The New Professional Negligence List

Professor Michael Fearnside: Ladies and gentlemen, good evening. I think we might start this evening's session. It is a pleasure to welcome Mr Justice Alan Abadee to address the Medico-Legal Society this evening. As you are aware, the Judge is the Chief Judge of the new Professional Negligence List in the Common Law Division of the Supreme Court and he is going to talk to us about the List and how it is going to work and how it is working.

As you know, it is usual when the Society meets to have both a medical and a legal speaker to address the issue, but your Committee was confident that his Honour would fulfill both of those roles in his usual forthright manner and we will have ample time for discussion afterwards.

The Judge was admitted to the Bar in 1964 and he was appointed Queen's Counsel in 1984. In 1990 he became a Judge of the Supreme Court and just last year Judge in Charge of the Professional Negligence List in the Supreme Court.

The goal of the new List is to reduce delays, and therefore costs, in negligence actions against professionals. It hopes to increase settlements and promote communication between parties by the initiative of the incorporation of a number of processes, as well as alternative dispute resolution and mediation, and aims to confine arguments to legal issues.

His Honour has paid particular attention in the setting up of his List to the role of the expert witness. It is critical that the role of the expert witness is altered such that the day of the 'hired gun' is gone forever and a true meeting of experts in the particular field be allowed to occur. In fact, the first conclave of so-called experts was held recently and one of my colleagues was a party to this. He was most impressed with the resolution of the issues and the discussion which occurred, and so things are happening in a bad area for us all, and it is with a great deal of pleasure that I ask his Honour to address us this evening. Thank you.

THE NEW PROFESSIONAL NEGLIGENCE LIST

Paper delivered by the Honourable Justice A. R. Abadee RFD, Supreme Court of New South Wales, to the MEDICO-LEGAL SOCIETY OF NEW SOUTH WALES, Sydney, 15 March 2000.

The new English **Civil Procedure Rules (CPR)** that have come into force in England in April 1999 reflect significantly the implementation of changes recommended by Lord Woolf in his **Access to Justice: Final Report to the Chancellor on the Civil Justice System in England and Wales** (July 1996) (the "Final Report"). That report recommended a shift in responsibility for management of civil litigation from litigants and their lawyers to the court with the court to be involved in active case management. In his Final Report Lord Woolf (Chapter 15) also said that he had singled out medical negligence for the most intensive examination during Stage 2 of his Inquiry. He stated that his reason for doing so, was because in his Inquiry "it become increasingly obvious that it was in the area of medical negligence that the civil justice system was failing most conspicuously to meet the needs of litigants in a number of respects". He also observed that the cost of medical litigation was so high that smaller claims could rarely be litigated because of disproportionate cost. He noted that it was difficult for patients to pursue a claim of real value unless they were eligible for legal aid. He observed that the difficulty of proving both causation and negligence "which arises more acutely in medical negligence than in other personal injury cases accounts for much of the excessive cost". He said in his Report at 171:

The new system of case management proposed in my interim report could do much to reduce cost and delay in medical negligence cases and encourage a more co-operate approach enabling cases to settle on appropriate terms at an earlier stage.

Lord Woolf's Final Report has had a significant impact and influence both in England and in Australia since its publication. It has influenced the drive for reform in respect of civil litigation generally. It has driven reform in respect of the dealing with medical professional negligence litigation.

The Professional Negligence List (the List) was established in the Common Law Division of the Supreme Court of New South Wales in April. It involves proceedings or claims for damages indemnity or contribution based on an assertion of professional negligence as defined against medical practitioners, hospitals, allied health professions and legal professional negligence against solicitors and barristers. As to a commentary on the List see my article: "The New Professional Negligence List: A Hands-on Approach to Case Management" *Judicial Officers Bulletin*: May 1999, Vol. 11 No. 4. In a statement made at the end of October 1998 the Chief Justice said that the main objective of the List "is to reduce delay and costs and increase the number of settlements and improve communication between the parties." In my article in the *Judicial Officers Bulletin* I said:

> *The establishment of the new [Professional Negligence] List with the support of the profession carries with it an opportunity to implement some new ideas including court control and case management from the time of institution of proceedings to the time of trial. Indeed it reflects a need that the class of case to be dealt with in the List receives specialised management and early intervention by the Court.*

For example, one such idea is reflected in Part 14C rule 6 requiring that in medical professional negligence cases at the

time of institution of proceedings there be filed and served expert(s) report on liability (supporting a case) and dealing with the general nature of damages and causation. Provision is made for a discretionary order for service of expert reports in legal professional negligence cases. Again period for service of proceedings is four months. That said there are not too many legal professional negligence cases where expert reports are, or have been, required. Most cases turn on their own facts.

Cases in the List are subject to their own Rules - Part 14C and to its own Practice Note 104 **Supreme Court Rules (NSW)**. That said, the Practice Note has in part been changed and superseded by amendments to Part 36, which commenced on 1 March 2000 omitting rule 13C and adding new rules 13C and 13CA which inter alia provide a code of conduct for experts engaged for the stated purposes referred to in rule 13C(1). Further, the new Part 39: "Court Appointed Experts and Assistance to the Court", will as a general rule and, like other general rules, be applicable to cases in the Professional Negligence List. A new Schedule K "Expert Witness Code of Conduct" is also added. A new Practice Note No 109 has been issued in respect of Expert Evidence in the Court. So too is a new Part 15A - "Limiting Issues". The Supreme Court Rules are also amended to provide a statement of overriding purpose in their application to civil proceedings, ie to facilitate the "just quick and cheap solution of the real issues in such proceedings".

Not overlooked in terms of relevance as well to the Professional Negligence List are the new case management Rules Part 26 rule 3. Under that rule the Court also has power to give orders and directions including as to the use of telephone, video conference facilities and other technology. A new Part 34(6AA)(1) "increases" the direction powers of the court both before trial and at trial including limiting the number of witnesses (including expert witnesses) that a party may call, and even limiting the time to be taken not merely by the trial but also limiting the time to be taken in examining, cross-examining etc a witness. The new Part 26 rule 3(f) gives the Court power to make orders and directions relating to the delivery and exchange of expert reports and holding of expert conferences.

In the List great emphasis has been placed on the matter of mediation and consents to mediation. The importance of a consent mediation is emphasised from the inception of proceedings. Indeed in the initial "Notice of Conference Hearing" it is a matter particularly emphasised. Mediation need not wait until the final preparation stage and should be considered at every List Conference held by the Court. The recent increase in consent mediations shown by the December 1999 - February 2000 figures reflects I believe the Court's active case management of cases in the List from April 1999 onwards. This in turn has impacted upon their state of preparation and readiness for hearing or referral to mediation. The statistics also show a pleasing number of settlement of actions in the Professional Negligence List - many clearly attributable to mediation. Already a considerable number of cases are to be the subject of mediation in the first quarter if this year, including both medical and legal professional negligence cases. This is against a background that the List only commenced in April 1999. New matters commenced since then have been very much in the state of preparation and the numerous old matters transferred to the List from the existing Common Law Division general list have needed case management. Hence the relative newness of the applicability of the mediation process. A point to be made is the high level of consensus as to the desirability for consent mediation under the consent mediation provisions of section 110K **Supreme Court Act (NSW)**. In cases to which section 110K applies the parties have agreed on the mediator, who need not be on the Court list of mediators under section 110O. There is no statutory or court power to compel or direct mediations absent party consent although the situation is different in other parts of Australia: cf Order 50 rule 50.07 **(Supreme & County Court Rules, Victoria)**. Next, a small specialised group of mediators has emerged as acceptable to the parties. This I regard as being highly desirable. They bring accumulated experience and expertise to bear in the mediation process. Reports and results suggest that in respect of matters the subject of the mediation process a high level or rate of success has been already achieved. Medical and legal insurers, and the plaintiffs and their advisers have come to recognise the real merits of mediation. I have frequently expressed the view in the Court that "generally speaking there is no such thing as a useless mediation" and I am becoming more and more convinced that this is correct. Even a failed mediation may bridge differences and identify or limit the real issues for trial. A failed mediation may cause the parties to pause, reflect and later settle before trial so that if the matter proceeds to trial the parties will be able to concentrate resources on the real controversies between them. The mediation matter is specifically addressed by paragraph 13 of Practice Note 104. Mediation is a parallel course to preparation for trial in the Court. Trial preparation continues. Mediation gives privacy and helps protect reputations. Mediation is attractive on a "referral" out under s 110 of the Act since there is the perception that the case remains under the Court's overall umbrella and is not placed outside of the court. The fact that many of the "few" specialist mediators are ex-judges is also helpful to the process.

Any infant settlement or settlement of a mentally disabled plaintiff's case resulting from a mediation still has to be approved by the Court. It is hard to envisage problems in this area. The Court however must perform its duty.

I have not sent any matter to a referee. No party appeared to have shown an interest in having a referee appointed under Part 72. I have not felt any need or considered it appropriate to do so, nor have been requested by a party to do so. I would mention in passing that the recent **Australian Institute of Judicial Administration Empirical Study** in respect of expert witnesses (to which reference may be found in an article in (1999) 73 ALJ 612) suggests that the responses of the judges as to the use of referees generally revealed that 37 per cent of the judges found them useful, 37 per cent disagreed, and 26 per cent had no opinion as to their use. I have considerable reservations as to the desirability of referring matters in the List to referees because of concerns that List cases are either not suitable for such a referee or I am not satisfied as to benefits to be obtained. Indeed in its recent report: "Managing Justice: a review of the federal civil justice system Report 89" (February 2000) the **Australian Law Reform**

Commission (ALRC) (at para 6.130) observed that submissions and consultations did not suggest that referees should be used in federal courts. There may also be constitutional problems. The Commission made no recommendation on the issue. Nor have I referred cases (or been asked to) to a court appointed expert under the now recently superseded Part 39.

In respect of Alternative Dispute Resolution (ADR) I have generally favoured the mediation approach as have the party litigants. I still do so. Experience has confirmed such as a very good way to go in respect of cases in the List. In any event, the increasing attraction of having joint meetings of experts on disputed matters and issues (under the superseded Schedule to the Professional Negligence List but see now Rule 13CA - "Conference between Experts") is becoming an important means of further or alternatively addressing expert differences. In a loose sense a joint meeting is perhaps a "form" of ADR because I believe such meetings and joint report will also contribute in its own way to resolution of matters. The joint conference held in private permits exchange, reduces or eliminates real issues. It will "impact" upon the time experts will need to attend court. The joint meeting of experts practice is still very much evolving and in its infancy.

The management of the List is carefully regulated. It is Court control of the litigation - that is important and enforced. No case is stood over generally. Every matter or conference is adjourned to a fixed date which ensures the maintenance of court control and compliance by the parties with court orders.

The efficiency of running the List has also been contributed to by several other particular factors. A policy decision was made that new cases from inception would be subject to active case management by the Court, with the Court playing a pro-active role from commencement of actions in the List and not just a traditional reactive one. A policy decision was made that the List would be specially administered and managed only by Professional Negligence List Judges, Justice Sperling and myself. Two groups of what I might loosely call "class actions" involving several defendants have been entered into the List to be specially case managed and dealt with by other judges of the Division.

Strict compliance with orders and directions has been required and proved to be generally appropriate. From day one all the parties have been led to understand that generally excuses for non-compliance with orders and directions will not be tolerated. If a breach is anticipated there has been encouragement to the parties to act before the breach and come back to Court rather than not comply and seek to explain to the Court later. A strict but fairly administered regime has led to very high levels of compliance with orders and directions, and with the provisions of Part 14C and Practice Note 104. Breach is "punished" in various ways. There are wide ranging powers including new general rule powers to order costs against barristers and solicitors and against any "person" failing to comply with a rule judgment or order of the Court: Part 52A rule 25; rule 43A. The compliance level has thus been high, and has contributed to both resolution of litigation, and if I may say so, to efficient case management.

Confidence and efficiency in the List has I believe been contributed to by perhaps the "less" formal manner in which the conferences have been conducted. The parties' representatives have helped encourage an atmosphere of efficiency and goodwill and I believe led to high levels of cooperation, and contribution to consent orders, mediations and case resolution. Indeed in my view the litigants' approach in the List has, in respect of both medical and legal negligence cases, become less confrontational. This can only be for the good and contribute to greater efficiency and more efficient dispute resolution with facilitation of just, quick and cheaper resolution of some or all issues.

Another matter that is very significantly for the good is the fact that the parties have been and are represented by lawyers who must "know and have authority" to speak on behalf of their real client: see para 12 of Practice Note 104 which was deliberately inserted to contribute to ensuring such. It provides that each party not appearing in person **must** be represented at any conference hearing by a barrister or solicitor familiar with the subject matter of the proceedings and with instructions sufficient to enable all appropriate orders and directions to be made. Failure to attend at a conference is a serious matter unless capable of reasonable explanation.

In February 1999 and in my written paper or commentary on the List I said: "The court will not accept indeed tolerate "messengers" or inadequate representation..." I also referred to the fact that the requirements of the representation rules, by those with knowledge and authority will be rigidly enforced.

There are "adverse" consequences for non-appearance or inadequate representation. As I have indicated the Court has a number of powers to address a multitude or variety of unfortunate situations. Non appearance of a party's legal representative (absent good cause) not only impacts on the efficiency of a busy List and conduct of conferences but it reflects rudeness not merely to the Court but to lawyer opponents. It causes delay. It adds to cost. I say nothing as to the possible further litigation stress to a client whose case may not be able to be dealt with or properly dealt with at a List conference. Fortunately there have been few examples of such happenings.

I also believe that proper, even high level, representation in practice is well supported by all parties. Not only does it lead to greater efficiency in addressing issues but the Court's expectation that lawyers will have authority to speak or act I believe permits the Court making substantial and significant decisions and orders on the spot. However there is even a more significant benefit flowing from the Court requirements of proper representation at conferences and the like. That rule and its practice compels lawyers with responsibility and authority to actually talk and meet each other "face to face" and discuss matters and case issues, whether or not they are the subject of the specific conference. The face to face procedure is I believe also an efficient method of doing and talking "business" in connection with all cases that fall within the List.

Let me now mention the matter of listing for hearing. In February 1999 I indicated that when a case is ready for trial proceedings will be entered into the Holding list. Indeed two

points may be made. First, I have in fact when able (on limited occasions) actually fixed Professional Negligence List cases ready for trial, for actual hearing without placing them in the Holding List. Further, I have directed that a number of cases ready for trial be placed in the Holding List to be called up at the next available call-up date. I have placed some cases in the next or in a specific call-up. I do not believe that the preparation of cases (including the parallel mediation system) under the Practice Note has resulted in any delays "at the other end" that is, in the obtaining of a trial date. My experience is to the contrary. In fact there have been no delays and perhaps the opposite has occurred in respect of cases actively case managed in the List. Also, the mediation process also does not delay cases being given hearing dates.

From time to time it has emerged that clearly some cases in the List should be in the District Court and the Court's powers under section 143 **District Court Act (NSW)** have been used to effect a transfer to that Court. This practice will continue in respect of appropriate cases.

A number of other matters should be mentioned and I deal with them briefly. Applications and motions, in respect of matters in the List (save for some **Limitation Act (NSW)** issues and other matters), are and have been dealt with by Justice Sperling or myself, and not by other Common Law Judges. The fixing of dates for such has been accommodated and done by arrangement. There is no regular application day. The past practice will continue. Some cases have been the subject of Part 31 (separate trial orders), with liability issues to be determined separate from the damages issues. In the appropriate case, this too is beneficial for reasons previously articulated by me: cf my article in the *Judicial Officers Bulletin* supra.

Part 14C and the Practice Note deals with the matter of entry into or removal from the List, and avoidance of the List. Entry into the List cannot be improperly avoided or circumvented.

For the purpose of the List "professional negligence" is defined by reference to a breach of duty of care or of a contractual obligation in the medical and health care professions, and to cases of legal professional negligence. It also includes certain classes of indemnity or contribution cases involving the issues described. There is the clear intention to bring into the List the proceedings of the type defined whether framed in tort or contract: see **Johnson v Perez** (1988) 166 CLR 351; **Chappel v Hart** (1998) 195 CLR 232; and the recent decision of the High Court in **Astley v Austrust Ltd** (1999) 73 ALJR 403 (where it was held that a duty of a solicitor to exercise reasonable care and skill lies both in contract and tort). It has been the practice to also manage in the List those professional negligence cases filed in country registries. Litigants will have their actions transferred to Sydney for active case management in the List. In the event of non-resolution, such actions may be returned to the local country registry to be heard and dealt with accordingly. My view is that it is of benefit to the parties that country cases receive the same management attention as city cases. The numerous old professional negligence actions in the Common Law Division have now been transferred to the new List by the Court of its own motion for active case management in the List. This is now leading to their resolution.

From time to time concerns have been expressed and raised about potential difficulty in plaintiffs obtaining access to copies of medical or hospital records before suit. Anecdotal stories are cited. In my view and experience these concerns have not been supported by practical experience. Indeed I have not identified any difficulty in this area.

I believe that the presence of such provision of paragraph 9 of Practice Note 104 ("Indemnity Costs") and the presence of extensive powers under paragraph 10 ("Action at Conference Hearings") of the Practice Note have proved to be an effective discouragement to those who might seek not to make available notes before suit. At "the end of the day they will be produced." Also there is the new spirit of cooperation that I have discerned since the establishment of the List. To reluctantly decline production would in realistic terms be counter-productive. Further, an award of indemnity costs in accordance with paragraph 9 if necessary would not depend on the result of the litigation and could be made at any time. This too is a sanction for encouraging production. There are also the new case management powers in Part 26 which can be called in aid, if necessary.

I now turn to the matter of **Experts** and the **new Court Rules** in respect of such. The matter of expert witnesses, their obligations and responsibilities, form, scope and content of their reports as well as meeting of experts were addressed in paragraph 18 (and Schedule) of Practice Note 104 (now superseded by new rules 13C and 13CA). The need for the new rules is well established. The role of experts, the scope and content of expert witness reports, and the case for greater control of experts by the Court is clearly established. Indeed, in respect of professional medical negligence cases, because of inter alia complex issues of breach of duty, damages and causation, the parties perhaps place greater reliance upon expert evidence than in any other personal injury area. At least Lord Woolf thought so in England.

In his Final Report Lord Woolf (Chapter 13 p 137, para 2) made the significant observation:

> *A large litigation support industry, generally a multi-million pound fee income, has grown up among professions ...*

A similar point was made in the English Court of Appeal case of **Stanton v Callaghan** (8 July 1998) Lord Justice Otton said at 23-24:

> *Witnesses who claim to be experts come from many disciplines and appear in ever increasing areas of litigation...with ever increasing claims against professionals the range of expertise has increased and with that their numbers.*

There is no real reason for believing that the situation is really different in Australia. The expert witness industry too is a growth industry. Particular growth areas are to be found in the behavioural science cases and other areas involving psychiatry and psychology. As Kirby J recently observed in **Farrell v The Queen** (1998) 194 CLR 286 (at 299):

> *The study of human behaviour including psychology is an accepted scientific discipline. It is one in which the*

frontiers of expert knowledge are constantly expanding.

We are seeing an increasing recourse to experts in Australia in all fields. This said, at common law the modern attitude towards expert evidence is perhaps less exclusionary than in the past but it is still important to recognise the dangers of wrongly admitting it: see **Murphy v The Queen** (1989) 167 CLR 94 per Dawson J at 194; **HG v The Queen** (1998) 194 CLR 286 per Gleeson at 288 when discussing the position of the expert (under s 79 of the **Evidence Act**), and inter alia considering that he/she may be an expert for one purpose but not necessary for multi purposes. His Honour also said that for an expert to express a view outside his or her expertise may "vest the opinion with a spurious appearance of authority". Further I would add in some cases experts add little to the case but cost. Next, concerns have been raised by the media itself as to the cost burden in litigation, of medical experts: cf the headline in an article in the Australian (page 5) **"The Legal Prescription for Wealth"**:

> *"Medical experts have successfully embraced the chance to expound their legal work throughout criminal and civil jurisdictions. David Brearly investigates the trends in his final report on psychiatry".* It is not a flattering article.

In the paper delivered by me to the Australian College of Legal Medicine Annual Conference October 1999 headed **"Professional Negligence Litigation - A New Order in Civil Litigation - The Role of Experts in the New Legal World and in New Millennium"** I addressed the matter of changes to the civil justice system, particularly in the area of medical negligence practice. I also addressed issues concerning Alternative Dispute Resolution. In particular I addressed matters relating to what I perceived to be the changing role and responsibilities of expert witnesses in the civil procedure context. In respect of the matter of experts I concluded by stating:

> *The expert is living in an interesting time. He/she will face the new millennium accepting as he/she must, change and further changes as to his/her responsibilities, duties and obligations as an expert involved in litigation or legal disputes... A "hired gun" philosophy will become a thing of the past.*

The arguments for change and new rules in my view are overwhelming.

In England in his **Access to Justice Report** (1996) Lord Woolf observed that a significant problem in medical negligence litigation was the polarisation of experts. He said that a new system of active case management "could do much to reduce cost and delay in medical negligence cases and encourage a more cooperative approach enabling cases to settle at an earlier stage."

As I have earlier said, recently, pursuant to the **Supreme Court Rules (NSW)** (Amendment No. 337) 2000, the new rule 13C has been introduced dealing with the subject of "Expert Witnesses". Also a further rule 13CA deals with "Conference Between Experts". A new Part 39 - "Court Appointed Expert and Assistance to the Court" has also been introduced. Division 1 of Part 39 deals with the matter of "Court Appointed Expert" and Division 2 deals with "Assistance to the Court" (in non-jury cases).

A new Schedule "K" - "Expert Witness Code of Conduct" has also been introduced. The code is defined in Rule 13C(1) and means the expert witness code of conduct in Schedule K. The Schedule falls into a number of parts under different headings being "Application of the Code"; "General Duty to the Court"; "The Form of Expert Reports" and "Experts' Conference". As to the form of expert evidence; Schedule K is in a more comprehensive detailed form than that earlier found in para 3 of the Schedule to the Professional Negligence List. A new Practice Note 109 (Expert Evidence) has also been issued inter alia superseding paragraph 18 of Practice Note 104 (Professional Negligence List).

In introducing the new rules inconsistency between the amendments and Practice Note 104 has been sought to be avoided. That said, there have been changes introduced by the new Rules and Schedule K which are of general application. The amendments to Part 36 which commenced on 1 March 2000 adding new Rules 13C and 13CA provide a code of conduct for experts engaged for the purpose of providing a report as to his or her opinion for use as evidence; or giving opinion evidence in proceedings or proposed proceedings.

The new rules have a number of objectives. They are to ensure such an expert engaged to provide such a report observes an overriding duty to assist the court impartially on matters relevant to the expert's area of expertise; to observe a paramount duty to the Court and not to the person retaining the expert; to not act as an advocate for a party; to make a full disclosure of all matters relevant to his or her report and evidence. Further objectives are to facilitate the appointment of expert witnesses by the court; and to extend the existing power of the Court to obtain assistance from an expert in proceedings in the Equity Division (other than the Admiralty List) and to proceedings in the Common Law Division (other than in proceedings tried with a jury).

The new rules should be seen against a background of concern about the role of the experts and clearly identified generally and in particular in cases of clinical professional negligence in England by Lord Woolf in his 1996 **Access to Justice Report.**

Further, in Australia there was in the latter part of the 1990's a considerable number of papers addressing concerns about the role of expert witnesses in litigation: see two recent papers identifying inter alia the problems with expert evidence including that each of objectivity or impartiality and of the hired gun approach of some: **The Australian Institute of Judicial Administration Empirical Study on Experts (1999)** (The AIJA study) and Justice Sperling's comprehensive paper: **"Expert Evidence: the Problem of Bias and other things"** (delivered to the Supreme Court of NSW Judges Conference in September 1999). I earlier referred to the recent report of the **Australian Law Reform Commission** entitled **"Managing Justice: A review of the Federal Justice System Report No. 89"** (17 February 2000). That report referred to criticisms of expert evidence based on claims that the use of expert evidence was a source of unwarranted cost, (a burden on the cost of litigation) delay and inconvenience in court and before tribunals. Much criticism related to the use of expert evidence concerned particular case types where parties routinely used the same expert witness who became

associated as the applicant's or respondent's expert. Other criticism involved complaints that courts only heard the most favourable experts to the parties; of partisan experts who frequently appeared for one side; of experts being paid for their services and instructed by one party; and of bias concerns about lack of objectivity or impartiality.

In the medical expertise area other criticism involved what was thought to be of doctors in semi-retirement or retirement or in their twilight years moving into forensic medicine or into the expert witness "market". The new rules too will inter alia address some of these concerns.

In respect to the AIJA Study: (see also the note in 73 ALJ 612 "Expert Witnesses") the article author observed that in dealing with judicial responses to how far expert evidence impressed the judges, of all the experts it was observed that both judges and juries found accountants and psychiatrists the most difficult to understand and accept.

I return to the rules and a brief examination of such.

The new Part 36 rule 13C(1) provides that for the purposes of this rule and rule 13CA, "expert witness" means an expert engaged to provide a report as to his/her opinion or giving opinion evidence in proceedings or proposed proceedings. The rule also refers to the "code of conduct" in Schedule K. Rule 13C(2)(a) provides that unless the Court otherwise orders, as soon as practicable after the engagement of an "expert" as a witness (whether to give oral evidence or to provide a report for use as evidence) the person engaging the expert shall provide the expert with a copy of the "Code of Conduct" (Schedule K). Similarly where there is a court appointed expert a copy of the code Schedule K shall be provided to the expert by the court registrar.

Rule 13C(2)(b) requires that an expert witness's report must contain a written acknowledgment by the expert witness that he or she has read the code of conduct in Schedule K and **agrees to be bound by it.** This goes further than the equivalent provision in the English Part 35 of the new **Civil Procedure Rules.** I would note in passing that under the English Practice Directions - Experts and Assessors provision is made that an expert's report must be verified by a statement as to truth in terms "I believe that the facts I have expressed are correct". The new **ALRC** Report 89 in terms does not address this issue.

Under Rule 13CA(1) the Court may of its own motion or on the application of a party **direct** expert witnesses to: confer; endeavour to reach agreement; and provide the Court with a joint report specifying matters agreed and matters not agreed and reasons for non-agreement. As to such joint conferences in the pre 1999 English **Civil Procedure Rules** context: see the interesting discussion by the English Court of Appeal in **Stanton** supra. Such meetings of experts in medical negligence cases were referred to in Lord Woolf's **Access to Justice Report** (para 77) with it being said that in respect of such the "benefits outweighed the disadvantages".

The new Schedule "K" - "Expert Witness Code of Conduct" has also been introduced. It embodies a "code of conduct" (see Part 36 rule 13C(1)) essentially applying to expert witnesses and not the lawyers who instruct them.

The provisions of Schedule K under the heading "General Duty to the Court" reaffirm and restate in the rule in the form that was perceived to be the common law view of the experts overriding and paramount duty to the Court. The latter point was well made by Lord Woolf in his Final Report when he said (pp 143-144):

> *The experts responsibility is to help the court impartially on matters within his expertise. This responsibility will override his duty to the client. This rule will reaffirm the duty which the courts have laid down as a matter of law in a number of cases notably Whitehouse v Jordan.*

See also **Whitehouse v Jordan** (1981) 1 WLR 246 per Lord Wilberforce: "expert evidence presented to the court should be or should be seen to be the independent product of the expert uninfluenced as to form or content by exigencies of litigation"; **The Ikarian Reefer** case (1993) 2 Lloyds Reports 68 per Creswell J at 81; **Stanton** supra; and the recent views of Callinan J in **Boland v Yates Property Corporation** (1999) 167 ALR 575 (applying the observations of Lord Wilberforce) when discussing the relationship between expert valuer and lawyers engaging him/her.

Scheduled K para 5 addresses the "Form of Experts Reports" and specifies the requirements of what a report must contain.

As to the form of a report I would add a further reference to requirements of such an expert's report (at least for purposes of s 79) of the **Evidence Act.** In **HG** supra Gleeson CJ (at 287) noted the importance of opinions of an expert to be expressed in admissible form and that an expert whose opinion is sought to be tendered should "differentiate between the assumed facts upon which the opinion is based and the opinion in question".

Schedule K para 10 too also deals with "Experts Conference" which is dealt with by Rule 13CA. It provides that an expert abide by any direction of the Court to confer with another expert witness; endeavour to reach agreement on material matters for expert opinion; and provide the Court with a formal report specifying matters agreed and matters not agreed with reasons for non-agreement.

Paragraph 11 provides that an expert witness **must** exercise his or her independent professional judgment in relation to such a conference and joint report and must not act on any instruction or request to withhold or avoid agreement.

The new reforms and the new rules will I believe encourage an economy in the use of experts, and a less adversarial expert culture including in the Professional Negligence List. They go some considerable distance in addressing concerns that I have mentioned about the role of the court expert and the scope and content of their reports and evidence.

The new NSW rule 13C(1) does not apply to what I might also loosely call "advisory" reports but only to experts who are engaged for one of the stated purposes: Pt 13C(1); Schedule K para 1(a) and (b) of the rules: see also Practice Note 109. Those who give in effect advisory reports to a litigant; those who are reporting in a capacity as a treating doctor or even, as a named defendant doctor (who was involved in the actual care of the Plaintiff), are not apparently caught up by the new rule even if such a person proffers expert opinion or who in effect, perhaps provides an expert opinion in a way similar to that of the independent retained expert witness.

I turn to another subject.

There is I believe considerable merit in developing practical guidelines or a draft code of **guidance** (or a similar "Protocol") at least for experts in the conduct of court ordered conferences of experts (indeed probably generally in respect of expert witness evidence under the new NSW Supreme Court Rules 13C and 13CA). At the very least, I believe it would be desirable to establish a "Working Party" to address and provide practical guidance in relation to the new rules (particularly those relating to joint experts conferences) for experts (especially medical experts) who are generally the experts involved in cases in the Professional Negligence List. After all, it is in that List area that one sees a very high level of specialised expert evidence in the cases.

I am not necessarily endorsing the draft English Code but such a code perhaps duly modified for Australian conditions could provide a guide.

I also consider that it is desirable that expert witness obligations be spelt out requiring compliance with court rules, practice notes, orders, and directions with even for example, professional disciplinary sanctions being considered for non-compliance. This could be addressed by individual professions to ensure that for example, codes of ethics reflect and implement the effect of new court expert rules and practice note.

Thus to summarise this point, whilst supporting a suitably modified and appropriate code of guidelines along the English lines of general application, I believe it at least desirable to have a code of guidelines for the Professional Negligence List applicable to experts involved in cases in the List. If such is not acceptable, I consider there is at least a need for a code of guidelines or protocol for that List in respect to joint meetings of experts and providing practical guidance as to the situation "before, during and after such conferences".

I consider education and retraining programs for experts in "the new ways" and the new outline would be desirable. This too is something addressed in England by such bodies as the highly regarded Expert Witness Institute (a body inter alia representing the profession with the objective of supporting the proper administration of justice and early resolution of disputes through fair and unbiased expert evidence). Perhaps it is time to address the creation of a similar body.

Another of the new rules should be mentioned.

Part 39 - Court Appointed Expert and Assistance to the Court

The new Part 39 applies generally to all trials. An appointment may be made at "any stage of the proceedings" and can of course be made during the case management stage of a case in the Professional Negligence List. The rule re-enacts (with some changes and additions) the existing provision of the earlier Part 39 for appointment of a Court expert to inquire into and report on the questions and to report on facts relevant to the inquiry. However, there are differences. In new Part 39 rule 1(1) there now are the additional words "after hearing any party affected who wishes to be heard" an important qualification preserving the rights of parties. Next Part 39 rule 1(1) provides that the Court **may** appoint as the expert a person selected by the parties affected **or** appoint a person selected by the Court in a manner directed by the Court. The rule as to selection is discretionary. The provisions of the "code of conduct" (Schedule K) are also addressed in relation to Court appointed experts (Pt 39 rule 2). The code of conduct binds a court-appointed expert in the same way as any other expert witness is bound.

I turn now to the new part 39, "Division 2 - Assistance to the Court". Rule 7 permits the Court in proceedings other than those proceedings tried with a jury (or in Admiralty) to obtain the assistance of any person specially qualified to advise on any matter arising in the proceedings may act upon the advisers opinion and may make orders for the adviser's remuneration. This rule reflects and retains and extends the existing power of the Court to obtain assistance from an expert specially qualified to advise on any matter arising in the proceedings to act upon the advisers opinion. The rule does not apply to proceedings tried with a jury.

Such order may be sought by a party as he made by the court of its own motion, but not in respect of a question to be tried before a jury. Again as I have stated earlier I have made no such order in respect of a matter in the Professional Negligence List. I have not been asked to do so. I have reservations about doing so in terms of matters in the List.

The Federal Justice System

I should not leave this paper without brief reference to the position in the federal justice system of witnesses. The matter has been as recently as February 2000 extensively considered by the **ALRC** in the paper I have referred to.

I would note in passing that there is no provision in the new Expert Witness Rules (nor in the superseded paragraph 18 or Schedule of the Professional Negligence List Practice Note 104) for the parties to agree to jointly instruct experts. This was a matter addressed by Lord Woolf and now dealt with in the new English **Civil Procedure Rule** 35.7. That latter rule gives the Court a discretionary power to direct that evidence is to be given by a single joint expert in cases where two or more parties wish to submit expert evidence on a "particular issue". In its recent Report No 89 (February 2000) reviewing the federal civil justice system, the **ALRC** in **Recommendation 66** that the Federal Courts and Tribunals should "as a matter of course encourage parties to agree jointly to instruct expert witnesses". Another recommendation for the federal justice system made in the same report is that experts should be required when requested by a party and with leave of the court to prepare for and answer questions from parties upon payment prior to trial of the reasonable costs of answering questions. Such a procedure does not exist in the new Supreme Court Expert Witness Rules. There is some indirect precedent for this in the new English **CPR's** Part 35.6 which permits (without leave of the court for a party to put to an expert witness instructed by another party on a "once only" basis written questions about his/her report.

The **ALRC** Report also noted that the Federal Court Guidelines were also presently under review.

To conclude I believe that the Professional Negligence List (Supreme Court of New South Wales), and the new Supreme Court Rules relating to expert witnesses represent major reforms and go a long way in providing just quick and

cheaper solutions of the issues arising in cases in the List.

Conclusion

The new **Supreme Court Rules** will introduce cultural changes in thinking. The new **Supreme Court Rules,** the new "Expert Witness" Rules, the Professional Negligence List and its implementation together with the pro-active case management role will, I believe, impact in the future upon the "pure" adversarial system as it is known and the adversary process where traditionally the parties were free to choose the ground, issues and manner on which to fight a case. I believe that the new reforms to the List will encourage greater economy in the use of experts, enhance the quality and independence of expert opinion, and produce greater transparency in reporting. Litigants and their advisers will need to carefully consider how to obtain expert witness support, expeditiously and in a cost-effective way. The obtaining of expert evidence is an expensive step in the litigation process.

I believe that the Professional Negligence List represents major reform in improving case management, in addressing issues of Alternative Dispute Resolution under the umbrella of the court, and in dealing with expert evidence. It will hopefully assist in the containment of costs of insurance premiums calculated in many instances by unresolved claims. I believe it will continue to contribute to improvement in dealings and relationships between those representing the litigants in itself a further way of implementing and achieving expeditious resolution of disputes. I believe that litigation will be resolved sooner, more cheaply, and more expeditiously in cases to which are dealt with in the Professional Negligence List. The List enjoys high levels of support from all participants in cases in the List. There is I believe a high level of confidence in it and its mode and manner of operation. This can only be to the good.

The Professional Negligence List I believe provides and will continue the opportunity to reduce delay and costs and increase the number of settlements and improve communications between the parties.

Professor Fearnside: Your Honour, thank you very much indeed for what was a fascinating speech. The development of this List is of importance to not only the medical but the legal profession, and I have got no doubt, not having heard of the working party before tonight, that that is a very important initiative and I have no doubt that it will retain wide support in the medical profession and the legal profession.

His Honour's paper is now open for discussion and questions. Could speakers please identify themselves because these proceedings are being recorded and would you please identify as to whether you are medical or a legal questioner or commentator.

Ms Ann Searle (Legal): My question is a legal one, your Honour. To what extent under the new system are the proceedings open? If you compare it to perhaps hearings where evidence is heard in open court and would be a matter of public record, what proportion of the new arrangements are in fact heard in open court?

Mr Justice Abadee: All proceedings in the court room are open proceedings. Anyone and everyone has the advantage to attend in open court. By the very nature of the mediation process, which is a private mediation between the litigants, that is a private matter and subject to the mediator's position and subject to the position of those who are mediating before him. In the ordinary course of events mediations would remain private.

In respect of a joint meeting of experts, which I have discussed, which is still in its infancy, what is contemplated is that there will be a joint meeting of experts, in other words there would be a peer group meeting and the experts will be asked to furnish a report to the Court, so it will have the report that is prepared pursuant to the Court direction, i.e. the report will at the end of the day bring about a situation of all the experts being in agreement, or, if they are not, at least identify those issues in respect of which they have not agreed, and the reasons why not.

Subject to those situations, everything that takes place in the Professional Negligence List, like everything that takes place in any other Division of the Supreme Court, is done publicly. There is full and absolute accountability, which we have for a very fundamental reason: When you do things in open court, when you give a judgment you normally give reasons, it is hard to imagine anything more accountable than that.

Mr Phillip Greenwood (Barrister): With a joint meeting of experts, we may have one expert who expresses his or her views in a very strong way, and we may have a person on the other hand who may be less inclined to express their views. Do you have in mind having somebody present at the joint conference to compere them and to provide some recording in an unbiased way?

His Honour: Let me answer it this way: When you start to mention unbiased ways, it always raises more problems than it perhaps solves. That is an aside on my part. The question of what will be done in a practical sense in respect of joint conferences is a subject that will be addressed, I hope, by the working party. That is the sort of matter that will be addressed.

It comes as no surprise that you should ask that question. At a meeting or a seminar of the Plaintiffs' Lawyers Association, the matter was raised as to whether or not there should be present at a joint conference some sort of useful facilitator or independent chairman. It would be a terrible thing if we made these joint conferences like some sort of mini trial, or, alternatively, a trial within a trial, being conducted at great expense. Everyone has got their own views and I prefer to keep mine to myself, bearing in mind the establishment of the working party. Perhaps this is not an answer, but let me take you to something which might provide some form of distillation.

Again, everyone declares an interest and I declare it now. I am a great believer in the jury system. I am a great believer in the common sense of the jury, particularly in the criminal areas. You might wonder why I am mentioning juries. If you can get twelve people, after hearing weeks of evidence, agreeing, as they must all agree, on the verdict one way or the

other, you may think that is nothing less than a miracle, but that is exactly what happens. After getting a summing up from the Judge, they go out to the jury room; they not only make hard decisions, and hard decisions sometimes in an atmosphere where there are several jurors trying to dominate the results, but we get results from juries. Presumably men and women are capable of resisting the domineering influence.

As to the problem of whether or not to have a compere person as a facilitator of a conference, again may I draw attention to the jury analogy. The jury selects one of their own to be the chairman or chairwoman as the case may be, and if they do not like the chairman or chairwoman they can stage a revolution and replace their chairman or chairwoman.

I must say, when one is dealing with experts, and let me just come back to the present situation of medical experts who are likely to be directed to hold a joint conference, I would be surprised if the experts attending were not other than bold spirits. I would be surprised if there were too many timid souls. But these are matters that will be addressed by the working party. They have got a long way to go. We have got to try to get it right but it is on the agenda.

Dr Richard Tjiong (Medical): I would like to make a comment and ask a question if I may. The comment is to this effect: I applaud your efforts, your Honour, in establishing the working party and especially introducing changes to the resolution of what may well be complex medical cases. It may be worthy of the attention of this group that your efforts have run in parallel with a general move towards a greater participation amongst the stakeholders, as you call them. I am particularly delighted to have been involved in the establishment of the working party.

His Honour: We are glad to have you involved.

Dr Tjiong: We have very quickly established a consensus and we are working together for the common interests of the community as a whole and towards a better system of compensation with respect to lump sum settlements for injury. What is significant to me is that right from the first the lawyers and medical representatives have seen eye to eye on complex medical issues and we believe a just settlement initiative is probably very close to resolution.

We commend your List and we think that your List and the working party is yet another manifestation of a community acting towards a better system of compensation and we welcome your invitation to us to be involved.

The question I would like to ask is: Given the success of the new Rules, one would wonder as to what will happen with respect to the District Court. The cases in the District Court may be of lesser value but they are not necessarily of lesser complexity. May I ask this question: When may we expect your prototype to be copied in the District Court as well as perhaps the Supreme Court?

His Honour: First of all, I thank you for your comments. I am very interested in your remarks about settlement. I have different views about a structured settlement situation, whether or not it should be mandatory or whether it should be expressly in what circumstances, whether some people are so well educated as to be able to manage their own funds or whether other people need to be protected. I am quite aware, in any event, that the major obstruction to the introduction of a structured settlement approach is perhaps the taxation ramifications and the ramifications not having been fully worked through. That is one of the problems, whether you introduce the GST or do other taxations go on the back burner. I express no views on the GST.

However, let me come to the other situation, namely, whether or not and to what extent in the law what we are doing in respect of the new Rules relating to expert evidence will be adopted or adopted in a modified form in the District Court. The short answer is I have enough problems with running the Professional Negligence List and doing all the other things that I do to be able to be really address a satisfactory answer, but let me say this, it would be somewhat surprising if the Supreme Court, having now spent the time and effort in preparing the new expert witness rules, did not find that perhaps they would be of considerable appeal to the District Court, and perhaps this is a personal view, that they would not in a period of time be adopted in the District Court and applied in respect of expert witnesses in that Court. It would be somewhat surprising if the Supreme Court, as a pacesetter, did not set the pace for the District Court, with the District Court adopting in due course similar rules, otherwise all sorts of problems might arise.

For example, were they not to do so, it might be a discouragement for people to commence proceedings in the District Court. Alternatively, it might be a discouragement to somebody like myself to exercise powers under section 143 of the District Court Act and transfer cases from the Supreme Court to the District Court. A whole host of things come into operation where you do not have harmony of approach in respect of courts within the one system.

As regards the working party and what might be produced by it, let me utter a religious remark. I think we are very much in the Genesis stage, rather than in the Exodus or indeed Revelations stage. I really have no idea how long it will take for the working party to put into practice that which I believe it should produce and will produce.

Deal in haste and you will repent at leisure. There are a lot of issues to address and I believe that they should be addressed carefully. Let us get it right, because if we get it right, I believe that we can provide a prototype which would operate in other areas of expert evidence concerning other professions as well, not only within the State, but also I would have thought perhaps throughout other parts of Australia. I do not know whether that is a satisfactory answer, Richard, but that is the best I can give you.

Dr David Bell (Psychiatrist): One matter, your Honour, that lurks in the background but you haven't raised as yet is that the problem with disputes between expert witnesses is really a matter of whether they are advancing what would be regarded as facts or as something which would be regarded as speculative opinion. Could you tell us what your thoughts are about that?

His Honour: It was only a matter of time at one of the meetings that I have addressed in the last few weeks before that question emerged and it is the first time tonight, David. I think you are raising the question as to the extent, if at all, the issues decided by the United States Supreme Court case Daubert v Merrill, which was followed very recently by a

United States Supreme Court case called Kuono, to what extent those principles and influence come to play a role in New South Wales or indeed in Australia.

We have in New South Wales, as well as in the Commonwealth Courts an Act called the Evidence Act, and there are several provisions of the Evidence Act, sections 79 and 80, which deal with the subject of expert evidence and admissibility of expert evidence. As presently advised, in New South Wales in terms of the test of admissibility, the test, it seems to me, is to be found in section 79 of the Evidence Act. In other words, you do not have to consider and address the Daubert or Kuono type principles, you go to the actual language of section 79 itself and it provides a statutory test of admissibility.

That is in respect of New South Wales and in respect of Commonwealth jurisdictions. That was the approach that was adopted by the High Court in a criminal case, a federal case called H G v The Queen, and I particularly refer to the views of the Chief Justice, Mr Justice Gleeson, when he said that the Daubert type issues did not arise for consideration in that particular case because the issues fell to be determined by reference to the express language of section 79 of the Evidence Act. It is appropriate to say that whilst the Evidence Act operates in respect of Federal courts and in respect of New South Wales courts, the Evidence Act does not in terms of similar provision necessarily operate and does not operate in the United States, so you go back to Common Law principles relating to the admissibility of evidence.

I think it was Mr Justice Menzies in the famous case called Advancik v The Minister for Government Transport, who said that for the purposes of admissibility of expert opinion, the expert does not have to be expressing a right view. Whatever that might mean, it presumably recognises that experts legitimately differ and it is perhaps at the end of the day for the Court to determine which is the right view to accept. Certainly, it is an unresolved question, I believe, as to whether when one is looking at the field of expertise, or the field of expert knowledge, or the field of knowledge, as to whether or not and if at all, and to what extent, the decisions in Daubert and Kuono, the United States decisions, may be applicable on the admissibility of evidence question.

If I may just briefly explain, for those who do not know, what Daubert decided reflected a change in thinking from earlier views in the United States. Whereby the earlier views reflected a general acceptance test of admissibility of expert opinion, rather I think, and I speak solely from memory, Daubert started to reflect the falsifiability theory of expert evidence. To what extent we will go down and ever have to address the issues of those two cases, in the light of provisions such as section 79 of the Evidence Act, is a matter for future lawyers. The very fact that we are having this discussion and means a bright future for future lawyers.

Dr Julian Lee: For the benefit of the previous speaker to the question, the topic that this Society will address at its November meeting is just that issue.

Professor Fearnside: Your Honour, thank you very much for what was a very fascinating and elucidating paper tonight. I certainly learnt a great deal. I am aware, being a neurosurgeon, that being on the sharp edge of perception of a great deal of medico-legal issues, it is of considerable reassurance to us and we look forward to the progress of the List and the provision of justice and fairness. So if I could thank you on behalf of the Society if I may, and I think we might invite you to return in four or five years time to see how it has all gone. Thank you very much.