



Tales from the Hot Tub – the Expert's perspective

The reason experts are a part of the litigation process is to provide information to assist the Court. Experts are interested in participating in a valuable and 'helpful' way. So does the 'hot tub' present a challenge or an opportunity for experts? And how can the Court get the most meaningful assistance from the experts? This paper will provide an expert's perspective on the opportunities and challenges provided by joint expert conferences, joint reports and concurrent evidence, and some suggestions as to how you can get the most from your expert witness.

Joint conferences and joint reports

Joint conferences can be very useful both in narrowing the issues in dispute and in refining an expert opinion. Whilst an expert may understand that they are to remain objective, and that their duty is to assist the Court, there is no avoiding the fact that up until the point of a joint conference, the expert operates in a knowledge 'vacuum', having been provided information by only one party. A common cause of experts having differing opinions is that they have been given different instructions, or have adopted a different set of assumptions. The joint conference can provide some insight as to the *reason behind* the different assumptions.

Once two experts meet to compare views, there will usually be at least some areas of agreement – whether it be a common methodology or theory, or agreement to certain calculations or opinions based on a range of possible fact patterns. This common ground can then be accepted, and the parties can move on to concentrate their resources on the areas of real disagreement.

In my view, the advantages are most likely to be maximised if the experts are allowed to have a free-flowing discussion without the presence of third parties. This also means that the experts have the opportunity to take a step back to 'check in' with their instructing solicitors following the conference, thus providing them with some space to consider any new information provided to them.

This process of a joint conference can be advantageous in itself, even if there isn't going to be concurrent evidence. It helps with further preparation for trial and 'refining' of views. The expert's opinion can become more robust after taking into account where the other party is coming from, and the information the opposing expert has relied upon. It allows resources to be concentrated on the important issues, rather than issues that may not have a significant impact on the final outcome.

The instructing solicitors may also find the 'report back' from the joint conference and the joint report process useful, as it can shed some light on the differences in instructions and assumptions. It can provide the lawyers with insights into the key documents or assertions that are being relied upon by the opposition, which can be invaluable in the preparation for a mediation or trial.

Concurrent evidence

In the 'traditional' process, the hardest part for an expert giving evidence isn't responding to the questions that have been asked, it is what *can't* be said because the question *wasn't* asked. Experts are aware that they can only answer the often very specific question that has been asked of them, and therefore can't give a 'complete' answer.

Their only hope is that the issue gets picked up in re-examination, or in submissions. However, it is either unlikely (often very little time is spent on re-examination), or too late (experts are often not involved in the submissions) for any meaningful contribution other than the evidence given by cross-examination.

In my experience with a traditional process, the vast majority of the oral evidence given by an expert is through the lens of cross-examination. This means that during the trial, the Court hears only a limited, or at best, a disjointed version of the expert's opinion. The expert doesn't have an opportunity to fully express their opinion for the Court. Importantly, it would presumably be easier for the Court to understand the opinions the expert is trying to express, and therefore be better informed, if the opinion was expressed more directly by the expert rather than only through the lens of cross-examination.

A well-run process of concurrent evidence can allow the experts to fully express their opinions in their own words. The environment is also less confrontational, and therefore more conducive to a constructive debate.

In addition, allowing the experts to question each other can more effectively uncover a 'flawed analysis'. The experts cannot hide behind their instructions or unreasonable assumptions, as these will be picked up by the other expert. The experts usually know the right questions to ask, but in the traditional process they don't have an opportunity to ask them. There is only so much one can get across in a scribbled post-it note passed to Counsel as he or she is in the middle of an argument!

The challenges

Despite the many advantages offered by participating in the 'hot tub', there are a few challenges to be addressed.

Firstly, experts are used to answering questions rather than asking them. Or rather, they are very used to asking questions, but not in the Court room. Experts usually arrive at their opinions by asking questions of the client, their instructing solicitors, and their colleagues. Asking questions of an opposing expert in a concurrent evidence environment should really be a transfer of those questioning skills. However, there will be an element of challenge in getting the right 'tone' so that independence and impartiality are maintained when the hard questions are asked, and they don't end up sounding like an advocate conducting cross-examination.

Second, some have expressed concerns that the process may be subject to bias towards one 'dominant' expert. However, in my view, this can happen in a traditional process as well, as one expert may be better in the witness box than another. I believe that as long as the process is actively chaired from the bench, then this issue can be overcome as the judge will ensure he has heard all relevant views. In any event, part of the challenge of being an expert in the first place is being able to get a sometimes 'technical' point across to individuals who are not experts in the particular field. That is why an expert has been retained in the first place. This is a challenge for experts regardless of the process chosen.

Finally, one of the biggest challenges for experts giving concurrent evidence in the current environment is that the process may not be well defined and may change as it actually unfolds in the Court room. The expert (and Counsel) may prepare for the experts asking questions of each other, only to find that the usual cross-examination process will be undertaken and there will not be an opportunity to ask those questions. Or there may end up being cross-examination on issues that have already been agreed, or on new issues that hadn't been discussed in the joint expert conference. To some extent this is unavoidable, as new issues or lines of enquiry arise during the course of the trial. However, if the process of a joint report and concurrent evidence has been agreed, then it would be most helpful to experts if the oral evidence in Court is actively chaired from the bench to ensure that the agreed process is followed.

How can you get the most from your expert?

Regardless of whether or not there will be concurrent evidence, one of the biggest challenges is in asking the right question of the expert. A common reason for differing expert opinions is that the opposing experts have actually been asked completely different questions. It sometimes takes an expert to work out what the question should be, particularly with complex issues and as new information comes to light throughout the course of the litigation. It may be useful to use a 'consulting expert' (otherwise known as a 'dirty expert') to assist with instructing your expert witness. Alternatively, opposing experts could meet very early in the litigation process to 'agree' on the appropriate question they should be addressing.

Second, consider the information you are providing to your expert. Whilst there may be a tendency to provide less rather than more, consider that more information leads to a more robust opinion, and that sooner or later your expert will see the information – even if it's presented to them whilst being cross-examined at trial. If you have concerns about particular documents or data, again you may want to use a consulting expert to help you work out the best and worst case scenarios with regards to the information.

Whilst there may be concerns about doubling up of costs when using a consulting expert, it should be noted that asking the right question and providing the right information from the start can lead to a much more efficient process and will actually save time and money in the long run.

Consideration should also be given as to when to schedule the joint conference. A conference earlier in the litigation process will assist in narrowing the issues sooner rather than later. However, a conference later on will allow the experts to consider new information that comes to light throughout the process, including opinions of other experts upon which they may be relying (for example, loss and damage experts relying on economic or industry experts).

With regards specifically to the concurrent evidence scenario, given that the process is “in development”, you can greatly assist your expert by clearly defining the process to be followed and doing what is within your power to stick to it. Experts are used to the ‘traditional’ cross-examination process – they know how it works and how to prepare for it. A significant degree of uncertainty can be created by a lack of a clearly outlined process.

Just prior to the concurrent evidence, you may need to ‘re-brief’ your expert as there may have been many days of trial covering many issues that are relevant to the expert’s opinion. The expert will not be aware of the outcome of evidence and discussions that have occurred related to the facts that they are relying upon. Giving them an update as to what the areas of focus have been will assist with their preparation for the likely topics of interest to the Court, allowing them to provide more relevant and valuable discussion during the concurrent evidence.

And finally, you may even consider a joint conference or report post-trial to provide input into submissions, or to interpret a judgment. It is possible that a judge finds in favour of facts that hadn’t been considered in the scenarios of either expert. Rather than second-guessing, it may be advantageous to re-consult the experts for a revised joint opinion.

Conclusion

Australia seems to be leading the way in this innovative development. In my view, the above challenges can be overcome, and joint conferences and concurrent evidence allow the experts to more fully assist the Court. And at the end of the day, isn’t that why they were engaged in the first place?

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