EXPERT EVIDENCE – TRASH OR TREASURE

Expert opinion impacts on a court's decision in a variety of ways. It might be the determining feature in the favourable outcome for your client. Treasure.

Though not determining the outcome it may reduce the impact of an opposing expert's opinion. Valuable.

On the other hand, it might have no impact at all on the decision. Trash – but very expensive trash.

That outcome is not necessarily the fault of the expert. This paper is intended to offer some practical considerations in a hope that it will assist you make the most of the expert evidence which you decide to engage. I prefer the presentation to take the form of an interactive discussion to elicit the wider experience of the audience and to hear the challenges to any views I might express.

If the expert has been given an inaccurate factual basis (inaccurate insofar as it does not accord with the Court's findings) then you can't blame the expert unless he or she should have foreseen the approaching train wreck - to borrow the computer programmer's jargon – rubbish in means rubbish out.

Finding the treasure is simple enough to state.

1. Have your client's version of the facts accepted by the Court.
2. Correctly identify the aspects of the case requiring expert opinion.
3. Choose an expert of undoubted eminence in that particular field.
4. Base your case on that opinion.
5. Comply with all the rules concerning the disclosure and adducing of expert evidence.

What could be simpler? We should consider those steps.

Your client's version

Your client's instructions are rarely bullet proof. Even if not being directly contradicted by another version it may yet be open to attack. It may be in part implausible or inconsistent with other evidence which you are compelled to lead or contrary to what your client has said on another occasion. You have often enough provided carefully qualified advice to your client along the lines "if that version is accepted you will win. However if the other version is accepted, you may not".

Aspects requiring expert opinion

Making the most of the expertise requires that the brief to the expert be wide enough to make the expert aware of the potential factual differences. This sometimes means including matter which is prejudicial to your client's interests. If you are dealing with a handwriting expert, you don't limit yourself to one sample of the handwriting of the putative author of the disputed document. You would seek to provide several samples, preferably from different writing environments. You would also provide samples from other prospective or suggested authors.

If you are dealing with a failed piece of equipment and engineers suspect and then prove that it was due to a single faulty bolt, it might be important also to show whether another part of the equipment would have failed had this bolt not done so.

The moral of this tale is think deeply about the brief that you will provide to the expert. It's not a matter of saying to your para-legal copy the statements and send them off to Mr X. Pert. Your awareness of the potential for different findings of fact must colour the scope of the opinion you seek.

A preliminary conference with the expert might be indicated for guidance as to the scope of your fact finding inquiry. Subject to what follows about joint experts, you should always seek the opinion of the expert at an early stage, certainly before the claim is formulated.

An early accurate opinion is a treasure – even if it dashes your client's hopes and aspirations.

Field of expertise

Sometimes this can be married to hit the point which is the nub of the dispute. Increasingly we live in a field of sub-specialisation. In the field of medicine all practitioners have general training. Specialists have general training in the specialist area, such as orthopaedics or ophthalmology. But many specialists undertake sub-specialisation. One ophthalmologist might confine his work to the anterior chamber of the eye, the other to the retina or the posterior chamber. Both can give a valid expert opinion but more can be made of the opinion if your expert is in the specific zone of interest.

In the field of law, a solicitor of two year's standing who has only worked as an employed lawyer with the World Wildlife Fund can give expert evidence to a court on legal matters just as well as the top silk. Your client might however prefer to spend the extra money.

Few psychiatrists have an adequate training or sufficient experience for the assessment of the effects of a blunt head injury. At the same time few neuro-surgeons have the training or experience to assess the long term outcome of a blunt head injury. What is your inquiry, is it the mechanics of the initial injury or the long term consequences? If the latter, an expert in rehabilitation with extensive experience acting for brain damaged individuals might be better than either of those alternative experts. Each of the opinions might have some value but one of them might be the treasure.

The above considerations are important when putting forward the names for a jointly appointed single expert or a court appointed expert. Each party usually nominates a panel of three experts and the choice is made from the competing panels. Sometimes the nomination gets down to a crude choice based on some expectation from the expert's past performances. There is not much point if the expert doesn't have standing with the court. This was illustrated in *Vakauta v Kelly*[1] where the trial

[1] [1989] 167 CLR 568

judge, somewhat naughtily, described a group of doctors as those who "think you can do a full weeks work without arms or legs" and as "the unholy trinity".

My point is that your nomination should be guided not by that sort of expectation but by demonstrated expertise in the area of the case where you have most to gain from a particular expert.

The present focus on the appointment of a single expert largely resulted from reforms taken in United Kingdom under the direction of Lord Wolfe. These, together with the remarks of influential commentators in Australia, including former Justice of Appeal Geoffrey Davies, led to rules for single experts being introduced in the court in most jurisdictions in Australia – Federal Court Order 34; Family Court Rule 15.42; Queensland Supreme Court UCPR Chapter 11 Part 5; Rule 429G. Even in circumstances where a single expert is to be appointed, having regard to the things mentioned above will optimise your client's prospects of success. But that does not mean that you will necessarily be successful.

There is a change in the air about the appointment of single expert. These rules have never captured the support from the profession nor, I suspect, from those litigants who are frequently before the courts. The new suggested approach is to give to each party liberty to retain an expert of their choice and to brief the expert in accordance with their respective instructions and inquiries, but then to insist that the experts confer to produce a joint report. The joint report would set out the areas of fact or assumption upon which the experts are agreed, details of the facts and assumptions upon which there is disagreement and the opinions agreed or qualified that flow from that situation. Arguments in favour of this proposed reform were made by his Honour Judge Rackeman in a paper to the Queensland Bar Conference in March this year.

This approach has most of the advantages of the single expert in terms of economy and limiting issues but it retains for the individual party the right to seek a court's determination on essential matters in dispute. The proposal includes significant steps to ensure that the independence of the expert is maintained and that the expert's awareness of his or her duty to the court is foremost. To that end experts are quarantined from any approach or intervention by the parties until the joint report is

provided to the court. I understand that this approach to expert witnesses has become common practice in the Planning and Environment Court. If this is to be the trend, then identifying a witness of eminence in the field of expertise that is most vital in the presentation of your case, becomes all the more important.

Sometimes an expert may not live up to the high standard expected of experts. This gives rise to nice questions as to whether the act of preparing a joint report enjoys the same level of immunity against civil suit as the giving of joint expert evidence in court. In *Jones v Kaney*[2], the Supreme Court of The United Kingdom considered this very question. The Court decided that the immunity against suit, despite its long standing, should not be preserved and that the negligent expert is capable of being sued, despite the fact that the expert owes a duty to the court as well as the client.

I draw your attention also to an excellent paper by Declan Kelly SC and Dan Butler entitled "Ethical considerations in dealing with experts". It is published in the February 2011 edition of *Hearsay*. The authors identify different areas where ethical issues may arise. In particular, this might require an early decision whether a particular expert is to be engaged to act only as an adviser rather than being available to give independent expert opinion to the Court. The differences between the two are colloquially referred to as "dirty" and "clean" experts. The conduct of the lawyer may result in the expert losing the status of independent expert and thus the admissibility of the report. This occurred in the *One-Tel* litigation. *ASIC v Rich*[3]. Or**,** there may be an accusation of bias against the expert, or there may be a risk that privilege in communication might be lost if the expert engaged as an advisor has to be recast as an independent expert.

Basing your case on the opinion

Whatever the environment, the receipt of the expert opinion will necessarily cause you to review your client's case and the anticipated case of the adversary. If you are involved in high end litigation with an expert advisor that review may be simple enough. If however a joint expert has been appointed, or the separate experts to a

2 [2011] UKSC 13

3 [2005] NSWSC 149 and [2005] NSWCA 152.

joint report remain quarantined, the ethical considerations may again come to the fore. Questions of whether the opinion can be challenged, or whether the assumptions on which it is based changed, could also arise. The format of the report might need to be changed thus requiring direct contact with the expert. Any such approach needs to be raised with your colleagues on the other side.

Courts in the main are watchful about the validity and indeed the admissibility of expert opinion evidence but that has not stopped judges coming in for some trenchant criticism. In a paper earlier this year Professor Gary Edmond blamed judges for not policing scientific evidence which he suggested may have doubtful pedigree.[4] He said,

> "Judges have to realise the depth of the problem relating to forensic sciences – they are in something of a crisis. The judges are complicit in it because they have not policed it for a century and have just allowed all this rubbish in."[5]

He was referring to such things as DNA evidence and fingerprint evidence which are virtually taken for granted rather than being closely scrutinised.

I am not quite sure what the judges can do about that, short of engaging experts to test the experts produced by the parties. But I suppose, at least, it does give rise to the need for a heightened sense of awareness that expert evidence does need to be firmly based on acceptable facts and good science. This discussion has been limited to the preparation of an expert report. I have not directed attention to the next issue of the admissibility of the expert's report – a topic which is engaging the attention f academic writers. So, with those remarks I simply deflect the criticism of the judges back onto the profession who also must ensure that public confidence is maintained in the processes that we choose to follow.

Compliance with the rules

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4 Australian Journal of Forensic Sciences 2010

5 As reported in The Australian on 15 April 2011.

Rule 429G[6] and Practice Direction No.2 of 2005 have been in operation now for 7 years and so are familiar to all of you. Not so, perhaps, the proposed guidelines for joint conferences of expert witnesses for cases on the supervised list which guidelines are due to commence on 11 July 2011. These guidelines in the main follow the process identified in his Honour Judge Rackeman's paper and used now in the Planning and Environment Court. The salient points require parties to agree on

- The experts to attend
- The questions to be answered
- The materials to be placed before the experts.

The usual materials are further identified in para 9.

The guidelines explain mainly, for the benefit of the experts, the role each is to play in the conference and in the preparation of the joint report. The expert may apply to the Court for further directions. (Para 34).

More importantly, the guidelines set down the role to be played by the lawyer in such conferences in the following terms:-

> *29. Legal representatives who attend a conference pursuant to an order of the Court or who are approached for advice or guidance by a participating expert should respond jointly and not individually, unless authorised to do so by the legal representatives for all other parties with an interest in the conference. Where a response is provided by one or some only of the legal representatives, the response should be in writing, and a copy provided forthwith to the other legal representatives.*
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> *30. Such advice or guidance may be provided by:*
> - *Responding to any questions in relation to the legal process applicable to the case;*
> - *Identifying relevant documents;*
> - *Providing further materials on request; and*
> - *Correcting any misapprehensions of fact or any misunderstanding concerning the questions to be convened on the conference process.*
>
> *31. The legal representatives of the parties should perform any other role the Court may direct.*
> ***Provision of information***

[6] 21 July 2004

> *32. The legal representatives of the parties should inform the associate of the judge who directed the conference of the date of a conference when arranged, the names of the participating experts and the questions submitted.*

From all of this you see there is always something new for you to consider. That is the joy of your practice of the law. Doctrina perpetua – forever learning.