INTERNATIONAL SYMPOSIUM ON SCIENTIFIC UNCERTAINTY AND SOCIETY

PRESENTATION ON EXPERT EVIDENCE IN AUSTRALIAN COURTS

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In Australia both criminal and civil proceedings are adversarial. This means that the parties are free to call any evidence which is admissible under the relevant rules including expert evidence, to support their case. This paper discusses expert evidence in civil trials.

Although the position is now changing in some courts, each party has traditionally been free to call experts of their choosing to give evidence about issues in the case. More than one expert could be called to give evidence in relation to the same question. In more recent years the evidence of an expert has been required to be reduced to writing and exchanged with the other parties prior to the hearing. The experts are generally called to give oral evidence, their reports are tendered and they may be cross-examined. Depending upon the nature of the litigation and the complexity of the issues, the expert's report may be voluminous and the time taken up by oral evidence from experts may occupy many days of the trial.

Some issues

The 20th century witnessed an extraordinary increase in knowledge in almost every field of endeavour. There are very few generalists in any field of learning whether it be medicine, engineering, architecture, accounting or town planning or any other

field. Both the increase in knowledge and the development of specialist areas have meant that many more questions than previously can be informed by the evidence of experts.

Towards the latter part of the 20th century Australian courts, as did the courts in England, identified a number of problem issues with expert evidence. Many courts have set about addressing these problems. The major issues are:

- the cost to the parties of obtaining expert evidence.
- the unnecessary costs in time and money occasioned by multiple experts in the same professional discipline.
- whether the process leads to injustice when one party has much greater resources than another party.
- lack of impartiality, commonly referred to as adversarial bias.
- the considerable costs occasioned to the parties by a failure to define the areas of disagreement between the experts and confine the debate at the trial to the issues in dispute.
- the difficulty in the adversarial process of obtaining the best evidence from an expert when called to give evidence.

Pre-trial management

All Australian courts have responded to some degree to some of the identified problems. Most courts have introduced pre-trial management procedures where a judicial officer, with the cooperation of the parties, seeks to define the issues which must be resolved at the trial. Issues which require expert evidence are identified and it will be usual for orders to be made for the parties to exchange expert reports in

advance of the trial with an opportunity given to one expert to respond to the evidence of another by providing a "report in reply."

The judicial officer managing the pre-trial process, will, depending on the rules of the particular court, have the power to limit the number of experts to be called on any particular issue and confine the expert's report to the matters actually in dispute.

Many courts require the experts to meet with each other before the trial and prepare a joint statement which states the matters upon which they agree and those upon which they disagree. That statement will be tendered at the trial. The purpose is to minimise the amount of court time which must be devoted to expert evidence.

Bias

More than one hundred years ago lawyers were talking about the problem of bias of experts in adversarial litigation. It is accepted by many as inevitable although not universal. The bias is not always or even commonly a conscious bias. The problem is that the competitive environment and desire to win the argument becomes a dominant force. No one wants to be part of a losing team – least of all the expert who may be and very often is dependent on being retained by other prospective litigants.

Australian courts have addressed problems of bias in a number of ways. Most courts have issued guidelines which require experts to acknowledge and adhere to a Code of Conduct before they can give evidence in court. Central to the Code is the requirement that the expert accept that their primary obligation is to the court and not their client.

Some courts also appoint their own experts to give evidence about a particular problem. Other courts have required the parties to accept that only one expert, normally agreed by the parties, will give evidence on identified issues. The former is commonly referred to as “court appointed experts”, the latter “single experts.” Some courts have utilised a hybrid system where, although the expert is appointed by the court, the person to be appointed has been agreed by the parties.

Usually when a court expert or single expert is appointed a party to the litigation may not call their own expert except with the leave of the court. Leave may be granted where that party is able to demonstrate that another expert will be able to add to the body of information relevant to the resolution of a particular issue. In some cases where the parties have their own experts, but the issues are particularly complex, the court will also appoint an expert to assist in the resolution of the dispute.

In the New South Wales Supreme Court a single expert is now commonly appointed in major personal injury litigation in relation to many issues, particularly those which involve accounting, estimates of economic loss and lesser damages issues. Because of the structure of the relevant New South Wales legislation major issues such as the nature and cost of future care often require resolution. The court does not normally confine the parties to a single expert on these issues.

The New South Wales Land and Environment Court resolves all disputes in relation to the natural and built environment in the State of New South Wales. In that court an

expert, agreed by the parties, is appointed by the court in at least fifty percent of the cases.

The experience of the courts where a single expert is appointed has been a general raising of the quality and integrity of the expert evidence which has been received. These observations are confirmed by the experts, some of who have publicly acknowledged the increased obligation of objectivity when free of obligations to a particular litigant. Cost savings can be achieved. Experience shows that not all issues are suitable for a single expert.

Concerns have been expressed that the appointment of single court appointed experts may involve an inappropriate delegation of decision-making power from the court to the expert.

Concurrent evidence

As I have indicated, under the conventional adversarial process each party to the litigation calls their own expert, who is examined, cross and re-examined. The plaintiff presents the first case, followed by the other parties. The evidence of the experts of each of the parties may be given days, or even weeks apart, and they never have the opportunity to talk to each other about the problem in the presence of the judge. The litigation is a contest controlled by the advocates. Procedures developed many years ago, when disputes were far less complex and expert evidence less significant, have been required to adapt to expert evidence. The process can be inefficient and often does not allow the experts to provide optimum assistance to the court.

To address these problems and encourage greater integrity in expert evidence a process known as “concurrent evidence” has been developed. It is now used in a number of courts and tribunals in Australia in civil cases. The basic steps are:

- the experts prepare and exchange written reports.
- the experts meet and discuss the issues and prepare a joint report of the matters upon which they agree and those upon which they disagree.
- the experts on any particular issue are all called at the same time and give evidence together.
- the trial judge, together with the advocates for the parties and using the joint report prepares an agenda, which is then utilised for a “discussion” with the experts which is chaired by the judge. The judge, advocates, and the experts all join the discussion. The experts respond to questions but are also able to ask each other questions and are not confined to the questions asked by the advocates.

The benefits of concurrent evidence are considerable. In many cases it will bring savings of court time – up to 80%. The experts are enthusiastic about the process because, although they may be guided, they are not confined by the advocates questions and have an opportunity to put questions directly to their professional colleagues. The atmosphere in the court room changes so that the true answer to the problem has greater focus. Many experts confirm that because they can be questioned by a colleague their answers are more complete and they feel obliged to acknowledge problems in their evidence which they may be able to avoid when questioned by an advocate in the conventional process.

In my experience, concurrent evidence, which provides the opportunity for the parties and judge's questions to be addressed by the experts during a single discussion is a superior method of determining the evidence which should be accepted than the conventional adversarial approach.

Some further matters

Assessors and referees

Some Australian courts appoint assessors (persons appointed by the court to provide expert advice to it) and referees (experts to whom particular issues are referred for evaluation and report). Although expert these persons are not witnesses. They are alternative means of providing the court with the benefit of the knowledge of experts in a particular field.

Disclosure of communication with experts

An issue which has generated considerable debate in Australia is the disclosure of communications between the parties and expert witnesses. There are suggestions that all communications with an expert by a party should be available to the other parties. This could extend to draft reports of the expert.

Counterintuitive evidence

"Counterintuitive" expert evidence is evidence which is led in order to avoid potential sources of error by educating triers of fact about issues in respect of which they may have misconceptions.