



THE USE OF EXPERT WITNESSES IN COURT AND INTERNATIONAL ARBITRATION PROCESSES

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16th Inter-Pacific Bar Association Conference 2006

**Sydney
3 May 2006**

Changing Attitudes to Common Law Procedure

In recent years there has been a significant movement in common law jurisdictions towards improving the efficiency and reducing the cost of dispute resolution by courts. The movement has inevitably influenced procedures in international commercial arbitration.

The primary focus has been on case management. This has involved some modification of the adversarial approach to litigation which is an essential characteristic of the common law system of dispute resolution. The parties are no longer left largely to themselves in determining the steps leading up to the hearing and the way the hearing proceeds. Judges or court officers now direct the steps to be taken to prepare a matter for hearing and exercise some control over the hearing itself. These changes have been occurring over a number of decades.

Changing Attitudes to Expert Evidence

The developing case management process has more recently focused attention on expert evidence. There has been a perception that expert evidence takes up too much time and that experts have a tendency to be

partial. A number of case management techniques have been proposed to address these issues.

The thrust of this paper will be to examine the validity of the concerns and the necessity for the proposed responses. However, it may first be appropriate to outline the background in which my opinions have crystallised.

The Australian Administrative Appeals Tribunal

Although I am a Judge of the Federal Court of Australia the bulk of my time is taken up by my other role as President of the Administrative Appeals Tribunal of Australia. The Tribunal is a unique Australian institution. It is a tribunal which has very wide jurisdiction to review decisions of the Executive Government of Australia. It reviews decisions of Cabinet Ministers, Government Departments and Government agencies where jurisdiction is conferred upon it by statute. The Tribunal now has jurisdiction under more than 400 legislative instruments. The review process is not judicial review but merits review. The Tribunal substitutes its own decision for the decision under review.

In hearing its cases “the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate”¹. It is also necessary to recognise that proceedings in the Tribunal are to be “conducted with as little formality and technicality, and as much expedition” as possible² and that the Tribunal must “pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick”³. In aid of these obligations the procedure of the Tribunal is within its discretion⁴.

The Tribunal does not exercise judicial power but executive or administrative power. This is a consequence of the strict separation of powers in Australia at the Federal level which is imposed by the Commonwealth Constitution. Were

¹ s 33(1)(c) of the *Administrative Appeals Tribunal Act 1975* (Cth).

² s 33(1)(b) of the *Administrative Appeals Tribunal Act 1975* (Cth).

³ s 2A of the *Administrative Appeals Tribunal Act 1975* (Cth).

⁴ s 33(1)(a) of the *Administrative Appeals Tribunal Act 1975* (Cth).

the Tribunal to exercise judicial power it would be unconstitutional because it is not a court established under Chapter III of the Constitution.

To say that the rules of evidence are not binding on the Tribunal is not, however, to say that it does not act on evidence. Indeed, it is required to give reasons for its decisions “which include its findings on material questions of fact and a reference to the evidence or other material on which those findings were based” (s 43(2B)). Many other sections of the Act refer to “evidence” in the Tribunal. Nor does saying that the Tribunal does not exercise judicial power mean that it is not court like. Early in its history Sir Gerard Brennan, the first President of the Tribunal and later Chief Justice of Australia, said that the legislature clearly intended that the Tribunal “should be constituted on the judicial model”⁵. This statement was approved by the High Court in 1996⁶. In addition to its obligation to give reasons for its decisions Sir Gerard no doubt had in mind that parties must be given an opportunity to present their cases⁷ at a hearing⁸ held in public⁹ at which they are entitled to be represented¹⁰.

While the Tribunal is flexible in its procedures and adopts an informal approach when appropriate (such as in small cases with unrepresented parties) proceedings in the Tribunal in which counsel appear often look remarkably similar to proceedings in a court.

Expert evidence in the Administrative Appeals Tribunal

There is, however, one very important difference in substance. Courts and tribunals alike are required to find the facts, determine the applicable law and apply the law to the facts. Merits review tribunals frequently face an additional task. It is to select the preferable decision from a range of available decisions emerging from the facts found and the law established. Courts rarely undertake this function. They certainly do not do so when engaged in judicial

⁵ *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158 at 161.

⁶ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 18 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ.

⁷ s 39 of the *Administrative Appeals Tribunal Act 1975* (Cth).

⁸ ss 21, 32 and 34J of the *Administrative Appeals Tribunal Act 1975* (Cth).

⁹ s 35 of the *Administrative Appeals Tribunal Act 1975* (Cth).

¹⁰ s 32 of the *Administrative Appeals Tribunal Act 1975* (Cth).

review of administrative decisions. The result is that the Tribunal is frequently asked to make decisions which require the application of judgment in matters of expertise. It follows that expert evidence plays a particularly important role in matters before the Tribunal. This explains why the Tribunal has non-lawyer members from a wide range of fields of expertise.

Two illustrations will help to elucidate the proposition. The Tribunal has jurisdiction to review decisions of the Australian Pesticides and Veterinary Medicines Authority. Curiously, that Authority has control over the marketing of swimming pool chemicals. That was one of the matters of law decided in the case. The decisions of the Authority are subject to review by the Tribunal. The Authority recently withdrew the licences of two companies to market unconventional systems for sanitising swimming pools. These products were very convenient to use but they contained no chlorine. The Authority considered that their efficacy had not been satisfactorily established. As a result they contended there was a risk to public health. The Tribunal needed to establish the facts, including facts involving sophisticated knowledge of chemistry and pharmacology before wading through a complex web of statutory regulation. At this point, however, the difficult task had only just begun. The ultimate decision involved a discretionary judgment assessing the public health risk and then balancing it against the legitimate interests of the companies which had been lawfully selling the products for many years and the consumers who wanted to continue to use them. I was very grateful to have the assistance of Professor Graham Johnston, the Professor of Pharmacology of the University of Sydney, who is a member of the Tribunal, sitting with me in this matter¹¹.

Another example of the importance of expert evidence in the Tribunal is to be found in one of its large jurisdictions: Commonwealth Employees Compensation. The exercise of that jurisdiction has become increasingly prescribed by legislation but it still involves determining the cause of injuries and assessing their consequences. This is a role that used to be undertaken alone by workers compensation judges but I think that Tribunal decisions, in

¹¹ *Questa Pool Products Pty Ltd v Australian Pesticides and Veterinary Medicines Authority* [2004] AATA 1390; 68 ALD 620.

appropriate cases, are assisted by the presence of members with medical qualifications and experience. The jurisdiction is probably the most significant jurisdiction in the Tribunal in which expert witnesses play a role.

Expert evidence is accordingly important in the Tribunal. As a result, the Tribunal has spent time over a number of years looking at how expert evidence should best be given. The object of the Tribunal, consistent with its statutory obligations, has been to find ways to maximise the value of the evidence while minimising the time and expense in producing and adducing it.

Flexibility has proved to be the most important consideration. Traditional methods are sometimes the best. Single experts can be appropriate. But there is another method of dealing with expert evidence which the Tribunal has found useful. The Tribunal coined the phrase Concurrent Evidence to describe it, although it had earlier been described by the unhappy phrase “Hot Tubs”. The Tribunal did not first devise the method. However, the Tribunal has been using it now for many years and is the only body which has scientifically evaluated it. For that matter I think the Tribunal is the only court or tribunal that has scientifically evaluated any form of giving evidence.

Single or court-appointed experts

For the moment, however, I want to look at another method of addressing expert evidence, namely the confining of the evidence on a subject of expertise to that of a single expert either court appointed or appointed by the parties under a threat that the alternative would be a court appointed expert.

In recent years, articles on problems with expert evidence have tended to begin by reciting paragraphs from judgments decrying the extent to which adversarial bias is encountered. A passage from a judgment of Sir George Jessell MR using the phrase “paid agents¹²” is often referred to. Lord Woolf has now joined the list. In his Access to Civil Justice Report, he said this:

¹² *Abringer v Ashton* (1873) 17 LR Eq 358 at 374

“Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients.”¹³

His words are contemporary; but what he said is very little different to what Sir George Jessell had said more than 100 years earlier. The authors usually conclude that conventional methods for receiving expert evidence are defective. Calls for reform are made. The kind of reform which is most popular relies upon single expert witnesses, often court appointed.

The procedure contended for, limits evidence on any field of expert knowledge to one witness. The parties are either to agree on the witness or the witness is appointed by the Court. The witness remains a conventional witness. The witness is neither an assessor nor a referee.

Justice Davies, now retired from the Supreme Court of Queensland, has been a principal advocate of the need for change¹⁴. More recently, he has been joined by Justice McClellan of the New South Wales Land and Environment Court and now of the Supreme Court of New South Wales¹⁵. The New South Wales Law Reform Commission has recently reported on Expert Witnesses¹⁶. Proposals for single expert witnesses are central to their recommendations. New rules providing for single experts are already in place in Queensland.

I have come to a different conclusion. To my mind the problem posed is not so serious and the solution required is not so drastic.

One of the members of the New South Wales Law Reform Commission who was involved with the Expert Evidence Report is the Hon. Hal Sperling QC, a retired judge of the Supreme Court of New South Wales. Last year I heard him interviewed by Terry Lane on his Sunday ABC Radio programme “The

¹³ Lord Woolf MR, *Access to Justice*, Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales, HMSO, London, 1995, p. 183.

¹⁴ See eg Davies GL, Justice, “The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System” (2003) 12 JJA 155 at 166; Davies G, “Expert Evidence: Court Appointed Expert” (2004) 23 *Civil Justice Quarterly* 367.

¹⁵ See eg McClellan P, Justice, “Prosperity – Cost Effective Justice?”, paper delivered to the Annual Conference of the Australian Institute of Judicial Administration, 18 September 2004.

National Interest”¹⁷. His subject was the Expert Evidence Report. To the best of my recollection he said this:

“I will give you an illustration from my own experience. As a judge I heard a case in which the critical issue was whether a surgeon had left a radioactive substance in the lungs of a patient. If he had, the plaintiff won. If he had not, the plaintiff lost. Two experts gave evidence.

Their evidence was based on the same X-ray of the patients lungs. One said it was obvious that the substance was in the lungs. It clearly appeared from the X-ray. The other said the X-ray showed only common deviations within the norm. Now what is a judge to do with that?”

My immediate reaction was that what a judge should not “do with that” is to ask a single expert to decide.

Is there a bias problem?

Before my present appointments I spent more than 32 years practising as a barrister and Queen’s Counsel. I saw many expert witnesses. They included one who won the Nobel Prize for Medicine for two separate discoveries (beta-blockers and anti-ulcer drugs)¹⁸. There were also valuers, planners, accountants, scientists, doctors, engineers and many more. Many of the witnesses were not world class experts. Many of them made a substantial part of their living from writing expert reports and supporting them in court hearings.

I must say that my impression from 32 years of examining expert witnesses and four years of listening to them is that, with very few exceptions, they do not deliberately mould their evidence to suit the case of the party retaining them. When they do, this emerges. They certainly expose the matters which support the hypothesis which most favours the party calling them. But, provided the matters are legitimate and that any doubt as to the strength of the hypothesis is exposed, I see nothing wrong with this. Indeed, I think this process is one of the great values of the traditional approach to expert

¹⁶ Expert Witnesses (Report 109) June 2005.

¹⁷ 16 October 2005.

¹⁸ Sir James W Black: 1988 Nobel Prize in Physiology or Medicine

evidence. It is exposing different expert points of view for evaluation by the judge.

A small proportion of disputes end in litigation. A small proportion of those go to a hearing. Parties do not persist with losing cases. It is not my perception that they seek to convert losing cases into winning cases by suborning expert witnesses. The few cases of this which do emerge are the exceptions proving the rule. In the vast bulk of cases proceeding to hearing the reason is that there is genuine doubt as to where the merits lie. In cases involving areas of expert knowledge that is where some of the doubts are found.

If there is, are single experts the answer?

It seems to be accepted that the best way to determine who said what in a contract negotiation, or what side of the road a motor car was on, is by hearing evidence presented by both sides. The function of a judge is to hear both sides and make findings of fact. Sometimes this is very difficult because memories of conversations are not good or even because the extreme self interest of parties may cause them to tailor an answer. This seems to be accepted as an essential part of the system. There is no alternative. The judge just has to decide where the truth lies. I wonder why expert evidence is thought to be any different; why those who accept the burden of resolving some evidentiary disputes find accepting the same burden objectionable when the subject matter of the evidence is a field of expert knowledge. To the extent to which requiring expert evidence to be given by one witness determines any issue it seems to me that there is a surrender of part of the judicial function. The role of judges is to make difficult decisions in circumstances in which no objective verification of the decision is available. Countless judges must have made wrong findings as to oral terms of contracts because they believed the wrong witnesses. The system should keep those situations to a minimum; but they do exist. The role of a judge includes assessing where the truth lies in situations of conflict. I do not see why this role is any different or any less well achieved where the subject of the conflict is a field of expert knowledge.

If adversarial bias in expert evidence has been a prominent topic for debate over many years, so has the role of expert evidence. There is no easy line to be drawn between what is properly a subject for expert evidence and what is not. Two propositions seem clear. First, expert evidence only has a role to play when it has been established that there is a relevant field of expert knowledge. Secondly, the role of the expert is not simply to arrive at a conclusion but to expose criteria which will enable that conclusion to be evaluated¹⁹.

The ultimate decision-maker must always be the judge. Expert opinion plays a subservient role. The first question is whether the issue is a matter for expert opinion at all. If it is, the final decision lies with the judge even if there is only one expert witness. However, in cases where there is an issue on a field of expertise and there is only one expert witness the requirement to expose criteria to enable a conclusion to be evaluated seems somewhat pointless when there is no alternative opinion available.

Let me return to Mr Sperling's illustration. Of course, the evidence before him would not have been confined to the experts' assertion and counter assertion as he described them. The evidence would not have been admissible if it was. Is not the most satisfactory way to resolve the difference, for a judge, part of whose expertise should lie in being able to detect where the truth lies, to resolve the dispute by reference to its context and the criteria identified by the experts? The problem with one expert in a situation such as that Mr Sperling described is that the expert might be either of the experts who actually gave evidence. That person may honestly strive to identify the competing expert view but will undoubtedly settle on the expert's own opinion. The result is that the case will be determined by the identity of the expert selected.

The fallacy underlying the one expert argument lies in the unstated premiss that in fields of expert knowledge there is only one answer. Of course, this is not true. The law is a field of expert knowledge. One only has to look at the

¹⁹ Per Haydon JA in *Makita Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 729(59) and 731(62) and Weinberg J in *Australian Retailers Association v Reserve Bank of Australia* [2005] FCA 1707 at [447].

level of disagreement between appellate judges of the highest common law courts. One wonders why appellate courts sit in banc, if one expert is enough, or why appellate courts are even necessary, if one person can be trusted to arrive at the correct result. The answer that is given is to say that single witnesses will not be appropriate in every case. My thesis is that they are rarely appropriate.

What might be a case in which a single expert is appropriate? Suppose the question concerns the background noise level at the site of a proposed development. That is a matter for measurement with the aid of an instrument. There is usually only one answer. That might well be a matter for a single expert. However, what if, unknown to the operator, the instrument is wrongly calibrated or defective? Moreover, the selection of the time and place to make the measurement is subjective. Most importantly, the significant evidence generally given by such witnesses is a prediction of the noise level after the development has occurred. That is just the sort of matter in which a better result will flow from a diversity of expert opinion. Finally, if the instruments are in good order and properly employed there will generally be no dispute at the hearing as to what the background noise level is. No expert evidence is required.

Some of the proponents of single experts consider they fulfil an important role by avoiding time taken on issues which will not play a part in the ultimate resolution of the dispute²⁰. It seems to me that in such a case there should be no expert evidence at all. Case management should achieve this if the parties do not see it for themselves.

When disputes survive until hearing there are generally matters bona fide and justifiably in dispute. Where can the differences lie when the dispute relates to fields of expert knowledge?:

1. There may be controversies within a discipline: is social isolation a risk factor in heart disease? T

²⁰ Justice Peter McClellan, *Prosperity – cost effective justice?* (a paper delivered to the Annual Conference of the Australian Institute of Judicial Administration on 18 September 2004) at pp. 5 & 13.

2. There may be different schools of thought: Freudian and non Freudian psychiatry.
3. There may be different streams within one discipline: animal behaviourists whose careers have been in zoos may have different opinions to those whose careers have been in the wild.
4. There may be different assumed facts: different histories for a person claiming workers' compensation.
5. Even when the relevant body of expert knowledge is not in dispute one expert may come to a different conclusion from another when that body of knowledge is applied to known criteria: Mr Sperling's example.

In all these situations it is for the judge to decide and the judge will generally be better able to do that when working with honest expert assistance which nevertheless attempts to present the case from genuinely available differing perspectives. I do not find anything untoward in expert witnesses presenting different perspectives. This is what counsel do all the time. The limitation is that they must be sustainable perspectives presented in a way which can be evaluated. I do not even mind experts who are "hired guns" provided that they are not presenting evidence that is unsustainable, particularly where this could only be known by the expert.

I am conscious that there are emerging reports, both in England and Australia, that single expert evidence is working well. That is not surprising. The evidence will certainly be given efficiently. The task of the judge will be easier. The problem is that there is no way of testing whether the conclusions are correct. By definition, there is nothing to test the expert evidence against. That seems to me to involve the rejection of one of the fundamental benefits of our system of justice.

It follows from the above that I do not share the concerns of some of my colleagues as to the extent of problems with expert evidence or with a single witness regime as at least one answer. There are, however, some problems with traditional methods of adducing expert evidence. Are there other responses which may enhance the quality of expert evidence?

Concurrent evidence

This brings me back to concurrent evidence. Its first significant use in the Administrative Appeals Tribunal was in the hearing of *Coonawarra Penola Wine Industry Association Inc and Geographical Indications Committee* [2001] AATA 844. That case related to the identification of the boundaries of the Coonawarra wine region. An estimated six months hearing was reduced to five weeks. I am using the same technique in a similar case at present which relates to the wine growing regions of north-east Victoria. I will be returning to the hearing tomorrow.

I recently used concurrent evidence in a hearing concerning proposals by Melbourne and Sydney Zoos to import eight Asian elephants. There were sixteen expert witnesses and three senior counsel to examine them. The evidence of all sixteen witnesses was concluded within four hearing days. This was achieved notwithstanding that, although the experts all had doctorates in disciplines associated with animal behaviour, one group had worked in zoos and the other group had worked in the wild. As one senior counsel said:

“...it’s very clear to all concerned that there is a great degree of polarisation of views on this subject.”²¹

Nevertheless, the process enabled areas of agreement to be readily discovered and set to one side and issues of disagreement then to be effectively addressed. This happened although there were up to four witnesses giving evidence at the same time including one occasion when one of a group of four gave evidence by telephone from New Delhi. We also took concurrent evidence from two witnesses in the United Kingdom by video link although the two witnesses were in different parts of the United Kingdom.

All the witnesses had prepared extensive reports which became evidence. The process we adopted was to ask the witnesses to meet together to identify areas of agreement and disagreement. They were asked to produce a

²¹ *International Fund for Animal Welfare (Australia) Pty Ltd v Minister for Environment and Heritage* Transcript 11 October 2005, p. 40.

document setting this down. At the beginning of their evidence the document was admitted as an exhibit. Each witness was then asked to outline the essence of their evidence on matters not agreed. The witnesses were then invited to comment on the evidence of the other witnesses and ask questions of them. During the whole process members of the Tribunal asked questions when they thought it appropriate. Finally, counsel for the three parties were invited to question any of the witnesses including those they had called to give evidence.

The process of asking the experts to find areas of agreement and disagreement was very successful. The two who gave evidence from England both had doctorates. One was head of wildlife for the RSPCA. The other was the Director of the British and Irish Association of Zoos and Aquariums. They accordingly gave evidence from very different perspectives. They could only meet by telephone. They were a long way from the lawyers and any guidance as to how they should go about their meeting. Yet they produced a comprehensive multi-page document of points of agreement and disagreement.

The RSPCA officer, Dr Atkinson, began his oral statement like this:

“Okay. Thank you. There was a lot of agreement. Miranda and I met yesterday. We are both very welfare conscious people and we’re anxious to improve the situation for captive elephants and we’ve both committed time and money to improvement. We are both aware of the limitations and the usefulness of the Mason Report and of the Wise and Willis Report on elephant mortality. We disagree on the benefits of freezing, breeding and the importation of elephants and we also disagree on the urge to breed earlier than would be the case in the wild.”²²

The Zoo Association Director, Dr Stevenson, followed, saying that she agreed with the way the areas of agreement and disagreement had just been outlined.

Concurrent evidence can have a number of virtues over the traditional process:

1. The evidence on one topic is all given at the same time.

²² *International Fund for Animal Welfare (Australia) Pty Ltd v Minister for Environment and Heritage* Transcript 18 October 2005, p. 456.

2. The process refines the issues to those that are essential.
3. Because the experts are confronting one another, they are much less likely to act adversarially.
4. A narrowing and refining of areas of agreement and disagreement is achieved before cross examination.
5. Cross examination takes place in the presence of all the experts so that they can immediately be asked to comment on answers of colleagues.

I cannot see how a single expert from each discipline, who must come from one range of experiences and possibly one school of thought, could have fairly put alternatives to the Tribunal and assisted it with its choice in that case free from the expert's natural bias.

One answer which will be given is that these cases of expert evidence are atypical. The experts do not make any substantial part of their income from preparing expert reports and giving evidence. The answer to that is that the Administrative Appeals Tribunal does not confine its use of concurrent expert evidence to such cases. Indeed, the primary use of expert evidence in the Tribunal is in personal injury and illness cases such as Commonwealth Employees Compensation cases and Veterans' Entitlements cases. These are cases in which the expert evidence is largely the evidence of medical practitioners. They are the cases where, it is said, the same doctors always turn up on the same side.

The use of concurrent evidence in these cases has been the subject of an Administrative Appeals Tribunal study. The process was used in nearly 50 selected cases. Statistical information was recorded. Opinions were collected from tribunal members, legal representatives and the experts themselves. The effectiveness of the process was then evaluated in accordance with accepted scientific standards. The Report is available on the internet at <http://www.aat.gov.au> (under Speeches, papers and research: Research papers). I will not seek to go into the details of its findings. However, they show that concurrent evidence is generally effective and broadly liked, even by lawyers.

In one of his judgments, Sir Owen Dixon, a very distinguished former Chief Justice of Australia, relied upon the adage “one story is true until another is told²³”. We would do well to bear that in mind when dealing with expert evidence, as we do when dealing with other evidence. Concurrent evidence recognises that the adage is as true of expert knowledge as of anything else; the use of single experts does not.

Conclusion

These remarks have been intended to identify and discuss what place expert evidence plays in courts and arbitrations. Particular emphasis has been placed upon newly developed ways of adducing expert evidence. Flexibility in the way in which expert evidence is given is the most important principle. Conventional examination and cross examination still play their part. However, the time is coming when efficiency will require limits on cross examination provided they do not lead to unfairness. In many cases concurrent evidence procedures will be an effective alternative to the conventional approach. Sometimes single experts will be appropriate but it is the view of the author that single experts are not appropriate when there is any bona fide dispute about the subject of the evidence. This will ordinarily be the case. Where there is no dispute, evidence will not be necessary and the matter should be dealt with by agreement.

²³ *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9 at 20.