PSYCHIATRIC DEFENCES
AND EXPERTS GIVING EVIDENCE

LEARNED FRIEND'S CONFERENCE
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Dina Yehia SC

NSW Public Defender

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Contents

I. Introduction

Before a person can be dealt with by a criminal court, he or she must be "fit to be tried". Procedural fairness requires that an accused person be aware of the nature of proceedings and be capable of pleading and participating in them. A person who is mentally impaired to such a degree so as to be incapable of understanding the nature of proceedings may be considered to be unfit to stand trial.

In ***Pritchard*** (1836) 173 ER 135, the Court said:

> *The question is, whether the prisoner has sufficient understanding to comprehend the nature of this trial, so as to make a proper defence to the charge. … Whether he [the prisoner] is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence — to know that he might challenge any of you to whom he may object — and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation.*

The question of fitness to stand trial relates therefore to the accused's mental state at the time of the trial. In New South Wales, the procedures governing fitness to be tried are contained in the ***Mental Health (Forensic Provisions) Act*** *1990* (the 'MHFP Act'). Commonwealth provisions are contained in the ***Crimes Act*** *1914* (Cth).

Raising the Question

Where the fitness issue is raised in good faith, the court must hold a hearing. A Judge can only decline an inquiry where there is patently no real and substantial question as to unfitness: ***Zhang*** NSW CCA 31.8.2000; ***Tier*** [2001] NSW CCA [53].

The question of fitness remains open throughout the trial. Even after finding that an accused is fit to stand trial, a trial judge should not decline to order a further fitness hearing during the trial if the question is again raised in good faith: ***Mailes*** (2001) 126 A Crim R 20.

Dismissing the Charge Before Conducting a Hearing

The power of the court to dismiss a matter before conducting an inquiry under s 10(4) addresses the appropriateness of punishment. It seeks to avoid unnecessary delays, costs and complications of fitness hearings where no

punishment would ultimately be inflicted. 'Punishment' includes conviction with no further penalty and orders of the court after a special hearing. The procedure is equivalent to the power of court to dismiss a charge without recording a conviction under s 10 ***Crimes (Sentencing Procedure) Act****: **Newman*** [2007] NSWCCA 103; see also ***DPP v Mills*** [2000] NSWCA [236].

Test for Fitness

As the legislation does not provide a definition of 'unfitness to be tried,' the common law test applies as set out in ***Presser*** [1958] VR 45 - ***whether the accused has sufficient understanding to comprehend the nature of the trial so as to make a proper defence:***

> *"It is whether the accused because of mental defect fails to come up to certain minimum standards which he needs to equal before he can be tried without unfairness or injustice to him. He needs…to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceedings, namely that it is an inquiry as to whether he did what he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all of the various court formality. He needs to be able to understand…the substantial effect of any evidence that may be given against him; he needs to be able to make his defence or answer the charge. Where he has Counsel he needs to be able to do this through his Counsel by giving any necessary instructions and by letting his Counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence but he must…have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his Counsel, if any."*

This test has been applied in ***Ngatayi*** (1980) 147 CLR 1; ***Kesavarajah*** (1994) 181 CLR 230; ***Eastman*** (2000) 203 CLR 1 at [57] per Gaudron J; ***Robinson*** [2008] NSWCCA 64 at [65]-[66].

The test should be applied in a reasonable and common sense fashion: ***Presser*** [1958] VR 45; ***Ngatayi*** (1980) 147 CLR at 8; ***Kesavarajah*** (1994) 181 CLR 230. The length of the trial and what the accused's condition will be like during the trial may also be a factor to consider: ***Kesavarajah***; ***Robinson*** at [66].

An accused may be unfit to plead for reasons other than mental illness: ***Eastman*** (2000) 203 CLR 1 at [57] per Gaudron J (deaf and dumb, unable to understand

language); ***Mailes*** (2001) 126 A Crim R 20; ***Robinson*** at [66] (intellectual/ developmental disability as well as mental illness; see also consideration of cases in ***Clarkeson*** [2007] NSW CCA 70 at [111]).

Raising Fitness on Appeal

Robinson [2008] NSW CCA 26.6.2008

> *"[63] … In short, before it could dismiss the appeal, the Court was required to reach the affirmative view that, had the question of fitness been raised at trial, the court below, acting reasonably, must have found the appellant fit to stand trial:* ***Eastman*** *(2000) 203 CLR;* ***R.T.I.*** *(2003) 58 NSWLR 438; [2003] NSWCCA 283;* ***Rivkin*** *(2004) 59 NSWLR 284 at 296;* ***Henley*** *[2005] NSWCCA 126;* ***Kirkwood*** *[2006] NSWCCA 181."*

Special Hearing

Where it is determined that a person who has been found unfit to be tried will not become fit within twelve months a special hearing is held to determine whether the person is guilty of the offence charged on the available evidence. The provisions for special hearings are contained in the MHFP Act: ss 21-22A.

A special hearing is held before a judge alone unless the accused person elects to have a jury: s 21A. A special hearing must be conducted as nearly as possible as if it was a criminal trial. The cases emphasise the importance of following the mandatory procedures under the legislation: ***Zvonaric*** (2001) 127 A Crim R 9 (NSWCCA).

Limiting Term

Where an accused, at a special hearing, has been found to have committed the offence, on the available evidence the court must determine whether a period of imprisonment would have been imposed at a normal trial and if so, impose a limiting term, being the best estimate of that sentence. A limiting term is the estimate of the **total** sentence **not the NPP:** ***Mitchell*** (1999) 108 A Crim R 85 at [30]-[32] (NSWCCA).

The limiting term is the period beyond which a person cannot be detained: ***Mailes*** (2003) 142 A Crim R 353 (NSWSC). A person can be released prior to the expiry of the limiting term because of 6 monthly reviews.

In setting the limiting term the court must have regard to ordinary sentencing principles. A court must have regard to any subjective mitigating factors that have been established: ***Mitchell*** (1999) 108 A Crim R 85 at [35]. A court must also take into account mental illness in accordance with normal sentencing practices: ***Courtney*** (2007) 172 A Crim R 371 (NSWCCA) at [13].

Where the court determines a sentence of imprisonment would not have been imposed, it may impose any other order or penalty under s 23(2). This may include alternative sentences under ***Crimes (Sentencing Procedure) Act 1999***, including a section 9 bond. However, a limiting term cannot be suspended: ***Warren*** [2009] NSW CCA 176 at [20].

Where the Court has imposed a limiting term, the Mental Health Review Tribunal must determine whether the person is suffering from a mental illness or a mental condition that can be treated in a Mental Health Facility: s 24(2). Upon such determination the Court may then make an order detaining the person in a Mental Health Facility [s 27(a)] or some other place [s 27(b)].

The Court has no power under s 27(b) to specify that only part of a limiting term is to be served in detention**:** ***AN (No.2)*** (2006) 163 A Crim R 133 (NSWCCA).

II. Mental Illness Defence

The statutory provisions governing mental illness as a defence are found in the MHFP Act, ss 37-39.

> ***"37 Explanation to jury***
>
> *If, on the trial of a person charged with an offence, a question is raised as to whether the person was, at the time of commission of the offence, mentally ill as referred to in section 38, the Court must explain to the jury the findings which may be made on the trial and the legal and practical consequences of those findings and must include in its explanation:*
>
> *(a) a reference to the existence and composition of the Tribunal, and*
>
> *(b) a reference to the relevant functions of the Tribunal with respect to forensic patients, including a reference to the requirements of this Act that the Tribunal may make an order for the release of a person detained in accordance with section 39 only if the Tribunal is satisfied, on the evidence available to it, that the safety of the person or any member of the public will not be seriously endangered by the person's release.*

38 Special verdict

(1) If, in an indictment or information, an act or omission is charged against a person as an offence and it is given in evidence on the trial of the person for the offence that the person was mentally ill, so as not to be responsible, according to law, for his or her action at the time when the act was done or omission made, then, if it appears to the jury before which the person is tried that the person did the act or made the omission charged, but was mentally ill at the time when the person did or made the same, the jury must return a special verdict that the accused person is not guilty by reason of mental illness.

(2) If a special verdict of not guilty by reason of mental illness is returned at the trial of a person for an offence, the Court may remand the person in custody until the making of an order under section 39 in respect of the person.

39 Effect of finding and declaration of mental illness

(1) If, on the trial of a person charged with an offence, the jury returns a special verdict that the accused person is not guilty by reason of mental illness, the Court may order that the person be detained in such place and in such manner as the Court thinks fit until released by due process of law or may make such other order (including an order releasing the person from custody, either unconditionally or subject to conditions) as the Court considers appropriate.

(2) The Court is not to make an order under this section for the release of a person from custody unless it is satisfied, on the balance of probabilities, that the safety of the person or any member of the public will not be seriously endangered by the person's release.

(3) As soon as practicable after the making of an order under this section, the Registrar of the Court is to notify the Minister for Health and the Tribunal of the terms of the order."

Raising the Defence

The issue of mental illness may be raised by defence counsel or the prosecution. Where the defence has been raised on the evidence, the trial judge will have a duty to leave the defence although the matter was not raised by the accused: ***Ayoub*** (1984) 10 A Crim R 312 (NSWCCA); see also ***Falconer*** (1990) 171 CLR 30 at 62-3:

> *"It used to be said that it was for the defence to raise a plea of insanity and not for the prosecution. That is probably still the case, but we think that the position has now been reached where it is only realistic to recognize that, if there is evidence of insanity, the prosecution is entitled to rely upon it even if it is resisted by the defence. … we can see no reason why, if there is evidence which would support a verdict on the grounds of insanity, the prosecution should not be able to rely upon it in asking for a qualified acquittal as an alternative to conviction. "*

Explanation to Jury – s.37 MHFP Act

The purpose of the explanation to the jury is to ensure the jury understand the legal and practical consequences of a finding of not guilty by reason of mental illness – particularly with respect to the role of the Court and the Tribunal and the protection

of the community. It is important that the jury understand that the accused will not be released until the Tribunal is satisfied that there is no danger: ***PCB*** [2012] NSWSC 482 at [89] per Johnson J; ***Rodriguez*** [2010] NSWSC 198 at [56]-[57] per Johnson J; ***Coleman*** [2010] NSWSC 177 at [69]-[79] per Hall J.

s.38 Finding Offence Committed by Accused

The trier of fact must first be satisfied beyond reasonable doubt that the offence was committed by the accused before turning to the question of mental illness: ***PCB*** [2012] NSWSC 482 per Johnson J at [45]; ***Rodriguez*** [2010] NSWSC 198 at [32] per Johnson J; ***McDonald*** [2012] NSWSC 875 at [58] per Bellew J.

Onus / Burden of Proof

Mental illness must be proved on the balance of probabilities regardless of who raises the defence: ***Mizzi*** (1960) 105 CLR 659 at 664–665; ***Ayoub*** (1984) 2 NSWLR 511 at 515; ***Jennings*** [2005] NSWSC 789, 11.8.2005 at [26], [28] per Kirby J; ***Rodriguez*** [2010] NSWSC 198 at [32] per Johnson J; ***Melehan*** [2010] NSWSC 210 at [27] per Schmidt J; ***McDonald*** [2012] NSWSC 875 at [57] per Bellew J.

Use of Expert Evidence

Medical evidence is usually adduced, although the trier of fact is not bound to accept and act upon expert evidence. However the trier of fact is not entitled to disregard it capriciously. The trier of fact ought not reject unanimous medical evidence unless there is evidence which can cast doubt upon the medical evidence: ***Rodriguez*** [2010] NSWSC 198 at [45] per Johnson J.

Test for Mental Illness

The test is the common law test as established in ***M'Naghton*** (1843) 8 ER 718 and ***Porter*** (1933) 55 CLR 182 at 189–190. This has been recently set out by Bellew J in ***McDonald*** [2012] NSWSC 875:

> *[55] … In order to rely upon that defence, it must be established that at the time of the commission of the relevant act the accused was labouring under such a defect of reason from disease of the mind as to not know the quality and nature of the act he was doing or, if he did know it, that he did not know that what he was doing was wrong (see generally M'Naghton (1843) 8 ER 718).*

[56] The test was formulated by Dixon J in Porter (1933) 55 CLR 182 at 189–190 in the following terms:

The question is whether he was able to appreciate the wrongness of the particular act he was doing at the particular time. Could this man be said to know, in this sense, whether his act was wrong if, through a disease or defect or disorder of the mind, he could not think rationally of the reasons which, to ordinary people make, that act right or wrong?

If, through the disordered condition of the mind, he could not reason about the matter with a moderate degree of sense and composure, it may be said that he could not know that what he was doing was wrong. What is meant by wrong? What is meant by wrong is wrong having regard to the everyday standards of reasonable people.

Disease of the Mind

Whether a person is suffering from a 'disease of the mind' is a question of law for the judge, who determines whether there is sufficient evidence for the issue to be considered by a jury. It is a legal term not a medical one: ***Falconer*** (1990) 171 CLR 30 at 48-9; ***Bratty v AG (Northern Ireland)*** [1961] 3 All ER 523.

It is then for jury to decide whether expert and other evidence establishes a disease of the mind: ***Porter*** (1933) 55 CLR 182 at 188.

A disease of the mind requires an underlying pathological infirmity of the mind. The essential notion appears to be that in order to constitute insanity in the eyes of the law, the malfunction of the mental faculties (called a 'defect of reason' in the M'Naghten rules) must result from an underlying pathological infirmity of the mind, be it of long or short duration and be it permanent or temporary, which can be properly termed mental illness, as distinct from the reaction of a healthy mind to extraordinary external stimuli: **Radford** (1985) 42 SASR 266 at 274 per King CJ; approved in ***Falconer*** (1990) 171 CLR 30 per Mason CJ, Brennan and McHugh JJ, Deane and Dawson JJ; and referred to recently in ***Woodbridge*** (2010) 208 A Crim R 503; ***Pratt*** [2009] NSWSC 1108 at [19]-[21] per Hulme J.

Nature and Quality of the Act

"Nature and quality of the act" refers to the physical nature and consequences of an offence rather than moral aspects: ***Sodeman*** (1936) 55 CLR 192 at 215 per Dixon J; ***Willgoss*** (1960) 105 CLR 295.

A person does not know the nature and quality of an act if s/he does not know the physical nature of what s/he is doing or its implications. For example, one does not know the nature and quality of an act of killing another if one has so little understanding of the nature and destruction of life that the intentional destruction of life is, to that person, no worse than breaking a twig or other inanimate object: ***Porter*** (1933) 55 CLR 182 at 188 per Dixon J.

Knowledge of Wrongfulness

"Wrong" means wrong according to ordinary principles of reasonable people, not wrong in the sense of an act being contrary to law: ***Porter***; ***Stapleton*** (1952) 86 CLR 358; ***Jenkins*** [1964] NSWR 721; (1963) 64 SR (NSW) 20; ***Matusevich*** [1976] VR 470.

The question is whether or not an accused was able to appreciate the wrongfulness of the criminal act such that s/he was able to reason about the matter with moderate degree of sense and composure. If unable to so reason, it may be that the accused could not know that what s/he was doing was wrong: ***Porter*** at 189-90 per Dixon J; ***Pangallo*** (1989) 51 SASR 254.

Uncontrollable impulse is not a defence. Thus, the defence of insanity does not apply to an accused person who knew what s/he was doing and that it was wrong, but was unable, owing to a disease of the mind, to stop from doing what s/he did. Evidence of inability to reason with calmness and composure, however, may satisfy the jury that the accused lacked capacity to know that what s/he was doing was wrong. Evidence of uncontrollable impulse may be relevant to deciding whether a disease of the mind was present if there is evidence it is a symptom of a particular disease of the mind: ***Porter***; ***Attorney-General (SA) v Brown*** [1960] 1 All ER 734; ***O'Neill*** (1977) 141 CLR 496 at 381 per Barwick CJ and Mason J; ***Hodges*** (1985) 19 A Crim R 129 (SC WA).

III. Substantial Impairment

***Crimes Act 1900 (NSW)* s.23A**

(substantial impairment replaced diminished responsibility 3.4.1998)

(1) A person who would otherwise be guilty of murder is not to be convicted of murder if:

(a) at the time of the acts or omissions causing the death concerned, the person's capacity to understand events, or to judge whether the person's actions were right or wrong, or to control himself or herself, was substantially impaired by an abnormality of mind arising from an underlying condition, and

(b) the impairment was so substantial as to warrant liability for murder being reduced to manslaughter.

(2) For the purposes of subsection (1) (b), evidence of an opinion that an impairment was so substantial as to warrant liability for murder being reduced to manslaughter is not admissible.

(3) If a person was intoxicated at the time of the acts or omissions causing the death concerned, and the intoxication was self-induced intoxication (within the meaning of section 428A), the effects of that self-induced intoxication are to be disregarded for the purpose of determining whether the person is not liable to be convicted of murder by virtue of this section.

(4) The onus is on the person accused to prove that he or she is not liable to be convicted of murder by virtue of this section.

(5) A person who but for this section would be liable, whether as principal or accessory, to be convicted of murder is to be convicted of manslaughter instead.

(6) The fact that a person is not liable to be convicted of murder in respect of a death by virtue of this section does not affect the question of whether any other person is liable to be convicted of murder in respect of that death.

(7) If, on the trial of a person for murder, the person contends:

(a) that the person is entitled to be acquitted on the ground that the person was mentally ill at the time of the acts or omissions causing the death concerned, or

(b) that the person is not liable to be convicted of murder by virtue of this section,

evidence may be offered by the prosecution tending to prove the other of those contentions, and the Court may give directions as to the stage of the proceedings at which that evidence may be offered.

(8) In this section:

underlying condition means a pre-existing mental or physiological condition, other than a condition of a transitory kind.

Requirements

Abnormality of mind is a state of mind so different from that of ordinary human beings that the ordinary person would term it abnormal: ***Tumanako*** (1992) 64 A Crim R 149 at 159, quoting from ***Byrne*** [1960] 2 QB 396 at 403; (1960) 44 Cr App R 246 at 252-3; ***Jennings*** [2005] NSWSC 789 at [30] per Kirby J ('deviates from what

may be regarded as normal, given that there is variation in the different ways in which people function').

Abnormality of mind must substantially impair the capacity of the accused to understand events, or to judge whether their actions were right or wrong, or to control themselves. The impairment must be so substantial as to warrant the liability for murder being reduced to manslaughter.

Procedure

The accused must prove substantial impairment on the balance of probabilities: ***Dunbar*** [1958] 1 QB 1; (1957) 41 Cr App R 182.

A trial judge should direct the jury as to diminished responsibility where such a finding is reasonably open on the evidence, even though the matter is not raised by the defence: ***Cheatham*** [2000] NSWCCA 282, 4.8.2000 at [31]-[63].

Relevance of Intoxication

Under s 23A(3), self-induced intoxication cannot be taken into account even as a trigger to an underlying abnormality: ***Zaro*** [2009] NSW CCA 219 at [34]-[38].

Use of Medial Evidence - Summary

Evidence of medical experts is relevant to, but not determinative of, the question of substantial impairment. The jury is not bound to accept the medical evidence if there is other material that conflicts and outweighs it. The jury should not, however, reject unanimous medical evidence unless there is a basis to do so: ***Majdalawi*** (2000) 113 A Crim R 241; ***Tumanako*** (1992) 64 A Crim R 149 at 160; ***Trotter*** (1993) 35 NSWLR 428 at 431; 63 A Crim R 536 at 537-8; ***Chayna*** (1993) 66 A Crim R 178 at 188. Gleeson CJ warned against treating conclusions by medical experts on the ultimate issues in the case as the most important features of their evidence: ***Ryan*** (1995) 90 A Crim R 191 at 195-6.

The question of whether the abnormality of mind falls within s.23A must be established by medical evidence: ***Tumanako*** (1992) 64 A Crim R 149 at 160;

Trotter (1993) 35 NSWLR 428 at 431; 63 A Crim R 536 at 537; ***Ryan*** (1995) 90 A Crim R 191 at 195-6.

The question of whether the abnormality of the mind so substantially impaired the mental responsibility of the accused as to warrant liability being reduced to manslaughter is a question for the fact finding body: ***Crimes Act*** *1900* (NSW) s 23A(2) [evidence of an opinion that an impairment was so substantial as to warrant liability for murder being reduced to manslaughter is not admissible]; see also ***Kaewklom (No.1)*** [2013] NSWSC 1103 at [69]-[72] per Johnson J; ***Hucker*** [2002] NSWSC 1068 at [2] per Howie J; ***Majdalawi*** (2000) 113 A Crim R 241 at [36] (value judgment by the jury representing the community); ***Trotter*** (1993) 35 NSWLR 428 at 431 (jury must approach task in broad common-sense way, involving a value judgment by jury representing the community).

IV. Code of Conduct

Supreme Court Rules **1970**

Part 75 Criminal Proceedings

(inserted 30.8.2002)

3J Expert witnesses

(1) This rule and rule 3K apply to all criminal proceedings in the Court (including those specified in the Third Schedule to the Act).

(2) For the purposes of this rule and rule 3K:

expert witness means an expert engaged for the purpose of:

(a) providing a report as to his or her opinion for use as evidence in proceedings or proposed proceedings, or

(b) giving opinion evidence in proceedings or proposed proceedings.

the code means the expert witness code of conduct in Schedule 7 to the Uniform Civil Procedure Rules 2005.

(3) Unless the Court otherwise orders:

(a) at or as soon as practicable after the engagement of an expert as a witness, whether to give oral evidence or to provide a report for use as evidence, the person engaging the expert must provide the expert with a copy of the code, and

(b) unless an expert witness's report contains an acknowledgment by the expert witness that he or she has read the code and agrees to be bound by it:

(i) service of the report by the party who engaged the expert witness is not valid service for the purposes of the rules or of any order or practice note, and

(ii) the report is not to be admitted into evidence, and

(c) oral evidence is not to be received from an expert witness unless:

(i) he or she has acknowledged in writing, whether in a report relating to the proposed evidence or otherwise in relation to the proceedings, that he or she has read the code and agrees to be bound by it, and

(ii) a copy of the acknowledgment has been served on all parties affected by the evidence.

(4) If an expert witness furnishes to the engaging party a supplementary report, including any report indicating that the expert witness has changed his or her opinion on a material matter expressed in an earlier report by the expert witness:

(a) the engaging party must forthwith serve the supplementary report on all parties on whom the engaging party has served the earlier report, and

(b) the earlier report must not be used in the proceedings by the engaging party, or by any party in the same interest as the engaging party on the question to which the earlier report relates, unless paragraph (a) is complied with.

(5) This rule does not apply to an expert engaged before this rule commences.

3K Conference between experts

(1) The Court may do any or all of the following, with the consent of the parties:

(a) direct expert witnesses to confer (whether before or during a trial or other proceedings),

(b) specify the matters on which they are to confer,

(c) direct that they provide the Court with a joint report specifying matters agreed and matters not agreed and the reasons for any non agreement,

(d) direct that such conference be held with or without the attendance of the legal representatives of the parties affected, or with or without the attendance of legal representatives at the option of the parties respectively,

(e) give any additional directions as may be considered necessary.

(2) An expert who is the subject of an order made under subrule (1) may apply to the Court for further directions.

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

(4) The parties may agree, at any time, to be bound by agreement on any specified matter. In that event, the joint report may be tendered at the trial as evidence of the matter agreed. Otherwise, the joint report may be used or tendered at the trial only in accordance with the rules of evidence and the practices of the Court.

(5) Where, pursuant to this rule, expert witnesses have conferred and have provided a joint report agreeing on any matter, a party affected may not, without leave of the Court, adduce expert evidence inconsistent with the matter agreed.

Uniform Civil Procedure Rules 2005

Schedule 7 Expert witness code of conduct

(commenced 8.12.2006)

1 Application of code

This code of conduct applies to any expert witness engaged or appointed:

(a) to provide an expert's report for use as evidence in proceedings or proposed proceedings, or

(b) to give opinion evidence in proceedings or proposed proceedings.

2 General duty to the court

(1) An expert witness has an overriding duty to assist the court impartially on matters relevant to the expert witness's area of expertise.

(2) An expert witness's paramount duty is to the court and not to any party to the proceedings (including the person retaining the expert witness).

(3) An expert witness is not an advocate for a party.

3 Duty to comply with court's directions

An expert witness must abide by any direction of the court.

4 Duty to work co-operatively with other expert witnesses

An expert witness, when complying with any direction of the court to confer with another expert witness or to prepare a parties' expert's report with another expert witness in relation to any issue:

(a) *must exercise his or her independent, professional judgment in relation to that issue, and*

(b) *must endeavour to reach agreement with the other expert witness on that issue, and*

(c) *must not act on any instruction or request to withhold or avoid agreement with the other expert witness.*

5 Experts' reports

(1) An expert's report must (in the body of the report or in an annexure to it) include the following:

(a) *the expert's qualifications as an expert on the issue the subject of the report,*

(b) *the facts, and assumptions of fact, on which the opinions in the report are based (a letter of instructions may be annexed),*

(c) *the expert's reasons for each opinion expressed,*

(d) *if applicable, that a particular issue falls outside the expert's field of expertise,*

(e) *any literature or other materials utilised in support of the opinions,*

(f) *any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out,*

(g) *in the case of a report that is lengthy or complex, a brief summary of the report (to be located at the beginning of the report).*

(2) If an expert witness who prepares an expert's report believes that it may be incomplete or inaccurate without some qualification, the qualification must be stated in the report.

(3) If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.

(4) If an expert witness changes his or her opinion on a material matter after providing an expert's report to the party engaging him or her (or that party's legal representative), the expert witness must forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect containing such of the information referred to in subclause (1) as is appropriate.

6 Experts' conference

(1) Without limiting clause 3, an expert witness must abide by any direction of the court:

(a) *to confer with any other expert witness, or*

(b) to endeavour to reach agreement on any matters in issue, or

(c) to prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement, or

(d) to base any joint report on specified facts or assumptions of fact.

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

The Code was recently discussed by the Court of Criminal Appeal in:

Wood [2012] NSWCCA 21 at [725]

Gilham [2012] NSWCCA 131 at [405]

WOOD v R [2012] NSWCCA

On 3 May 2006, eleven years after Caroline Byrne died, Gordon Wood (the applicant) was charged and subsequently convicted of her murder. The Crown's case was a circumstantial one. The allegation was that the applicant had thrown Ms Byrne off a cliff at the Gap in Sydney. The police failed to take photographs of the body in situ. Some years after her death, there was some controversy over the precise location at which Ms Byrne's body was found. The location was crucial to the conclusions reached by A/Prof Rod Cross about whether Ms Byrne had jumped or was thrown over the edge.

[461] The applicant challenged the evidence and opinions of A/Prof Cross. It was submitted that his opinion that Ms Byrne had been "spear thrown" from the "northern ledge of the Gap" was based on a number of "assumptions, experiments and assumed facts." It was argued that before his evidence could be considered these assumptions had to be identified and proved by admissible evidence: ***Ramsay v Watson*** *[1961] HCA 65; (1961) 108 CLR 642 at 649; ss 55, 76, 79 and 137 of the* ***Evidence Act****. It was further argued by the applicant that in order for A/Prof Cross' opinions to be probative, the assumptions he made needed to have a reasonable foundation in evidence and, furthermore, he needed to be qualified to express the relevant opinions. The applicant submitted that since these conditions were not met the trial miscarried.*

[462] The applicant submitted that the flawed assumptions accepted by A/Prof Cross related to:

conditions under which A/Prof Cross' experiments were conducted;

the availability of 4 m of run-up on the northern ledge;

the northern ledge being the point of departure;

the 180-degree rotation of Ms Byrne's body;

the applicant's weight being 80 kg, thus enabling him to bench press 100 kg;

the athletic ability of Ms Byrne;

Ms Byrne ending up in hole A; and

the use of a spear throw to throw Ms Byrne off the cliff top.

The challenge to the admissibility of A/Prof Cross' evidence at the trial was confined to his views on the issue of the likelihood of injury being caused to Ms Byrne as she landed on the rocks at the base of the cliff. Although his evidence was not otherwise challenged, significant and important aspects of his evidence were concerned with biomechanics, which required an understanding of the functioning and capacity of the human body. In ***HG v The Queen*** *[1999] HCA 2; (1999) 197 CLR 414 at [44] Gleeson CJ said:*

"Experts who venture 'opinions', (sometimes merely their own inference of fact), outside their field of specialised knowledge may invest those opinions with a spurious appearance of authority, and legitimate processes of fact-finding may be subverted."

[467] To my mind A/Prof Cross was allowed, without objection, to express opinions outside his field of specialized knowledge.

McClellan CJ at CL was critical of the experiments conducted by A/Prof Cross at the police academy in Goulburn using the gymnasium and swimming pool. Female police cadets were thrown into the pool by male officers. They were instructed to cooperate with the thrower. They did not resist or struggle. Although the subjects simulated being limp in the arms and legs, they cooperated by diving out of the throw.

A number of variables that may have been present on the night in question were not taken into account in the experiments. The Court noted that if A/Prof Cross' conclusions were to be of significant utility, it must be assumed that the conditions under which his experiments were conducted were not materially different to the conditions on the night Ms Byrne died. However, this was not the case: [476].

The appeal in this case was upheld on Ground 1 - that the verdict was unreasonable. In upholding the appeal on this ground, the Court expressed the view that little weight should be afforded to A/Prof Cross' opinions. In Ground 9, the applicant argued that there had been a miscarriage of justice in the trial on account of fresh evidence and evidence undisclosed at the trial. Relevant to this argument

was a book published by A/Prof Cross while the appeal was pending. McClellan CJ at CL concluded that had that book been available at trial it would have significantly diminished the witnesses credibility because it exposed the fact that A/Prof Cross had approached his task in a biased way:

> *[717] My reading of the book and the lecture leads me to the conclusion that if it had been available at the trial, it would have significantly diminished A/Prof Cross' credibility. In the book A/Prof Cross makes plain that he approached his task with the preconception that, based on his behaviour, as reported after Ms Byrne had died, the applicant had killed her. He clearly saw his task as being to marshal the evidence which may assist the prosecution to eliminate the possibility of suicide and leave only the possibility of murder. The book is replete with recitations of his role in solving the problem presented by the lack of physical evidence and records how he was able to gather the evidence which enabled the prosecutor to bring proceedings against the applicant…*
>
> *[719] The obligations of an expert witness were discussed by Cresswell J in* ***National Justice Cia Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)*** *[1993] 2 Lloyd's Rep 68 at 81-82. They may be summarised as follows:*
>
> > *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. See also* ***Whitehouse v Jordan*** *(1981) 1 WLR 246 at 256 (Lord Wilberforce).*
> >
> > *An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness should never assume the role of an advocate.*
> >
> > *An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider the material facts which could detract from his concluded opinion.*
> >
> > *An expert witness should make it clear when a particular question or issue falls outside his expertise.*
> >
> > *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. In cases where an expert who has prepared a report cannot assert that the report contains the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.*
> >
> > *If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert reports, 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.*
> >
> > *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.*
>
> *[720] These principles were approved by Otton LJ in* ***Stanton v Callaghan*** *[2000] QB 75 at 107-8 and are accepted and applied in the UK in both civil and criminal cases. In* ***Meadow v General Medical Council*** *[2007] 2 WLR 286, they were*

*again approved by Auld LJ at [204], by Thorpe LJ at [250] and by Sir Anthony Clarke MR at [21], [70]-[71], and were said to be "of particular importance in a serious criminal matter such as the trial of a defendant for murder" at [71]. In **R v Harris** [2006] 1 Cr App R 5, the Court of Appeal stated that the guidance of Cresswell J was "very relevant to criminal proceedings and should be kept well in mind by both the prosecution and defence": at [273].*

*[721] In Australia, the **Ikarian Reefer** principles were discussed by Heydon JA in **Makita (Australia) Pty Ltd v Sprowles** [2001] NSWCA 305; (2001) 52 NSWLR 705 at [79], by Debelle J in **James v Keogh** [2008] SASC 156; (2008) 101 SASR 42 at [67]-[72], and by Austin J in **ASIC v Rich** [2005] NSWSC 152; (2005) 190 FLR 242 at 320-1 [333].*

[722] The applicant challenged the admissibility of the evidence of A/Prof Cross in this Court. There is a live issue as to whether a failure to comply with the relevant obligations renders the expert's evidence inadmissible.

*[723] It was accepted by Austin J in **ASIC v Richat** [256] that in this State, the law is not fully settled in relation to principles of admissibility of expert opinion evidence. Cresswell J's propositions were said by Austin J to have been "strongly influential upon the drafters of the **Expert Code of Conduct**, to which Pt 36, r 13C of the **Supreme Court Rules** refers." Austin J was of the opinion that neither the propositions of Cresswell J nor the **Code of Conduct** were to be construed as rules of admissibility of expert evidence: at [333]. He noted however, that the structure and content of the present law for responding to the problem of bias in expert evidence is "controversial and arguably unsatisfactory": at [335].*

*[724] In **Sydney South West Area Health Service v Stamoulis** [2009] NSWCA 153 at [203], Ipp JA (Beazley and Giles JJA agreeing) said that the content of the duty of expert witnesses and the powers of the court to enforce that duty are yet to be finally determined.*

*[725] The **Code of Conduct** is found in Schedule 7 to the **Uniform Civil Procedure Rules** 2005. It applies to expert evidence in criminal proceedings by virtue of Part 75 Rule 3(j) of the **Supreme Court Rules** 1970 and applies to A/Prof Cross' reports and oral evidence. Clause 2 of the Code imposes on an expert witness "an overriding duty to assist the court impartially on matters relevant to the witness's area of expertise." Furthermore, there is a duty on the expert to state, "if applicable, that a particular issue falls outside the expert's field of expertise" and "If an expert witness who prepares an expert's report believes that it may be incomplete or inaccurate without some qualification, the qualification must be stated in the report." There is also an obligation to disclose whether an opinion is "not a concluded opinion because of insufficient data or research or for any other reason." An expert report is not to be admitted into evidence unless an expert has agreed to be bound by the Code (unless the Court otherwise orders) nor is oral evidence to be received from that witness: r 75.3J (3)(ii), (c)(i).*

*[726] In **Dasreef Pty Ltd v Hawchar** [2011] HCA 21; (2011) 243 CLR 588, the High Court unanimously held that where an expert purports to give evidence not based on his specialised knowledge, the evidence is inadmissible. The majority confirmed the relevance of the analysis of Gleeson CJ in **HG v The Queen** [1999] HCA 2; (1999) 197 CLR 414 at [41] and of Heydon JA in **Makitaat** [85] when determining whether the opinion of a witness is "based on specialised knowledge or belief": **Dasreef** at [37]-[43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).*

…

*[729] This is not to say that the **Expert Witness Code of Conduct** is merely aspirational. Where an expert commits a sufficiently grave breach of the Code, a court may be justified in exercising its discretion to exclude the evidence under ss 135 or 137 of the **Evidence Act**. Campbell J adverted to this possibility in Lopmand when his Honour stated at [15]: "The policy which underlies the existence of Part 36 rule 13C is one which I should take into account in deciding whether [the expert evidence] should be rejected under section 135." I respectfully agree with that approach. While there is no rule that precludes the admissibility of expert evidence that fails to comply with the Code, the Code is relevant when considering the exclusionary rules in ss 135-137 of the **Evidence Act**. The expert's "failure to understand his [or her] responsibilities as an expert" (**Lopmand** at [19]) may result in the probative value of the evidence being substantially outweighed by the danger that it might mislead or confuse or be unfairly prejudicial to a party.*

*[730] I do not believe it is necessary to resolve this issue in these proceedings. However, as I have said, to my mind the book which A/Prof Cross published has the consequence that his opinion on any controversial matter has minimal if any weight: see **Pan Pharmaceuticals Ltd (in liq) v Selim** [2008] FCA 416 at [157] (Emmett J).*

…

[758] A/Prof Cross took upon himself the role of investigator and became an active participant in attempting to prove that the applicant had committed murder. Rather than remaining impartial to the outcome and offering his independent expertise to assist the Court he formed the view from speaking with some police and Mr Byrne and from his own assessment of the circumstances that the applicant was guilty and it was his task to assist in proving his guilt. In my opinion if the book and the speech had been available to the defence and the extent of A/Prof Cross' partiality made apparent, his evidence would have been assessed by the jury to be of little if any evidentiary value on any controversial issue.

V. <u>"Hot Tubbing"</u>

What is "Hot Tubbing"?

After experts have prepared individual reports the court may direct them to meet (in absence of legal representatives) and discuss case in order to identify areas of agreement and disagreement and basis for disagreement - identified by some as the most critical of all the steps in the procedure.[1]

A joint report is presented to the court and all parties identifying the results of the conference.

[1] Neil Young QC, 'Expert Witnesses: On the Stand or in the Hot Tub – How, When and Why?', 27 October 2010, [11].

Expert witness then give evidence together in the courtroom – each presenting his or her point of view, commenting on the opinion(s) of the other expert(s), being questioned by counsel and the judge, and, in some cases, being in a position to question each other.[2]

Some courts (including the Federal Court) allow counsel to put a question to their own expert during cross-examination of another expert:[3]

> ***BGP Properties Pty Limited v Lake Macquarie City Council*** [2004] NSWLEC 399 at [121]
>
> *The issues which were ultimately defined in the proceedings required resolution of the different views of experts in relation to a number of significant matters. As will become commonplace in proceedings in this Court, the oral testimony of the experts was taken by a process of concurrent evidence. This involved the swearing in of the experts with similar expertise, who then gave evidence in relation to particular issues at the same time. Before giving evidence, the experts had completed the joint conferencing process, which enabled the court to identify the differences which remained and which required resolution through the oral evidence. Each witness was then given an opportunity to explain their position on an issue and provided with an opportunity to question the other witness or witnesses about their position. Questions were also asked by counsel for the parties. In effect, the evidence was given through a discussion in which all of the experts, the advocates and the Court participated*

History[4]

The procedure was first introduced in the ***Federal Court Rules*** 1998, which were subsequently replaced by 2011 Rules.

The NSW Land and Environment Court started issuing Practice Directions on the use of concurrent evidence, despite there being no statutory procedures guiding it

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[2] See, for example, Justice Pepper's summary for the Land and Environment Court: Justice Pepper, *Expert Evidence in the Land and Environment Court*, http://www.lec.lawlink.nsw.gov.au/agdbasev7wr/_assets/lec/m420301l711808/expert%20evidence%20in%20the%20land%20and%20environment%20court%20v2.pdf, 18-19.

[3] Young, above n 1, [23].

[4] Good summary in Hans Eriksson, *Experts in the Australia Hot Tub*, Masters Thesis, University of Lund (2008), 66-72.

to do so. It was the first and only court to require use of concurrent evidence in all applicable cases.

Concurrent evidence has been used in many of the most important cases before the AAT in recent years. There are no formal rules or guidelines, but usage is common.

The procedure has also been adopted as a valuable tool in many alternative dispute resolution settings. Australia is acknowledged as having the most experience with the procedure.[5] The practice has been adopted in some provinces in Canada, but not yet in Britain. Pre-trial conferences are used in Queensland, but not hot tubbing.

Statutory Basis

Some statutory provisions that provide for joint conferences and concurrent evidence:

Uniform Civil Procedure Rules Rule 31.35

http://www.austlii.edu.au/au/legis/nsw/consol_reg/ucpr2005305/s31.35.html

Federal Court Rules 2011 r 23.15

http://www.austlii.edu.au/au/legis/cth/consol_reg/fcr2011186/s23.15.html

Family Law Rules 2004 (CTH) r 15.70

http://www.austlii.edu.au/au/legis/cth/consol_reg/flr2004163/s15.70.html

In some courts, such as the Land and Environment Court, there are no statutory provisions guiding concurrent evidence procedures. The use of the practice rests upon the informal nature of the court.[6]

See also NSW Supreme Court, "Practice Note: SC Gen. 11", August 17, 2005 in relation to the preparation of joint reports.

[5] Steven Rares, 'Using the Hot-Tub: How concurrent expert evidence aids understanding issues' (2010), http://www.fedcourt.gov.au/__data/assets/rtf_file/0004/21469/Rares-J-20100823.rtf, [1].

[6] Pepper, 19; NSW Law Reform Commission (NSWLRC), Report 109, 'Expert Witnesses' (June 2005), 96.

http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/991e2f2f3bcd8289ca2572ed000cec4b

Criminal Procedure Act 1986

s.149E Court powers to ensure efficient management and conduct of trial

(1) On or after the commencement of the trial in proceedings, the court may make such orders, determinations or findings, or give such directions or rulings, as it thinks appropriate for the efficient management and conduct of the trial.

(2) Without limiting subsection (1), the court may order that any of the parties to the proceedings disclose any matter that was, or could have been, required to be disclosed under this Division before the commencement of the trial.

Evidence Act 1995

26 Court's control over questioning of witnesses

The court may make such orders as it considers just in relation to:

(a) the way in which witnesses are to be questioned, and

(b) the production and use of documents and things in connection with the questioning of witnesses, and

(c) the order in which parties may question a witness, and

(d) the presence and behaviour of any person in connection with the questioning of witnesses.

Perceived Advantages

Saving of time and expense

Saving of time and expense is one of the goals of hot-tubbing.[7] Some practitioners claim there has been great savings.[8] Others argue it is difficult to assess and no solid empirical evidence to suggest actual savings.[9]

An AAT study in 2005 of practitioners suggested that they regarded saving of time and costs the least important factor in the use of the procedure.[10]

Permits Experts to Better Present Opinion

Another goal of hot tubbing is to assist experts in fulfilling their role as independent advisors whose primary role is to assist the court.[11]

The procedure is widely supported by experts who feel that their opinions and knowledge was better presented to the court, and not "twisted" or "distorted" by the process of cross-examination.[12]

The following advantages were observed by some expert witnesses: a more open and collegial setting instead of confrontational and partisan atmosphere;[13] limits the role and influence of counsel; and the fostering of a more professional discussion.[14]

Permits Better Understanding of Expert Evidence

A further goal of hot tubbing is to enable judges, legal representatives and other experts to better understand expert testimony and facilitate effective analysis of the

[7] Eriksson, 11 citing AAT, 'An evaluation of the use of concurrent evidence in the Administrative Appeals Tribunal' (2005) 4.

[8] Pepper, 21; Rares, [34]

[9] Gary Edmond, 'Impartiality, efficiency or reliability? A critical response to expert evidence law and procedure in Australia' (2010) *Australian Journal of Forensic Sciences* 1, 10.

[10] Eriksson, 78; Elizabeth Cheeseman, 'Hot Tubbing: Concurrent Expert Evidence', (2006-07) *Bar News* 54, 58; Mia Louise Livingstone, 'Have we fired the hired gun?' (2008) 18 *JJA* 39,52.

[11] AAT, 'An evaluation of the use of concurrent evidence in the Administrative Appeals Tribunal' (2005) 4, quoted by Eriksson, 11.

[12] McClellan J cited in Pepper, 22; NSWLRC, 53-54, 97; Peter Holmes, *Standing Together: Assisting the Court with Concurrent Evidence*, Peter Holmese, *Standing Together: Assisting the Court with Concurrent Evidence* (December 2008/ January 2009); Rares, [29], [33].

[13] Eriksson, 11.

[14] Eriksson, 11.

testimony so as to help the judges make the correct (or preferable) decision in a given case.[15]

In an AAT study, 94.9% of the judiciary was satisfied with the procedure and said it improved objectivity and quality of evidence, made comparison of testimony easier, enhanced decision making, made decision writing quicker and easier, and improved efficiency in dealing with issues and deciding cases.[16] A combination of questioning by experts, judge and counsel meant that issues were quickly identified and explored.[17]

Advantages pointed to are the presentation of all the evidence on an issue at the same time,[18] and judges being able to hear all the expert debate in answer to their questions.[19]

Where Used With Joint Conference –Better Identifies and Narrows Issues

Joint conferences facilitate discussion and help to narrow disputed issues.[20]

Extreme or biased views adopted by experts may be moderated when they need to be justified before peers.[21]

Factual concessions can be easier to make in private rather than in Court.[22]

A conference may disclose facts and/or relevant information not always known or appreciated by other experts[23] - often problems arise because experts proceeded on different assumptions.[24]

[15] AAT, 4; quoted by Eriksson, 11.

[16] Eriksson, 74-79; Livingstone, 50; Cheeseman, 58.

[17] Rares, [33].

[18] Rares, [4], [29].

[19] Holmes.

[20] Pepper, 18; Cheeseman, 54; Rares, [4].

[21] Pepper, 30

[22] Ibid.

[23] Ibid.

[24] Rares, [17].

The experience of one practitioner is that the procedure is effective in quickly identifying key differences, and narrowing or eliminating differences promptly and efficiently.[25]

See, for example, ***Strong Wise Ltd v Esso Australia Resources Ltd*** (2010) 185 FCR 149 per Rares J, in relation to joint reports from 8 experts:

> *[94] … were extremely useful in crystallising the real questions on which the experts needed to give oral evidence. Experience in using this case management technique generally demonstrates considerable benefits in practice. First, the experts usually will readily accept the other's opinion on the latter's assumptions… Second, the process then usually identifies the critical areas in which the experts disagreed.*
>
> *…*
>
> *[96] [t]he great advantage of this process is that all the experts are giving evidence on the same assumptions… and can clarify or diffuse immediately any lack of understanding the judge or counsel may have about a point. The taking of evidence in this way usually greatly reduces the court time spent on cross-examination because the experts quickly get to the critical points of disagreement.*

Permits a More Objective Consideration of the Issues

Hot tubbing is designed to facilitate professional conversation, and reduce the influence of lawyers and incidence of partisanship.[26]

Experts typically co-operate, make more concessions, and state matters more frankly and reasonably.[27]

It can also prevent 'fudging' of answers by experts, as evidence is being assessed by other experts.[28]

Limitations / Concerns

Not suitable for all cases

[25] Young, [3].

[26] Edmond, 10; NSWLRC, 98.

[27] NSWLRC, 98; Rares, [28].

[28] Rares, [27].

An AAT study on use of the procedure suggested it is best used where experts have same level of expertise and are commenting on the same issues, where it would improve the objectivity of evidence and would clarify complex issues. It is less suitable with differing specialities.[29]

It should never be conducted by telephone.[30]

Dominating Expert

There is a concern that the procedure will be dominated by the most assertive, articulate and apparently authoritative (and best resourced) witness, both in the joint conference and in the courtroom.[31]

McClellan argues that the reverse happens - shy experts are more likely to be overborne by cross-examination, and judges can observe the interaction.[32]

Ability of Participants

The procedure requires careful direction and control by judge, which may vary depending upon the ability and character of the judge.[33] Success will also depend upon the preparedness, skills and co-operation of lawyers and experts.[34]

Some participants have found the procedure confusing and unhelpful.[35]

Care must be taken to ensure that the judge does not take-over the process – excessive interjections and interruptions can result in a disjointed and unintelligible transcript, and raise issues of judicial impartiality.[36]

McClellan J argues:[37]

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[29] Eriksson, 77-78.

[30] Eriksson, 78.

[31] Pepper, 20-21; Young, [15], [19].

[32] Livingstone, 51; Rares, [38].

[33] Pepper, 20-21; NSWLRC, 98; Rares, [43]-[44].

[34] NSWLRC, 98; Young, [4]-[5].

[35] ME Rackemann, 'The Management of Experts' (2012) 12 *Journal of Judicial Administration* 168.

[36] Young, [20].

> *"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."*

Fairness of Procedure

The procedure needs to allow freedom of exchange, but also ensure that all points of view are aired, and that counsel are given an adequate opportunity to test all experts.[38]

Young points out that he has been in cases where cross-examination has been seriously limited, leaving parties feeling no fair opportunity to present their case.[39]

Collaboration Not Early Enough

The Queensland Planning and Environment Court introduces collaboration at an earlier stage of the case, requiring agreement on issues prior to experts preparing individual reports.[40]

Does not Improve Value of Evidence

Gary Edmonds argues that there are few reasons to believe it substantially reduces partisanship or improves reliability:[41]

> *information about validity and reliability is generally more important than expressions of cordiality and impressions of credibility.*

Use in Criminal Cases

The use of the hot tubbing procedure has been primarily in civil cases.

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[37] The Hon Justice Peter McClellan, 'Expert Witnesses – the Experience of the Land & Environment Court of New South Wales' (paper presented at XIX Biennial Law Asia Conference 2005, Gold Coast, 24 March 2005), 18; cited in Pepper, 21.

[38] NSWLRC, 98.

[39] Young, [24].

[40] Pepper, 20-21; see also Young, [7]; Rackemann.

[41] Edmond, 10.

An example of a criminal trial in which the procedure was used was in the WA Supreme Court trial of Lloyd Rayney for the murder of his wife. CSIRO scientists gave joint evidence on soils. In that case the accused was acquitted.[42]

Professor Gary Edmond has expressed concern about the use of the procedure in criminal trials. One of his concerns is that is very easy for experts to say something that is inadmissible or subversive in all sorts of ways.[43]

Another concern is that, in criminal cases, the opposing sides are not on level playing fields.[44]

There may be some cases where concurrent evidence is a useful procedure to adopt. However, the adversarial nature of criminal trials does not easily lend itself to wide use of the procedure.

[42] ABC News, 'Scientists 'Hot Tubbing' in Rayney Trial Evidence' (14 August 2012), http://www.abc.net.au/news/2012-08-14/research-scientists-give-evidence-at-rayney-trial/4197874.

[43] Judy van Rhijn, 'Hot-Tubbing Experts: Should Lawyers Like It?' (July 2011) *Canadian Lawyer Magazine*.

[44] Eriksson, 60.