

Expert Evidence

Expert evidence

22.1 For centuries common law courts have allowed expert witnesses to give evidence at trials. Over the years, the fields of expertise have expanded and expert evidence has proliferated. Opposing experts are now as much a part of the litigation process as opposing parties, solicitors and barristers. The growth in use of expert evidence has reached the point where uncontrolled expert evidence has been described as one of the major costs in civil litigation.

Expert witnesses as 'saxophones'

22.2 The lack of impartiality of expert witnesses is a major problem. The slang term for expert witnesses in the United States is 'saxophones': the lawyer hums the tune and the expert witness plays it like a musical instrument. Unlike other witnesses, experts are paid for their evidence. No matter how honest, experts tend to be aligned with their employer — although there may be a genuine divergence of opinion between experts, regardless of how they are paid. The problem is that the adversarial system discourages a cooperative approach between opposing experts. The existing system does not encourage parties to agree upon a single expert who would act on the instructions of all parties and be cross-examined by all parties. Instead each party engages its own expert.

22.3 Currently Supreme Court judges conducting civil pre-trial directions hearings enquire about the need to call more than one expert witness. We recommend that this practice be applied in all courts in matters where expert witnesses are to be called. In civil matters, the courts should reinforce the shift towards the use of single expert through the allocation of costs. (If our recommendations in Chapter 31 are implemented, there will be no costs awards in criminal cases.)

238. All courts should encourage parties to agree to use a single expert in all matters in which expert opinion is genuinely required.

239. In civil matters, the courts should order costs associated with the use of multiple experts against parties who do not cooperate in the appointment of a single expert witness.

Interrogating an opponent's experts

22.4 One reason opposing parties call different experts on the same issue is because there is only a limited opportunity to interrogate an expert witness who is briefed by another party. For example, the expert witness cannot be asked to express an opinion based on alternative factual assumptions or upon an issue on which the opposition does not propose to lead evidence. If the notion of expert witness as advocate is abandoned there is no reason why these questions would not be allowed so long as the party seeking the answers meets the cost.

240. Experts should be required to prepare for and answer questions from parties upon payment prior to trial of the reasonable costs of answering questions.

Expert evidence and access to justice

22.5 The time and expense involved in preparing, receiving and debating expert evidence may deny some litigants access to justice. Inequality of resources may mean large corporations such as insurance companies can readily access substantial supporting expert evidence while the opposing party has insufficient resources to respond. The proportionality of costs incurred as a result of engaging experts should be relative to the subject matter in dispute. Although already the practice in the Supreme and District Courts, we recommend the requirement for leave to adduce expert evidence be formalised in the rules applicable to all courts. In giving effect to this recommendation, however, care should be taken that the outcome not be merely to shift, or worse, to duplicate the hearing of argument about disputed expert evidence.

22.6 In civil matters, the usefulness of expert evidence could be improved by case managers first assessing whether its value is diminished because the primary facts upon which the expert opinion is sought are controversial. (See Recommendations 24 and 25.) The case manager could require the parties to seek to agree the facts prior to seeking expert opinion if appropriate. In criminal matters such a process is unlikely to be effective given that facts are rarely agreed in criminal trials. The particular issues raised by the use and

exchange of expert witness statements in criminal matters are discussed in Chapters 24 and 27.

22.7 We note that the proposed reform of the civil system could result in there being little to gain in attaching expert witness statements or outlines of evidence in the exchange of Pre-Trial Memoranda discussed in Chapter 10. The facts upon which the expert evidence is provided may be altered and so any costs associated with the report would be 'wasted'. That is why we have exempted expert evidence from the requirements at Recommendation 38.

241. No expert evidence should be adduced without the leave of the court.

242. In civil matters, the case manager at the status conference should consider whether the primary facts should be agreed first and then an agreed expert appointed or expert reports exchanged. (See Recommendations 24 and 25.)

Expert advisers and expert witnesses

22.8 Until now the courts have allowed experts to act as both partisan advisers and independent witnesses in the same dispute. Experts may be engaged to assist in:

- formulating a claim;
- advising a client of the range of opinions held;
- identifying the facts needed in order to express an opinion;
- preparing a case for trial; and
- providing a critical review of the expert evidence of other parties.

All these activities are necessarily partisan and are consistent with the adversarial goal of advancing a party's case as strongly as possible.

22.9 With the best will in the world an expert who has participated in the process of preparing the case on behalf of a party will have difficulty in giving an independent opinion at trial. Yet the current practice is for such an expert to be called to give evidence before the court as an 'independent' expert. If the following Recommendation 245 is accepted, an expert who claimed to be 'independent' would not be entitled to claim that any communication with the parties and/or lawyers was privileged. If an expert is an 'adviser' of one party, the expert would only be entitled to claim privilege if the other party called him or her. In civil matters, the scale of costs also should provide an appropriate fee which can be charged for expert advisers, so that it may be recovered if a party is successful at trial.

- 243.** The practice and procedure of all courts should maintain a clear distinction between expert advisers and expert witnesses. The distinction should be established by requiring expert witnesses to disclose, prior to trial, the nature of their relationship with the parties, which may be subject to cross-examination.
- 244.** The scales of costs should provide for appropriate fees for expert advisers in civil matters, so that a party who is successful at trial may recover these costs.

The existing law on expert evidence

22.10 The existing laws facilitate the transition from partisan adviser to 'independent expert'. There are many examples of laws which establish that a person who has an obligation to represent the interests of one party should not act in another capacity that may conflict with that responsibility. There are also rules which ensure that lawyers do not coach witnesses of fact. Neither principle currently applies to expert witnesses.

Experts and legal professional privilege

22.11 In other respects an expert witness is in the same position as a witness of fact when it comes to facts observed by the expert. This means the expert can be subpoenaed to give evidence of observed facts by the opposing party and can be seen beforehand and given a proof. The things or chattels and documents upon which the expert bases his or her opinion and the opinion itself are not privileged. Communications between solicitor and expert which would otherwise be privileged also must be disclosed if they are necessary to properly understand the expert's evidence. Significantly, however, legal professional privilege generally attaches to confidential communications between solicitor and expert. This encourages solicitors to communicate more fully with experts about the interests of their client and the arguments supporting their client's case. The privilege also attaches to communications between a party and expert if the communication relates to instructing a lawyer. The privilege which keeps such communications confidential sits uneasily with the notion of the expert later being called to give an 'independent' report to the court.

Making expert witnesses independent

22.12 Faced with the prospect that the party's expert may be cross-examined about communications with the party's solicitors, or the prospect that the expert's opinion may be disregarded where the expert provided assistance concerning the preparation of the case, the character of communications with experts can be expected to change. In particular, solicitors could draw a distinction between expert advisers who assist in the preparation of a case and experts who are called as witnesses and whose communications with solicitors would be subject to cross-examination. However, the waiver of legal professional privilege would not apply if the

opposing party subpoenaed a party's expert adviser who would not have been a witness or otherwise participated at trial.

22.13 The desired result is not that solicitors engage two experts — one as adviser and one as witness — but that solicitors ensure that in most cases their communications with the expert will not compromise the expert's independence. This in turn may lead to a culture where agreement between the parties on the appointment of a single expert is more realistic and where the existing adversarial nature of expert evidence is altered so that experts will be more likely to reach agreement.

245. Where a party calls its own expert adviser to give evidence there should be a waiver of legal professional privilege in respect of all communications with the expert, except communications consisting of statements and other communications from other witnesses.

Conflicting expert evidence

22.14 Should the parties be unable to agree on appointing a single expert witness, there is still the possibility that the points of conflict between opposing parties' experts can be narrowed. Currently, experts may be ordered to attend a 'without prejudice' pre-trial conference to investigate narrowing the issues in dispute for trial. This is already a common feature of directions made by courts in Western Australia. A useful preliminary step would be to require experts to consider carefully opposing expert witnesses' statements and clearly identify grounds of agreement and disagreement. This could reduce the costs associated with expert evidence.

246. Where there are opposing expert witness statements filed, each expert should be required to:

- (1) certify that he or she has considered the other opinions that have been expressed;
- (2) specify the matters with which the expert agrees; and
- (3) state those with which the expert does not agree and explain the basis of the disagreement.

Expert reports

22.15 Experts' preparation of comprehensive written reports for court proceedings is an area of enormous cost. In order to reduce the time and cost associated with expert reports we had originally proposed, in Consultation Draft 3.3, to restrict the use of detailed reports by expert witnesses. However,

a number of submissions indicated the importance of opposing parties having access to the expert reports in full. This was not only because of the potential of the proposal to create duplication of work — through writing and then summarising the report — but also in the interests of fair disclosure of the opponent's case and the increased likelihood of settlement prior to trial.

22.16 Accepting the importance of full disclosure, however, leaves the issue of how to encourage shorter reports which provide all relevant detail. Our view is that courts could encourage this, at least in civil cases, by not allowing costs in full where an expert report is excessively long.

247. Civil courts should disallow costs in full for overly long experts' reports.

Expert witnesses' obligations to the courts

22.17 There appears to be a view, especially amongst judges, that experts are not aware of their obligation to provide independent assistance to the court. To address these concerns the Federal Court recently published a practice direction including the requirement that:

At the end of the report the expert should declare that '[the expert] has made all the inquiry which [the expert] believes are desirable and appropriate and that no matters of significance which [the expert] regards as relevant have, to [the expert's] knowledge, been withheld from the Court.

The Supreme Court already has implemented a similar practice. In our view, this practice should be universal.

248. All expert witness statements should contain a detailed declaration that all appropriate enquiries had been made in a form required by the courts.

Hearsay and expert evidence

22.18 The common law requires that the basis of an expert opinion must be proved by admissible evidence. Considerable time and expense may be incurred in proving the basis for an expert opinion in circumstances where it is usual in commercial practice to rely upon hearsay evidence, for example. The *Evidence Act 1995* (Cth) replaced this rule with a discretion for judges to admit expert evidence by balancing the potential prejudice against the probative value of the opinion evidence.

22.19 Recent Commonwealth reforms of hearsay and expert evidence do not require the factual basis of expert evidence to be proved or tested.

Concerns over not requiring the factual basis of the expert opinion to be proved may be countered by parties seeking to have more weight attached to the evidence, where possible, by adducing and proving expert opinion by direct evidence. In any event, it is difficult to see how expert evidence which does not establish its factual basis could meet the requirements of relevance.

The ‘ultimate issue’, ‘common knowledge’ and expert evidence

22.20 The courts are cautious of expert witnesses giving evidence on the ‘ultimate issue’. The difficulty is that by speaking to the ultimate issue the expert may be seen to be taking the place of the arbiter of fact — the judge or jury. For example, issues concerning the cause of an accident, or what conduct amounts to negligence, may be the subject of expert opinion, but the answer to the question: ‘was a party negligent?’ is not allowed. Another difficult rule precludes expert witnesses from giving evidence which is not in the ‘common knowledge’ of the decision-maker. This has been interpreted to mean that the only evidence the expert is allowed to provide is evidence which may assist the decision-maker. Both rules prescribe standards which are uncertain and raise conceptual distinctions which are difficult to apply. General discretions replace these rules in the *Evidence Act 1995* (Cth).

Commonwealth Evidence Act 1995 and expert evidence

22.21 We believe the Commonwealth provisions governing expert evidence and hearsay, the ‘ultimate issue’ and the ‘common knowledge’ rules, have much to commend them and should be adopted in Western Australia. The adoption of these provisions and others relating to expert evidence, would not only assist in the uniformity of evidence rules throughout Australia, but could result in cost savings. In particular, allowing a judicial discretion may ensure that substantial costs are not expended in proving matters which are out of proportion to their significance in the dispute between the parties.

249. When drafting a new Evidence Act for Western Australia (Recommendation 221) the provisions of the *Evidence Act 1995* (Cth) relating to expert evidence, as modified by these recommendations, should be adopted.

22.22 The ALRC has recently distributed for comment ALRC (1999d) Background Paper No. 6, *Experts*. The paper sets out the ALRC’s (1999e) current thinking on expert evidence in federal courts and tribunals. As part of the drafting of a new Evidence Act recommended in Chapter 20, the matters raised in the ALRC’s discussion paper, where relevant, should be considered.

An Expert Evidence Forum

22.23 There is no established channel of communication between judges, lawyers, experts and parties to litigation concerning the process by which experts prepare and present evidence to the courts. Information on the

duties and responsibilities of the various participants in litigation is not readily accessible. There is no agency which provides specific training for lawyers on instructing and cross-examining experts.

250. An Expert Evidence Forum should be established.

22.24 In its Discussion Paper No. 62, the ALRC (1999h) raised issues, similar to our own, relating to the cost, delay and inconvenience associated with expert evidence as part of the 'litigation industry', but pointed out that there is little research in Australia on the use and cost of expert witnesses in litigation. In the absence of such research and in light of strong stakeholder opposition, we have decided not to recommend the more radical reforms discussed in the Consultation Draft on this topic (3.3) allowing the courts to appoint expert witnesses and permitting expert witnesses to make submissions to the court. However, the ALRC does cite research, both American and Australian, which substantiates one particular concern: the partisan nature of expert evidence. We believe our recommendations to clearly differentiate the role of expert advisers and expert witnesses and to highlight expert witnesses' obligations to the court should facilitate court access to expert evidence which is truly independent.