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ROOM IN AMERICAN COURTS FOR AN AUSTRALIAN HOT TUB?

An evidentiary practice, novel to United States courts, has been in operation in Australia for at least 20 years. Concurrent expert evidence, also colloquially referred to as "hot-tubbing," refers to a practice where competing experts are sworn and presented as witnesses at one time and remain on the stand together throughout the course of their testimony. Concurrent expert evidence has its origins in the Australian Competition Tribunal, where it has been commonly used to receive evidence from economics experts in the Land and Environment Court in New South Wales and the Commercial List of the Supreme Court of New South Wales. This practice has been employed in non-jury cases in many other Australian courts.[1] Recently, concurrent expert evidence was used in two high-profile Federal Court of Australia cases involving collateralized debt obligations, one against Lehman Brothers[2] and another against ABN AMRO and Standard & Poor's.[3]

Australian Law Reform Commissions in 2000 and in 2005 have treated concurrent expert evidence as an established practice and endorsed its use in appropriate cases.[4] The procedure is now recognized in court rules and practice notes in a number of Australian jurisdictions.[5] The procedure is not free of critics.[6] It has not been tested in Australian appellate courts.

THE NUTS AND BOLTS–HOW DOES CONCURRENT EXPERT EVIDENCE WORK IN AUSTRALIA?

Concurrent expert evidence has been characterized in Australia as a "discussion" between or among experts. Their testimony may take the form of opening expert statements followed by a dialogue either between the judge and the experts, or between or among the experts themselves, mediated and managed by the judge. This dynamic substitutes for the typical Q&A between a lawyer and expert witness. It is preceded by pre-trial exchanges of reports and a joint submission that includes points of expert agreement and disagreement. For this reason, the "discourse which

follows at trial" tracks the joint submission and does not ordinarily necessitate objections by counsel.[7] While lawyers are not excluded from the process, they do not play the same dominant role historically associated with trials. Questions may be asked by the lawyers and the judge and by one expert of another, as the judge allows. The effect of this practice may be to reduce the extent of cross-examination, but cross-examination by trial counsel is always permitted.

THE CASE FOR CONCURRENT EXPERT EVIDENCE

Australia's favorable experience with concurrent expert evidence has been based upon a conviction that bias in expert testimony should be eliminated. Even though retained by a party, experts testifying in Australian courts are required by applicable rules to acknowledge that they have an overriding duty to the court and that they are not an advocate for a party.[8] Apart from promoting impartial expert testimony, many Australian supporters of hot-tubbing believe that it improves the judge's, experts' and legal practitioners' understanding of the evidence. The testimonial dialogue helps to ensure that experts deal with the same issues based on the same assumptions at one point in time so that differences of opinion are crystallized or explained. The experts can readily clarify any lack of understanding the judge or counsel may have about a point. The judge is able to compare opposing experts' evidence as they are giving their testimony rather than attempting the comparison after an interval of days or weeks and then only by a more arduous and time-consuming process of locating, comparing, or contrasting testimony given on separate occasions perhaps on subtly different but important points. Concurrent expert testimony can improve the quality, precision, and clarity of the technical communication and sharpen the differences that may exist between experts.

Justice Peter McClellan, one of the Australian judiciary's most ardent supporters of hot-tubbing, has stated that evidence that may have required a number of days of testimony in direct and cross-examination can now be taken in half or as little as 20 percent of the time that would have been necessary.[9]

THE LIMITED U.S. EXPERIENCE AND CONSONANCE WITH U.S. RULES

In the United States, the use of the concurrent expert evidence technique has been limited.[10] The first reported example took place in a 2003 voting rights case before a three-judge panel of the U.S. District Court for the District of Massachusetts.[11] The panel used the concurrent expert evidence technique to examine two political scientists in a case that challenged the Massachusetts Legislature's redistricting plan based on statistical evidence of discrimination. Two years later, a judge in the U.S. Court of Federal Claims used the concurrent expert evidence technique in a breach of contract case.[12] There, the court evaluated the testimony of two damages experts and used the opportunity to pose several fundamental economics questions as well as clarify questions about demonstrative evidence used earlier in the trial. The practice was also employed during a *Daubert* hearing in a product liability case pending in the U.S. District Court for the Northern District of Ohio.[13] In that case, the court initially heard separately from the parties' experts. When their testimony revealed vastly different views regarding whether manganese exposure could cause Parkinson's disease, the court held an additional day of hearings using the concurrent evidence technique. A more recent example includes the use of the concurrent evidence technique in a claims construction (so-called *Markman*) hearing in a patent infringement case pending in the District of Massachusetts before Judge Woodlock.[14]

The consensus of the U.S. judges who have used concurrent expert testimony is that the technique can be a helpful learning tool. Indeed, the Ohio judge noted in his *Daubert* order that "the parties and the court found this 'hot tub' approach extremely valuable and enlightening." In Massachusetts, Judge Woodlock has reported using the concurrent expert evidence technique "in a number of non-jury cases over the years, including in patent and business cases."[15]

To date, no reported decision of an American court has examined the compatibility of the concurrent expert evidence technique with civil rules of procedure or evidence. Wigmore cites the technique as one of several possible mechanisms for improving the use of expert testimony.[16] And the Federal Rules of Evidence, while they do not specifically

sanction the practice, provide a framework in which the concurrent expert evidence technique seems to fit. Rule 611, for example, gives trial courts "control over the mode and order of examining witnesses and presenting evidence so as to," among other things, "make those procedures effective for determining the truth" and "avoid wasting time."[17] According to the Advisory Committee's Notes, the rule empowers trial courts to decide "whether testimony shall be in the form of a free narrative or responses to specific questions," "the order of calling witnesses and presenting evidence," and "the many other questions arising during the course of a trial."[18] Additionally, Rule 614 permits trial courts to call and interrogate witnesses, provided that all parties have the opportunity to cross-examine.[19] All of these rules, moreover, must be construed broadly to "promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[20] As long as cross-examination rights are preserved, the use of the concurrent expert testimony technique appears to be a matter of a trial court's discretion reviewed only for abuse of discretion under the circumstances of a particular case.[21]

THE IMPACT OF CONCURRENT EXPERT EVIDENCE ON THE LAWYERS AND THE EXPERT

The concurrent expert evidence technique certainly diminishes the direct control of trial counsel and enhances the flexibility and spontaneity of the expert.

The selection of the expert raises an interesting debate as to whether the characteristics that an expert needs for concurrent evidence vary compared to the traditional manner of experts giving evidence. Experts need to be seen by the court as careful, reliable, and authoritative. Concurrent evidence changes how those characteristics are evaluated by moving from the expert being tested by an advocate to being tested by his peers. Discussion and debate become the prominent features in the more freewheeling hot tub, ordinarily unattainable in the constrained realm of cross-examination. The hot tub may require an expert who is more persuasive and cogent in his presentation of views in a "controlled" argument with a peer, rather than in responding to questions from counsel. However, the view that the hot tub benefits experts who are better communicators or debaters is not uniformly accepted. An alternative view is that the hot tub prevents a diversion from content to style as other experts are present to challenge or verify content.

The use of concurrent evidence places limits on cross-examination compared to the more traditional approach to expert evidence. Justice Peter McClellan sees this as enhancing the judge's capacity to decide which expert to accept as "a person's expertise [is not] translated or coloured by the skill of the advocate, … you actually have the expert's views expressed in his or her own words."[22] But from the lawyer's and client's perspective, the loss of a careful and searching cross-examination may mean that experts are not as thoroughly tested. Cross-examination, and its preparation, may involve a more comprehensive review of an expert's evidence than the scrutiny afforded by peer review, especially when the litigation stakes are high. Cross-examination is still possible within a concurrent evidence framework, but the advocate's ability to structure and control the cross-examination may not be as complete if the experts and judge have had a free-flowing discussion beforehand. This can mean that an advocate needs to attempt to "carve out" a place in which to put a series of questions, request that a particular issue be dealt with through conventional means, or consider how one's own expert can be deployed to contradict or question an opponent's expert. It also necessitates an inquiry of the trial judge as to how he or she plans on conducting the concurrent evidence session and an opportunity for counsel to make suggestions as to the configuration of the hot tub in a particular case.

ONE TECHNIQUE FOR TWO DIFFERENT MODELS?

In the Australian system, this practice is seen to promote the impartiality of experts and the elimination of bias. Indeed, the practice fosters adherence to the expert's written pledge to the tribunal that he will not act as an advocate. This is hardly compatible with traditions in the United States. The American system tolerates, if not encourages, the adversarial use of experts whose allegiance is to the party that retains them and whose opinions may only be cloaked in the rhetoric of objectivity. It may be so that the most persuasive expert is also the most truthful, but the American system does not make the expert a functionary of

the court. Were that the case, there might well be a history in the United States of some species of Australia's hot-tubbing.

While the expert's relationship to the tribunal is materially different in the United States, it is obviously desirable in either system to have expert testimony presented in a way that helps to clarify challenging technical issues. Doubtless there are many cases, particularly in the intellectual property world, where judges can benefit from the simplest exposition of technical principles, where an appreciation of technical common ground can advance immeasurably the resolution of technical disagreements. Whether in Australia or the United States, hot-tubbing can shorten the time it takes to give expert testimony and focus areas of technical disagreement for the judge. This is especially true in non-jury cases, the only circumstance where hot-tubbing has been used in Australia.

In 1901, Judge Learned Hand offered his own comment on the utility of expert testimony.[23] He worried that because it was inevitably partisan, it did not really help juries reach the truth. Rather, he suggested that impartial experts be recruited and used as panels who might assess the parties' partisan expert testimony and offer a neutral, unbiased view for the jury's consideration. Although Judge Hand's suggestions in the intervening century have not had much traction in the United States, we do have rules that allow judges to appoint their own experts, something of a variant on the Hand proposal. Rule 706 authorizes the use of neutral experts that the trial court itself has selected and appointed.[24] Such a judicial prerogative is exercised infrequently, but it is available in cases where the court's ability to reach a reasoned judgment is frustrated by the apparent bias of the parties' experts. The neutral expert is also available in jury cases in the United States, and the protocols necessary and appropriate to ensure the effective use of the neutral, court-appointed expert have also been considered and discussed.[25]

To reform the adversarial system in the United States by employing an evidentiary practice not fitted for its adversarial system could be a serious mistake. Whether in Australia or the United States, the rules of practice, procedure, and evidence should fit their intended purpose. If hot-tubbing has an American future, at least before the role of experts is broadly reconsidered, there is a case to be made that it should be used in very limited, non-jury contexts where the technical issues are so complex that a "discussion" by the experts is essential for a rudimentary understanding of the dispute and where trial counsel have been advised well in advance of the court's intended use of the process.

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ENDNOTES

1 Michael Legg, *Case Management and Complex Civil Litigation* 115 (Federation Press 2011).

2 *Wingecarribee Shire Council v. Lehman Bros. Austl. Ltd. (in liq)* [2012] FCA 1028.

3 *Bathurst Reg'l Council v. Local Gov't Fin. Servs. Pty. Ltd. (No 5)* [2012] FCA 1200.

4 New South Wales Law Reform Commission, *Expert Witnesses—Report 109* (June 2005) at [6.56]-[6.62]; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Justice System—Report 89* (2000) at [6.113]-[6.122].

5 *Federal Court of Australia Rules 2011* (Cth) r 23.15; *Uniform Civil Procedure Rules 2005* (NSW) r 31.35.

6 Gary Edmond, *Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure*, 72 Law & Contemp. Probs. 159, 182-86 (Winter 2009).

7 In the United States, colloquies between experts in the hot tub or in response to court interrogation may necessitate contemporaneous objections to preserve appellate rights, at least when the jury is not present. See Fed. R. Evid. 614(c) ("A party may object to the court's calling or examining a witness either at the time or at the next opportunity when the jury is not present."). *See generally* 29 Charles Alan Wright *et al., Federal Practice and Procedure* § 6236 (1st ed. 1997 & Supp. 2000) (collecting cases).

8 *Federal Court of Australia Rules 2011* (Cth) r 23.12, 13; Practice Note CM7.

9 Hon. Peter McClellan, *Expert Witnesses—the Experience of the Land and Environment Court of New South Wales*, XIX Biennial Lawasia Conference 2005, Gold Coast, 19-24 (March 2005).

10 While limited in U.S. courts, the technique had been used with increasing frequency in arbitration, in both the United States and abroad, and may be particularly suited to that forum. *See* Doug Jones, *Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last*, 24 Arb. Int'l 1, 146-48 (2008) ("Hot tubbing is frequently used in international arbitration hearings. Given the more flexible and informal nature of international arbitration, it is probably better suited to arbitral proceedings than traditional litigious methods of calling expert evidence.").

11 *See Black Political Task Force v. Galvin*, No. 02-11190 (D. Mass.). The transcript of the relevant hearings in Galvin, as well as that in Anchor (see infra note 12), are discussed in detail in Lisa C. Wood, *Experts in the Hot Tub*, 21 Antitrust 3, 98-101 (Summer 2007).

12 *See Anchor v. United States,* No. 95-39C (Ct. Claims). Jones Day served as counsel for the plaintiff in the *Anchor* case.

13 *See In re Welding Fume Prods. Liab. Litig.*, No. 03-17000, slip op. at 45 n.39 (N.D. Ohio Aug. 8, 2005) (Dkt. No. 1353).

14 *See Genzyme Corp. v. Seikagaku Corp.*, No. 11-10636 (D. Mass.) (Dkt. entry dated Nov. 30, 2011).

15 *See* Wood, *supra* note 11, at 97.

16 3 *The New Wigmore: A Treatise on Evidence* § 11.5, at 498 & n.8 (Aspen Publishers 2012) (suggesting that trial courts "[p]ermit experts from both sides not only to communicate with one another, but to testify concurrently, sitting together on a panel in which the various experts hear each others' statements, comment on them, and possibly ask questions of each other.").

17 Fed. R. Evid. 611(a)(1)-(2).

18 Fed. R. Evid. 611 advisory committee's note. *See also* 4 *Weinstein's Federal Evidence* § 614.04[4][a], at 614-21 (2d ed. 2012) ("Adherence to a particular form of conducting a trial is not required; appellate courts recognize that there is more than one permissible way to preside over a courtroom.").

19 Fed. R. Evid. 614(a)-(b).

20 Fed. R. Evid. 102.

21 *See generally* Scott Welch, *From Witness Box to the Hot Tub: How the "Hot Tub" Approach to Expert Witnesses Might Relax an American Finder of Fact*, 5 J. of Int'l Comm. Law & Tech. 154 (2010).

22 Justice Peter McClellan, *Expert Evidence—Aces Up Your Sleeve?*, Industrial Relations Commission of NSW Annual Conference, at 5 (Oct. 20, 2006).

23 *See generally* Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. L. Rev. 40 (1901).

24 Fed. R. Evid. 706.

25 *See generally* 29 Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 6305 (1st ed. 1997 & Supp. 2000) (collecting cases).