Concurrent evidence conclaves: getting the most out of your hot tub

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The Supreme Court now invariably orders expert evidence to be given concurrently in trials. With concurrent evidence, all experts of similar disciplines give evidence at the same time. Courts are now configured to allow several witnesses to give evidence concurrently. They are usually seated in the witness box together, hence the description 'hot tubbing'.

Previously each expert in a party's case was called and gave evidence in chief orally and/or by report and was then cross-examined. The experts of other parties would be called in due course – sometimes weeks or even months later when the party qualifying that particular expert went into evidence.

Snapshot

- The Supreme Court invariably orders expert evidence in trials to be given concurrently.
- The giving of concurrent evidence needs to be carefully planned and structured. There are numerous procedures and rules to be followed.
- Given the high cost of conclaves and their importance in the conduct of litigation, it is advisable to appoint a chair or facilitator to ensure the conclave does not miscarry for procedural reasons.

Concurrent evidence – a practical guide

Concurrent evidence has been described as 'essentially a discussion chaired by the judge in which the various experts, the parties, the advocates and the judge engage in a cooperative endeavour to identify the issues and arrive where possible at a common resolution of them' (P McClellan, 'New Method with Experts – Concurrent Evidence' (2010) 3 *Journal of Court Innovation* 259 at 264).

The giving of concurrent evidence needs to be carefully planned and structured. This article is written as a practical guide. Practitioners should thoroughly familiarise themselves with:

- Part 31 of the *Uniform Civil Procedure Rules 2005* (NSW) (which applies to the adducing of expert evidence in civil matters in the Supreme Court); and
- Practice Note SC Gen 11 (Joint Conferences of Expert Witnesses).

There are numerous other Practice Notes of the Supreme Court and the Federal Court of Australia (for example, Federal Court Expert Evidence Practice Note – GPN – EXPT) which discuss the procedures relating to expert evidence in particular divisions of the courts and in reference to particular types of matters coming before those courts. The relevant rules and the Practice Notes of the appropriate court must always be checked.

Judicial case management process

The prelude to the court embarking upon the process of ordering concurrent evidence is the provision of expert reports. This has occurred for many decades. Rule 31.20(1) confers a broad discretionary power on the court in respect of the use of expert evidence in the proceedings. It provides: 'Without limiting its other powers to give directions, the court may at any time give such directions as it considers appropriate in relation to the use of expert evidence in proceedings'.

This will occur as part of the judicial case management process. The parties need to determine which experts should be grouped together for the purposes of providing a joint report in response to specific questions put by the parties. The next step in this process will be an order for the holding of a conclave or joint meeting of those experts – usually by a specific date.

Conclave construction

The court may be asked to determine how the various conclaves will be constructed. By way of example, in a personal injury case the structure of conclaves can be simple – there may be a conclave of orthopaedic specialists, another conclave of psychiatrists, and another of occupational therapists and so on.

This can be a complicated process which will involve marrying up issues and expertise of the experts. In large cases the number of technical issues and accordingly the number of conclaves can be significant. In the Kilmore East bush fire class action in the Victorian Supreme Court (*Liesfield v SPI Electricity Pty Ltd and Others* [2013] VSC 634), Forrest J and the parties identified six general topics of expert evidence disclosed by the reports. Just one of those topics alone required six separate conclaves with up to five subtopics.

If the parties cannot agree upon the structure of the conclaves, the timing of the conclaves, the questions to be put to the witnesses, or the material to be provided to witnesses in the conclaves, the court will do so.

Framing questions

It cannot be overemphasised that the precise form of the questions to be answered in a joint report emanating from the conclave is critically important. Questions which are ambiguous, irrelevant in whole or in part or which incorporate questions of law are unhelpful.

It is the practice of some judges to require the parties to provide the list of assumptions which are to be given to experts to ensure that the assumptions involve questions of fact and not law. The parties then submit an agreed bundle of documents and a series of joint questions to the experts forming each conclave with a view to those experts providing a joint report.

As the parties will almost invariably be the subject of an order that the conclave take place by a particular date, it is for the parties to arrange to get all the participants in the conclave together for that purpose. The arranging and holding of conclaves of experts can be an extremely expensive business which frequently costs tens of thousands of dollars. It is preferable that they meet in person although this cannot always be done. Sometimes it is done with one or more of the participants participating by audio-visual means or by telephone.

The joint reports which flow from those conclaves are often determinative not only of issues but of the fate of a party's entire case. It is essential that the questions and answers succinctly address the real issues relevant to the case and are within the expertise of the experts. It is also important that the answers in the joint report are given in a form which the court can utilise in addressing the legal and factual issues before it.

At the trial, the participants in a conclave having one specialty may be invited to listen to the concurrent evidence of experts with a different specialty. For example, in *Sanchez-Sidiropoulos v Canavan* [2015] NSWSC 1139, the trial judge had the psychiatrists, who were giving concurrent evidence together, listen to the concurrent neurological evidence before the concurrent psychiatric evidence took place.

As is stated by Justice Garling in a paper entitled 'Concurrent Evidence: Perspective of an Australian Judge' (Oxford University Seminar Paper [2013] *NSWJSchol* 36) the internal discussions held during the joint conclave are confidential and cannot be challenged in the joint evidence session in the trial. The object of the joint conclave is the production of a joint report which addresses the questions put by the parties. In many cases the experts will agree in giving their joint answer. In other cases, they will not agree. The subject of that disagreement will become the point of debate in the concurrent evidence session ('hot tub') which takes place at the trial.

It is in the utmost interests of the parties to ensure that the conclaves proceed in a fashion which is not subject to challenge. Such litigation can occur, for example, as in *Campton v Centennial Newstan Pty Ltd (No 1)* [2014] NSWSC 304 and *X v Sydney Children's Hospitals Specialty Network & Anor (No 5)* [2011] NSWSC 1351.

The role of a chair or facilitator

Given the high cost of conclaves and their importance in the conduct of the litigation, it is often wise and good insurance to appoint a chair or facilitator whose job is to ensure that the conclave does not miscarry for procedural reasons and that the experts express their opinions in a way which is responsive to the questions asked. It is equally important that the answers which are given are answers which can be understood by the parties and, more importantly, capable of utilisation by the court in giving its judgment on questions of fact and/or law.

Specific issues which can arise involve: ambiguous questions or questions which cannot lead to an admissible answer; the potentially difficult issue of the actual wording of an answer (bearing in mind that experts may use certain words in a very different way from lawyers); and the difficulty that is sometimes expressed, of accepting assumptions for the purpose of a question when those assumptions are different from what the expert was provided for the purposes of the preparation of his or her report.

In *Coffey v Murrumbidgee Local Health District* [2017] NSWSC 1441 at [9] Campbell J dealt with an application for the appointment of a chair in a conclave involving medical experts in which at least one of the experts had said that having a chair or facilitator would be of great assistance in dealing with the difficult questions which the experts had to answer. In rejecting the plaintiff's argument that no such chair or facilitator was required, His Honour said:

'I am familiar with the role referred to in the rules as "facilitator", sometimes referred to in practice as "moderator" and, of course, as "chair". It has been my experience that the involvement particularly of a member of the bar in that role can be invaluable, and the involvement of a person in those roles however designated in the given case assists in the administration of justice, and in the provision of the joint report by the experts, which is likely to be provided in proper form. This is of assistance to the parties as well as the Court in the resolution of the case.'

When acting as a chair, it is most important that nothing that is said by way of explanation is to be taken as suggestive of any particular answer. Sometimes before the conclave starts it is necessary to point out to the parties (the lawyers, not the witnesses) that a question does not make sense or is incapable of being answered in a meaningful way. The problem can be corrected before the conclave starts.

Apart from difficulties with questions, answers and assumptions, a chair in control of the process can also deal with personal issues which sometimes arise between the experts for a multitude of reasons. Occasionally a particular expert with a strong personality might try to control the conclave, the content of the joint report or a particular co-participant.

Conclaves are now a central part of the litigation landscape. We all have a responsibility to the court and to our clients to make them work. **LSJ**