Rules on expert evidence in Queensland

By Margaret Brain

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This article examines the Expert Evidence Rules in Queensland and how they relate to personal injury claims.

The rules are contained in Chapter 11, Part 5, of the *Uniform Civil Procedure Rules* 1999 (UCPR). They were introduced six years ago in 2004,[1] but by and large seem to have been overlooked by lawyers practising in personal injuries until relatively recently.

Rule 423 declares that the main purposes of Part 5 are to:

(a) declare the duty of an expert witness in relation to the court and the parties; and
(b) ensure that, if practicable and without compromising the interests of justice, expert evidence is given on an issue in a proceeding by a single expert agreed to by the parties or appointed by the court; and
(c) avoid unnecessary costs associated with the parties retaining different experts; and
(d) allow, if necessary to ensure a fair trial of a proceeding, for more than one expert to give evidence on an issue in the proceeding.

BACKGROUND

These changes to the rules followed the *Access to Justice* final report, produced by Lord Woolf in 1996 in the UK.[2] The report made it clear that he was concerned with access to justice, which involved reductions in costs, delay and complexity and made recommendations for the appointment of a single expert on the basis that a single expert is much more likely to be impartial than a party's expert can be. Further, that appointing a single expert is likely to save time and money and increase the prospects of settlement.[3]

His recommendations resulted in new expert evidence procedures in the UK.[4]

A similar range of reforms were introduced in various jurisdictions in Australia, including in Queensland.

On 12 April 2005, Practice Direction No. 2 of 2005 in relation to expert evidence was introduced, which requires that either before commencement of any proceeding or soon afterwards, a party intending to call expert evidence on a substantial issue should raise with all other parties the prospect of their jointly appointing an expert who would become the only expert to give evidence on that issue, unless the court ordered otherwise.

The practice direction further provides (at para 5) that as soon as it is apparent to a party that expert evidence on a substantial issue in a proceeding will be called at the trial or hearing, that party must file an application for directions and, on the hearing of the application, the party must inform the court of the steps taken or to be taken to conform with the rules.

For reasons that are not apparent, para 5 does not apply to claims under the *Motor Accidents Insurance Act* 1984, the *Workers' Compensation and Rehabilitation Act* 2003, or the (repealed) *WorkCover Queensland Act* 1996.

A Request for Trial Date for matters in the Supreme Court in personal injuries matters requires the lawyer to certify that in proceedings other than those subject to the *Motor Accidents Insurance Act* 1984, the *Workers' Compensation and Rehabilitation Act* 2003, or the (repealed) *WorkCover Queensland* Act 1996 there has been compliance with Practice Direction 2 of 2005: 'Expert Evidence – Supreme Court' – and, further, that attention has been given to the requirements of Part 5, Chapter 2, of the *Uniform Civil Procedure Rules,* which of course govern expert evidence.

DECISIONS

In personal injuries matters, it took some time for decisions to be made in respect of the application of the expert evidence rules.

In the unreported decision of *Moore v Queensland Rail and*

Mackay City Council,[5] the parties proposed, during the first day of trial, calling a number of experts in relation to the issue of liability. Cullinane J referred to the expert evidence rules and the parties' obligations, and indicated that he intended to limit the expert evidence proposed to be led in order to give effect to the rules. The parties were provided with an opportunity to agree on the appointment of a joint expert in accordance with UCPR 429G, but they were unable to do so, and his Honour appointed an expert. The cost to the parties would have been considerable, as the trial was adjourned.

Justice McMeekin next considered the rule in *Stewart v Fehlberg and Anor*.[6] The plaintiff's counsel argued that rule 429G was not mandatory in its terms, as it provides that a party *may* apply to the court for the appointment of an expert to prepare a report on the issue.

It was also submitted that this was a WorkCover claim and was therefore excluded from the practice direction. However, Justice McMeekin rejected this interpretation of the rules. His Honour commented that counsel's submissions paid scant regard to the purpose behind the introduction of the rules relating to the receipt of expert evidence contained in Part 5, Chapter 11, of the UCPR.

He stated further that the court retains its inherent jurisdiction to control its own processes and the rules contained in Part 5, Chapter 11, of the *Uniform Civil Procedure Rules* provide guidance as to how that inherent jurisdiction should be exercised. He said that he approached the applications on the basis that there should ordinarily be only one expert in any given field, and that he should permit multiple experts only if the justice of the case so requires.

He stated that parties who chose to ignore the rules do so at the risk that the evidence may be rejected when the court becomes aware that the intent behind the rules and practice direction has been ignored.

The *Stewart* case involved electric shock injury, and his Honour commented that if there was a particular area of expertise involving electric shock injuries, and if the symptoms of such injuries fall outside the area of expertise of those medical practitioners already identified by the parties, then this was precisely the case that cries out for the appointment of a person that the parties can both accept as an acknowledged expert in the field and upon whom the court could rely to give the necessary guidance. That can best be achieved, as the rules require, by the precise identification of the issue, the naming of at least three experts with relevant qualifications and with each party having full opportunity to put before the court material to decide on the selection of an expert.

However, that procedure hadn't been followed, and with the trial only weeks away, his Honour wasn't prepared to appoint an expert on his own initiative. His Honour examined the qualifications of the plaintiff's two experts in this area and excluded the evidence of one of them. He stated that if there are to be multiple experts, then the onus lies on the party seeking to call the evidence to demonstrate that it is in the interest of justice that multiple experts be allowed, and that onus had not been discharged.

Justice McMeekin again had cause to consider the application of the rules in *Simpson v Brett & Suncorp General Insurance Limited*,[7] where the defendant had been granted leave to call:

- an orthopaedic surgeon;
- a neurosurgeon; and
- psychiatrist.

The plaintiff sought leave to call;

- two orthopaedic surgeons;
- a neurosurgeon;
- a psychiatrist;
- a clinical anatomist; and
- an occupational therapist.

The clinical anatomist, Dr Giles, had reported for the plaintiff prior to the introduction of the rules and practice direction but had provided a subsequent report after the commencement of the practice direction.

Justice McMeekin was of the opinion that Dr Giles, while he had some expertise in the anatomy of the spine, did not have any expertise going beyond that possessed by a neurosurgeon or orthopaedic surgeon. Once again, McMeekin J stated that the onus was on the plaintiff to establish how Dr Giles' opinion added to the views of the orthopaedic surgeon and neurosurgeon. His Honour found that this onus had not been discharged. He also refused to allow the plaintiff to call two orthopaedic surgeons and an occupational therapist, as no compelling reason as to why this was necessary had been presented; the evidence of the occupational therapist would not cover any ground not already covered by the orthopaedic and neurosurgical experts.

The plaintiff was ordered to pay the costs of the application.

In *Ritchi v Dallimore and Allianz Australia Insurance Limited*,[8] Justice Douglas heard an application by a defendant just days before the trial was to commence to amend the defence to refer to sections in the *Civil Liability Act* in relation to the consumption of alcohol, and for leave to call an expert in relation to the degree of the plaintiff's intoxication.

The report, used in the prosecution of the defendant's drink-driving charge, had been in the possession of the plaintiff's solicitors for some years, and the plaintiff was aware of the allegation of contributory negligence based on the intoxication of the defendant.

Justice Douglas ordered that the defendant be permitted to amend the defence and to call the expert on the basis that the plaintiff be permitted to call similar evidence if he wished to.

DISCUSSION

Justice McMeekin has since stated that he 'has come to rue the decision' he made in *Stewart v Fehlberg*, as it has resulted in an inundation of applications for permission to call experts.[9]

As his Honour correctly pointed out, saving of expense is one of the prime reasons for this rule, but parties are left in a position where they may not know whether the single expert opinion does represent a reasonable view of the case, particularly if that opinion is contrary to the interests of their clients. Solicitors will then be in a position where a further report will be commissioned, with additional cost. >>

In all matters in which I am involved, I am making applications to the court for directions that were previously not necessary. This involves additional cost, which will ultimately be borne by the client.

A further problem that I have encountered in conducting medical negligence claims is the protracted time that it is taking to negotiate with defendants' solicitors as to whether there is an expert in a particular field whom we can agree is an appropriate expert in the case. This process is delaying, in a number of complex cases, the resolution of the matter for many months. It also involves additional costs, due to the plethora of correspondence that is exchanged in trying to reach agreement, and then the further correspondence involved in trying to reach agreement on the content of the joint instructions to the expert.

Whether the single expert rule has resulted in impartiality on the part of the experts is a matter of conjecture. Gary Edmond, in his 2009 article, comments that there is little evidence to suggest that adversarial bias is deliberate or consistently detrimental to civil practice. 'Even if not conspicuously or predictably allied, experts (including court appointed experts) do not enter disputes without professional, institutional, and ideological "baggage".'[10]

Regardless of whether we consider that the rules have met their stated goal, it is clear that if we ignore the rules, then the consequence may be that the evidence of the experts may be rejected. This will impact both on the client and the lawyer, with potential liability for the resulting adverse outcome. ■

Notes: **1** The rules came into effect on 2 July 2004. **2** *Access to Justice* final report by the Right Honourable the Lord Woolf, Master of the Rolls, July 1996. **3** *Ibid*, chapter 13. **4** Part 35 of *Civil Procedure Rules* 1998 (UK). **5** Unreported, Supreme Court, Mackay 30 October 2006. **6** [2008] QSC 203. **7** Unreported – Supreme Court, Rockhampton, number 467/208. **8** [2009] QSC 192. **9** The Hon Justice McMeekin Keynote Address: 'Expert Evidence and the Expert Evidence Rules. Why, What and Where To from Here?' ALA Qld State Conference 2010. **10** Gary Edmond, 'Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure', *Law and Contemporary Problems*, Vol. 73, (Winter 2009): 159.

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COSTS UPDATE

Retainer and disclosure issues

By Peta Solomon

The decision of the Court of Appeal in *Boyce v McIntyre*[1] is of substantial significance in relation to the proper compliance with disclosure provisions relevant to personal injury matters.

The court considered the definition of 'costs' in s302(1) and held that a costs assessor *does not have power* to determine the amount of GST payable on legal costs.[2] The court held:

> '[51] The costs assessor, the Panel and Harrison AsJ all held that the assessor had that power. I disagree. By the Act, a costs assessor is empowered to assess costs that are defined by s302(1) as including "fees, charges, disbursements, expenses and remuneration". GST does not fall under any of these categories and does not come within the ambit of legal costs. GST is an issue in respect of taxation, not legal costs.'

This decision has important implications, including in relation to the importance of compliance with the disclosure provisions.[3] While a practitioner would retain a contractual right to recover GST under a costs agreement which so provides, that right would now presumably have to be enforced in another forum. Difficulties may arise where there has been some defect in disclosure. In such circumstances, where a costs agreement is set aside and the practitioner is entitled only to claim their fees on a *quantum meruit* basis, and is limited to the assessment system to do so,[4] a practitioner may not have another avenue to recoup GST that the practice is liable to remit on those fees. Until the case is overruled or legislative amendments requested by the Law Society are introduced, it is even more critical that practitioners be vigilant in respect of compliance with disclosure provisions.

The case also has implications for disclosure and estimates in litigious matters. Section 309(1)(f) *Legal Profession Act* 2004 (LPA) provides that additional disclosure is required in a litigious matter of an estimate of:

> '(i) the range of costs that may be recovered if the client is successful in the litigation, and