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### **TWO CONTEMPORARY CHALLENGES: THE ROLE OF DETERRENCE IN SENTENCING AND THE EFFECTIVE USE OF EXPERTS**

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In recent years I have participated in a number of conferences with the judiciary of developing countries in the Asia Pacific region. Many of these communities are relatively poor and lack capital to fund the physical facilities which we accept as necessary for an effective judiciary. Some countries lack a legal tradition which ensures the acceptance by their communities of the role of the courts as the arbiters of disputes. In some there may be tensions between the judiciary and the executive. In many places the development of customary laws must be reconciled with a legal system inherited from colonial times. Maintaining public confidence in the judiciary can be a difficult task.

I recently attended a conference in Tonga where the Chief Justice of Samoa spoke of the development of customary law. As I listened to him speak I was reminded of the early days of equity as the judges struggled to develop principles which would provide a just solution to a problem while ameliorating the perceived harshness of the common law. Every exchange I have with judicial colleagues of the Asia Pacific region reminds me that the law is not static. Society is in constant change. Legal

systems must respond to those changes. The response may be cautious and changes made only when the demand is expressed by many in the community. In some cases the need for change is only apparent when a retrospective assessment confirms that what may have been first thought to be an irritant or inconsequential has become an entrenched problem. Sometimes it is the courts which respond by changing their procedures, adapting and altering the rules by which litigation is conducted. Other times when the problem develops a “political” dimension the legislature intervenes. When this occurs the changes are likely to be abrupt. Parliaments rarely intervene to merely refine systems, a task which can be accomplished by the courts. They are more likely to intervene to impose radical change. These forces can be seen at work in many aspects of the Australian court system.

It is important to appreciate that there are limits to the extent to which the courts can effectively respond to contemporary expectations. On some issues, which include community attitudes to various types of criminal offending, the judges can play a part but others in the community have a significant (and sometimes a more significant) role. There are other issues, including the means by which expert evidence is available to the courts, which can and must be addressed by the judges. If they are not, an informed community will lose confidence in the courts. It is these two issues, deterrence in sentencing and expert evidence, which I shall address this morning.

When sentencing an offender a judge is required to reflect community aspirations. An individual sentence marks out the community’s attitude to particular offences and is accepted as able to influence the behaviour of others who may contemplate

committing similar crimes. Whether sentencing patterns achieve this objective is sometimes debated. It is a significant debate and one which is increasingly informed by analysis of the available statistics about the rate of offending and the sentencing pattern for those offences.

Recent analysis of the number of charges by offence type in NSW indicates that for two thirds of the surveyed crimes the annual rate has fallen or remained stable in the last ten years. Only one third of the crimes surveyed has had an upward trend.

In the period 1998 to 2005 “break and enter” charges decreased by 29% and “vehicle theft” and “robbery” fell by 41% and 20% respectively. However, in the same period incidents of sexual assault increased by 33%.<sup>1</sup> “Driving causing death” charges have risen by 89% in a ten year period.<sup>2</sup> Murder fluctuates but generally shows an increase. Yet the public perception is of increasing crime rates. This may be explained by the rate of violent assault in the community.

Assault accounts for the majority of charges laid in relation to violent crimes nationally with over 170,000 assault charges laid in 2006, compared with 319 homicide and 725 kidnapping charges.<sup>3</sup> The overall trend in relation to assaults has been upward. The Australian Institute of Criminology (“AIC”) has indicated that the national trend in assaults shows an average growth of 5% each year between 1995 and 2006.<sup>4</sup> This is four times the annual growth of the Australian population over the same period. The NSW Bureau of Crime Statistics and Research (“BOSCAR”) has

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<sup>1</sup> Australian 2020 Summit, Strengthening Communities, Supporting Families and Social Inclusion, April 2008 at 21.

<sup>2</sup> Bureau of Crime Statistics and Research (BOSCAR) (see n 8).

<sup>3</sup> BOSCAR (see n 8).

<sup>4</sup> “Australian Crime Facts and Figures 2007”, Australian Institute of Criminology at 25.

commented that there is a significant long-term upward trend for assault and also for sexual assault.<sup>5</sup>

The principles by which judges are required to sentence offenders include a component for deterrence. Deterrence may be general, specific or both. It is accepted that the sentence of a person for a crime, if sufficiently severe, may deter others from committing a similar offence. The underlying assumption is that the community will find out about what has happened in the courtroom. When society was more homogenous and the population much smaller this was likely to occur. Whether this assumption holds true today may be doubted. It is a matter which requires thought by and cooperation between the courts and the media. Deterrence will have little effect if “the message”, as judges often say, is not being received.

When I was young the offence of driving under the influence was still managed by the police observing the behaviour of the driver, his or her physical appearance and the state of their breath. Although the community was distressed when a tragedy occurred, the prevailing culture tolerated drivers who may have taken alcohol but who did not fail the observation test. It cannot be doubted that many people with a significant level of alcohol in their blood were driving every day. Random Breath Testing was introduced in most States in the early 1980's.<sup>6</sup> By this means the community moved to change the culture which permitted intoxicated people to drive. Initially providing an acceptable blood alcohol level of 0.08, it was reduced to 0.05, (and now there are limits of zero, 0.02 and 0.05, depending on what class of licence you hold). The alcohol-related motor accident rate fell significantly. The availability of

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<sup>5</sup> Bureau of Crime Statistics and Research, Bureau Brief, “An Update of Long-term Trends in Property and Violent Crime in New South Wales: 1990-2007”, Issue Paper No: 37, April 2008 at 1.

<sup>6</sup> For example Victoria introduced RBT in 1977 with a relaunch in 1989 and Northern Territory in 1980.

Random Breath Testing which allows for any driver to be stopped and tested underpinned a change in the culture of acceptable behaviour on the roads. Although of course offences still occur, anyone with adolescent children will be aware of the change in culture. The concept of the designated driver in a family group or amongst friends is the mark of a fundamental change in the way the community addresses this issue.

Out of concern that drink driving remained a problem, tougher laws with increased penalties were introduced in NSW in 1998. However, there was no significant decrease in the rate of offences. The increases in penalties included a 19% increase in the average jail term, a 47% increase in the average amount of fine and a 16% increase in the licence disqualification period between the years 1998 to 2004.<sup>7</sup> It would appear that increasing prison terms may not be effective in changing the culture necessary to reduce the level of offending for this type of offence. However, increased rates of random testing probably is.

There has been a significant upward trend in the length of sentences which have been imposed for most crimes over the last decade. Sentencing judges have tended to increase not only the frequency with which people are sentenced to prison but also the length of their sentences.<sup>8</sup> For some crimes the trend toward an increased sentence is significant. The average term of imprisonment for murder in New South Wales has risen by 50% in the last ten years.<sup>9</sup> Sentencing for assault in New South

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<sup>7</sup> Nicholls, S. Tougher penalties for drink-driving have failed: study, Sydney Morning Herald, June 8, 2004.

<sup>8</sup> Bureau of Crime Statistics & Research, NSW Higher Courts and NSW Lower Courts; Average Length of Imprisonment (months) by principal offence 1996 to 2000 and 2002 to 2006 accessed via <http://www.lawlink.nsw.gov.au>, June 2008.

<sup>9</sup> Ibid.

Wales increased by 44% in the lower courts between 1996 and 2006 and sexual assault sentences have risen 22% in the higher courts and 40% in the lower courts in the same period.<sup>10</sup> However, having regard to the increased rate of offending these statistics suggest that deterrence may not be effective in relation to assault and similar offences.

In a paper published in 2006, Weatherburn, Hua and Moffatt suggested that while sentencing is effective as a deterrent with respect to many crimes, it is most effective where the potential criminal has the opportunity to reflect upon whether or not to commit the crime.<sup>11</sup> Where there is a capacity for offenders, before committing a crime, to consider the prospect of being caught and the likelihood of severe punishment, the deterrent effect of possible imprisonment may be present. Although offenders contemplating property crimes may be deterred, the perpetrators of “crimes of passion”, the “hot head”, inebriated or immature are unlikely to reflect on the consequences before getting into a fight.

In recent months there has been considerable discussion about the influence of alcohol and drugs on the level of assault in the community. It is estimated that in any given week around 170,000 12 to 17 year olds are engaged in binge drinking behaviour at harmful levels.<sup>12</sup> The effects of alcohol are well known. It may encourage people to act without inhibition, raising the likelihood of their reacting to

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<sup>10</sup> Bryant, M and Williams, P Alcohol and Other Drug-Related Violence and Non-reporting (October 2000) No 171 *Australian Institute of Criminology* at 1.

<sup>11</sup> Weatherburn, D. Hua, J and Moffatt, S. How much crime does prison stop? The incapacitation effect of prison on burglary. (January 2006), 93 *Crime and Justice Bulletin* at 1.

<sup>12</sup> Prime Minister Kevin Rudd, Media Release, “Australia’s Top Sporting Bodies Support the National Binge Drinking Strategy”, 14 March 2008.

extremes of emotion such as anger or frustration. The persons most likely to become involved in alcohol related violence are young, unemployed males.<sup>13</sup>

Nationally, an average of 41% of non-domestic assaults in 2004 were attributed to alcohol-related circumstances.<sup>14</sup> Such assaults were most likely to occur between 12am and 3am or 3pm and 6pm with most non-domestic assaults occurring between Friday and Sunday.<sup>15</sup> The 1998 National Drug Strategy Household Survey estimated that 4.4 millions persons were victims of alcohol-related verbal abuse, 2.4 million were threatened by alcohol affected persons and almost 1 million were subject to physical assault by an alcohol affected person.<sup>16</sup> Males aged 20-29 years were over-represented as both victims and offenders in alcohol-related violence.<sup>17</sup>

It must be remembered that some incidents which start off as an assault, where the perpetrators intend to hurt but not seriously injure the victim, escalate, resulting in manslaughter or even murder charges. A single punch thrown by a strong and fit young person, often under the influence of drugs or alcohol, can result in the death of the victim. The Supreme Court faces this problem regularly. And it is when sentencing young people for manslaughter offences that the greatest controversy over the length of a sentence can emerge. When a young life is lost through a casual act of violence the sentencing of the young person responsible presents the courts with a significant problem. It may only take one punch. The perpetrator did not intend

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<sup>13</sup> Teece, M and Williams, P. Alcohol-Related Assault: Time and Place (October 2000), 169 *The Australian Institute of Criminology Trends and Issues*.

<sup>14</sup> People J Trends and patterns in domestic assaults (October 2005) 89 *Contemporary Issues in Crime and Justice* at 7.

<sup>15</sup> *Ibid*.

<sup>16</sup> Briscoe, S and Donnelly, N. Temporal and Regional Aspects of Alcohol-Related Violence and Disorder (May 2001), 1 *Alcohol Studies Bulletin*.

<sup>17</sup> Briscoe, S. and Donnelly, N. Assaults on licensed premises in inner-urban areas (October 2001) 2 *Alcohol Studies Bulletin* at 5.

to kill, that would be murder, yet a life has been lost. The impact on the family of the deceased cannot be adequately appreciated by others. The offender may deeply regret their random and irresponsible act and give every indication of being able to mature into a responsible member of the community. The need for punishment and retribution are plain. A prison term will inevitably interrupt the offender's development. It may have the effect of irretrievably damaging their prospect of making a useful contribution to society.

The sentencing process is a blunt but necessary part of the response by society to these problems. To the extent that individual sentences influence community behaviour, including the behaviour of at risk individuals, the courts have a significant responsibility. But, as the increasing rate of assault offences makes plain, sentencing may not be an effective means of influencing prospective behaviour with some types of crime. As with our programs to influence driver behaviour in the interests of road safety, we as a community must continue to address aspects of our culture which encourage or accept a violent response to provocative or frustrating situations. There are significant indications that the community is prepared to address issues relating to alcohol. There is also a need to reflect on our attitudes to and acceptance of casual acts of violence on social, sporting and other occasions. Such behaviour can have tragic consequences rarely foreseen by the persons involved. The statistics are telling us that we have a community problem which the judges alone cannot resolve.

I have previously considered the role of truth, both real and perceived, in the decisions made by judges and juries in the justice system. Although a judge's task is to endeavour to identify the real truth we must accept that the decision will reflect the

judge's perception of the truth. If that perception is significantly removed from the real truth criticism may follow. The criticisms may be justified either because of problems manifest in the quality of the process by which the individual judge has made the decision or because the method which the system requires the judges to utilise is less than ideal. Over many years serious doubts have been expressed about the quality and integrity of some of the expert evidence received in the courtroom. Those criticisms increased in the latter part of the 20<sup>th</sup> century. They have come from judges, litigants and in many cases the experts themselves. The latter commonly express concern about the process by which courts receive expert evidence. In some disciplines concern has risen to pointed criticism resulting in reluctance in some cases and the refusal in others of experts to become involved in assisting the courts in resolving disputes.

In earlier days, when issues requiring the assistance of experts were involved, courts used their own experts, sometimes referred to as assessors, and expert jurors who were independent of the parties. Expert juries were frequently empanelled in matters involving practices or customs of a particular trade. In trade disputes, the use of "juries of men of that trade" was not only known, but was common in the city of London throughout the 14<sup>th</sup> century.<sup>18</sup> For a time under the influence of Lord Mansfield, who was the Lord Chief Justice during the 18<sup>th</sup> century (1756-1788), merchant juries were used for their knowledge and professional experience in mercantile affairs as a "permanent liaison between law and commerce."<sup>19</sup>

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<sup>18</sup> "Expert Witnesses", NSWLRC Report 100 at [2.4].

<sup>19</sup> C Jones, "Expert Witnesses", Clarendon OUP, 1994, at 25-26; NSWLRC Report at [2.5]; T Golan, "Laws of Nature and Laws of Men", Harvard University Press, 2004, at 21.

There is no comprehensive history of court experts. However, there are records as far back as 1299, indicating that physicians and surgeons in London were called to advise the court on the medical value of the flesh of wolves.<sup>20</sup> During the 14<sup>th</sup> century, surgeons were asked by the court to provide an assessment of wounds in medical malpractice cases. In the 17<sup>th</sup> century, cases involving witchcraft utilised the assistance of physicians as court experts who applied their learning in the midst of “misapprehensions over natural phenomena and attributed some of these to Satan’s attempts to mislead the human race.”<sup>21</sup> There are records from the early 18<sup>th</sup> century of court experts assisting in the proper construction to be placed on the wording of business and commercial papers, where a specialised meaning was appropriate.<sup>22</sup>

Court experts and assessors were in reality a form of expert jury. They were free from the restraints of judicial control, could not be cross examined and their advice was often given in private and not required to be disclosed to the parties. Today the New South Wales Land and Environment Court utilises a similar structure in some merit appeals.

By the late 18<sup>th</sup> century and early 19<sup>th</sup> century, the adversary system was maturing and judges and practitioners were asserting its accepted principles with confidence. The judge was confined to the role of umpire and in many areas the expert had been removed from the judge’s right hand. A perception had developed that judges were too dependent upon the advice of assessors or court experts and were not making their own decisions. There were concerns that the court expert or assessor, was no

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<sup>20</sup> T Golan, “Laws of Nature and Laws of Men”, Harvard University Press, 2004, at 20.

<sup>21</sup> C Jones, “Expert Witnesses”, Clarendon OUP, 1994, at 36-37.

<sup>22</sup> Ibid at 36.

longer subsidiary to the judge and the judiciary had lost its primary role as a decision-maker.<sup>23</sup>

These concerns were resolved by the increasing use of expert witnesses called by the parties to the proceedings. Described as “special” witnesses, their evidence was received as an exception to the common law rule forbidding opinion evidence. The expert witness has been described as a “freak in the new adversarial world, an incompatible and inharmonious, yet indispensable and influential figure in the modern adversarial courtroom.”<sup>24</sup>

The industrial revolution brought many changes. Its impact upon the law was significant. Many disputes now involved the consequences of industrial pollution, nuisance and the damage occasioned by accidents from the motor car and machinery of various kinds. The world of patent law developed apace with the creation of new inventions and products. The expert became an essential witness in many cases. And the number of cases increased significantly. Unlike expert juries and assessors, the expert witness did not enjoy independence from a party and did not have an independent role in the decision-making process. Commentators became sceptical of their honesty and the integrity of the opinions they expressed in court.

Our legal system underwent significant change during the 20<sup>th</sup> century. Although trial by jury is still utilised for serious crime, more than 90% of criminal trials are disposed of without a jury. In a civil context trial by jury has all but disappeared. It is

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<sup>23</sup> C Jones, “Expert Witnesses”, Clarendon OUP, 1994, at 41.

<sup>24</sup> T Golan, “Laws of Nature and Laws of Men”, Harvard University Press, 2004, at 7.

maintained in defamation where an expression of community values through lay jurors is believed to be significant. Otherwise, at least in New South Wales, a civil jury trial is a rarity.

In the latter part of the 20<sup>th</sup> century a number of aspects of the adversarial system of justice have been questioned. Two forces are at work. As the standard of living in the community has risen the unit cost of labour for any task has also risen. This is as true of litigation as it is of manufacturing or agriculture. The consequence has been an increasing demand for efficiency of process to ensure that the cost of the ultimate product remains affordable. Although the price of a refrigerator, motor car, or bottle of wine has, in real terms, reduced over the last 30 years the same is not true of our system of justice. The result, as Sir Anthony Mason commented, has been an “erosion of faith”<sup>25</sup> in the adversarial system. In a paper titled “The Future of Adversarial Justice”, Sir Anthony commented: “The rigidities and complexity, the length of time it takes and the expense (both to government and the parties) has long been the subject of critical notice.”<sup>26</sup>

The adversarial system in its ultimate manifestation was once accepted as providing the most effective means of resolving a dispute. When the community was less concerned with the time and cost of the judicial process, and in any event those costs were less onerous, most people accepted that its benefits outweighed the detriments. The primacy of individual autonomy which it acknowledged could be afforded. This is no longer the case. The adversarial system has already been modified in many areas.

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<sup>25</sup> Sir Anthony Mason, “The Future of Adversarial Justice”, a paper given at the 17<sup>th</sup> AIJA Annual Conference on 6-8 August 1999.

<sup>26</sup> Ibid.

In almost every common law jurisdiction in the last 30 years a detailed and critical examination of the civil justice process has been undertaken. Although other issues have been addressed and responses developed, case management by the court is now universal, expert evidence has been and remains a critical matter. Unless the issues are resolved, public confidence in the courts as the place to resolve disputes between differing expert views will be significantly eroded.

Apart from the cost of litigation the quality of judicial decision-making has been called into question when the evidence of experts is involved. The judges are not the subject of the criticism. The concern is with the integrity of the evidence upon which they are required to adjudicate.<sup>27</sup> The abolition of the jury as the decision-maker means that there is now a reasoned judgment from a judicial officer. Those reasons will disclose the impact upon the judge of the evidence of individuals, including the experts, and the part their evidence has played in the resolution of the problem. It provides a capacity in the parties and others to judge whether the judge's reasoning is sound and assess whether the judge has misunderstood or been misled by the evidence. Those with special knowledge of areas of learning critical to the decision are able to assess whether "the science" applied by the judge is consistent with that accepted by leaders in the particular field. If the judge has got it wrong members of the profession can identify the error. Any error has the potential to erode confidence in the judicial process. Repeated errors will lead to considerable disquiet.

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<sup>27</sup> M Nothling, "Expert Medical Evidence: The Australian Medical Association's Position", available from: <http://www.aija.org.au/info/expert/Nothling.pdf>, viewed 28 June 2006, at 1.

Both because of the cost to the parties of the receipt and scrutiny of expert evidence and because of questions about its integrity, many professional bodies have expressed concern about whether our conventional approach to expert evidence is acceptable. The concerns are widespread. Many highly qualified professional people will quite simply not accept a retainer to give evidence in court.

In response to these concerns, a number of changes have been made to the procedures in the Common Law Division of the Supreme Court. In particular changes have been made to the way expert evidence is dealt with in civil litigation. The aim of the changes has been to enhance the integrity and reliability of expert evidence.

The changes include single experts appointed by agreement between the parties, the option of court-appointed experts, powers in the court to control the number of experts and the manner of the giving of their evidence. The amended rules allow the court to confine the number of experts called and to refuse to allow an expert to give evidence on particular issues. They also allow the judge to order the sequence for the giving of evidence and require the defendant to call lay or expert evidence in what would otherwise be the plaintiff's case.

The use of single joint experts in the UK following the Woolf Reforms<sup>28</sup> has been controversial. They have been described as “arguably the most significant and controversial recommendation of Lord Woolf’s Report concerning expert evidence.”<sup>29</sup>

Single experts, agreed by the parties and appointed by the court have been

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<sup>28</sup> “Access to Justice: Final Report to the Chancellor on the Civil Justice System in England and Wales”, July 1996.

<sup>29</sup> “Expert Witnesses”, NSWLRC Report 100 at [4.16].

extensively and successfully used in the New South Wales Land and Environment Court for more than four years. They are now widely used in the Family Court where although initially controversial, they are now widely accepted.

The amended rules provide for parties' single experts to be used in the Supreme Court. The Court may order at any stage of proceedings that an expert be engaged jointly by the parties.<sup>30</sup> A "parties' single expert", is engaged and selected by agreement of the parties.<sup>31</sup> The parties take the initiative. The selection of the expert by the parties is integral to the concept of the joint expert witness.<sup>32</sup> The amended rules also preserve the role of the "court-appointed expert" who is the court's witness and different from the "parties' single expert".

Where a parties' single expert has been called in relation to an issue, the rules prohibit the parties from adducing further expert evidence on that issue, unless with the leave of the court. The rules provide a similar control in respect of the evidence of a court-appointed expert in relation to an issue. The rules provide a presumption in favour of one expert per issue.

Perhaps the most significant change in relation to expert evidence is the use of the concurrent method of hearing their evidence. The relevant practice note provides that:

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<sup>30</sup> *UCPR* r 31.37(1).

<sup>31</sup> *UCPR* r 31.37(2).

<sup>32</sup> "Expert Witnesses", NSWLRC Report 100 at [7.57].

“All expert evidence will be given concurrently unless there is a single expert appointed or the Court grants leave for expert evidence to be given in an alternate manner.”<sup>33</sup>

How does it work? Although variations may be made to meet the needs of a particular case, concurrent evidence requires the experts retained by the parties to prepare a written report in the conventional fashion. The reports are exchanged and, as is now the case in many courts, the experts are required to meet to discuss those reports. This may be done in person or by telephone. The experts are required to prepare a short point document which incorporates a summary of the matters upon which they are agreed, but, more significantly, matters upon which they disagree. The experts are sworn together and, using the summary of matters upon which they disagree, the judge settles an agenda with counsel for a directed discussion, chaired by the judge, of the issues the subject of disagreement. The process provides an opportunity for each expert to place their view before the court on a particular issue or sub-issue. The experts are encouraged to ask and answer questions of each other. Counsel may also ask questions during the course of the discussion to ensure that an expert's opinion is fully articulated and tested against a contrary opinion. At the end of the process the judge will ask a general question to ensure that all of the experts have had the opportunity of fully explaining their position.

I have utilised the process of concurrent evidence on many occasions, both when I was in the Land and Environment Court, and in the Supreme Court. I recently sat as the trial judge in relation to a claim by a young lad who was aged 18 at the time he had a cardiac arrest and suffered catastrophic and permanent brain damage. He sued his general practitioner. The issues required evidence from other general

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<sup>33</sup> Practice Note SC CL 5, “Supreme Court Common Law Division – General Case Management List”, 5 December 2006 at [37].

practitioners about the duty of a doctor given the plaintiff's circumstances. There was also a major cardiological issue.

As it happened, the parties called a total of five general practitioners. They gave evidence concurrently. They sat at the bar table together and in 1½ days discussed in a structured and cooperative manner the issues which fell within their expertise. They had previously conferenced together for some hours and prepared a joint report which was tendered. In all likelihood if their evidence had been received in the conventional manner it would have taken at least five days. I would not have had the benefit of the questions which they asked each other, and, of even greater value, the responses to those questions.

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

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

Concurrent evidence is the means by which we can provide in the courtroom the decision-making process which professional people conventionally adopt. If one of us suffered a traumatic injury on our way home this afternoon which required hospitalisation and the possibility of major surgery to save our lives a team of doctors would come together to make the decision whether or not to operate. There would be a surgeon, anaesthetist, physician, maybe a cardiologist, neurologist or one of the many specialities which might have a professional understanding of our problems. They would meet, discuss the situation and the senior person would ultimately decide whether the operation should take place. It would be a discussion in which everyone's views were put forward, analysed and debated. The hospital would not set up a court case. If this is the conventional decision-making process of professional people, why should it not also be the method adopted in the courtroom.

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

I have had the opportunity of speaking with many witnesses who have been involved in the concurrent process and with counsel who have appeared in cases where it has been utilised. Although, generally because of inexperience, counsel may be hesitant before being involved I have heard little criticism once they have

experienced the process. The change in procedure has met with overwhelming support from the experts and their professional organisations. They find that they are better able to communicate their opinions and, because they are not confined to answering the questions of the advocates, are able to more effectively convey their own views and respond to the views of the other expert or experts. Because they must answer to a professional colleague rather than an opposing advocate, they readily confess that their evidence is more carefully considered. They also believe that there is less risk that their evidence will be unfairly distorted by the advocate's skill. The process is significantly more efficient than conventional methods. Evidence which may have required a number of days of examination in chief and cross-examination can now be taken in half or as little as 20% of the time which would otherwise have been required.

I have had cases where eight witnesses gave evidence at the one time. I know of one case where there were twelve. There have been many cases where four experts have given evidence together. As far as the decision-maker is concerned, my experience is that because of the opportunity to observe the experts in conversation with each other about the matter, together with the ability to ask and answer each others questions, the capacity of the judge to decide which expert to accept is greatly enhanced. Rather than have a person's expertise translated or coloured by the skill of the advocate, and as we know the impact of the advocate is sometimes significant, you have the expert's views expressed in his or her own words. There are also benefits when it comes to writing a judgment. The judge has a transcript where each witness answers exactly the same question at the same point in the proceedings.

I am often asked whether concurrent evidence favours the more loquacious and disadvantages the less articulate witness. In my experience, the opposite is true. Since each expert must answer to their professional colleagues in their presence, the opportunity for diversion of attention from the intellectual content of the response is diminished. Being relieved of the necessity to respond to an advocate, which many experts see as a contest from which they must emerge victorious, rather than a forum within which to put forward their reasoned views, the less experienced, or perhaps shy person, becomes a far more competent witness in the concurrent evidence process. In my experience, the shy witness is much more likely to be overborne by the skilful advocate in the conventional evidence gathering procedure than by a professional colleague with whom, under the scrutiny of the courtroom, they must maintain the debate at an appropriate intellectual level. Although I have only rarely found it necessary, the opportunity is, of course, available for the judge to intervene and ensure each witness has a proper opportunity to express his or her opinion.

Concurrent evidence is essentially a discussion chaired by the judge in which the various experts, the parties, advocates and the judge engage in an endeavour to identify the issues and arrive where possible at a common resolution of them. In relation to the issues where agreement is not possible, a structured discussion, with the judge as chairperson, allows the experts to give their opinions without constraint by the advocates in a forum which enables them to respond directly to each other. The judge is not confined to the opinion of one advisor but has the benefit of multiple advisors who are rigorously examined in public.

There is always a temptation for those who have responsibility within institutions to reject criticism and resist suggestions for change. Of course, not every criticism is justified and not every suggested change will bring improvement in process or outcome. There is an obligation on those who criticise the judiciary when sentencing to ensure that they understand the capacity of an individual sentence to influence social outcomes. A complementary obligation falls upon the judges to listen to the criticisms and respond by improving the quality of our processes and the effectiveness of our decision making.

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