.

Expert Witnesses

This is an area involving considerable innovation and thinking. The Practice Note not only reflects some cultural changes in the approaches to the use of experts in litigation but also seeks to emphasise the nature of such important changes.. It is important to understand that the new requirements are not just a mirror image of what occurs in other courts whether in Australia, New South Wales or elsewhere. That said full regard has been had to what has occurred elsewhere including the **Federal Court Practice Direction** dealing with guidelines to expert witnesses

That said, there are a number of specific matters that need to be mentioned.

The Practice Note paragraph 18 and Schedule to it, deals with the engagement of a person (expert witness) with a view and gives expert evidence. This paragraph and Schedule creates and deals with new "obligations" in respect of such witnesses.

Expert Witnesses - The Schedule

In respect of a person engaged by a party with a view to giving expert evidence, the Practice Note requires that a copy of the Schedule be provided to that expert. Further, where prior to the commencement of the Practice Note such an expert has been engaged, again a copy of the Schedule is to be provided to the expert.

Subject to paragraph 4 the Practice Note does not limit the application of other provisions relating to experts in the Rules.

Schedule paragraph 2 emphasises the general duty to the Court owed by an expert. It reflects that part of the Federal Court Practice Directions relating to an expert witness's general duty to the Court. The matter of the experts' duty has been stated in the Practice Note. In the United Kingdom it is reflected in one of the relatively new rules relating to experts (r 32(1)). Service of the Schedule will bring home to experts, that the role of the expert is to assist the court impartially. The reminder is timely and appropriate. Paragraph 2 spells out that. The duty overrides any duty or obligation to the person from whom the expert has received instructions or by whom he is to be paid. In a paper delivered in July 1998 in the United Kingdom headed "**The Judge in the Chair - A Review of the Likely Impact of the Civil Procedure Rules on Medical Negligence Practitioners**", Senior Master Turner of the United Kingdom High Court observed:

"At a meeting of experts last year at Church House, it was astonishing to hear how many of 350 experts believed with great sincerity that they were genuinely entitled to act as 'hired guns' by their paymasters. Those beliefs must be a thing of the past".

If such beliefs are held by some experts in New South Wales the Practice Note is intended to relegate them to the past.

Paragraph 3 of the Schedule spells out what is required in an experts report, and in general terms deals with its form and content to implement a view that an expert's report should reveal matters and reasons behind such. Such reports will assist in facilitating resolution of cases, confining and identifying of issues, reduce hearing times. They will assist the court in resolving conflicting expert opinions. Implementation of paragraph 3 will also assist the Court and the parties in determining what experts may, or ultimately should be accepted at a trial. The benefits are patent, hence the Court will in many instances be disposed to implement the Schedule obligations.

Paragraph 4 of the Schedule imposes a continuing obligation on experts. If the opinion of an expert has changed since an earlier opinion, he/she should notify the engaging party. An obligation (continuing) is then imposed on the party to notify the other party or parties. This paragraph also reflects a policy of non concealment for forensic or other purposes of changing opinions by experts. It reflects a requirement or need for openness and proper disclosure. Non disclosure affects delay, costs, resolution by settlement or finality in the Courts. Disclosure ensures that the parties are aware of relevant changes in opinions so that they may address them and respond to such.

I now turn to make several observations in respect of Practice Note Schedule paragraph 5. It does not in terms follow the Federal Court guidelines although proper regard has been had to them. Nor in terms does it necessarily reflect what is occurring in other courts or in this Court. Like other matters it has been formulated following discussion and consultation with the profession, having regard to what is occurring elsewhere as well as the Court's powers.

Paragraph 5(1) reflects a discretionary power in the Court to give the direction. The words have been carefully selected: The discretionary power is to "direct the parties to request expert witnesses" and not to "request the parties to request the experts". Whether or not a direction will be given, when and under what circumstances will depend upon the facts and issues raised in the case and further, upon a case by case basis. When given, the direction will bind the parties to make the relevant request of the experts. The Court may direct the parties to make the request. When given the directions, the parties cannot refuse to make such a request and will be required to implement the direction in accordance with the intent and spirit of the direction. Paragraphs 5(1)(a), (b) and (c) address the content of the request and provide for what may be requested of them under the direction. It is also expected that not only the "letter" but also the "spirit" of the paragraph generally will be recognised. The paragraph reflects what are believed to be benefits that will flow to the parties, to the experts and ultimately to the Courts. It is not intended that lawyers be present in cases where a direction is given under Schedule 5(1)(9a). Indeed, they should not be present for obvious reasons.

To encourage the experts to respond to the request and to give them a degree of protection, paragraph 5(1)(a) has been included. It is considered that paragraph 5(1)(a) will facilitate a free and frank exchange of views and enhance secrecy and confidentiality of conversations. Paragraph 5 should be read with paragraph 6. Paragraph 6 reflects the Court's expectations when a direction and request is made under paragraphs. The independent judgment of an expert is not to be fettered or controlled by the litigants or their legal representatives in relation to a statement or conference falling within paragraph 5. Indeed, in paragraph 6 it is an appropriate reminder to an expert as to what is expected of him/her, in relation to a conference and/or statement referred to. Further, it informs a direction to the party and/or his/her legal adviser as to what is required of such person or adviser. In this respect an obligation or duty is imposed on the party or solicitor. Breach of such obligation or duty will not be acceptable or tolerated.

Registrar

I have already mentioned that there will be a special Registrar, Mr Irwin who will be the Registrar for the List. Having a specialist Registrar will confer many advantages including consistency of approach in administering the List.