LEARNED FRIENDS – CONFERENCE IN HAWAII – January 2014
"LITIGATING PROFESSIONAL NEGLIGENCE CLAIMS"

OVERVIEW

1 In the last ten years the preparation and conduct of professional negligence cases in the Supreme Court of New South Wales (NSW) have undergone a very significant change. The following is a brief overview of those developments, the reasons for them and their results.

2 In order to better understand this paper, I should say something about the judicial structure in Australia. We have a High Court which functions as does the US Supreme Court, as the final appellate court for all superior courts in the country. In NSW the lowest court tier is the Local Court. It has a criminal jurisdiction which allows sentences of imprisonment of up 2 years to be imposed and a civil jurisdiction for claims up to $50,000. It is presided over by Magistrates.

3 The second judicial tier is the District Court. Its criminal jurisdiction covers all indictable offences, except for murder and terrorism. In its civil jurisdiction it has a limit of $750,000 for most claims.

4 The final judicial tier is the Supreme Court. It is made up of the Court of Appeal, the Common Law Division and the Equity Division. The Common Law Division has a criminal jurisdiction which extends to murder trials and terrorist trials. In recent times it has conducted trials for large drug importations and major white collar crimes. It also provides Judges for the

Court of Criminal Appeal which deals with all criminal appeals from the District Court and the Supreme Court.

5 In its civil jurisdiction, the Common Law Division deals with claims for personal injury, contract, professional negligence, possession of land, admin law and class actions. The Equity Division does not have any criminal jurisdiction. Its work includes trusts, corporations and general chancery work. The Court of Appeal deals with all appeals on civil matters from the District Court and the Supreme Court. There is a Federal Court which operates nationally in parallel to the State jurisdictions. It has no criminal jurisdiction and its civil work is related to specific Federal statutes.

6 For those unfamiliar with Australia, NSW is the most populous State with Sydney alone having a population of over four million. It is also the most litigious State in the country. The filing of civil suits in the Supreme Court of NSW has been steadily increasing at the rate of 10 – 15 percent per year. One of the important drivers for changes in the preparation and conduct of professional negligence cases has been this increase in claims generally and professional negligence claims in particular.

7 Claims for professional negligence are primarily made against doctors, lawyers and accountants. There have been claims against other professionals such as valuers etc, but these categories of defendant predominate. Of these defendants, by far the majority of claims are made against doctors and hospitals. Accordingly, in this paper I will take as my paradigm a typical medical negligence action against a doctor and a hospital.

8 An important difference between NSW and the US is that general damages in such cases have been capped, as have other damages components, such as interest under the *Civil Liability Act* 2002 (NSW). Another important difference between NSW and the US is that all civil trials

are decided by judges, not by juries. Civil juries are only used in defamation cases. Criminal trials in the District Court and the Supreme Court, however, continue to be heard by juries, although there is a capacity for a judge alone trial if both sides agree.

REASONS FOR CHANGE

9 I've already referred to the sheer numbers of new filings in the civil list of the Common Law Division being an important factor leading to changes in how professional negligence cases are conducted. I will develop that issue in due course. There have, however, been other important drivers of change. These have been primarily costs and the quality of the expert evidence given in such cases.

10 When talking about legal costs, it needs to be kept in mind that another important difference between contested litigation in NSW and in the US, is that in NSW costs follow the event. In other words, in almost all cases the loser pays not only his, her or its own costs, but those of the successful litigant. Accordingly, both sides in any litigation are keen to keep costs to a minimum.

11 Because NSW does not have a pre-trial deposition procedure, and to a large extent pre-trial procedures such as discovery and interrogatories are carefully case managed, the most expensive part of any litigation is the time spent in court. A civil trial requires each side to have a team of barristers, solicitors and witnesses available. For those considering this problem, it was concluded that if time in court could be reduced, so also would costs.

12 Under the traditional system of adducing expert evidence, time spent in court was inevitably substantial. In our typical medical negligence case the plaintiff would lead his or her factual evidence and then each expert on liability would give evidence in chief and be cross-examined. In my

experience it was rare for more than two expert witnesses to be completed within a day. It was not unusual for the evidence of a single expert witness on liability to take more than one day to complete. The plaintiff would then call his or her evidence as to damages which might also involve expert evidence (e.g. as to care and rehabilitation).

13 In our typical medical negligence case, the doctor would adduce the factual evidence upon which he or she wished to rely and would then call experts on liability who would give evidence and be cross-examined in the traditional way and lastly would adduce evidence as to damages. The hospital and any other defendants would proceed to adduce evidence in the same way.

14 In medical negligence cases it was not unusual for there to be expert evidence in reply from the plaintiff, usually on liability issues. This was because issues of a factual or expert kind might have arisen in cross-examination of the defendant's witnesses which were not put to the plaintiff's experts. Even with a relatively simple case, that evidentiary process could take weeks to complete.

15 There were inevitable delays in the course of the trial with costs consequences. This was because evidence usually took longer than was anticipated. It was difficult to arrange for the attendance of expert medical witnesses on specific days when there was no certainty as to when they would be required. That caused delays since opposing parties were unwilling to go into evidence until the plaintiff's case had closed. At the end of that process the Judge was required to make findings as to the factual basis for the claim and liability and damages having regard to the expert evidence.

16 One only has to describe the process for it to be obvious that the intrinsic time element with its consequential costs was substantial. In very complex cases, costs could be almost prohibitive so as to affect the availability of

justice. It was also difficult for the Judge to get a feel for the merits of the case because evidence on different topics was spread throughout the trial. The solution was obvious – if the length of trials could be reduced, so would legal costs.

17 Perhaps the most enduring criticism of the traditional system was the quality of the evidence which was placed before the Court. Many experts challenged the proposition that the best way of resolving a controversy was by a process controlled by advocates for whom the intellectual integrity of the outcome was not an imperative. Of necessity advocates are intent on advancing the interests of their clients. The evidence is thus placed before the Court through the prism of what respective counsel consider is the best way to advance that interest. This is not to be critical of counsel, but one has to ask was this really the best way to enable a Judge to solve a scientific or medical controversy?

18 A consequence of the adversarial system is that witnesses, including some experts, consciously or unconsciously perceive themselves to be on one side or the other of the controversy. We are all familiar with the expert who comes across more as an advocate for a particular point of view than as someone seeking to assist the court in its search for truth. This was still occurring despite the enactment in 2000 of the *Expert Witness Code of Conduct*. Such witnesses, however, were usually fairly easy to identify and the courts tended to discount their evidence accordingly.

19 What was a more difficult problem was where, understandably, experts felt a loyalty to the party which retained them and sought to do the best they could for that party thereby giving rise to an unconscious bias. The same situation arose when experts, as a matter of personal pride, sought to defend propositions which they had put forward in a report. Unless the court had some way of independently assessing that evidence, such unconscious bias could be difficult to detect and evaluate.

20 A particular problem arose in the case of expert evidence in medical negligence cases. Members of the medical profession took a close interest in such cases because of the effect which it was having on their professional indemnity insurance premiums. The concern of such organisations as the Australian Medical Association was that sound, medical scientific principles did not seem to carry sufficient weight in medical negligence cases and that at times, maverick opinions from those who were considered to be hired guns, seemed to be the preferred evidence.

21 The AMA and kindred organisations exerted considerable pressure on governments to improve the quality of expert evidence given in professional negligence cases.

22 As I have already indicated, there was another factor suggesting change in the way that expert evidence was traditionally given. This arose from the availability of judicial time and the capacity of judges to provide a reasoned decision within an acceptable timeframe. Over the last ten years there has been a steady increase in the Professional Negligence List of the Common Law Division and in the number of cases where expert evidence was required. There was also a significant increase in the number of serious criminal trials required to be heard in the Division. For example, a much publicised terrorist trial took a judge of the Division out of the system for over 18 months. There has been no increase in the number of judges in the Supreme Court, and particularly in the Common Law Division, for 15 years. The increase in the number of criminal trials being dealt with by the Common Law Division meant a corresponding decrease in the amount of judicial time available to hear civil matters and in particular, professional negligence matters.

23 The Court decided that the best way to solve the problem was to be smarter in the way it conducted civil matters so that actual face to face hearing time was reduced, provided of course that the necessary

standards of fairness were safeguarded. The solution chosen was to have substantially more case management to make sure that only matters which were genuinely in dispute were dealt with in court and to modify the traditional and rather cumbersome way of conducting cases. This included the way in which expert evidence was adduced.

24 As the review of the traditional way in which professional negligence cases were run made clear, it was an inefficient way of placing disputed scientific and medical issues before a judge. What happened was that information on an array of topics was trickle-fed to the Court, so that the Court could not form even a preliminary view of matters (particularly factual matters) until all parties had closed their cases.

THE CHANGES IMPLEMENTED

25 I won't say anything about case management. That is an appropriate topic for a paper all by itself. All that I will say is that over the last 10 years, active case management by judges has not only significantly increased the number of settlements of potentially long civil cases, particularly in the Professional Negligence List, but it has also substantially reduced the length of the cases. This is because parties have been able to agree on peripheral issues and only those genuinely in dispute are being placed before the Court for adjudication.

26 The two most significant changes which were made were the taking of expert evidence concurrently and a change in the way in which trials involving experts were conducted.

Concurrent Evidence

27 As a first step, it is important to understand what concurrent evidence is and how it works. Although variations may be made to meet the needs of a particular case, the following steps are usual:

(i) The experts retained by the parties prepare a written report, or reports, in the traditional way.

(ii) The reports are exchanged and the experts are required to meet to discuss those reports. This can be done in person or by telephone.

(iii) The experts are required to prepare a short document, which sets out the matters upon which they agree, but most importantly the matters upon which they disagree, and a brief statement of the basis for the disagreement.

(iv) Either pre-trial or at the commencement of the trial, using the experts' joint statement of issues, the trial judge settles an agenda with counsel for a directed discussion, chaired by the judge, of the issues the subject of disagreement.

(v) The experts are sworn and give their evidence concurrently.

28 Each judge has a different way of controlling and directing the evidence. Whichever method is used, it is essential that the judge not counsel, control the process for it to be effective.

29 The approach I use is as follows:

(i) Clearly identify for the experts a particular issue in dispute.

(ii) Invite one of the experts (usually the plaintiff's principal expert) to express his or her opinion on that issue.

(iii) Invite or allow the other experts in turn to comment on that opinion, either by way of support, elaboration, contradiction or qualification.

(iv) A controlled discussion can then proceed between the experts, including the right of experts to put a specific question on the issue under discussion to other experts.

(v) Each counsel is then given the opportunity to put questions to any of the experts on the issue under discussion. Depending upon the preference of the trial judge, this step can be subsumed by the previous

step with counsel participating in the controlled discussion by asking questions of the experts.

(vi) Invite each expert to make final comments, if appropriate, particularly if any of the experts thinks that there is a question which should have been raised during the preceding discussion on that issue.

(vii) The judge then summarises the position reached by the experts on the issue under discussion.

(viii) The trial judge identifies the next issue in dispute and the process is repeated in relation to that issue.

30 From being somewhat sceptical, I am now a strong supporter of concurrent evidence. My personal experience supports the following conclusions:

(i) Where there are more than two relevant experts, the process can save time allowing the key points to be quickly identified and discussed.

(ii) The process moves somewhat away from counsel interrogating experts towards a structured, professional discussion between peers in the relevant field.

(iii) Experts typically make more concessions and state matters more frankly and reasonably than under the traditional type of cross-examination.

(iv) The questions tend to be more constructive and helpful than the sort of questions sometimes encountered in traditional cross-examination.

(v) Taking expert evidence concurrently will be more successful in some situations than in others. Much depends upon the judge and the type of case.

(vi) The process is likely to better inform the judge about the expert issues in dispute and thus increase the potential for a more accurate and reasoned decision.

31 Let me give an example. Some five years ago, I gave judgment in a matter of *Wilson v Tier* [2008] NSWSC 92. This was an action by a former patient against an oral surgeon. Eight expert witnesses had been qualified

on the issue of liability. They comprised four oral surgeons, two ENT specialists, a prosthodontist and a medical bacteriologist. All eight experts gave evidence concurrently and their evidence was completed in a single day. This was able to be achieved because the parties had co-operated in identifying the issues to be considered by the experts and because the experts co-operated wholeheartedly in the process. It was noticeable that as the process progressed, the experts became more relaxed, more expansive in their evidence and significant concessions were made.

32 The leading expert for the plaintiff was an ENT specialist, who had treated her in hospital, after she had left the care of the defendant oral surgeon. In the course of the concurrent evidence, he said this:

> "It has been an education to me. I am not dentally trained. I have never pulled out a wisdom tooth. I am not trained in that area. I bring to this my head and neck bias where any swelling, inflammation or trismus three weeks after an operation is assumed to be infection unless disproved. To hear infection in a wisdom tooth three weeks after removal is common and commonly responds to antibiotics is something that is new to me."

33 He then substantially withdrew the opinion which he had proffered in his report. It is difficult to envisage a better endorsement for the process than that.

CHANGE IN CONDUCT OF TRIALS

34 As a result of implementing the taking of evidence from experts concurrently, it became necessary to change the way in which professional negligence trials were run. Instead of the traditional approach described above of each party putting forward the whole of their case before the next party commenced their case, evidence is adduced by all parties by reference to categories. We called this process the "phased trial", which is now the norm in professional negligence cases in NSW.

35 In a phased trial what happens is that all of the factual evidence, upon which the expert opinions are based, is adduced before any expert gives evidence. In practical terms, this means that the parties will adduce their factual evidence as to liability first. In our medical negligence paradigm, this would mean that the plaintiff, the doctor and the hospital would adduce all of their factual evidence as to liability before any expert gave evidence.

36 We have found that the phased trial has a number of advantages. Instead of assumptions being put to experts which may never be made out, the evidence actually given can be placed before the experts. It also obviates the necessity for calling expert evidence in reply where factual issues have arisen which were not put to the plaintiff's experts.

37 The process has produced some unanticipated benefits. It often happens that when all the factual evidence on a subject has been given, the factual issues in dispute either narrow or fall away, because one version of the facts becomes so unlikely that it can be safely disregarded.

38 Some years ago I had to decide a somewhat complex case involving a collision between a 70 tonne dump truck and a private motor vehicle on an internal roadway controlled by one of our big mining companies. One of the factual issues was whether the lights on the dump truck had been properly adjusted and whether the glare from those lights had blinded the driver of the private vehicle. After the factual evidence had been completed, it became obvious that the adjustment argument simply could not be maintained and had no substance. The cross-claims were discontinued and that part of the case disappeared. Not only did the evidence of four experts become unnecessary, it probably reduced the length of the trial by at least two weeks.

39 For those conducting professional negligence trials in NSW, it is now necessary to take into consideration that all of the factual evidence on liability will be adduced at the beginning of the trial and no expert evidence

on liability will be adduced until that factual evidence has been completed. By co-operation between the legal advisors, the time when the expert evidence is to be given can be predicted with more certainty. We have also found that it is useful to briefly adjourn such a trial, after the factual evidence has been given, to enable the expert witnesses to absorb what has been said and to adjust their opinions accordingly. It often happens that once that factual evidence has been given, a case will settle because until that point in time, one or other of the parties has been proceeding on an assumption as to the factual evidence which has been shown to be unsustainable.

40 The above discussion has focused on a medical negligence trial being heard by a judge. In NSW we have also used concurrent evidence and the phased trial in criminal cases before a jury but our experience in that regard is much more limited. So far we have only used that procedure in criminal trials where the issue is essentially a medical one, i.e., the mental health of the accused or whether the actions of the accused caused the death of the victim or victims. Our experience so far is that these procedures can be just as effective in saving costs and time before a jury as before a judge sitting alone.

DIFFICULTIES

41 The concurrent evidence and phased trial process is working well in NSW. Professional negligence trials are now much shorter than they were and more settle before proceeding to judgment. There are, however, some difficulties. Most of these can be solved by co-operation between the parties and their legal advisors, but not always.

42 One of the major difficulties, particularly with a large number of experts, is to arrange for them to be able to attend court and give evidence at the same time. This requires careful planning, not only to ensure that the day or days chosen are convenient to the experts, but also to make sure that

the factual evidence has been completed by that time. Considerable flexibility is required, as is co-operation between the parties and the Court.

43 By way of illustration, some years ago I heard a medical negligence trial involving as its principal issue the cause of a cerebral aneurism which led to the plaintiff becoming a brain damaged quadriplegic. Two hospitals and a number of doctors were named as defendants. The key liability evidence was from eight neurologists and four neuro-radiologists. Because these persons comprised most of the leading specialists in those disciplines in Sydney, they were not able to give evidence during the day because they were too busy saving lives. The solution we arrived at was to take their evidence concurrently, over four nights, between 5pm and 9pm.

44 One cannot always guarantee co-operation between the parties and between the experts. It can be difficult to agree on issues to be put to the experts. On occasions, it is clear that experts have no difficulty in identifying the issues in dispute, but lawyers for the parties do. In some cases where the expert medical witnesses have reduced the contentious issues to five or six, the lawyers for the respective parties have prepared hundreds of questions which they wish to be answered by the medical experts in their meeting.

45 My approach in such circumstances is to read the expert reports, which identify the issues identified by the experts, and to prepare my own list of issues which the experts are to address in their joint statement. In most cases, I have disallowed the carefully crafted (and often completely unhelpful) questions prepared by the parties' legal advisors. In those circumstances, however, I have given counsel more latitude in their questions during the concurrent evidence process at trial.

46 Very occasionally, the experts have almost no common ground and are diametrically opposed on almost every issue. That is quite rare, but does

happen. I have found that latter situation more prevalent on damages issues than in relation to liability.

47 Difficulties arise when one or two experts are dominant or dogmatic and refuse to entertain other points of view. This can create difficulties where other experts involved in the concurrent evidence process are less assertive. This can be controlled by the judge and I have found that the more reticent experts, once they are drawn out a little, tend to be more persuasive than those experts whose opinions are definite and unqualified.

48 A complaint which used to be made by counsel when the process was first introduced was that concurrent evidence reduced their capacity to cross-examine expert witnesses as to credit. That criticism has largely disappeared.

49 I believe there are two reasons for that. Firstly, the "hired gun" expert has largely disappeared. This is because it is very hard to maintain an extreme position in the presence of one's peers, particularly where such persons often are of international prominence and regarded as pre-eminent in their field. Secondly, even where a "hired gun" expert does give evidence, he or she knows that this evidence will be subject to scrutiny by their peers, so that the expressions of opinion tend to be more moderate than they were when such evidence was given in the traditional way.

CONCLUSION

50 Concurrent evidence and the phased trial have now been operating in NSW for approximately ten years. They have resulted in a significant saving in time and costs. Most importantly, however, when a matter does have to proceed to judgment, the judge as the tribunal of fact is much better informed as to the matters which are the subject of expert opinion and is much more likely to arrive at the correct result.

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