

EXPERT WITNESSES: ON THE STAND OR IN THE HOT TUB – HOW, WHEN AND WHY?

Formulating the Questions for Opinion and Cross-Examining the Experts

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1. Concurrent evidence involves enhanced judicial control over privately retained expert evidence through conclaves, joint reports and concurrent oral evidence¹. The objective is to achieve greater efficiency and expedition, by reduced emphasis on cross-examination and increased emphasis on professional dialogue, and swifter identification of the critical areas of disagreement between the experts.
2. There is no doubt that, when sensibly implemented, these procedures offer many advantages to litigants and decision makers. The advantages include –
 - Greater efficiency, particularly substantial reductions in court time and costs.
 - The ability for experts to comment on each other's evidence allows for greater clarity and the clear identification of any disagreements.
 - Experts give their evidence at a time when the critical issues have been refined and the area of real dispute has been narrowed to the bare minimum.
 - Peer presence can increase the objectivity accountability of experts.
 - It can eliminate lengthy and unnecessary cross-examination on matters that are not of any real importance.
 - Judicial decision making is facilitated because evidence on one topic is given by all experts at the same time and it is easier for courts to compare their evidence and to evaluate its weight or persuasiveness.
 - Parties retain the right to engage in cross-examination on key issues and, on matters of credit, if required.
3. For the purposes of this seminar, I reviewed the recent literature on expert evidence², particularly the adoption of concurrent evidence procedures in Australian courts and tribunals. The literature is quite extensive, and most of it is very supportive of the new procedures³. My own experience is that the new procedures have been very effective in quickly identifying the key differences between the experts, and narrowing or eliminating those differences efficiently and promptly.
4. The literature also reveals, and my personal experience confirms, that the effectiveness of the procedures can differ significantly from one court or tribunal to another and from judge to judge. In a way, this is unsurprising. The whole concept of concurrent evidence assumes that the court

¹ Allsop J: "The judicial disposition of cases: dealing with complex and specialised factual material", *Bar News: NSW Bar Association*, Summer 2009/2010

² A bibliography is attached.

³ There is a very good review of the advantages and disadvantages of the concurrent evidence process in Justice Rares' article: Rares J, "Using the "Hot Tub" – How Concurrent Expert Evidence Aids Understanding Issues", Paper presented to the New South Wales Bar Association Continuing Professional Development Seminar in Sydney, 25 August 2010

is very familiar with the technical issues, and can absorb and participate in a professional exchange that is conducted at a sophisticated level.

5. So much has been acknowledged by judges who are very familiar with the process. In a paper entitled "*New approaches to expert witnesses*", Justice Peter Vickery, the judge in charge of the Supreme Court's Technology, Engineering and Construction List has observed that "*the judge plays a much more active role in the exercise and needs to be well prepared in advance of the panel discussion between experts*".
6. In essence, concurrent evidence procedures involve three stages:
 - i. An early identification of the critical questions that need to be addressed and answered by the experts.
 - ii. A conference between experts, and a preparation of a joint report identifying areas of agreement or disagreement after the experts have exchanged their individual written reports.
 - iii. The giving of concurrent oral evidence by the experts after all lay evidence in the case has been tendered.

I propose to address each of these stages, making some observations about the approach adopted by various courts or tribunals. I do so with the caveat that it is difficult to generalise about these matters, as much will depend upon the facts and issues in the particular case.

Identifying the critical questions for expert opinion

7. In my experience, the first step is not utilised as extensively as it should be. Courts and tribunals nowadays have extensive case management powers. There is nothing to prevent them getting the parties' legal representatives together at an early stage to identify the critical issues, and to formulate an agreed set of questions for expert opinion. Similarly, there is ample power to bring the experts together early so as to confirm that the questions had been properly identified, or to rephrase or refine those questions in advance of the provision of the individual expert reports.
8. Few judges are so proactive. Ordinarily, each party and its expert get together to formulate the questions, with appropriate assumptions, that the expert is to address in his written report. Consequently, there is the risk of a disconnect between the questions addressed and the assumptions used by one party's expert and those used by another party's expert. Usually these differences will get sorted out in due course, often by the provision of supplementary or reply expert reports, but this tends to complicate and lengthen the expert evidence section of the case. Frankly, it is to no-one's advantage to have to grapple with a series of lengthy intersecting expert reports that have been provided in chief, in reply or by supplementary report.
9. In the usual civil case, the experts only get together to identify the critical issues after they have exchanged their written expert reports. The concept of an experts' conference and the preparation of a joint report works well, so there is no reason why an earlier meeting between experts would not be advantageous.
10. In the Technology, Engineering and Construction court, expert evidence is often taken topic by topic. When expert evidence has been given on a particular topic, the court may state a separate question for determination pursuant to Order 47.04. That question will be formulated in the light of the expert evidence. The question may be formulated by consensus, or by the judge, following submissions from the parties. Typically, the court will give directions enabling the parties to contribute to the formulation of the question or questions for determination.

The experts' conference and joint expert report

11. This step has been critical to the success of the new procedures. Indeed, some judges have expressed the view that it is more important than the later step of concurrent oral evidence.
12. Most courts have established guidelines governing the way in which the experts' conference is to be convened, and prescribing the contents of the joint report. For instance, Commercial Court Practice Note 1/2010, paragraph 13, provides that the Commercial Court will almost invariably direct that experts confer before trial and that after such conference they provide to the court and the parties a joint report containing their joint opinion as to stipulated questions. In the Commercial Court, those questions will have been settled at a directions hearing by the court before the joint experts' conference is ordered but after the court has received submissions from the parties' legal representatives following the exchange of experts' reports. This is a very useful step, but it is not commonly followed in other jurisdictions, where the experts are left to define the key questions and the issues of agreement and disagreement for themselves.
13. The Commercial Court Practice Note (and the Schedule 8 Form) also controls the nature of the experts' conference and the contents of the joint report. In relation to the conference, it states that:
 - The experts' conference is intended to be a consultation of experts without any influence from a party to the proceeding;
 - The procedure to be adopted at the conference is a matter for the experts and not the parties or their practitioners;
 - The conference is normally to be conducted in the absence of the parties or their legal representatives;
 - Neither the parties, nor practitioners, should seek to restrict the freedom of the experts at the conference to identify and acknowledge the matters upon which they agree; and
 - The experts may jointly request further information or direction by a joint letter.
14. In relation to the joint report, the Practice Note states that it should set out the matters upon which the experts agree and disagree and a brief summary of their reasons for the disagreement. The typical TEC order contains a pro-forma report along these lines.
15. In my experience, guidelines like these are useful. I have seen situations where the more aggressive and best resourced of the experts takes command of the writing of the joint report so as to produce a report that is weighted in favour of his or her opinions.
16. A private conference between experts and the provision of a joint report has, generally speaking, been a very effective way of identifying and explaining the points of agreement and disagreement between the experts. In this way, the joint report tends to achieve much of what cross-examination would otherwise have been seeking to achieve. Further, by identifying and narrowing the areas of disagreement, the joint report lays the groundwork for oral evidence that is more focused and likely to be much less protracted.

Concurrent oral evidence

17. While concurrent evidence procedures can differ between courts they generally tend to be along the following lines –

- the experts are sworn together and a structured discussion ensues, chaired by the judge;
 - each expert is asked to identify and explain the principal issues between the experts (usually using the joint report as a base);
 - each expert may comment on the evidence of the other expert or experts;
 - each expert may ask the other expert or experts questions about what was said (or not said);
 - counsel is provided with an opportunity to question the experts on their evidence and/or matters of credit;
 - the judge makes a general enquiry of the experts to ensure each is satisfied that they have had the opportunity of fully explaining their evidence.
18. Let me comment on some variations to these procedures. One variant, adopted on occasions in the Federal Court, is to invite counsel to identify the issues or topics on which they wish to cross-examine. This might occur at the outset of the concurrent evidence process, or after each expert has explained his views and commented on the evidence of the other experts. When this invitation is extended to counsel, the judge might query some lines of questioning. The judge might also invite the expert to make an initial statement concerning the issues identified by counsel.
19. It is important that the panel discussion be a structured one. By that I mean that each expert should be given a full and fair opportunity to explain both his or her opinions about the particular issues, and his or her comments and criticisms about the opposing expert opinions – without undue interruption by the other experts or from the Bench. Courts also need to ensure that confident and assertive experts do not unfairly dominate the panel processes.
20. The judge should not be so interventionist as to take over the process. One of the common criticisms of “hot tubs”, and a problem I have seen in practice, is that the judge tries to control the direction of the debate unduly or intervenes excessively. This can result in a messy and even unintelligible transcript of evidence. Interjections and interventions, whether from other experts, counsel or from the Bench, can result in missed dialogue or inadequately explained opinions, making the transcript hard to follow and incomplete⁴. The enhanced role of the judge in the concurrent evidence process makes sense from the perspective of communication and comprehension, but increased participation can also raise concerns about judicial impartiality and procedural fairness that courts and tribunals need to carefully watch⁵

Cross-Examination

21. Cross-examination of witnesses giving concurrent evidence obviously calls for special techniques. It would be most unwise for counsel to ignore the context in which the cross-examination is to proceed by simply adopting, unthinkingly, the traditional approach to the cross-examination of an expert witness. Any cross-examination will take place after the experts have identified their key areas of disagreement in their joint report, and perhaps further explained or even narrowed those differences in their initial oral evidence. While every case will be different, it will ordinarily be appropriate for counsel to focus on the key areas of disagreement as revealed by the joint report and the oral evidence, with a view to narrowing them to his client’s advantage

⁴ Rares J has observed that the use of a single portable microphone can assist in preventing these issues; see *Strong Wise Ltd v Esso Australia Resources Limited* (2010) 247 ALR 259 at [95]

⁵ See Gary Edmond, “Merton and the Hot Tub; Scientific Conventions and Expert Evidence in Australian Civil Procedure”, 72 *Law and Contemporary Problems* 159 at 177

or to undermining the grounds upon which the opposing expert maintains his different opinion. These objectives might be achieved by demonstrating that the disagreement has arisen because the other side's expert has misapprehended certain facts, or is mistaken in his expert opinions, or has flawed grounds for maintaining his disagreement.

22. The reality is that the cross-examiner must adjust his techniques to the new paradigm. In rare cases and before some judges only, it might still be possible to engage in a rigorous cross-examination on aspects of the expert opinions and to do so in a conventional way. But most judges will expect the cross-examination to be concise, and confined to key areas of disagreement. Cross-examination as to credit might still be possible on occasions, but I doubt that it will have much effect when it follows a joint report and a panel exchange between the experts.
23. One feature of hot tub cross-examinations that is worthy of note is the possibility that counsel can refer to his own side's witness in the course of cross-examination. What I mean is that if counsel's question receives an unfavourable answer, or if the witness provides a series of reasons for his position which counsel does not accept, counsel can turn to his side's expert and ask what that expert says about the other's answer. I am not sure that all courts or tribunals adopt this view because it goes a step beyond the boundaries of ordinary cross-examination, but the practice is certainly permissible before some judges in the Federal Court. Needless to say, counsel would have to be confident of the answer that his expert will give.
24. I have been in cases where the ability of counsel to engage in any serious cross-examination has been severely limited. In my view, there is danger in this approach. It can leave the parties, not just counsel, with a feeling that the court has jumped to incorrect conclusions about the expert evidence and that they have not had a fair opportunity to present their case.

Conclusion

25. The new procedures for joint expert reports and concurrent evidence are a welcome development. Properly used, they can greatly enhance the efficiency of the litigation process. At the same time, it is important to recognise that the new procedures remain a means by which the parties can present their expert evidence, efficiently and effectively, within the confines of an adversarial system of civil litigation.
26. Courts need to be astute to manage the process so that it adduces the relevant expert evidence in a way that is coherent and complete. Moreover, while courts must control and structure the discussion inherent in the new processes, they need to ensure that the parties are satisfied that they have a fair opportunity of presenting their case and of testing the expert evidence given by opposing witnesses. Cross-examination still has a valuable role to play in testing the critical evidence. These considerations mean at least two things. Counsel should be provided with a fair and reasonable opportunity to question the experts about their evidence; and secondly the judge should at the end of the process make a general enquiry of the experts to ensure that each is satisfied that they have had an opportunity to fully explain their evidence.

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