WINNING!

The continued role of the advocate in a less adversarial approach to expert evidence.

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PART A

Courts want to control cases. Clients want to win cases.

1. In 1822, Lord Eldon had this to say of the role of a barrister:

> *"He lends his exertions to all, himself to none. The result of the cause is to him a matter of indifference. It is for the court to decide. It is for him to argue. He is, however he may be represented by those who understand not his true situation, merely an officer assisting in the administration of justice, and acting under the impression, that truth is best discovered by powerful statements on both sides of the question."* [1] [emphasis added].

It is questionable whether many recent developments in litigation preserve that traditional divide in the role of the Bench and Bar, not to mention the adversarial system itself.

[1] *Ex parte Lloyd* (5 November 1822, reported in *Ex parte Elsee* (1830) Mont. 69, at p.70n., at p.72):

2. The previous Chief Justice, The Hon JJ Spigelman AC, had this to say about the idea of argument[2]:

> *"… there are three views about the relationship between truth and the adversarial system. They are:*
>
> *1. The adversarial system is not concerned with truth, but with "procedural truth" or "legal truth", as distinct from substantive fact.*
>
> *2. The adversarial system is the most effective mechanism for the discovery of truth by the application of the Socratic dialogue.*
>
> *3. The adversarial system seeks truth, but that search is qualified when the pursuit of truth conflicts with other values."*

3. My view is that there is an ethical and, *pro bono* cases to one side[3], contractual requirement imposed on advocates to strive to win, although they should do so with the kind of detachment from the outcome described by Lord Eldon. It must be said at the outset that this is subject to the restraint imposed by the overriding duty that one has to uphold the administration of justice and also the duty of candour and honesty enshrined by rules of professional conduct. Currently, the *Legal Profession Uniform Conduct (Barristers) Rules* 2015, made under the *Legal Profession Uniform Law* (NSW) set out these proper ethical restrains on the notion of winning. In particular the following should be noted:

> *Rule 8*
>
> *A barrister must not engage in conduct which is:*
>
> *(a) dishonest or otherwise discreditable to a barrister,*
>
> *(b) prejudicial to the administration of justice, or*

[2] "Truth and the Law", The Sir Maurice Byers Lecture, NSW Bar Association, Address by the Honourable JJ Spigelman AC, Chief Justice of New South Wales, Sydney, 26 May 2011.

[3] There are certain exceptions to this, such as Crown Prosecutors and counsel for bankruptcy trustees etc.

(c) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.

Rule 23

A barrister has an overriding duty to the court to act with independence in the interests of the administration of justice.

Rule 24

A barrister must not deceive or knowingly or recklessly mislead the court.

4. Policy-makers, both judicial[4] and parliamentary, are increasingly proceeding on the premise that the third of Spigelman's alternatives is correct. That is, that the purpose of an advocate is to qualify the pursuit of truth with a pursuit of his/her own interests, or those of his/her client. To that end, the traditional role of the Bar has been somewhat eroded, as the various examples in the cases cited below bear out. However, naturally enough, clients still want to win cases and briefing counsel is still the best way to win.

5. Members of several courts and tribunals have expressed approval of concurrent evidence. In *Temple and Repatriation Commission*[5] the Administrative Appeals Tribunal said:

> *The practice of calling two medical expert witnesses together is still unusual within the Tribunal. I consider it appropriate to record how helpful I found it to be and to express the Tribunal's appreciation to the doctors for their cooperation, and to the representatives for their assistance in making the necessary arrangements. I suggest that the approach be adopted more frequently. <u>There is benefit in a more investigative and less adversarial approach</u>.*

[4] In the sense that heads of jurisdiction (judges) author practice notes etc.
[5] [2001] AATA 490 at [67].

The question, with respect is, *cui bono* (who benefits)? The tribunal or your client?

Although “hot tubbing” and similar practices are probably here to stay, the approach has not been free from criticism. Justice Davies[6], writing extra-crucially, has said this[7]:

> *In short, whilst the hot tub method has some advantages over the process of calling expert witnesses as part of each party's case, it remains, in substance, a partisan procedure which has a high risk that adversarial bias will distort the result. And it saves little in costs.*

In his Honour’s view, this is because:

> *… in many cases each expert will have been "prepared" for the hot tub contest by their party's lawyer; including by being told the kind of questions which they are likely to be asked and how those questions may be answered without giving ground.*

Without resorting to coaching, it is my view that it is a legitimate part of the advocacy process to prepare witnesses in this way. Although expert witnesses are not hired guns, barristers are.

Difficulties in assessing credit in a hot tub have been noted by Justice Garling in, although in his Honour’s view these problems are rare. He proposes the following solution[8]

[6] Justice Davies formerly of the Queensland Court of Appeal not Justice Davies of the New South Wales Supreme Court.
[7] The Hon G L Davies AO QC, *Court Appointed Experts*, QUT Law Review, 2005.
[8] Justice Peter Garling, *Concurrent Expert Evidence, Reflections and Development*, 17 August 2011.

> *The third disadvantage is said to be that the conduct of a cross-examination about credit is, practically speaking, very difficult. That is so, but I do not regard this necessarily as a disadvantage. In fact, I see this, generally speaking, as an advantage. Experience suggests that by the time that experts have participated in the process of joint conference, joint report and concurrent evidence, with careful adherence to the Code of Conduct, issues of credit rarely arise.*
>
> *But if they do, then such an issue can be dealt with in an entirely conventional manner by organising the concurrent expert evidence session so that some issues, such as those relating to credit, are not dealt with during the concurrent session, but are dealt with at the conclusion of the session, on an individual basis, in an entirely conventional manner.* [Emphasis added]

My own view is that credit attacks should be made *before* and not after the giving of concurrent evidence in order to discredit the opposing witness before the substantive issues in dispute are "hot tubbed".

Incidentally, the other two disadvantages identified in Garling J's paper are:

1. The practicalities of getting all experts at court at the same time and place; and
2. Lack of uniformity in the approach by judges as to the conduct of concurrent evidence.

6. The case management considerations, and how they are paramount in the administration of cases have been well known to all litigators since the enactment of ss.56 and 57, *Civil Procedure Act* 2005[9] ie the "just, quick and cheap resolution" of cases having regard to, inter alia, the "efficient disposal of the business of the court" and "the efficient use of available judicial and administrative resources". The approach endorsed by these provisions could

[9] Also see equivalent federal provision; s.37M, *Federal Court of Australia Act* 1976 (Cth).

not be ignored anywhere in Australia since *AON Risk Services Australia Limited v Australian National University*[10] where it was held by the High Court that courts must always take into account the public interest in the use of court resources in making case management decisions.

7. The philosophical underpinnings of s.56 have been espoused for more than a decade and are well known. The main purpose of this paper is to explore examples of the role of and challenges faced by advocates in priority to critiquing whether these reforms, both statutory and at common law, have improved the delivery of just outcomes to litigants or not.

8. There are a number of areas where reforms have made rethinking advocacy essential such as increasing use of mediation/settlement conferences; use of statements in lieu of evidence in chief, and disallowing legal representation except by leave[11].

PART B

Technical requirements for expert evidence

9. The concept of expert evidence can be distilled as evidence which cannot be given by a layman, but can be given by an expert, by reason of his/her training, study or experience. This is enshrined in ss.76 and 79 of the *Evidence Act 1995*, however, the admissibility of expert evidence, per se, is not the intended subject matter of this paper.

10. In the NSW Supreme Court, the main two relevant practice notes are SC Gen 10 and 11.

11. Para 8 of practice note 11 says the following in relation to conclaves[12]:

[10] [2009] HCA 27; (2009) 239 CLR 175; (2009) 258 ALR 14; (2009) 83 ALJR 951.
[11] See for example, s.596, *Fair Work Act* 2009 (Cth) and s.45, *Civil and Administrative Tribunal Act* 2013 (NSW).
[12] The meeting of experts in the same field after writing their own individual reports and (generally but not always) giving evidence orally in court.

The questions to be answered should be those specified by the Court or those agreed by the parties as relevant and any other question which any party wishes to submit for consideration.

12. There is a similar practice now in the District Court per Practice Note DC (Civil) 1. At least per the respective practice notes, the procedure does have one key difference which is that, in the District Court, there is no requirement to pose questions for the conclave. Para 9 of the District Court practice note simply says:

> *The experts, before giving their oral evidence, should confer with the intent of reducing the issues between them. Thereafter a joint report should be prepared stating areas of agreement and continued disagreement. Where areas of continued disagreement remain, reasons must be stated by each expert (or group of experts holding a common opinion) for such continued disagreement.*

13. In any (State) court there is undoubtedly a power for the court to intervene – UCPR 31.25:

> *If a direction to confer is given under rule 31.24 (1) (a) before the expert witnesses have furnished their reports, the court may give directions as to:*
>
> *(a) the issues to be dealt with in a joint report by the expert witnesses, and*
>
> *(b) the facts, and assumptions of fact, on which the report is to be based,*
>
> *including a direction that the parties affected must endeavour to agree on the instructions to be provided to the expert witnesses.*

14. An emerging issue has been that one party unilaterally writes to the members of the conclave, directing them to respond to various (sometimes highly leading) questions. It is submitted the correct response to this situation is:
    a. To write to the conclave members asking them not proceed (unless this would amount to a breach of court time table); and
    b. Immediately approach the Court for relief (either by relisting the matter if that procedure is available[13], or by motion under rule 31.24).

15. A "single expert" is defined in practice note 10 as "an expert witness jointly retained by the parties or appointed by the court pursuant to this practice note". It is important to note that para 6 provides "Unless cause is otherwise shown, a single expert direction will be made in every proceeding and at the earliest practicable time in the course of case management". When should a Court decline to make such an order?

16. In the Federal Court, Central Practice Note: National Court Framework and Case Management (CPN-1) requires that:

> *11.4 The parties' approach should have in mind the most effective, efficient and economical way to manage evidence. Innovative tools relating to managing evidence will be encouraged by the Court, including the use of:*
>
> - *statements of agreed and disputed facts;*
> - *joint reports and concurrent expert evidence; and*
> - *organisation of evidence, where appropriate, into discrete components (eg. preliminary issue(s), splitting liability and quantum etc).*

[13] Either because the applicable practice note says so, or because a judge or registrar has granted liberty to restore.

17. Whilst Expert Evidence Practice Note (GPN-EXPT) cautions against excessive interaction with experts, it does acknowledge at least the possibility of having an additional “consulting” expert at para 3.2

> *…it is important to note that there is no principle of law or practice and there is nothing in this practice note that obliges a party to embark on the costly task of engaging a "consulting expert" in order to avoid "contamination" of the expert who will give evidence. Indeed the Court would generally discourage such costly duplication.*

18. Para 7.2 of GPN-EXPT contemplates that in appropriate circumstances a registrar or other qualified person could be appointed a “conference facilitator”.

19. The timing of conclave orders in the Federal Court is interesting. Para 7.5 lists the circumstances where a “conference of experts” might be ordered and this can be done, for example, where parties are in a mediation. This may solve deadlocks if a party refuses to budge due to an unresolved factual issue.

20. Parties and their lawyers *may* attend the conclave but only by order (para 7.6). UCPR 31.24(a) allows for a direction that lawyers may or may not attend but it is not expressed as being prohibited for the parties or their lawyers to attend in the absence of that direction. I suggest it would be very dangerous for a legal representative to attend without either consent or a direction to do so.

21. A particular opportunity for advocacy in the Equity Division is under paragraph 10 of the Practice Note which suggests that the Court will allow multiple witnesses on the same area of expertise when persuaded to do so. Motions are not required in Equity to relist the matter for directions on expert evidence. Paragraph 15 sets out 6 different lists and the relevant judge and the relevant judge who will determine the matter.

22. The Commercial List and the Technology and Construction Lists are governed by PN SC Eq 3 which, at para 54 and 55 reads:

Experts

54. The use of a single expert or a Court Appointed Expert and/or the concurrent evidence of experts is encouraged in suitable cases. The parties are to confer as early as practicable with a view to reaching agreement as to whether the use of such an expert or the concurrent evidence of experts is appropriate and, if agreed, the inclusion of such appointment and/or adoption of concurrent evidence should be accommodated in the timetable for the preparation for hearing.

55. Where experts' reports have been or are to be served (whether or not pursuant to an order or direction of the Court) the Court will, unless otherwise persuaded, direct, upon such terms as it thinks fit, that the parties cause the experts or some of them to confer with a view to identification of and a proper understanding of any points of difference between them and the reasons therefore and a narrowing of such points of difference. The Court may, at the same time or subsequently, direct that the parties and/or the experts prepare an agreed statement of the points of agreement, and of difference remaining, between experts following such conference and the reasons therefore (see Schedule 7 of the UCPR).

PART C

The role of the advocate – in court and beforehand

23. The importance of conferring with an expert cannot be overstated. Their reports must be satisfactory because the report *is* their evidence in chief: UCPR 31.21. You will be on the backfoot if you try to strap the evidence up orally. A common problem in expert/lawyer conferences is expert ego. The expert knows more than you do about the subject matter, but you know more about what is going to impress a judge. An expert may be tempted to express a view on the “ultimate issue” (eg “the defendant was negligent”). This is, of course, not prohibited.

Even before the *Evidence Act 1995*, s.80 of which abolishes the alleged "ultimate issue rule", the ability of experts to express such a view was acknowledged, for example in *Arnotts Limited v Trade Practices Commission*[14]:

> *It is often said that an expert cannot give an opinion as to the ultimate fact that the court has to decide. This is inaccurate, as experts, especially valuers, often give evidence as to the ultimate fact, and in many cases the question whether that fact exists can be answered only by experts … What the rule really means is that an expert must not express an opinion if to do so would involve unstated assumptions as to either disputed facts or propositions of law.*

Nevertheless, the exclusive domain of the judge to actually *decide* these issues (as opposed to express a view on them) must be respected. Qualifying letters with questions like "In your opinion, was the defendant negligent" are to be avoided. Similarly, but less obviously, questions like "what was the content of the defendant's duty of care" are not appropriate. "Liability experts" often tend to express a view on, for example whether the *Work Health and Safety Regulation 2011* in work injury damages cases where, in reality this is tangentially relevant at best. Experts tend to know other experts in their field and can shed some light on the temperament on other members of proposed conclaves/hot tubs – this can assist in management of the evidence in court in order to avoid one witness bullying the other. Another matter for proper guidance of experts (and one consistent with s.56, CPA) is to encourage culling material. Nothing is to be gained by appending hundreds of pages of Australian Standards or photocopies of text books to reports. The persuasive value of slabs of material of this kind is low because it shows an absence of reasoning on the part of the expert.[15]

[14] (1990) 24 FCR 313, 350 (Lockhart, Wilcox and Gummow JJ) quoting R Eggleston, Evidence, Proof and Probability (2nd ed, 1983), 147–148.

[15] See *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305 as for the need for an expert to expose his/her manner of reasoning.

24. Most experts are experienced in giving evidence, some are not. Less experienced ones may need to be educated on the basics like:
    a. Adhering to the code of conduct in Shd 7, UCPR (rule 31.23(3));
    b. Setting out the *Makita* factors:
        i. Matters assumed; source of assumption
        ii. Reasoning
        iii. Whether opinion differs if different facts assumed;
    c. Attaching up to date CV;
    d. Defining jargon;
    e. Why (anticipated?) contrary views should be rejected.

25. There are cases where judges will want explicit evidence on components of the relevant legal test, although such evidence should be expressed in factual rather than legal terms. In *Coles Supermarkets Australia v Ready Workforce Pty Limited*[16], a slip and fall case, the Court of Appeal specifically lamented what it considered to be a lack of "expert evidence as to any industry standard or practice in relation to the cleaning of warehouses of the kind used by Coles or similar workplaces." This was so, notwithstanding a wealth of lay evidence going to the problems of floor surface contamination, the number of workers on site, and the paucity of periodic cleaning (every 12 hours). Based on a lack of this evidence, the trial judge's findings (based on *submissions* as to a conclusion on breach rather than *evidence*) that cleaning should have occurred every 4 hours were reversed.

26. Unique considerations apply in the Equity Division of the Supreme Court by reason of PN SC Eq 5. There is a presumption of one expert being used jointly. Paragraph 6 provides:

> *Where the prospective parties have retained legal representatives the legal representatives of those parties must confer in an endeavour to jointly retain:*

[16] [2018] NSWCA 140.

one expert, or

One expert for each specified issue or matters in issue.

Another important feature of this practice note is that the judge (not counsel) will deal with evidence in chief (*cf* UCPR 21.31 which says there should be no oral evidence of experts without leave). Paragraph 8 of the Practice Note says this of concurrent evidence:

> *…Generally, the procedure will be that the judge will examine them in chief as witnesses of the Court; cross examination will take place of all witnesses jointly, the order of cross examination being either agreed by counsel or determined by the Judge.*

27. Concurrent evidence will not always be necessary. One reason for this is UCPR 31.30(3)(a) which provides that, in the District and Local Courts (but not the Supreme Court), the cross-examining party must procure the attendance of the expert. Should only one party in a two-party case wish to attack the other party's expert evidence, that would generally be in the conventional manner as the cross-examining party cannot force the calling party to procure its expert's attendance at court. Even where concurrent expert evidence is prima facie preferred (I am aware of no circumstance where it is absolutely mandatory), there is scope for advocacy in terms of whether the norm should be departed from. Judge Rackemann of both the Queensland Planning and Environment and District Courts had this to say on the point[17]:

> *One of the problems with the enthusiastic promotion of concurrent evidence is that it has tended to give the impression that it is "the" method for adducing expert evidence and is, in itself, a sufficient way to address concerns surrounding expert opinion evidence. In*

[17] Judge ME Rackemann, "The Management of Experts" *Judicial Conference of Australia Colloquium,* 14-16 October 2011.

truth, it is neither. It is a tool, the usefulness of which will vary according to the context in which it is used, and the manner in which it is employed.

Whether concurrently giving evidence or not, consideration should be given to objecting, in some circumstances, to the presence of the experts in court prior to giving evidence. It has been said that experts are "never excluded from the court"[18] but this must be seen as a general rule only. By contrast, the opposite position is adopted in the United States where "sequestration" of witnesses is in most cases mandatory upon the application of a party[19]. Curiously, (and again, in contradistinction to the Anglo-Australian approach), the American rules do not differentiate between lay and expert witnesses on the sequestration issue. The Australian approach is perhaps best set out in *R v Tait*[20] where it was held to be a matter of discretion, aimed at being conducive to determining truth. Assuming expert evidence is being given sequentially and not concurrently, it is submitted that having "your" expert in court during your opponent's expert giving evidence could be useful in picking up ideas for your up-coming cross-examination. One particular circumstance where both experts should be excluded is where there is an in-court discussion as to whether the content of a conclave should be referred to (which requires consent of the parties; UCPR 31.24(6)).

PART D

CASE EXAMPLES ON ADVOCACY AND EXPERT EVIDENCE

28. *Tabet, by her Tutor, Sheiban, v Mansour* [2005] NSWSC 908

    Matters arose for the first time in an expert conclave – leave granted to amend statement of claim. Note decided *before Aon Risk*. The conclusions of Hulme J are worth extracting in full:

[18] *Tomlinson v Tomlinson* [1980] 1 ALL ER 593 at 596.
[19] Rule 615, *Federal Rules of Evidence* 1975 (United States).
[20] [1963] VR 520.

Conclusions

66 The analysis of the facts relevant to the present application leads me to the following conclusions:-

• Where a plaintiff seeks an amendment to raise an arguable issue which is maintainable at law and delay in seeking it has not occasioned the other party irremediable prejudice, justice being the paramount consideration, the plaintiff should not be prevented or shut out from a determination of the issue: ***Queensland v. J.L. Holdings*** *[1997] HCA 1; (1996-1997) 189 CLR 146, 155.*

• The plaintiff's proposed amendment raises an arguable issue which is potentially relevant to her allegations both of breach of duty and causation.

• The issue raised by the proposed amendment will involve an examination of complex medical questions, the resolution of which involves questions of both fact and expert medical analysis.

• Of its nature the issue is one that is only likely to be resolved by conventional trial processes and cannot be taken to have been considered, resolved and foreclosed by the answers of the joint conference of experts held on 8 November 2002.

• Whilst the identification of "the new contention" may well have resulted from inquiry prompted by negative or adverse answers provided by the experts attending the joint conference, that does not in my opinion undermine either the demonstrated existence of an arguable issue nor the primacy of the principle of justice to which I have referred.

• A report of a joint conference of experts held in accordance with the rules of Court does not operate as an irrevocable bar on the subsequent raising of an issue not dealt with in or by the report. Whilst a report of a joint conference is intended to assist in resolving issues and in limiting the evidence, time and cost associated with proceedings, it cannot, in my opinion, where justice otherwise demands it, inhibit a proper exercise of the discretion to permit an amendment in accordance with the abovementioned principles.

• Whilst answers provided by the joint conference of experts are in many respects adverse to the plaintiff on the issue of causation, that issue must, in order that justice is done, be further considered and determined following appropriate examination of the complex issues associated with "the new contention".

• The plaintiff accordingly should have leave to amend to ensure that this may take place.

29. *Andonovski v Park-Tec Engineering Pty Ltd & Anor; Andonovski v East Realisations Pty Limited Formerly t/as Westbus Pty Ltd* [2013] NSWSC 1926

The plaintiff tried to tender a bundle of 53 expert reports. An order had been made previously for an orthopaedic conclave. Dr Max Ellis, a general surgeon but providing orthopaedic treatment, had prepared 6 of those reports. He did not attend the conclave. The tender of his reports was allowed, but this highlights the need to seek clear direction on the scope of expertise to be included in a conclave order.

30. *Campton v Centennial Newstan Pty Ltd (No 1)* [2014] NSWSC 304

Five objections were taken to conclave evidence:

- Conclave not given joint statement of assumptions,
- No statement of being bound by the Code,
- The questions were inappropriate,
- There was a lack of reasoning in the report,
- The members of the conclave took into account irrelevant considerations.

The Court's answer to each objection can be summarised as follows:

- The conclave was provided with evidentiary statements,
- The joint report must be read in light of the preceding individual reports (which referenced the Code),
- The questions were appropriate,

- The rule that reasoning be exposed does not apply to the reasons for agreement by the conclave rules (See *Makita* for the general proposition),
- The irrelevant considerations argument, in terms of administrative law principles, was flatly rejected.

The interesting part of this case is that *Makita* objections can apparently not be taken to conclave reports. Advocates will have to be creative.

31. *Matthews v SPI Electricity; SPI Electricity Pty Ltd v Utility Services Corporation Ltd (Ruling No 10)* [2012] VSC 379

Victorian Bushfires litigation. Parties agreed there were six broad topics for expert evidence in the proceedings ie:

- Fire ignition,
- Conductor break,
- Asset management,
- Prescribed burning,
- Fire suppression,
- Warnings.

The importance of these, especially ignition (ie the start of the problem giving rise to the litigation) is obvious enough.

The parties disagreed on the specific topics to be discussed at each of the conclaves. Justice Forrest had the following approach:

- Make the topics specific,
- Appoint an associate judge to supervise the conclaves (note legal representation was permitted but capped at three lawyers per party),
- Have a scribe,
- Ordered the parties to create an agenda (rather than a list of questions).

Given how fundamental the broad topics were to liability, the role of advocacy here was to steer the specific topics in favour of each party's respective case

theory on liability. To the extent the parties could not agree on a conference agenda, they had liberty to argue the point before the associate justice.

32. *Re Qantas Airways Limited* [2004] ACompT 9

This case (in the Australian Competition Tribunal – in relation to competition of airlines) shows what happens when parties lose control of their witnesses (who in turn become the advocates). This is evidenced by just a few quotes from one of the experts. Professor Timothy Hazledine (a professor of Economics at the University of Auckland) described the other party's case on costs savings as "almost entirely bogus", and on re-entry to trans-Tasman routes as a "desperate attempt to bolster a case which has failed comprehensively ..." and stating that the applicants "may have attempted to finesse [a particular] issue with the aid of a cunning but long discredited concept of contestability".

33. *Jones v Kaney* [2011] UKSC 13; [2011] 2 AC 398; [2011] 2 All ER 671[21]

This matter serves as an example of how dominating personalities can create perverse conclave reports (and the subsequence challenges for counsel for the party whose expert was overwhelmed – ie difficult submission to make that your expert should still be preferred). Although this is an English case (and so the UCPR does not apply) it also shows the potentially problematic effect of UCPR 31.24(6)[22] in relation to the prohibition on referring to what happened in the conclave). Lord Phillips in the UK Supreme Court commented that:

> *Blake J rightly described as an unhappy picture of how the joint statement came to be signed, summarised as follows:*
>
> > *i) She had not seen the reports of the opposing expert at the time of the telephone conference;*

[21] This case is more important for reasons unconnected with this paper, namely that it overruled 400 years of authority that expert witnesses were immune from suit, although the narrow issue before the Supreme Court was whether a conclave report as such was the subject of the immunity. The majority of the Court saw fit to bring the position of experts in line with that of advocates on the immunity point (advocates immunity having been abolished in *Hall v Simons* [2000] 3 WLR 543 a decade or so earlier). It should be noted this is not the position in Australia; *Attwells v Jackson Lalic Lawyers Pty Ltd* [2016] HCA 16 as to advocates immunity. The continued willingness of Australian courts to strike out claims against expert witnesses can be seen in the recent example of *Chalk v Larder* [2017] QDC 308.

[22] Rule 35.12(4) of the *Civil Procedure Rules* (England & Wales) is essentially the same in any event. These rules apply to most of the senior courts in that jurisdiction.

ii) The joint statement, as drafted by the opposing expert, did not reflect what she had agreed in the telephone conversation, but she had felt under some pressure in agreeing it;

iii) Her true view was that the claimant had been evasive rather than deceptive;

iv) It was her view that the claimant did suffer PTSD which was now resolved;

v) She was happy for the claimant's then solicitors to amend the joint statement. "

PART E

WINNING CONSIDERATIONS FOR CROSS-EXAMINATION OF EXPERTS

34. Be bold in asserting what the issues are *before* oral evidence commences.

35. Do an Austlii search on the expert. The witness may have been criticised before.

36. Check the latest core text.

37. Has the witness/party circumvented UCPR 31.22 (contingency and deferred fees – will they be written off? Is there a “wink-wink” arrangement)?

38. Can you compete with the expert?

39. Should you have a “consulting expert”?

40. Is there any point arguing an expert is not an expert when he/she gives evidence in your court all the time?

41. Generally, get a reply report (even if the court time table does not allow you to tender it) as this should expose the errors in the opposing evidence.

42. Obtain a concession that reasonable minds may differ within a given field.

43. Has there been adherence to the code of conduct?

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