CONCURRENT EVIDENCE IN THE CHILDREN'S COURT

Definition and Purpose

Concurrent evidence (sometimes referred to as 'hot tubbing') is a process by which expert evidence is given in court. All experts in relation to a particular topic are sworn to give evidence at the same time.

> *"What follows is a discussion, which is managed by the judge or commissioner, so that the topics requiring oral examination are ventilated. The process enables experts to answer questions from the Court, the advocates and, most importantly, from their professional colleagues. It allows the experts to express in their own words the view they have on a particular subject...The change in procedure has met with overwhelming support from the experts. They find that they are better able to communicate their opinions and, because they are not confined to answering the questions of the advocates, are able to more effectively respond to the views of other expert or experts. There is no risk that their expertise will be distorted by the advocate's skill."*[1]

The purpose of using concurrent evidence procedures is to:

- Enable the evidence and opinions of experts to be better tested by the judicial officer, legal representatives and other experts, with the aim of the evidence being comprehensively explained, understood and analysed, thereby enhancing the Court's capacity to make the best decision;
- Assist experts in fulfilling their role as independent advisers whose primary role is to assist the Court; and
- Enhance the efficient operation of the Court proceedings by reducing the time taken to resolve matters.

Experts in the Children's Court

The Children's Court has moved towards requiring experts to confer before a hearing with a view to identifying matters upon which they agree and those in respect of which they disagree. This process is intended to narrow issues and define the views of each expert thereby enhancing the quality of the ultimate decision and reducing time required for hearing.[2]

The Children's Court has taken measures to enhance the objectivity and accountability of experts by:

- Requiring all expert witnesses' documents to be tendered in evidence in proceedings with the author's qualification to express that expert opinion and the expert's training and experience[3]
- By applying the Supreme Court of New South Wales' Expert Witness Code of Conduct to reports[4]

The Children and Young Persons (Care and Protection) Act 1998 provides for the appointment of the Children's Court Clinic as the expert in care proceedings when an assessment order is made for the assessment of parenting capacity or the assessment of the child.[5]

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[1] Speech of The Hon Justice Peter McClellan, Chief Judge of the NSW Land and Environment Court to the Twenty-Second AIJA Annual Conference – 18 September 2004

[2] See Clause 29 of Practice Direction 22, May 2004

[3] Clause 27.1 of Practice Direction 22

[4] Clause 28 of Practice Direction 22

[5] Chapter 5, Part 1, Division 6 of the Children and Young Persons (Care and Protection) Act 1998

In practical terms this means that there is usually a single expert in relation to issues of parenting capacity and/or psychological assessment of a child.

The Children's Court Clinic will not provide any form of medical assessment.[6]

In some cases in the Children's Court the main issue is whether the child is in need of care and expert medical evidence will be the crucial evidence before the court in relation to this issue. Examples are physical injury cases, the shaken baby cases and the Munchausen Syndrome by Proxy type cases.

In relatively few cases the contested medical evidence may be given in relation to what final orders should be made. An example of this type of case is a child with anorexia nervosa.

Current use of Concurrent Evidence in Australia

- Land and Environment Court (New South Wales)
- Administrative Appeals Tribunal (Commonwealth)
- Federal Court of Australia (Commonwealth)

Experience in the Land and Environment Court

The Chief Judge of the New South Wales Land and Environment Court, the Hon Justice Peter McClellan has introduced the use of concurrent expert evidence in his court. He has delivered many speeches about expert witnesses and the use of concurrent evidence in his Court. Recently he was speaking at the XIX Biennial Lawasia Conference on the Gold Coast and said:

> *"At the same time as the Court has moved to appoint experts, we have also changed the process by which expert evidence is given in Court. This is now done concurrently and all experts in relation to a particular topic are sworn to give evidence at the same time. What follows is a discussion, which is managed by the judge or commissioner, so that the topics requiring oral examination are ventilated. The process enables experts to answer questions from the Court, the advocates and, most importantly, from their professional colleagues. It allows the experts to express in their own words the view they have on a particular subject. There have been cases where as many as six experts have been sworn to give evidence at the same time.*
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> *For hearings in my court, the procedure commonly followed involves the experts being sworn and their written reports tendered together with the document which reflects their pre-trial discussion - matters upon which they agree or disagree. I then identify, with the help of the advocates and in the presence of the witnesses, the topics which require discussion in order to resolve the outstanding issues. Having identified those matters, I invite each witness to briefly speak to their position on the first issue followed by a general discussion of the issue during which they can ask each other questions. I invite the advocates to join in the discussion by asking questions of their own or any other witness. Having completed the discussion on one issue we move on until the discussion of all the issues has been completed.*
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> *Experience shows that provided everyone understands the process at the outset, in particular that it is to be a structured discussion designed to inform the judge and not an argument between the experts and the advocates, there is no difficulty in managing the hearing. Although I do not encourage it, very often the experts who will be sitting next to each other, normally in the jury box in the courtroom, end up referring to each other on first name terms. Within a short time of the discussion commencing, you can feel the release of the tension which normally infects the evidence gathering process. Those who might normally be shy or diffident are able to relax and contribute fully to the discussion.*

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[6] "The Children's Court Clinic is unable to undertake physical medical assessments or assessments that are required in an emergency situation." Excerpt from the Children's Court Clinic website at www.lawlink.nsw.gov.au/cc

This change in procedure has met with overwhelming support from the experts and their professional organisations. They find that they are better able to communicate their opinions and, because they are not confined to answering the questions of the advocates, are able to more effectively respond to the views of the other expert or experts. They believe that there is less risk that their expertise will be distorted by the advocate's skill. It is also significantly more efficient. Evidence which may have required a number of days of examination in chief and cross-examination can now be taken in half or as little as 20% of the time which would have been necessary.

As far as the decision-maker is concerned, my experience is that because of the opportunity to observe the experts in conversation with each other about the matter, together with the ability to ask and answer each others questions, the capacity of the judge to decide which expert to accept is greatly enhanced. Rather than have a person's expertise translated or coloured by the skill of the advocate, and as we know the impact of the advocate is sometimes significant, you actually have the expert's own views expressed in his or her own words.

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

The Land and Environment Court, like the Children's Court, is required to conduct its proceedings with "as little formality and technicality as possible", is not bound by the rules of evidence and "may inform itself on any such matter as it thinks appropriate."[7]

The Federal Court of Australia's Experience

The Federal Court Rules were amended in 1998 to facilitate the use of concurrent evidence.

The Australian Law Reform Commission reported the Federal Court's experience as follows:[8]

"It has been the judges' experience that having both parties' experts present their views at the same time is very valuable. In contrast to the conventional approach where an interval of up to several weeks may separate the experts' testimony, the panel approach enables the judge to compare and consider competing opinions on a fair basis. In addition, the Court has found that experts themselves approve of the procedures and they welcome it as a better way of informing the Court. There is also a symbolic and practical importance in removing the experts from their position in the camp of the party who called them."

The Administrative Appeals Tribunal's Experience

The AAT, like the Land and Environment Court and the Children's Court, have some flexibility in the manner in which it receives evidence. Concurrent evidence procedures have been successfully in use in the AAT for approximately five years.

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[7] Section 38(1) of the Land and Environment Court Act 1979

[8] The Australian Law Reform Commission 'Managing Justice: A Review of the Federal System'

The Court of Appeal

In the case of Botany Bay City Council v Rethmann Australia Environmental Services Pty Ltd (unreported, Spigelman CJ, Santow J, Tobias J, 6 September 2004) the NSW Court of Appeal considered the use of concurrent evidence in the Land and Environment Court with approval and setting and giving some guidance as to its use.

> *43 The foregoing principles were repeated by Giles JA, with whom Handley and Powell JJA agreed, in Kekatos v The Council of the Law Society of New South Wales [1999] NSWCA 288 where his Honour said:*
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> > *"60 A judge should not depart from his role as a judge and take up the role of an advocate. But particularly when sitting without a jury (as was his Honour), the judge may intervene to control, to clarify, or to make known a provisional view. In modern times it is to be expected that the judge will not be a silent spectator, but will so intervene in the interests of ensuring a just and expeditious trial. As was said by Kirby P in Burwood Municipal Council v Harvey (1995) 86 LGERA 389 at 397, determining whether judicial intervention had crossed the line from the permissible to the impermissible requires an exercise of judgment by the appellate court, and the ultimate question is whether the conduct complained of has undermined the fairness of the trial so as to render it, in law, no trial at all. In some circumstances even extensive questioning by the judge will not undermine the fairness of the trial (Burwood Municipal Council v Harvey , at 398).*
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> > *61 The exercise of judgment must take into account the course of the trial, why and when the judge's interventions occur, and their frequency, length and terms. A distinction must be drawn between intervention which suggests that an opinion has been reached which can not be altered by further evidence or argument, and intervention which is neutral or which suggests only an opinion which is provisional, put forward to seek clarification, to test the evidence or to invite further persuasion. The distinction reflects that a judge finding the facts is, and is taken to be, able to correct and allow for preliminary opinions formed when reaching a final decision (see Galea v Galea at 281)."*
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> *44 In my opinion, the present case does not even come close to the point where this Court might even give preliminary consideration to upholding the appellant's complaints. I am of this view for the following reasons.*
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> *45 Firstly, and critically, a close reading of the relevant part of the transcript reveals that the tone of the questioning adopted by both her Honour and the Commissioner was benign in the extreme. Their questions did no more than request each of the experts to explain in the simplest terms possible the particular methodology that he had adopted. Her Honour made it perfectly clear to each witness that she and the Commissioner were asking very basic questions for the purpose of enabling them to understand the assumptions he had made in his evidence and the reasons why he had adopted his particular methodology.*
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> *46 Secondly, there was no hint of cross-examination in the questions that were asked. None of the questions purported to challenge any of the witnesses' responses. The question was a clear case of an inquirer seeking clarity.*
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> *47 Thirdly, there was no attempt to suggest that the methodology explained if each of Mr Atkins and Mr Gross was incorrect or flawed in any way. Practically all the questions asked of the experts by either the Commissioner or the primary judge were patently directed to exploring and understanding the experts' evidence and to obtaining as simple an explanation as possible of what was obviously to them a technical and complex subject.*
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> *48 Finally, it is clear that each expert was given every opportunity, without any limitation or interruption, to provide the explanation which the questioner sought. That is no doubting the reason why this questioning occupied 37 pages of transcript. It was due to the lengthy and detailed answers given by each expert to the questions asked.*

49 It follows from the foregoing that the questioning of the witnesses by her Honour and the Commissioner of which the appellant complains was far from excessive and was entirely permissible. Any criticism of that questioning is, in my respectful opinion, entirely without foundation. It follows that that questioning did not constitute a departure from the rules of procedural fairness governing the conduct of the trial by taking the case on the issue of traffic noise out of the hands of the parties; nor did it in any way come close to undermining the fairness of the trial.

Application in the Children's Court

Concurrent evidence should work well in the Children's Court as:

- Proceedings before the Children's Court are not to be conducted in an adversarial manner[9]
- Proceedings before the Children's Court are to be conducted with as little formality and legal technicality and form as the circumstances of the case permit[10]
- The Children's Court is not bound by the rules of evidence[11]
- There are a relatively small number of judicial officers and a relatively small number of cases with more than one expert, which are identifiable well in advance of a hearing

The Children's Court used concurrent evidence for the first time in a case in St James in June 2005. When the matter was set down for hearing it was done so on the basis that the expert evidence would be taken in the traditional manner. The case was allocated 4 days, 2 of those 4 days, for the medical evidence. In this case, the medical evidence, given concurrently, took 1.5 hours.

The success of the process was in no small way due to the fact that the experts had written reports and had all been given an opportunity to consider the other experts' reports. A conference of experts then took place and the areas of agreement and disagreement were recorded. In this case the conference of experts was chaired by the Legal Representative for the child. She produced a comprehensive and easily accessible document which formed the basis of the discussion in court. The experts' conference may mean that there are more costs at the front end of the litigation, but that will be offset by the reduced hearing time necessary. It will hopefully mean that better decisions are made and, in the Children's Court, that is of overwhelming importance.

The use of concurrent evidence requires more active participation by the judicial officer than in the ordinary adversarial process. The judicial officer must read the material and be aware of the issues in order to effectively chair and lead the discussion.

In the case at St James, a table was set up beside the bar table, where the experts were all sworn in.[12] The process of concurrent evidence was explained to the experts and they were told that they could only speak when holding the microphone. This was used as both a means of controlling the discussion and ensuring that the proceedings were properly recorded.

There was an objection raised at the beginning of the hearing that concurrent evidence should not be used as the experts were of differing disciplines (ie paediatrics, ophthalmology and forensic pathology). It is clear that if the experts are offering an opinion on the same issue then concurrent evidence is a useful process. The issue of expertise may be an aspect of the discussion.

The feedback the Children's Court has had in relation to the use of concurrent evidence in this one case has been extremely positive.

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[9] Section 93(1) of the Children and Young Persons (Care and Protection) Act 1998

[10] Section 93(2) of the Children and Young Persons (Care and Protection) Act 1998

[11] Section 93(3) of the Children and Young Persons (Care and Protection) Act 1998

[12] In the Land and Environment Court the witnesses sit in the jury box. There are no jury boxes in the Children's Court.