Index to compilation of speeches delivered by the Hon. Justice H D Sperling

Date speech delivered	Description	Page number reference within pdf compilation
3 September 1999	Expert Evidence: The Problem of Bias	Page 2 of 26
24 August 1999	The Supreme Court Professional Negligence List	Page 20 of 26

Print Page | Close Window

Expert Evidence: The Problem of Bias and Other Things

SUPREME COURT OF NEW SOUTH WALES ANNUAL CONFERENCE

TERRIGAL, 3-4 SEPTEMBER 1999

The Hon Justice H. D. Sperling, Supreme Court of NSW

EXPERT EVIDENCE: THE PROBLEM OF BIAS AND OTHER THINGS

I acknowledge the contribution of a previous tipstaff, Ms Rebecca Kang, in the preparation of this paper. I also acknowledge the assistance of Mr Michael Blay, secretary of our Rules Committee.

The paper is limited in scope to civil trials without a jury. Source materials are such as came into my hands by 30 July 1999.

The problem of bias

Judges have been complaining about the lack of objectivity in expert evidence for a long time. The following lament was made by a judge over a hundred years ago:

> "Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them." *See Lord Arbinger v Ashton (1873) 17 LR Eq 358 at 374.*

A survey of Australian judges on the topic of expert evidence was sponsored recently by the Australian Institute of Judicial Administration. The report on the survey by Dr I Freckelton and others was published in July 1999 under the title "Australian Judicial Perspectives on Expert Evidence: An Empirical Study". *I Freckelton, P Reddy, H Selby, Australian Judicial Perspectives on Expert Evidence: An Empirical Study (Australian Institute of Judicial Administration Inc, Carlton, 1999) ("the Freckelton report").*
All judges in Australia, 478 judges, were sent the questionnaire. Judges *without* trial experience were asked not to respond. 51% of those sent the questionnaire, 244 judges, replied. The response rate for judges *with* trial experience was thought by the authors to be closer to the 60% mark. *The Freckelton report at pp.1, 21.*

Judges were asked about bias and partisanship on the part of expert witnesses. *The Freckelton report at p.25 and Appendix B.*
65% said they encountered bias "occasionally" (Q2.2). (Here and following, except where indicated, the percentages are of the 244 judges who responded to the questionnaire.) 26% said they encountered bias "often". 70% said the same expert witnesses appeared regularly before them for the same side (Q 6.7). 85% said they had encountered partisanship in expert witnesses (Q 6.8). Of those, 47% (or 40% of the total respondents) said that was a significant problem for the quality of fact-finding in their court (Q 6.9).

These are significant findings. About 1 in 4 of the judges who responded said they encountered bias often, and about 2 in 5 said that partisanship was a significant problem for the quality of fact-finding.

The authors of the survey invited respondents to make comments. I quote a comment of my own, which is recorded in the report and which is said by the authors to have been typical: *The Freckelton report at p.81.*

> "In the ordinary run of personal injury work and to a lesser extent in other work, the

> expert witnesses are so partisan that their evidence is useless. Cases then have to be decided on probabilities as best one can."

This is what one would expect. In the adversarial system, experts who will support an opinion at one extreme or the other are selected. Apart from any question of dishonesty, the adversarial system is also calculated to bring forward unrepresentative opinions in cases where a range of opinions exists. Over a hundred years ago Lord Jessel said in *Thorn v Worthing Skating Rink Co*: *See Thorn v Worthing Skating Rink Co (1877) 6 Ch D 415 at 415n.*

> "A man may go, and does sometimes, to a half-a-dozen experts. I have known it in cases of valuation within my own experience at the Bar. He takes their honest opinions, he finds three in his favour and three against him; he says to the three in his favour, will you be kind enough to give evidence? And he pays the three against him their fees and leaves them alone; the other side does the same. It may not be three out of six, it may be three out of fifty. I was told in one case, where a person wanted a certain thing done, that they went to sixty-eight people before they found one."

Nothing has changed in that regard over the intervening century, except that litigation lawyers might not be quite so energetic.

Much has been written about the supposed function of expert evidence. A typical statement is to be found in the Freckelton report: *See the Freckelton report at p.15.*

> "(Expert witnesses are) "suppliers of informed opinions on matters beyond the ken of lay finders of fact … Their role is to shed light on areas that would otherwise not be adequately appreciated or understood".

Or see Finkelstein J in *Quick v Stoland*: *Quick v Stoland (1998) 157 ALR 615 at 625.*

> "The function of an expert is to provide the trier of fact, judge or jury, with an inference which the judge or jury, due to the technical nature of the facts, is unable to formulate."

Such statements assume that the expert witness is there to help the court. They do not recognise the practicalities of litigation under the adversarial system. Under that system, all evidence is selective, and it is selected on the basis of what will help the party to win, not on the basis of whether it will help the court to find the facts correctly. Indeed, the reliability of expert evidence is antipathetical to the interests of the litigant except where reliability and interest coincide by accident.

Under the adversarial system, the opposing party is relied upon to disclose the falsity of the other side's evidence by cross-examination or evidence to the opposite effect. That sometimes happens but it may not happen, particularly when the other side's case is just as extravagant in the opposite direction.

The actual role of the expert witness, particularly in major litigation, is that the expert is part of the team. He - it usually is a "he" - contributes to the way the case is framed and indirectly to decisions as to what evidence is to be got in to provide a basis for his opinion. His report is honed in consultation with counsel. Then, when it comes to the trial, he is a front line soldier, carrying his side's argument on the technical issues under the fire of cross-examination.

Natural selection ensures that expert witnesses will serve the interests of their clients in this way. If the expert measures up he will be kept on and he will be used again by the same client, the same solicitors and others. If he does not measure up, he will be dropped from the case or never used again by anyone. He then disappears from the forensic scene.

An appearance of objectivity is a marketable attribute. Cross-examination or contrary evidence may unmask dissemblance or may not. A judge is ill equipped to diagnose bias in an expert witness. It is likely, therefore, that the incidence of bias as assessed by surveyed judges in the Freckelton report is

an under-estimate.

Judges are interested in valid fact-finding. So long as the adversarial system continues unremittingly, however, the interests of litigants in presenting expert evidence that may win the case will prevail over the interests of judges in obtaining objective assistance on technical issues as a basis for valid fact finding.

How then is objective expert assistance to be obtained? The answer has to be: by modification of the adversarial system.

That has happened already to some extent. In civil litigation, expert evidence must be notified in advance by the service of reports. That is now commonplace everywhere. But it represented an important inroad into the adversarial system in its day, trial by ambush being the traditional approach.

What else can be done?

Gatekeeper control

A device designed to curb the worst excesses of biased expert evidence was developed by the Supreme Court of the United States in *Daubert v Merrel Dowe Pharmaceuticals*. *Daubert v Merrel Dowe Pharmaceuticals (1993) 113 S Ct 2786.*
Under that decision, opinion evidence of a technical, specialised kind is not admissible unless it is both relevant and reliable. *Daubert* set out criteria for determining reliability. These require the court to assess the methodology underlying the expert testimony, to determine whether it can or has been tested, whether it has been subjected to peer review, whether it has a known or potential error rate, and whether it has gained general acceptance within the community of relevant experts. The approach is not confined to scientific evidence, but applies to any opinion evidence dealing with technical or other specialised knowledge. *See Kumho Tire Co Ltd v Carmichael 1999 US Lexis 2189.*

The problem of biased expert evidence is much more acute in the United States than here. Most civil suits are tried by jury there and juries are more likely to be duped by “junk science” than judges. The problem in the United States is also fuelled by contingency fees being paid not only to lawyers but also to expert witnesses.

The *Daubert* approach has its limitations and its draw-backs. As developed, *Daubert* has a somewhat narrow focus, the exclusion of theories which have not been validated or widely accepted. It is costly, requiring a preliminary hearing which may involve other expert evidence, called to impugn the evidence under consideration.

One would be slow to introduce the approach here. In my view, it is not warranted in our current legal environment.

Codes of conduct

A recent development has been the promulgation of codes of conduct for expert witnesses. The starting point of this process seems to have been in 1981 with a statement by Lord Wilberforce in *Whitehouse v Jordan*. *Whitehouse v Jordan [1981] All ER 267; [1981] 1 WLR 246.*
When the case was before the Court of Appeal, Lord Denning MR had criticised the way the plaintiff’s expert evidence was prepared. In the House of Lords, Lord Wilberforce said in that regard: *Whitehouse v Jordan [1981] 1 WLR 246 at 256-257.*

> “While some degree of consultation between experts and legal advisers is entirely proper, it is necessary that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form of content by the exigencies of litigation. To the extent that it is not, the evidence is likely to be not only incorrect but self defeating.”

Although directed to the preparation of expert reports, the underlying theme in this statement was that expert evidence should be the objective opinion of the expert, uninfluenced by being retained for one side or the other.

The sanction proposed by Lord Wilberforce for a lack of objectivity was that the expert's evidence is likely to be incorrect and self-defeating if it is not objective. But this is not a sanction. It does not matter to the litigant whether the expert evidence is correct, only whether it is favourable and persuasive. And bias will be self-defeating only if revealed. Litigants do not need Lord Wilberforce to know that expert evidence should have the appearance of objectivity whether it is objective or not. If expert evidence does not have the appearance of objectivity, it is a wasted shot.

In 1987, a duty to be objective was explicitly promulgated by Garland J in *Polivitte Ltd v Commercial Union Assurance*. *Polivitte Ltd v Commercial Union Assurance [1987] 1 Lloyd's Rep 379, 386.*
In 1991, that was filled out by Cazalet J in *Re J* *Re J [1991] FCR 193, 226.*
as being a duty to express only opinions genuinely held and which are not biased; a duty not to mislead by omission; and a duty to consider all the material facts and not to omit to consider material facts which could detract from the concluded opinion. In 1993, a developed code of conduct in 10 paragraphs was then devised by Creswell J in *National Justice Cia Naviera SA v Prudential Assurance Co Ltd (The "Ikarian Reefer*") *National Justice Cia Naviera SA v Prudential Assurance Co Ltd (the "Ikarian Reefer") [1993] 2 Lloyd's Rep 68, 81-82.*
- the "Ten Commandments" for the expert witness. In 1995 and 1997, the code was enthusiastically endorsed by Stuart-Smith LJ on appeal in that case to the Court of Appeal, *National Justice Cia Naviera SA v Prudential Assurance Co Ltd (the "Ikarian Reefer") [1995] 1 Lloyd's Rep 455, 496.*
and by Evans LJ, also in the Court of Appeal, in *Vernon v Bosley (No 1)*. *Vernon v Bosley (No 1) [1997] 1 All ER 577, 601.*

The code in *"The Ikarian Reefer"* contains some practical points, such as that assumptions should be stated by the expert and that any change of opinion should be disclosed. More relevant to the present theme, are the opening words of the code and the first two numbered paragraphs:

> "The duties and responsibilities of expert witnesses in civil cases include the following:
> 1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation. (Credited to *Whitehouse*)
>
> 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise. (Credited to *Polivitte.*)"

(The full text of the *Ikarian Reefer* code appears as Appendix 'A' to this paper.)

In this country, the Federal Court has issued guidelines for expert witnesses. They are incorporated in a practice direction issued by press release (jointly with the Law Council of Australia) on 15 September 1998. The practice direction requires legal practitioners to provide prospective expert witnesses with a copy of the guidelines when the expert is retained for a report or to give evidence. The guidelines include a statement of the expert's duty to the court. The first three guidelines are as follows:

- An expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise.
- An expert witness is not an advocate for a party.
- An expert witness's paramount duty is to the Court and not to the person retaining the expert.

These guidelines assume that the duty promulgated in *The Ikarian Reefer* is good law in Australia.

The guidelines go on to deal with the content of an expert's report, including a requirement that a declaration be included that nothing significant has been withheld, that all instructions and assumptions be disclosed, and that any subsequent change of opinion be disclosed. These too follow the code in *The Ikarian Reefer*.

Lastly, the guidelines state that, if experts are instructed to confer, it would be improper conduct for an expert to be given or to accept instructions not to reach agreement.

(The full text of the Federal Court practice direction appears as Appendix 'B' to this paper.)

In this Court, the practice note which supplements the rules for the Professional Negligence List and which came into operation on 1 April 1999, contains a schedule in similar terms to the Federal Court practice direction. A party engaging an expert witness is required to provide that person with a copy of the schedule. The schedule includes the following paragraph:

> "An expert witness's paramount duty is to assist the court impartially. That duty overrides the expert witness's obligation to the engaging party. An expert witness is not an advocate for a party."

The schedule provides that any change of opinion should be disclosed. It goes on to state that, if experts are requested to confer, it is expected that they will exercise their independent judgment and will not be instructed or requested to withhold or avoid agreement.

(The full text of the schedule to our Professional List practice note appears as Appendix 'C' to this paper.)

There has been some positive response to these developments. The Academy of Experts in England has promulgated a declaration to be incorporated in experts' reports, which includes that the expert witness' "primary duty in written reports and giving evidence is to the court rather than to the party who engaged (the expert)".

Dr Freckelton, in the study to which I have referred, *See the Freckelton report at pp.113-114.* proposes a declaration to be required of expert witnesses recognising "an overriding duty to the court or tribunal, rather than to the (retaining) party". The draft declaration goes further. It requires the expert to be available for discussion with all parties to the litigation.

The courts have been ambitious in promulgating a duty of objectivity in relation to experts' reports. I do not have a problem about courts promulgating a duty of objectivity on the part of experts *as witnesses*. That is to do no more than to require a witness to be honest. But by what mandate do the courts impose a duty on an expert to give an objective report? Unlike lawyers, experts who provide reports for use in litigation are not subject to the supervision of the court in their professional activities.

A second question is by what means a duty of objectivity is to be enforced. One obvious sanction is open criticism of expert witnesses by the court when bias is apparent. A formal and authoritative promulgation of a duty of objectivity would provide a secure foundation for such criticism in appropriate circumstances. As I have said, one cannot always expect bias to be apparent. But the threat would be there. Judges will sometimes make a mistake about an expert witness being biased. That cannot be helped. Judges have to make findings on the credit of witnesses every day. This is just another kind of credibility finding.

Is criticism and the threat of criticism likely to make a difference? I think it is. Once expert witnesses became aware of what was expected of them by the court, they would be motivated to avoid criticism for failing to meet the court's expectations. That would tend to rein in some of the excesses of the present situation. More is, I think, unattainable by this device.

A duty of objectivity in relation to experts' reports should be promulgated for this court, either by rule of court (if there is power, which may be doubtful) or by statute. It should extend to giving evidence for completeness. There is no reason to restrict this to the Professional Negligence List. A practice note could fill out the content of the duty.

Another possible sanction I propose for consideration would be to procure amendment of the various statutes which govern disciplinary proceedings against professionals, such as the *Medical Practitioners Act 1992* (NSW). Breach of a duty of objectivity as an expert witness could be made a species of professional misconduct. That would attract the sanction of disciplinary proceedings. The suggestion is novel. I think it should be explored.

Apart from a code of conduct for expert witnesses with some kind of sanction, there are other ways in which the problem of expert witness bias can be reduced.

Court appointed expert

The idea is not new. Part 39 of our Rules already provides that, in relation to non-jury trials, the court may, on application or of its own motion, appoint an expert to inquire and report, and may give instructions to the expert relating to any inquiry or report. The report is admissible in evidence unless the court otherwise orders, but is not binding on the parties unless they agree to be bound by it. There is a right to cross-examine the court expert. Remuneration is fixed by the court. The parties are jointly and severally liable for the court expert's fee, subject to any order for costs in the proceedings. The parties may adduce expert evidence, notwithstanding that a court expert has been appointed.

There are similar rules in some other courts in Australia (the Federal Court, the Family Court and the Supreme Courts of Victoria, Queensland and Western Australia) and in New Zealand. *See Federal Court Rules O 34; Family Law Rules O 30A; General Rules of Procedure (Vic) O 5; Uniform Civil Procedure Rules (Qld) Pt 6; Rules of the Supreme Court (WA) O 40; High Court Rules (NZ) R 324.*

A reading of the literature would suggest that the appointment of an expert by the court has rarely been done, and reasons have been advanced to explain why this is so.

It has been said *See Re Saxton [1962] 1 WLR 968 per Lord Denning MR at 972; Kian v Mirro Aluminium Co 88 FRD 351 at 356 (Mich 1980); Woolf, Access to Justice (Final report to the Lord Chancellor on the Civil Justice System in England and Wales, HMSO, London, July 1996) at p.186, (Interim report to the Lord Chancellor, HMSO, London, June 1995) at p.142; Australian Law Reform Commission, Experts (Review of the Adversarial System, Background Paper 6, Jan 1999) at pp.47-49; R Chesterman, "Dealing with Expert Witnesses" (1998) 36 Law Society Journal 50; Editorial, "Expert Evidence" (1991) 59 Medico-Legal Journal 67; V Plueckhahn, "Legal Dilemmas in the Use of 'Expert Medical Evidence'" (1982) Australian Journal of Forensic Sciences 158.*
that the appointment by the court of its own expert witness is contrary to the fundamental premise of the adversarial system; that the parties have the right to present their own case and to call witnesses of their own choice to support that case; that a court appointed expert may be unable to deal satisfactorily with a situation where more than one acceptable expert view of the matter in question is held in the professional community; that the court might place undue reliance on the evidence of the court expert, with the result that it will be the expert rather than the judge who decides the case; that, if the parties are permitted to call their own experts in order to reduce that concern, the appointment of a court expert may cause delay and an increase in costs without any countervailing benefit; and that, even if parties are precluded from calling their own experts, they would still have to incur the cost of retaining experts to advise on the likely outcome of the proceedings and to assist in preparation for cross-examination of the court expert, so that the saving in costs might be less than anticipated.

It seems, however, that the appointment of a court expert is not as unusual in this country as the literature would suggest. In the Freckelton study, *See the Freckelton report at pp.101-105 and Appendix B.*
11% of respondents said they had called an expert witness themselves in the previous 5 years, 3% more than 5 times (Q 9.2). But nearly half of respondents said they did not have the power to call an expert witness (Q 9.1), so about 20% of judges who believed they had the power had exercised it in the previous 5 years, with about 5% of those who believed they had the power doing so more than 5 times.

Of those who had appointed an expert, 97% said it had been "helpful" or "very helpful" for the quality of the fact-finding process (Q 9.4). *See the Freckelton report at Appendix B.*

49% of judges thought more use of court appointed experts would be helpful (Q 9.5). *See the Freckelton report at Appendix B.*

On the most conservative analysis of these figures, an average of 16 court expert appointments a year were made by the 116 judges who considered they had the power to do so. That is, on average, an appointment a year by 1 judge in 7 who considered he or she had the power. Consistently with the data, the true incidence of such appointments might easily be 2 or 3 times that.

The day to day practice of the courts seems to answer the negative rhetoric. So does the response by 1 judge in 2 who thought more use of court appointed experts would be helpful.

I asked the members of this Court for a reference to any case where an expert had been appointed by the court. Only one case was identified, a Chelmsford Hospital case tried by Badgery-Parker J,

Tweedale v Herron. Tweedale v Herron (NSW Supreme Court, Common Law Division, Badgery-Parker J, 23 April 1997, No 13212/93, unreported).
It may be that this court is unrepresentative in a disinclination to appoint expert witnesses.

Illustrations are not easy to find. In *Abbey National Mortgages Plc v The Key Surveyors Nationwide Ltd*, Abbey National Mortgages Plc v The Key Surveyors Nationwide Ltd [1996] 1 WLR 1534.
the Court of Appeal (UK) upheld such an order. The rule of court making the appointment possible had been in existence for sixty years. Notwithstanding that, it was said that it had been little used and the order made in this case was described as "novel". The trial judge included in his reasons for the order that the appointment of a court expert was likely to promote settlement and might reduce costs.

It should not be thought that the appointment of a court expert would only be warranted in large cases. In *Newark Pty Ltd v Civil & Civic Pty Ltd*, Neward Pty Ltd v Civil & Civic Pty Ltd (1994) 75 ALR 350.
a decision by Pincus J, a court expert was appointed over the objection of one of the defendants. The applicant was a tiling company in liquidation claiming a sum of $60,000 and general damages. The liquidator had only $70,000 available for payment of costs and creditors which could easily have been swallowed up in pursuing this one claim.

Although there was no certainty that a court expert's report would resolve the matter, Pincus J thought the report would assist the court to resolve the issues if the matter proceeded, and that it might assist towards settlement of the case. He went on to say: Neward Pty Ltd v Civil & Civic Pty Ltd (1994) 75 ALR 350 at 351.

> "Looking at the matter more broadly, the case seems one peculiarly suited to treatment of this sort. The amount in issue is very much less than the expected cost of the litigation and a competent person is available to look into the central questions requiring expert resolution, on behalf of the court. Experience suggests that too often expert witnesses display a degree of partiality, whereas the court-appointed expert may be expected to be indifferent as to the result of the case."

The liquidator and one of the two defendants had agreed on a particular architect and had agreed to the $600 fee he had nominated. The architect was appointed as a court expert to inquire into and report on questions set out in a schedule to the order. The expert was authorised to inquire into and report on any relevant facts. It was further ordered that he go about his inquiry and report in such fashion as seemed to him appropriate, informing himself as he saw fit, including, for example, by making inquiries by telephone. The orders fixed the fee at $600 nominated by the expert. The parties were to be jointly and severally liable for the expert's fee, although it was to be paid in the first instance by the liquidator.

Tweedale, as I have mentioned, was one of the Chelmsford Hospital cases. The order for appointment of experts was made in another case in the series, *Salay v Est. late Harry Bailey*. Salay v Est. late Harry Bailey (NSW Supreme Court, Common Law Division, Badgery-Parker J, 24 February 1995, No 12427/82, unreported).
Fifteen test cases were selected more or less at random. Five court appointed psychiatrists were selected through nomination by the relevant college. These were pared down to three. Each was allocated five of the test cases. The order for selection and appointment of the court experts included the method of selection, the materials to be provided to the expert, medical examination by the expert, the provision to the expert by the plaintiff of other expert reports which the plaintiff had obtained, restriction of communication with the expert, and costs. The material sent to the expert included records relating to medical and personal history, hospital notes and the reports of other medical practitioners.

The expert appointed in *Tweedale* was a psychiatrist practising in Brisbane. His report was admitted into evidence. All documents provided to him for the purpose of the preparation of his report were admitted into evidence irrespective of whether the author of any such document was called to give oral evidence. If either party required, the author of any such document was to attend for cross-examination. In that event, it was incumbent on that party to secure the attendance of the person as a witness. Each party was given leave to cross-examine the court appointed expert, the order of cross-examination being the party most favoured by the expert's conclusions going first.

It was hoped that such an independent report would facilitate settlement or reduce the hearing time of any case that went to trial. *Tweedale* was the first - and I think the only - case in the batch that has gone to trial. The case did not settle. However, Badgery-Parker J said in his judgment: Tweedale v

Herron (NSW Supreme Court, Common Law Division, Badgery-Parker J, 23 April 1997, unreported) at pp.6-7.

> "(T)he engagement of an independent expert who provided a well-considered report and made himself available for cross-examination by counsel for both parties has been of great assistance to me in determining a most difficult case".

In his report on the civil justice system in England and Wales, *See Woolf, Access to Justice (Final report to the Lord Chancellor on the Civil Justice System in England and Wales, HMSO, London, July 1996) ("the Woolf report") at pp.140-142; Woolf, Access to Justice (Interim report to the Lord Chancellor on the Civil Justice System in England and Wales, HMSO, London, June 1995) ("the Woolf interim report") at pp.186-187.*
Lord Woolf recognised the limited value of the court appointing an expert if the parties were also at liberty to call expert evidence of their own. He therefore spoke of a "single expert" rather than of a court appointed expert. While acknowledging that the appointment of single experts may give rise to additional costs, he did not consider this to be a sufficient ground for rejecting their use. He emphasised that a single expert is much more likely to be impartial than an expert called by a party. Any additional expense involved in calling a single expert could therefore be justified by the objective assistance the expert would be able to offer the court. To safeguard the quality and reliability of the single expert's evidence, he proposed that the parties be allowed to cross-examine the expert and to call their own expert witnesses, but only if the scale of the case justified it.

Lord Woolf's recommendations *See the Woolf report, Chapter 13, recommendations 1&2.*
on this topic have now been substantially incorporated in Part 35 of the *Civil Procedure Rules 1999* of the High Court. The rules provide as follows. The court may direct that evidence on an issue is to be given by one expert only. Such a direction would preclude the parties from calling their own expert witnesses. The parties are then to be regarded as that expert's "instructing parties". If the parties are unable to agree on an appropriate expert witness, the court may select the expert, either from a list prepared by the parties, or in a manner that the court directs. (That would accommodate, for example, nomination by a professional association.) The parties are jointly and severally liable for payment of the expert's fees and expenses, unless the court otherwise directs. The Practice Direction annexed to the rules states that, where there are a number of disciplines relevant to the issue on which a single expert is to be appointed, a leading expert in the dominant discipline should be identified as the single expert and should prepare the general part of the report; and that the single expert should be responsible for annexing or incorporating the contents of any relevant reports from experts in other disciplines.

In Australia, there have been a number of moves to follow Lord Woolf's lead and to facilitate the greater use of court appointed experts. Both the Australian Law Reform Commission *Australian Law Reform Commission, Experts (Review of the Adversarial System, Background Paper 6, Jan 1999) ("ALRC BP 6") at pp.45-62 & recommendation 9.*
and the Law Reform Commission of Western Australia *Law Reform Commission of Western Australia, Consultation Paper: Expert Evidence in Civil Proceedings (Review of the Civil and Criminal Justice System, Project 92, December 1998) ("WALRC Consultation Paper") at pp.29-31 & proposal 3.*
have made proposals for the appointment of court experts in terms similar to those proposed by Lord Woolf. They have proposed that parties wishing to rely on expert evidence be required, as a matter of course, to consider the appointment of a single expert. The Australian Law Reform Commission proposed that parties be required to identify in their pleadings whether an expert's opinion is considered relevant to an issue, and to come before the court at the close of pleadings in order for the court to decide whether and how such an expert should be engaged. Both commissions considered that more extensive use of single or court appointed experts would encourage greater objectivity in the presentation of expert evidence and reduce the need for the courts to choose between conflicting, partisan expert views.

Similarly, the Litigation Reform Commission, established to review the rules governing civil procedure in Queensland courts, made a recommendation for greater use of court appointed experts. *See R Scott, "Court-Appointed Experts" (1995) Queensland Law Society Journal 87.*
That approach has now been incorporated in the *Uniform Civil Procedure Rules*. *See Uniform Civil Procedure Rules (Qld) Pt 6 r 425, 426.*
These provide that the court may appoint an expert to inquire into and report back on a specified issue in the litigation. The expert's report is then admissible in evidence but the expert's opinion is not binding on a party unless agreed. The parties have the right to cross-examine a court appointed expert, *See Uniform Civil Procedure Rules (Qld) Pt 6 r 427.*
but may only call their own expert witnesses with the court's leave. *See Uniform Civil Procedure Rules (Qld) Pt 6 r 429.*

I would advocate amendment to Pt 39 of our rules, giving judges the power to limit the expert evidence to that of a single expert, to be selected by the parties or, failing agreement, to be appointed by the court, with the parties being entitled to cross examine the single expert. The method of instructing the expert could be filled out in a practice note, but flexibility should be preserved. I would then advocate selective experimentation in the use of court appointed experts.

Court appointed assessors (court advisers)

This idea is not new either. Historically, assessors have had a significant role in the Admiralty jurisdiction, informing the judge of matters nautical and, in effect, deciding technical issues. For illustrations of such use in Admiralty see *Richardson v Redpath Brown & Co Pty Ltd* *Richardson v Redpath Brown & Co Pty Ltd [1944] AC 62, 70.*
and *The Tovarich*. *The Tovarich [1931] AC 105.*
What is now contemplated for a wider range of cases is, however, a role limited to assisting the judge to understand technical evidence.

There are provisions for the appointment of such assessors in this Court. Part 39 r 7 of our rules provides that the Court may, in any proceedings in the Equity Division, obtain the assistance of an expert to advise on any matter arising in the proceedings, may act upon his opinion, and may make orders for his remuneration.

Then there is Practice Note 100, which relates to the Commercial and Construction Lists. It provides that directions may be given relating to the obtaining of the assistance of an expert to advise on any matter arising in the proceedings.

There is no such rule of court or practice note applicable to the Common Law Division.

In Western Australia, Tasmania and the Northern Territory there is a rule relating to proceedings in chambers which is similar to our Equity Division rule. In New Zealand, there is a similar rule but limited to patent cases. *See Rules of the Supreme Court (WA) O 59 r 6; Rules of the Supreme Court (Tas) O 65 r 15; Supreme Court Rules (NT) R 62.06; High Court Rules (NZ) r 725B-725H*
.

The *Patent Act 1990* (Cth), s217, provides that the Federal Court or the Supreme Court of a state or territory, exercising jurisdiction under that act, may call in the aid of an assessor to assist it.

Two reported New Zealand cases illustrate the use of such assessors or court advisers. Both were patent infringement cases. In each case, the adviser sat with the judge. *Beecham Group Ltd v Bristol Myers Co* *Beecham Group Ltd v Bristol Myers Co (1980) 1 NZLR 185.*
involved complex issues relating to chemistry. Counsel for Bristol Myers objected to the appointment of an adviser on the ground that the adviser could transgress the limits of his proper role, expressing views to the judge which the parties might wish to challenge and have no opportunity of doing so. This was dealt with by Barker J in a judgment setting out the parameters of the adviser's role. *See Beecham v Bristol-Myers [1980] 1 NZLR 185 per Barker J at 190.*
The judgment defined the role of the adviser as being to consider the submissions and assist the judge in chambers to understand them. If the adviser proffered any views of his own, either contrary to any submission or as additional matters for the court to consider, the judge would seek the comments of counsel.

Barker J has commented that the adviser appointed in tht case, a professor of organic chemistry, was extremely helpful. *In a paper given at the 11th Annual Conference of the Intellectual Property Society of Australia and New Zealand on 24 August 1997, Sir Ian Barker QC, retired Puisne Judge of the High Court of New Zealand mentioned two occasions on which a scientific adviser had been appointed in patent infringement cases. He told the judge at the conclusion of the hearing that the judge would probably qualify for a B pass in Stage 2 Organic Chemistry.*
When the case came before the Court of Appeal, the same scientific adviser assisted the court, on this occasion with the consent of both parties. The Court of Appeal acknowledged, with gratitude, the help the expert had given them. *See Beecham Group Ltd v Bristol-Myers Company [1981] 1 NZLR 600.*

In the second case, *Smale v North Sails Ltd*, *Smale v North Sails Ltd (1991) 3 NZLR 19.*
the design and function of sails was in question. Tompkins J appointed a professor of engineering as a scientific adviser. Tompkins J took a more conservative view than Barker J. He considered it

inappropriate to discuss the evidence with the expert in private in any detail. The adviser was asked to comment on issues raised by the judge and his comments were then made available to counsel before closing submissions.

In *Smale* and *Beecham* the scientific adviser checked the draft judgments to ensure that matters of a scientific and technical nature had been correctly described.

For a further reported decision illustrating the successful use of an assessor in a patent infringement case, see *Genentech Inc v Wellcome Foundation Ltd. (1989) 15 IPR 423*

The main benefit in the appointment of assessors of this kind lies in the potential for an assessor to provide clear, independent and unbiased assistance to the judge in understanding and interpreting complex technical evidence, particularly in larger matters involving a high volume of conflicting expert opinion. It is also to be expected that an expert adviser would assist the judge to identify a lack of objectivity in biased expert witnesses.

As in the case of court appointed experts, a reading of the literature would suggest that assessors of this kind are very rarely appointed and that there are strong reasons against doing so. The most commonly expressed concern about the use of assessors is the possibility that the assessor may usurp the role of the judge, without the parties having an opportunity to challenge the assessor's views through cross-examination or even to be made aware of what those views are. *See Adhesives Pty Ltd v Aktieselskabet Dansk Gaeringindustri (1936) 55 CLR 523 per Rich J at 580; The Ship Sun Diamond v The Ship Erawan (1975) 55 DLR (3d) 138 per Collier J at 144; I Freckelton and H Selby, Expert Evidence (Law Book Co, Sydney, 1993-) at p.1-5255; the Woolf report at p.151; the Woolf interim report at p.187; ALRC BP at p.65 forward; WALRC Consultation Paper at pp.30-31.*

The appointment of assessors may, however, be more common than is thought. In the Freckelton study, *See the Freckelton report at pp.105-107 and Appendix B.*
5% (11 judges) had appointed an assessor in the previous 5 years, 1% (3 judges) more than 5 times (Q 9.7). But nearly half the judges who responded to the survey considered they did not have the power to make such an appointment (Q 9.6). So, about 10% of the judges who considered they had the power had exercised that power in the previous five years. Of those who had made such appointments, 77% found it "helpful" or "very helpful". (Q9.8).

I have analysed these figures, as in the case of court appointed experts. On the most conservative analysis, an average of 6 appointments a year were made by the 108 judges who considered they had the power to do so. That is an appointment a year by 1 judge in 18 of those who considered they had the power. Again, consistently with the data, the true incidence of such appointments might easily be 2 or 3 times that.

The Freckelton study further suggests that judges may by in serious need of the assistance of expert advisers in some cases. *See the Freckelton report at pp.29-33 and Appendix B.*
43% of judges said they occasionally encountered expert evidence which they were not able to evaluate adequately because of its complexity, although only 2% said that happened often (Q 2.4). 68% said they occasionally had difficulty evaluating the opinions expressed by one expert as against those expressed by another, and 21% said that happened often (Q 3.7). By contrast, with the relatively small proportion of judges who had appointed assessors, 34% of respondents thought that more use of assessors would be helpful (Q 9.9).

Recommendations for the more extensive use of assessors of this kind were made by Lord Woolf *See the Woolf report at p.151; the Woolf interim report at p.187.*
and by the Australian Law Reform Commission. *See the ALRC BP at pp.63-69 and recommendation 12.*
Both acknowledged the potential for unfairness if an assessor were to usurp the judge's role or expressed his or her views without the opportunity of challenge by either party. They also acknowledged that the use of assessors may be expensive. However, they concluded that there were some cases where greater use of assessors would be beneficial and appropriate, particularly where the issues to be decided were complex.

The Australian Law Reform Commission referred to particular ways of addressing the potential unfairness arising from the use of assessors, such as providing the parties with the opportunity to address the court whenever the assessor expressed a view that was contrary to the position taken by

either side in submissions.

Lord Woolf's recommendation on assessors has since been incorporated in the *Civil Procedure Rules 1999* (UK). Rule 35.15(3) provides that an assessor is to take such part in the proceedings as the court may direct. Rule 35.15 provides (among other things) that if an assessor prepares a report for the court, the court must send a copy of the report to the parties, and the parties may use it at trial.

The Law Reform Commission of Western Australia *See the WALRC Consultation Paper at pp.30-31.* has taken a more conservative approach, recommending that the appointment of expert assessors should be limited to special cases. It has expressed concern about the possibility of unfairness arising from private communications between the judge and the assessor without the parties having an opportunity to respond.

I would advocate extending Pt 3 r 7 to cover the Court of Appeal and the Common Law Division of the court as well as the Equity Division. A rule covering the whole court should, however, be in terms of an "adviser", making the role clear, as is done in Practice note 100 (which relates to the Commercial and the Construction Lists). It could then be left to individual judges to utilise the provision, encouraged, I would suggest, by what appears to be a greater use of expert advisers by judges in this country than might have been thought to be the case.

Consultation between experts

There is a threshold problem about the Court directing experts to confer with a view to finding common ground and narrowing the technical issues. I am not sure that the problem has been sufficiently recognised or recognised at all in some quarters. It relates to procedural fairness.

Expert witnesses are not subject to the jurisdiction of the Court in the way that parties to the proceedings are. At the appropriate time for a directed conference, experts who have given reports will usually not yet have given evidence in the proceedings. They are not yet witnesses at that stage. They might never be witnesses in the proceedings. By giving a direction to confer at that stage, a Court is, in effect, issuing a mandatory injunction, directed to persons who are not parties to the proceedings, who are not before the court in any sense and who have not had the opportunity to be heard.

These difficulties may, however, be met by notice to experts when they are retained. Experts are not amenable to subpoena requiring them to give opinion evidence. They may decline to be retained. When retained, that may be engaged on specified terms. If the terms of engagement include that the expert submits to any direction by the court to confer with other experts and to produce a joint report, it seems to me that the expert consents in advance and waives any entitlement to be heard.

The scheme in the Federal Court may meet these requirements. The practice direction, issued by press release on 15 September 1998, to which I have referred, requires legal practitioners to provide a copy of the guidelines set out in the practice direction to any expert they propose to retain to provide a report and to give evidence. The guidelines include under the heading "Experts' conference" the following:

> "If experts retained by the parties meet at the direction of the Court, it would be improper conduct for an expert to be given or to accept instructions not to reach agreement. If, at a meeting directed by the Court, the experts cannot reach agreement on matters of expert opinion, they should specify reasons for being unable to do so."

That may constitute sufficient notice to the expert that such a direction might be made, and engagement on those terms may then constitute consent to such a direction and waiver of any entitlement to be heard.

Following publication of the guidelines, the rules of the Federal Court were amended, with effect from 7 December 1998, by introducing O 34A "Evidence of expert witnesses". O 34A r 3 applies where the parties call or intend to call expert witnesses about the same or a similar question. The court then has power to give certain directions, of its own motion or at the request of a party, requiring the expert witnesses to confer and to record, for use by the court, matters and issues agreed and not agreed.

There is no similarly explicit rule in this court, only the general general directions rule, Pt 26 r 1. There are, however two relevant practice notes. Practice Note 100, which relates to the Commercial and the Construction Lists, provides in paras 21 and 22, that, where experts' reports have been served, the court may direct that the parties cause the experts (or some of them) to confer with a view to identification and proper understanding of any points of difference and the reasons therefor and a narrowing of such points of difference; and that the court may direct that the parties prepare an agreed statement of the points of agreement and of difference remaining between experts following such a conference, and the reasons therefor.

Whether the experts retained to provide reports are amenable to such a direction by the parties may depend on the terms of their engagement.

The new Practice Note 104, which relates to the Professional Negligence List, is less ambitious. As in the case of the Federal Court practice direction, it contains a schedule to be provided to experts when they are engaged as potential witnesses. The schedule includes a provision that the court may direct the parties to *request* expert witnesses to confer on a "without prejudice" basis, for them to endeavour to agree and for them to make a joint statement in writing to the court specifying matters agreed and matters not agreed, together with the reasons for any such disagreement. The schedule records that it is expected that expert witnesses will exercise their independent judgment at any such experts' conference and will not be instructed or requested to withhold or avoid agreement. There is no provision in the practice note for the court to *direct* the experts to confer and report.

There is precedent elsewhere in Australia. Under the Queensland *Uniform Civil Practice Rules*, r 423 (4), the court may order expert witnesses to confer and to prepare and file a document setting out areas of agreement and disagreement and the reasons for any such disagreement.

There is a similar provision in Tasmania. *See Rules of the Supreme Court (Tas) O 32A r 2.*

Western Australia has gone somewhat further. There is a prescribed Form 80, Expert Evidence Order. The procedure under that order involves the attendance of the solicitors at a meeting between experts, followed, if disagreement persists, by a mediation as between experts, presided over by a mediation registrar, and, finally, a report by the solicitors to the court as to the points of agreement and differences that have been established.

I am informed that, in building and construction arbitrations, a meeting of experts, presided over by the arbitrator, is frequently undertaken. The procedure is apparently so common that it has a name. It is called a "conclave".

Judges who have had expert witnesses confer are very enthusiastic about the approach. It seems that, when the experts have to justify their position to a fellow professional, extreme views tend to be moderated. It is one thing to present a biased opinion to a lay audience such as a court, which is ill equipped to evaluate it. It is another to attempt to do so in discussion with a professional colleague. The approach has the potential to reduce biased expert evidence from the start, if expert witnesses know, before committing themselves to an opinion, that they may have to justify that opinion to a qualified listener.

The advantages of this device are well illustrated by the case of *Capita Financial Group Ltd v Triden Properties Ltd*. *Capita Financial Group Ltd v Triden Properties Ltd (NSW, Supreme Court, Common Law Division, Cole J, 25 January 1993, No 55046/91, unreported).*
The parties were in dispute about the scope of rectification work required under a building contract. The court directed that the experts engaged by the parties meet with a view to isolating technical issues in respect of which there was disagreement, with a view to those matters then being referred out for determination by a referee. The meeting was presided over by the referee who would have been well motivated to ensure that matters of disagreement were clearly defined. The saving in time and costs in that case was said to be enormous.

There was also the opportunity for an expert referee to cut through what may have been the partisan positions taken by expert witnesses retained by either side. The idea of the experts retained by the parties meeting under the supervision of an independent expert is of interest from that perspective.

There is scope for an elemental or for a more thoroughgoing approach to consultation between experts. At the most elemental level, experts may simply be requested or directed to confer. Next, a joint report can be sought, to be drafted by the experts alone or with the assistance of the solicitors, or

the solicitors can report to the court on the result of discussion. Experts can be invited to interrogate each other in writing. There can be consultation, supervised or mediated by the court, by a mediator with general mediation skills or by a mediator with expert qualifications in the field. Lawyers may be excluded if it is thought that this would introduce unnecessary complications.

In any event, the parties should be required, before the experts meet, to identify the issues in the case on which the parties or either of them wish to adduce expert evidence: for example, in a medical negligence case, whether the defendant complied with proper practice; the practice or practices of the profession at the relevant time; the existence, nature and extent of the alleged disabilities; the causation of the alleged disabilities; what treatment is reasonably required; what regime of care and facilities is reasonably required.

The optimum time for a conference between expert witnesses will depend on the case. Where technical issues are apparent early, an early conference may be useful. Where the assumptions to be made by the experts are a significant factor, it could be useful to take the lay evidence first, make findings and then have the experts confer before the expert evidence is taken. I had this planned recently, but the case settled at the conclusion of the lay evidence. I do not know whether that is sometimes done or even commonly done by other judges.

Order 34A of the Federal Court rules make provision for postponing the expert evidence in this way.

The rules of the Federal Court also make provision for the "hot tub" method. This was developed in the Australian Competition Tribunal and was adapted for use in the Federal Court by Lockhardt J: *Re Queensland Independent Wholesalers Ltd*. *Re Queensland Independent Wholesalers Ltd (1995) ATPR 41-438 at 40,925.*
The rules provide for experts to give their evidence on the same occasion, beginning with an oral exposition by each, a comment by each on the opinion of the other (or others), followed by cross-examination and re-examination of the experts, either witness by witness on all issues or, alternatively, topic by topic.

I would advocate a revision of the rules and practice notes of our Court relating to these matters. New rules and practice notes should be formulated which are uniform across the court. They should provide a secure basis for directing experts, who have been retained to provide reports, to confer and to provide a joint report in relation to matters agreed and not agreed. They should provide for the greatest possible flexibility in the timing, order and manner of adducing expert evidence.

I would advocate this as a further means of combating bias in expert witnesses and as a means of enhancing the assistance the court may derive from expert evidence in aid of valid fact-finding.

Referees

The most radical and potentially the most effective way of dealing with the problem of bias in expert witnesses is the referral of technical questions to a referee pursuant to Pt 72 of our rules.

Part 72 gives the court a broad power to refer the whole or part of proceedings to a referee to inquire into and report back on any matter. The referee may inquire into the matter referred out in such manner as he or she thinks fit, subject only to observance of the rules of natural justice. The referee's report may be accepted, varied or rejected by the court.

On appeal in *Triden Properties*, *(1993) 30 NSWLR 403.*
it was held by the Court of Appeal *At 408-9.*
that an order barring legal representatives from appearing on the reference was not of itself a denial of procedural fairness.

Referral to expert medical boards in the Compensation Court of New South Wales is an every day occurrence. Such boards customarily determine the nature and degree of disability. They sometimes determine the existence and extent of incapacity and the causation of incapacity. Lawyers do not appear before such medical boards. The procedure has been going on for decades, to the reasonable satisfaction of all concerned.

Some short instruction by the court to an inexperienced referee concerning the rules of procedural fairness would be a good idea. A trained up panel of referees would be even better.

Apart from the problem of bias in expert witnesses, it is seriously questionable whether courts are the best place to resolve complex technical issues. I refer to findings in the Freckelton study, *See the Freckelton report at pp.29-33 and Appendix B.*
mentioned earlier, that a significant proportion of judges had, at least occasionally, encountered evidence from experts which they considered they were not able to evaluate adequately (Q2.4); and that a significant proportion of judges said they often had difficulty in evaluating the opinions expressed by one expert as against those expressed by another (Q 3.7). In addition to those answers, 29% of judges said the courtroom was not, in their view, a forum in which the reliability of expert theories and techniques is adequately evaluated (Q 6.4). 52% said it is and 19% had no opinion or did not answer the question. So, only 1 in 2 judges was sufficiently enthusiastic to support the courts as a reliable venue for the evaluation of expert theories and techniques, and 1 in 3 judges thought they were not. Many of the judges in the majority qualified their answers. *The Freckelton report at pp. 79-8-.*

Let me illustrate the kind of case where I think referral to an expert referee would be a good idea. Not long ago, I decided a case *See Papadopoulos v NSW Insurance Ministerial Corporation & Ors (NSW, Supreme Court, Common Law Division, Sperling J, 19 April 1996, No 11613/86, unreported).*
where the issue was whether the trauma suffered by a pregnant woman in a motor accident had caused cerebral palsy in her unborn infant or whether the motor accident was too early in the development of the foetus to have caused the particular injury. The child was born with a substantial brain deficit demonstrable on MRI. It was known that a proportion of such deficits could not, in clinical practice, be attributed to any particular cause. The issues included whether the MRI showed a form of scar tissue, called glioma, at what time in foetal development the formation of glioma became possible and whether, having regard to those considerations and the level of confidence with which those questions were answered, the brain deficit was reasonably attributable to the motor car accident or had to be ascribed to an unknown cause. The plaintiff's experts included a French neurologist, who gave evidence by video link, and a Scottish neurologist who was called in Sydney. The defendant's witnesses included an American paediatric radiologist who gave evidence in Sydney. The expert evidence ranged widely over the interpretation of MRI pictures and over the developmental physiology of the foetal brain. There was, to my mind, a serious question as to whether some of the experts were doing their honest best to assist the court or were merely arguing the case for their side.

I was not satisfied that a case of causation had been made out and found for the defendant. The Court of Appeal was of the opposite view and substituted a verdict for the plaintiff. *See Papadopoulos v NSW Insurance Ministerial Corporation & Ors (NSW, Court of Appeal, 30 April 1999, No 40263/96, unreported).*
Opinions about the credibility of some of the expert witnesses differed between the Court of Appeal and myself.

A paediatric neurologist and / or a paediatric radiologist, appointed as an expert referee or together as expert referees, could have dealt with the medical issues in the case in a fraction of the time that it took in court to do so and at a fraction of the cost, utilising the reports of experts submitted by both sides and without the need for cross-examination. The findings of such expert referees, made in that way, would have been more reliable than mine after weeks of examination and cross-examination, and, I venture to suggest with respect, more reliable than the findings of the Court of Appeal.

More particularly for my present theme, in deciding what assistance was to be gained from the opinions of the experts retained by the parties, such expert referees would have been better able to identify and cut through any bias on the part of fellow professionals than a court was capable of doing. *For another case involving complex medical issues and the honesty of at least one expert witness, see X and Y v Pal (1990-1) 23 NSWLR 26 (CA)*

Similar issues considerations arise concerning claims made against obstetricians and hospitals in relation to anoxic brain damage in infants at birth. Often, the issue is whether the damage is due to untoward delay in delivering the infant or to some anterior, often unidentifiable cause in utero. Unfortunately, such occurrences - and the consequential legal proceedings - are not rare.

The referral of cases or of issues to expert referees should be more utilised than is presently the case. In the Building and Construction List, such referrals are commonplace. Yet they are a rarity elsewhere in the Court, if they ever occur. There is an opportunity to explore the use of referees in the Professional Negligence List, but there is scope for this approach in all kinds of cases which involve technical issues outside the experience of judges.

Implementation

My principle recommendations are as follows. They are designed to address the problem of bias in expert witnesses and to make better use of experts in aid of valid fact-finding.

1. That the *Daubert* gatekeeper approach not be implemented.

2. That the Court promulgate a code of conduct for expert witnesses.

3. That consideration be given to procuring amendment to the statutes governing the conduct of various professionals, making breach of a duty of objectivity professional misconduct.

4. That Pt 39 of the Supreme Court Rules be amended, giving judges an express power to limit expert evidence to that of a single expert, selected by the parties or by the Court, with a right of cross-examination.

5. That Pt 3 r 7 be amended, extending to the whole Court the express power to appoint an assessor (ie a judge's expert adviser).

6. That the Rules (and, if necessary, the *Supreme Court Act 1970*) be amended to give express power to the whole Court to direct experts retained by the parties to confer and provide a joint report specifying matters agreed and not agreed with the reasons for disagreement.

7. That more use be made of single and appointed court experts.

8. That more use be made of assessors (ie expert judge's advisers).

9. That more use be made of directions that experts retained by the parties confer and produce a joint report in relation to matters agreed and disagreed, and the reasons for disagreement.

10. That more use be made of the power to refer out technical issues for determination by an expert referee.

Much of this approach would be seriously limited without case management by judges rather than registrars, case management by judges from an early stage in the proceedings, and case management by the judge who is to hear the proceedings. It seems now to be recognised that, for other reasons as well, case management by the trial judge and the early fixing of a firm date for hearing is the way to go. But that is another paper.

-oOo-

APPENDIX A - The "*Ikarian Reefer*" Code

B. **THE DUTIES AND RESPONSIBILITIES OF EXPERT WITNESSES**

The duties and responsibilities of expert witnesses in civil cases include the following:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (*Whitehouse v. Jordan,* [1981] 1 W.L.R. 246 at p. 256, per Lord Wilberforce).

2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise (see *Polivitte Ltd. v. Commercial Union Assurance Co. Plc.,* [1987] 1 Lloyd's Rep. 379 at p. 386 per Mr. Justice Garland and *Re J.* [1990] F.C.R. 193 per Mr. Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.

3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (*Re J* sup.).

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.

5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (*Re J* sup.). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report (*Derby & Co. Ltd. And Others v. Weldon and Others. The Times.* Nov. 9 1990 per Lord Justice Staughton).

6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports (see 15.5 of the Guide to Commercial Court Practice).

APPENDIX B - The Federal Court Practice Direction

PRACTICE DIRECTION

Guidelines for Expert Witnesses in proceedings in the Federal Court of Australia

Practitioners should give a copy of the following guidelines to any expert witness they propose to retain for the purpose of giving a report and giving evidence in a proceeding. The guidelines are not intended to address exhaustively all aspects of an expert's duties.
M.E.J. BLACK
Chief Justice

GUIDELINES

General Duty to the Court [1]
· An expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise.
· An expert witness is not an advocate for a party.
· An expert witness's paramount duty is to the Court and not to the person retaining the expert.

The Form of the Expert Evidence[2]
· An expert's written report must give details of the expert's qualifications, and of the literature or other material used in making the report.
· All assumptions made by the expert should be clearly and fully stated.
· The report should identify who carried out any tests or experiments upon which the expert relied in compiling the report, and give details of the qualifications of the person who carried out any such test or experiment.
· Where several opinions are provided in the report, the expert should summarise them.
· The expert should give reasons for each opinion.
· At the end of the report the expert should declare that "[the expert] *has made all the inquiries which* [the expert] *believes are desirable and appropriate and that no matters of significance which* [the expert] *regards as relevant have, to* [the expert's] *knowledge, been withheld from the Court.*"
· There should be attached to the report, or summarised in it, the following: (i) all instructions (original and supplementary and whether in writing or oral) given to the expert which define the scope of the report; (ii) the facts, matters and assumptions upon which the report proceeds; and (iii) the documents and other materials which the expert has been instructed to consider.
· If, after exchange of reports or at any other stage, an expert witness changes his or her view on a material matter, having read another expert's report or for any other reason, the change of view should be communicated in writing (through legal representatives) without delay to each party to whom the expert witness's report has been provided and, when appropriate, to the Court. [3]

· If an expert's opinion is not fully researched because the expert considers that insufficient data is available, or for any other reason, this must be stated with an indication that the opinion is no more than a provisional one. Where an expert witness who has prepared a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report. [4]
· The expert should make it clear when a particular question or issue falls outside his or her field of expertise.
· Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the opposite party at the same time as the exchange of reports. [5]

Experts' Conference
· If experts retained by the parties meet at the direction of the Court, it would be improper conduct for an expert to be given or to accept instructions not to reach agreement. If, at a meeting directed by the Court, the experts cannot reach agreement on matters of expert opinion, they should specify their reasons for being unable to do so.

footnote #1. See "Access to Justice" Draft Civil Proceedings Rules: The Rt. Hon. Lord Woolf, July 1996 at Pt. 32:1; see also Lord Woolf "Medics, Lawyers and the Courts". [1997] 16 C.J.Q. 302 at 313.
footnote #2. See "Access to Justice" Draft Civil Proceedings Rules: The Rt. Hon. Lord Woolf, July 1996 at Pt. 32.9.
footnote #3. The "*Ikarian Reefer*" [1993] 20 FSR 563 at 565.
footnote #4. The "*Ikarian Reefer*" [1993] 20 FSR 563 at 565.
footnote #5. The "*Ikarian Reefer*" [1993] 20 FSR 563 at 565-566. See also Ormrod "*Scientific Evidence in Court*" [1968] Crim LR 240.

APPENDIX C - Schedule to Supreme Court of NSW Practic Note 104

SCHEDULE

1. In this Schedule a person engaged by a party with a view to giving expert evidence is referred to as an “expert witness”.

2. An expert witness’s paramount duty is to assist the court impartially. That duty overrides the expert witness’s obligation to the engaging party . An expert witness is not an advocate for a party.

3. A report made on or after 1 April 1999 by an expert witness should (in the body of the report or in an annexure):

(a) include the person’s qualifications as an expert;

(b) specify the assumptions on which the opinions in the report are based (a letter of instructions may be annexed);

(c) specify any examinations, tests or other investigations on which he or she has relied; and

(d) specify any literature or other materials utilised in support of the opinions.

4. An expert witness should notify the engaging party of any change in the opinions in a report, and that party should then notify any other party who has been or is subsequently provided with the report accordingly.

5. (1) The court may direct the parties to request expert witnesses to:

(a) confer on a “without prejudice” basis;

(b) endeavour to agree; and

(c) make a joint statement in writing to the Court specifying matters agreed and matters

not agreed together with the reasons for any such disagreement.

6. It is expected that an expert witness will exercise his or her independent, professional judgment in relation to such a conference and statement, and that an expert witness will not be instructed or requested to withhold or avoid agreement.

* * *

Print Page Close Window

The Supreme Court Professional Negligence List

August State Legal Conference '99

Sydney, 24-27 August 1999
The Hon Justice H D Sperling
Supreme Court of New South Wales

The List
The Professional Negligence List is one of several specialist lists in the Supreme Court. Others include the Defamation List, the Commercial List, the Construction List, and the Administrative Law List. Mostly, cases come into these lists as soon as the proceedings are instituted. Preparation of the proceedings for trial is then supervised by the judge in charge of the list or his or her deputy. That is their distinguishing feature. It is the new way.

The Professional Negligence List is a recent addition. It came into operation on 1 April 1999. It has been in full swing only since conference hearings began in July 1999 under the new arrangements.

Mr Justice Abadee is in charge of the List. I am his back up.

The Rules and the Practice Note
The list is governed by Pt 14C of the Supreme Court Rules and Paractice Note No. 104. Together, the rules and the practice note provide a scheme for management of professional negligence cases in the Supreme Court. Copies of Pt 14C and Practice Note 104 appear as appendices to this paper.

The scheme was designed in close consultation with interested parties, including professional organisations, and with recourse to management regimes developed in other jurisdictions.

The List is designed to accommodate professional negligence claims as defined. That includes what may broadly be described as “medical negligence” and “legal negligence” claims. Pt 14C r 1: Professional negligence is defined as meaning breach of a duty of care or of a contractual obligation in the performance of professional work or in the provision of professional services by a medical practitioner, an allied health professional, a hospital, a solicitor or a barrister. Pt 14C r 1: A professional negligence claim includes a claim made by cross-claim. Pt 14C r 2: The List does not take in proceedings in the Equity Division or in the Construction List.

The effect of these provisions is that all proceedings involving a medical negligence claim or a legal negligence claim (as defined) are potentially covered by the professional negligence list, with the exception only of proceedings in the Equity Division or in the Construction List.

There are two ways that proceedings may be entered in the List. The first arises when the proceedings are commenced. Pt 14C r 3(1): A statement of claim or a cross-claim which includes a claim for professional negligence must be endorsed “Professional Negligence List”. Pt 14C r 3(2): The proceedings as a whole are then entered in the List. PN104 para 4: Practice Note 88, which relates to differential case management, does not apply to cases in the Professional Negligence List.

The effect of these provisions is to bring professional negligence proceedings under the supervision of a judge at a much earlier stage than has previously been the case.

Pt 14C r 3(3): As to existing proceedings, the Court may, on application by a party or of its motion, transfer proceedings to the List. That sub-rule is designed to deal with proceedings commenced before the List came into operation, and also with new professional negligence proceedings which have not been instituted in the List as required by the rules. Any attempt to avoid the List will be dealt with under this rule. There has been only one such attempt, so far as I am aware. It was dealt with by an order under r 3(3) and a rap over the knuckles.

A decision has been made to bring into the List all professional negligence proceedings (as defined), whether instituted before or after the commencement of the List on 1 April 1999. A bulk transfer of

some 92 legal negligence cases has been made. A bulk transfer of a large number of medical negligence cases is being processed at the time of drafting this paper.

As at 31 July 1999, 73 medical negligence cases had been entered in the List and 115 legal negligence cases, a total of 188 cases. The number of cases in the List will be substantially increased with the bulk transfer of medical negligence cases being processed.

PN104, para 6: When new proceedings are entered in the List, a first conference hearing is immediately appointed for a date approximately three months hence. An earlier conference hearing is appointed for existing cases which are entered in the List

There is a conference hearings list every fortnight, before the judge in charge of the List, Mr Justice Abadee, or myself. There will be 3 weeks of continuous conference hearings in December of this year to accommodate the large number of existing cases coming into the list.

The Court expects that new matters will be substantially prepared for hearing during the period of three months leading up to the first conference hearing. Pt 14C r 6(1): In medical negligence cases, preparation is given a head start by the requirement that a claim (whether by statement of claim or cross-claim) is to be accompanied by an expert report or reports supporting breach of duty of care or contractual obligation, the nature of extent of damage alleged and the causal relationship between breach and damage. Pt 14C r 6(2): Where a medical negligence claim is transferred to the List such a report must be served within 28 days. Pt 14C r 6(1) (the proviso): The Court may dispense with this requirement. That will be done where proceedings have to be commenced urgently, such as where a limitation period is about to expire.

There is no such automatic requirement for an expert's report in the case of legal negligence cases because they do not always require expert evidence. Pt 14C r 6(3): A report supporting such a claim may be ordered by the Court.

The need for prompt access to or copies of medical and hospital records has been recognised. PN104 para 9: Costs may be awarded in respect of work caused unnecessarily by unreasonable failure to comply with such a request, whether the failure occurs before or after the commencement of proceedings. Unnecessary work might include correspondence, a notice to produce, a subpoena or discovery. So far no such problem has been brought to attention. Perhaps the threat of a sanction in costs has contributed to that.

PN104 para 8: It is expected, in the case of new matters, that by the first conference hearing, that is, approximately three months after the proceedings have been entered in the List, the parties' solicitors will have conferred; filed defences and cross-claims; held medical examinations; narrowed the issues; agreed on any necessary interlocutory orders, directions and arrangements; prepared a draft timetable for any future management of proceedings, and prepared draft short minutes of any orders or directions to be sought at the first conference hearing.

Pt 14C r 7: Originating process containing a claim for professional negligence is valid for service for four months (shorter than for service of process generally); the court can extend the time. That is not an invitation to delay service. PN104 para 7: Process must be served promptly, in order to allow sufficient time for doing what has to be done prior to the first conference hearing.

PN104 para 10: The primary purpose of the regime and of conference hearings in particular is to ensure that the proceedings are disposed of as justly, as quickly and as cheaply as possible. PN104 para 11: Conformably with that objective, each party not appearing in person must be represented by a barrister or a solicitor familiar with the case and sufficiently instructed to deal with appropriate orders and directions.

PN104 para 11: I should add that particulars, discovery and interrogatories will be ordered only if the need is demonstrated with particularity.

One possible outcome of a conference hearing is that the case may be transferred to the District Court. That will be done where the damages likely to be recovered are modest and the case is not unusually complex. That has already occurred at a conference hearing in one or two cases.

Separate trials on liability and causation of damages will be freely ordered in appropriate cases. That will include some infants' claims and cases where a medical condition has not yet stabilised. Early hearings on liability and causation of damages will ordinarily be ordered where the assessment of

damages has to be deferred. Otherwise, witnesses are needlessly lost, documents may be destroyed and evidence about the events becomes increasingly unreliable. Orders of this kind have already been made.

PN104 para 13: Litigants may expect to be urged strongly to submit their case to mediation. It is increasingly recognised that mediation can provide an early resolution to the mutual satisfaction of the parties. At this stage, the Court has no power to order mediation otherwise than by consent. However, there are reports of a success rate for mediation of about 60% in jurisdictions where mediation is used more extensively and where mediation may be ordered over objection. The same success rate seems to be maintained irrespective of whether the parties consent or not. A compulsory mediation power may be provided by legislation in the not too distant future.

A start has been made in persuading litigants to submit their cases to mediation.

Parties may also expect to be directed to request expert witnesses to confer. The procedure is designed to identify the technical issues in the case and to narrow those issues where possible. PN104 para 18: A party retaining an expert witness is required, at the time of engaging an expert to report, to provide the expert with a copy of the schedule to the Practice Note. The schedule is also to be provided to expert witnesses who have been engaged before commencement of the List. It provides that the court may direct the parties to request expert witnesses to confer on a “without prejudice” basis, to endeavour to agree, and then to make a joint statement to the court, specifying matters agreed and matters not agreed with the reasons for disagreement. The schedule further provides that it is expected that an expert witness will exercise his or her independent, professional judgment in that regard, and will not be instructed or requested to withhold or avoid agreement.

A start has also been made in arranging such conferences between expert witnesses. It is too early to report on the results.

Generally speaking, interlocutory applications in relation to professional negligence cases will be heard on conference hearing days. PN104 para 14: Applications may be made orally at a conference hearing, on notice given by notice of motion or on notice given informally by letter to the registrar; urgent applications and applications by consent may be made at any time by arrangement with the Professional Negligence List judge. Applications in relation to professional negligence cases are no longer listed in the Common Law Division applications list.

When a matter is ready for trial, it is entered in the Holding List, but the proceedings retain their character as professional negligence matters and continue to be subject to the Professional Negligence List rules and practice note. Cases are periodically called up from the Holding List to be fixed for hearing. Expedition may be sought for special cause, as in any other case. Professional negligence cases will be allocated to judges in the Division for hearing in the same way as other cases. They will have no priority over other types of proceedings.

The present listing situation is that cases estimated at 7 days or less are coming on for hearing about three months after entry in the Holding List. Cases estimated at 8 days or more are coming on for hearing about 18 months after being entered in the Holding List. The delay in hearing long cases is a matter of concern, and is receiving attention. There is to be a blitz on long matters generally later this year and early next year. With this and other strategies, it is anticipated that the delay in hearing long matters will be progressively reduced over the next 18 months or so, with all proceedings in the Division , short or long, coming on for hearing within 3 months or thereabouts from entry in the Holding List.

In many instances, professional negligence cases in the List are already being entered in the Holding List, ready for trial, much more quickly than has been the situation to date. So the List is already paying its way.

PN104 para 15: The Practice Note provides for a final conference hearing in professional negligence cases 3 months or so before the date for hearing. That is to ensure that the proceedings will still be ready for trial when they come on for hearing. Such a final conference may already be unnecessary in the case of short matters and may become increasingly unnecessary in the case of long matters as the delay in fixing those matters for hearing is reduced.

To date Justice Abadee has been impressed with the positive way the legal profession has responded to the new regime. I share that view. The support which the List has received from the legal profession is very much appreciated.

The Professional Negligence List and the problem of bias in relation to expert evidence
The Professional Negligence List is likely to be a focus for experiment in relation to expert evidence. This is particularly so because of the problem of bias in relation to expert evidence. I would like to give you my personal views on this topic. They are not necessarily the views of any other judge.

There is an unavoidable tension between the objectives of a judge and the objectives of litigants. The judge wants to get it right. The litigants want to win. This means that judges and litigants look at expert evidence differently.

For a judge, the function of the expert witness is to assist the court to make valid findings. But under the adversarial system, the evidence is presented by the litigants, not the judge. And it is selected on the basis of what will help the party to win, not on the basis of whether it will help the court to find the facts correctly. Indeed, the reliability of evidence is antipathetical to the interests of the litigant except where reliability and the interests of the litigant happen to coincide accidentally.

Natural selection ensures that expert witnesses will serve the interests of their clients in this way. Experts who measure up tend to be kept on and are used again by the same client, the same solicitors and others. Experts who do not measure up tend not to be kept on or, if it is too late, tend not to be used again.

These observations relate to expert witnesses who are retained for the case, rather than to professionals - medical or legal - who have played a part in the course of events giving rise to the proceedings, including treating doctors. Such experts may also be asked to provide an opinion for the purpose of the proceedings, as well as giving evidence about things that occurred. It is to be expected that the opinions of such witnesses may be influenced by a personal interest in the outcome of the case. That is human nature.

Under the adversarial system, the opposing party is relied upon to disclose the weaknesses in the other side's evidence by cross-examination or by evidence to the opposite effect. That sometimes happens but it may not happen, particularly when expert opinion evidence on both sides is extravagant.

An appearance of objectivity in the expert witness is a marketable attribute, irrespective of whether the witness is objective or not. Unless the witness is or seems to be objective, the witness is of no use to the litigant. That makes the detection of bias in an expert witness difficult. A judge is ill equipped for this task. Nonetheless, many judges believe that they can sometimes recognise bias in an expert witness when it occurs. A recent survey of Australian judges on the topic of expert evidence, sponsored by the Australian Institute of Judicial Administration, bears this out.

The report on the survey by Dr I Freckelton and others was published in July 1999 under the title "Australian Judicial Perspectives on Expert Evidence: An Empirical Study" (the Freckelton report). All judges in Australia, 478 of them, were sent the questionnaire. Judges *without* trial experience were asked not to respond. 51% of those sent the questionnaire, 244 judges, replied. The response rate for judges *with* trial experience was thought by the authors to be closer to the 60% mark.

Judges were asked about bias and partisanship on the part of expert witnesses. 65% said they encountered bias "occasionally" (Q2.2). (Here and following, except where indicated, the percentages are of the 244 judges who responded to the questionnaire.) 26% said they encountered bias "often" (Q2.2). 70% said the same expert witnesses appeared regularly before them for the same side (Q 6.7). 85% said they had encountered partisanship in expert witnesses (Q 6.8). Of those, 47% (or 40% of the total respondents) said that was a significant problem for the quality of fact-finding in their court (Q 6.9).

These are significant findings. About 1 in 4 of the judges who responded said they encountered bias often, and about 2 in 5 said that partisanship was a significant problem for the quality of fact-finding.

The authors of the survey invited respondents to make comments. I quote a comment which is said by the authors to have been typical:

> *In the ordinary run of personal injury work and to a lesser extent in other work, the expert witnesses are so partisan that their evidence is useless. Cases then have to be decided on probabilities as best one can.*

Recent developments suggest the courts are likely to respond to the problem of bias in the expert witness more actively than they have done in the past.

Codes of conduct
In 1993, a code of conduct for expert witnesses was set out in ten paragraphs by Creswell J in *The "Ikarian Reefer*" [1993] 1 Lloyd's Rep 455, 496 - the "Ten Commandments" for the expert witness. In 1995 and 1997, the code was enthusiastically endorsed on two occasions in the English Court of Appeal. I quote the opening words of the code and the first two numbered paragraphs.

"The duties and responsibilities of expert witnesses in civil cases include the following:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise."

In this country, the Federal Court has issued guidelines for expert witnesses. They are incorporated in a practice direction issued by press release (jointly with the Law Council of Australia) in September 1998. The practice direction requires legal practitioners to provide prospective expert witnesses with a copy of the guidelines when the expert is retained for a report or to give evidence. The guidelines include a statement of the expert's duty to the court. Four of the guidelines are as follows:

· An expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise.
· An expert witness is not an advocate for a party.
· An expert witness's paramount duty is to the Court and not to the person retaining the expert.
· If experts are instructed to confer, it would be improper conduct for an expert to be given or to accept instructions not to reach agreement.

A schedule to the Supreme Court practice note is in similar terms to the Federal Court practice direction. PN 104 para 18: The schedule has effect whenever a person is or has been engaged by a party with a view to giving expert evidence; and a copy of the schedule has to be provided to the expert by the engaging party.

Because of the practicalities of the adversarial system of litigation to which I have referred, promulgation of such codes of conduct for expert witnesses and judicial criticism for non-compliance is unlikely, in my view, to have much effect.

Consultation between experts
I have referred to the Federal Court practice direction and the schedule to the Supreme Court practice note. Under those regimes, expert witnesses are put on notice that the court may look to them to confer in good faith and to provide a joint report specifying matters of agreement and matters of disagreement with the reasons for disagreement.

There is precedent for this approach elsewhere. For example, a meeting of experts, presided over by the arbitrator, is commonplace in building arbitrations. It is called a "conclave".

Judges who have had expert witnesses confer, whether pursuant to a directions power or by informal request, are very enthusiastic about the approach. It seems that, when the experts have to justify their position to a fellow professional, extreme views tend to be moderated. It is one thing to present a biased opinion to a lay audience such as a court, which is ill equipped to evaluate it. It is another thing to do so in discussion with a professional colleague. Once expert witnesses know, before committing themselves to an opinion, that they may have to justify that opinion to a qualified listener, the approach has the potential to reduce biased expert opinions being advanced in reports from the start.

The rules of the Federal Court also make provision for the "hot tub" method. This was developed

in the Australian Competition Tribunal and was adapted for use in the Federal Court by Lockhardt J: *Re Queensland Independent Wholesalers Ltd* (1955) ATPR 41-438, at 40925. The rules provide for experts to give their evidence on the same occasion, beginning with an oral exposition by each, a comment by each on the opinion of the other (or others), followed by cross-examination and re-examination of the experts, either witness by witness on all issues or, alternatively, topic by topic. The approach has obvious attractions but I do not believe it would be practicable or cost effective in the ordinary run of professional negligence litigation.

Court appointed expert

A more direct response to the problem of bias would be for the judges to make use of court appointed experts.

The Supreme Court already has the power to appoint an expert to prepare a report and for the report to be received in evidence, with the parties having a right to cross-examine the appointed expert: Pt 39.

A reading of the literature would suggest that the appointment of an expert by the court has rarely been done, and reasons have been advanced to explain why this is so. It seems, however, that the appointment of a court expert is not as unusual in this country as the literature would suggest. In the Freckelton study, 11% of respondents said they had called an expert witness themselves in the previous 5 years, 3% more than 5 times (Q 9.2). But nearly half of the respondents said they did not have the power to call an expert witness (Q 9.1), so about 20% of judges who believed they had the power to do so had exercised that power in the previous 5 years, with about 5% of those who believed they had the power doing so more than 5 times. Of those who had appointed an expert, 97% said it had been “helpful” or “very helpful” for the quality of the fact-finding process (Q 9.4). 49% of judges thought more use of court appointed experts would be helpful (Q 9.5).

On the most conservative analysis of these figures, an average of 16 court expert appointments a year were made by the 116 judges who considered they had the power to do so. That is, on average, an appointment a year by 1 judge in 7 who considered he or she had the power. Consistently with the data, the true incidence of such appointments might be 2 or 3 times that.

The actual practice of the courts seems to answer the negative rhetoric. So does the response by 1 judge in 2 who thought more use of court appointed experts would be helpful. It would be the fact, however, that it is rare for judges of my own court to appoint an expert.

Some law reform reports have recommended that the courts should have the power to limit the expert evidence to that of a court appointed expert, with the parties not being permitted to call their own experts. That was the recommendation of Lord Woolf in his report on the civil justice system in England and in Wales, “Access to Justice” (1996), which has now been substantially adopted in the *Civil Procedure Rules* (1999) of the English High Court. Similar recommendations have been made by the Australian Law Reform Commission in a background paper, “Experts” (January 1999), and by the Law Reform Commission of Western Australia in a report “Consultation Paper: Expert Evidence in Civil Proceedings” (December 1998). A similar provision recommended by the Litigation Reform Commission of Queensland in the *Uniform Civil Procedure Rules* (Qld) (1999).

Referees

The most radical and potentially the most effective way of dealing with the problem of bias in expert witnesses is the referral of technical questions to an expert referee pursuant to Pt 72 of the Supreme Court Rules.

Part 72 gives the court a broad power to refer the whole or part of proceedings to a referee to inquire into and report back on any matter. The referee may inquire into the matter referred out in such manner as he or she thinks fit, subject only to observance of the rules of natural justice. The referee’s report may be accepted, varied or rejected by the court.

There is a further advantage in such references. Apart from the problem of bias in expert witnesses, it is seriously questionable whether courts are the best place to resolve complex technical issues. I refer to findings in the Freckelton study, that a significant proportion of judges had, at least occasionally, encountered evidence from experts which they considered they were

not able to evaluate adequately (Q2.4); and that a significant proportion of judges said they often had difficulty in evaluating the opinions expressed by one expert as against those expressed by another (Q 3.7). In addition to those answers, 29% of judges said the courtroom was not, in their view, a forum in which the reliability of expert theories and techniques is adequately evaluated (Q 6.4). 52% said it is and 19% had no opinion or did not answer the question. So, only 1 in 2 judges was sufficiently enthusiastic about the present system to support the courts as a reliable venue for the evaluation of expert theories and techniques, and 1 in 3 judges thought they were not. Many of the judges in the majority qualified their answers.

Prophesy

Speaking for myself - and I cannot speak for any other judge or judges - I think it very likely that all of these approaches will come to be utilised or more utilised in response to the problem of bias in expert evidence. And I would not be surprised if the Professional Negligence List in the Supreme Court proves to be the sharp end of the ship.