EXPERT WITNESSES: RECENT DEVELOPMENTS IN NSW

The Hon Justice Peter Biscoe

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Expert witnesses are currently the subject of lively debate in NSW. The debate is over the recommendations of the NSW Law Reform Commission in its July 2005 Report 109 on Expert Witnesses in civil proceedings. The Commission's recommendations are currently under review by the Attorney–General's Working Party on Civil Procedure, of which I am a member. I propose to discuss five of the Commission's recommendations:

(a) the single expert;

(b) concurrent evidence;

(c) the permission rule whereby the leave of the court is required before parties can call an expert witness;

(d) mandatory disclosure of fee arrangements; and

(e) a requirement that expert witnesses be informed of the sanctions relating to dishonest, unethical or inappropriate conduct.

Unlike other NSW courts, the Land and Environment Court of NSW has, for several years, routinely used the single court appointed expert and concurrent evidence, the former in merit appeals from planning decisions and the latter in other civil cases.

THE SINGLE EXPERT

Proposals for single expert witnesses are central to the recommendations of the Law Reform Commission.

The practice of the Land & Environment Court of NSW in merit appeals from planning decisions, is that there is a presumption that a court appointed single expert will be appointed in each discipline rather than each party calling an expert witness. Typically, in this class of case, matters relating to so–called objective issues such as noise, traffic, parking, overshadowing, engineering, hydrology and contamination are seen as suitable for a single court–appointed expert. Court–appointed experts also deal with issues relating to matters such as heritage, urban design and general planning, if requested by the parties.

Overwhelmingly, the parties have selected the expert by mutual agreement. Where this does not happen they are required to each submit a list of three nominees and the court makes the selection.

The court has a discretion to permit parties to call their own expert evidence after the court–appointed expert has reported. Leave is granted liberally. It is usually the private litigant who seeks to call their own expert evidence if the opinion of the court–appointed expert is adverse to them. The government agency frequently elects not to call its own expert evidence, even if the opinion of the court–appointed expert is adverse.

The main arguments for the single expert, whether agreed by the parties or appointed by the court, are that (a) where the issue is one which usually permits of only one answer (eg noise) there is no need for more than one expert; (b) the court has the benefit of hearing from at least one expert witness who is unaffected by adversarial bias; and (c) that it saves costs. Costs are particularly significant, of course, where the amount at stake is relatively small.

In addition, it has been argued, in effect, that it makes the judge's task easier where conflicts of expert opinion are particularly difficult to resolve or intractible. Justice Sperling, now retired from the Supreme Court of NSW, who was involved with the Law Reform Commission report, gave this illustration:

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 patient's lungs. One said it was obvious that the substance was in the lungs. It clearly appeared from the x–ray. The other said that the x–ray showed only common deviations within the norm. Now what is a judge to do with that?

The reaction of Justice Downes, the President of the Australian Administrative Appeals Tribunal, is that what a judge should not 'do with that' is to ask a single expert to decide (paper delivered to the NSW Bar Association Administrative Law section on 22 March 2006 entitled 'Expert witnesses in proceedings in the Administrative Appeal Tribunal'). A staunch critic of the idea of the single expert, Justice Downes argues that 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, is 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 which Justice 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 experts' views 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. There is no adequate way of testing whether the single expert's opinion is correct. Also, it is said to be fallacious to assume that in fields of expert knowledge there is only one answer. By way of comparison, look at the level of disagreement between appellate judges.

Some still argue that a single expert is never appropriate, even with so–called objective issues. Justice Downes gives this illustration. Suppose the question concerns the background noise level of the site of a proposed development. That is a matter for measurement with the aid of an instrument. There is usually only one answer. It might well be thought to 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. Is this not the sort of matter in which a better result will flow from a diversity of expert opinion?

The court appointed single expert has also been criticised on the ground that the parties may incur greater costs, where the issues are sufficiently significant, as they are likely to brief 'shadow' experts to advise them as to the single expert's report, and then seek leave to call their own expert if the single expert's report is adverse to them.

Despite these criticisms, there are emerging reports, both in Australia and in England, that single expert evidence is working well in suitable cases. That is the experience in the Land and Environment Court of NSW.

CONCURRENT EVIDENCE

The Law Reform Commission of NSW was of the view that rules of court should facilitate the taking of concurrent expert evidence, sometimes irreverently called 'hot–tubbing'. It is used routinely in civil cases in the Land and Environment Court of NSW in civil

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cases where there is no single court appointed expert.

Concurrent evidence has recently emerged in the Supreme Court of NSW following the appointment in 2005 of McClellan J, the former Chief Judge of the Land and Environment Court, as the Chief Judge of the Common Law Division of the Supreme Court. In recent months concurrent expert evidence has been used in medical negligence cases in the Supreme Court.

The concurrent evidence procedure in the Land and Environment Court of NSW is not fixed in stone but typically is as follows:

Before giving evidence, experts of the same discipline confer and produce a joint report which sets out the matters on which they agree, the matters on which they disagree and their reasons for disagreement. This enables the court to identify the differences which remain between them and which require resolution through their oral evidence. At trial, the experts are sworn in and give evidence at the same time. It is often useful to have a written agenda of matters to be dealt with in oral evidence. The experts have an opportunity to explain their position on an issue and to question the other witness or witnesses about their position. Questions are also asked by counsel for the parties and the judge. In effect, the evidence is given through discussion in which the experts, the advocates and the judge participate. Questions and discussion on a particular issue by all experts can be completed before moving on to the next issue.

This procedure saves very considerable court time. It has met with support from experts and their professional organisations. Not being confined to answering questions put by the advocates, they are better able to communicate their opinions to the court and there is less risk that their opinions will be distorted. Advocates in the Land & Environment Court of NSW have adapted well to concurrent evidence.

For those interested in seeing how concurrent evidence works in practice in the Land & Environment Court of NSW, a DVD is available which simulates the concurrent evidence part of a trial.

THE PERMISSION RULE

The Law Reform Commission of NSW recommended that the rules of court be amended to provide that in civil proceedings parties may not adduce expert evidence without the court's permission. The Commission considered that such a rule would make explicit the court's ultimate responsibility for ensuring, so far as possible, that in each case the expert evidence is in the most appropriate form for the purpose of doing justice in the case. Its philosophy is that the court should have comprehensive control over expert evidence and that the permission rule would achieve that objective.

There is much opposition to this proposal. It is argued that it cuts too deeply across the adversarial system and that the administrative workload for courts dealing with applications to call expert witnesses would be very substantial. It also conflicts with the practice, in some jurisdictions in NSW, such as professional negligence, where it is a requirement that an expert witness report be served by the plaintiff when proceedings are commenced.

FEE DISCLOSURE

The Law Reform Commission of NSW recommended that the rules of court should require that fee arrangements with an expert

witness be disclosed. What the Commission was really concerned with was contingency fees. It considered that a contingency fee arrangement, whether express or implicit, raises the spectre of adversarial bias. The expert witness stands to gain financially by giving favourable evidence. I think there is likely to be a rule change requiring fee disclosure if the fee is any way dependant on the outcome of the case or is in any way subject to an arrangement for the deferred payment of fees.

NOTIFICATION OF SANCTIONS

The Law Reform Commission of NSW recommended that there should be a provision, by rule or practice note, requiring that expert witnesses be informed of the sanctions relating to dishonest, inappropriate or unethical conduct. The Commission identified the following as 'sanctions':

The expert witness might be criticised by the court, and thereby lose credibility, and thus a reduced prospect of further work as an expert witness.

Disciplinary proceedings might be taken against the expert witness within the relevant profession.

The court might make a costs order against the expert witness.

The expert witness might be charged with contempt or even perjury.

I expect that something along those lines will be adopted.

A SUGGESTED MODEL

I would like to conclude by suggesting the following ten point model:

First, when experts are briefed they must be provided with a copy of the expert witness code of conduct, and be informed in writing of potential sanctions for dishonest, inappropriate or unethical conduct.

Secondly, experts must undertake to be bound by the expert witness code of conduct which requires them to acknowledge that their paramount duty is to the court, and must disclose any contingency fee arrangements.

Thirdly, all expert reports, joint or otherwise, should be addressed to the court, so as to impress upon experts that their paramount duty is to the court.

Fourthly, parties should be encouraged to consider using a single expert. In suitable cases (notably where there is an objective issue usually permitting of only one answer or where the amount at stake is small) the court may appoint a single expert whether or not the parties consent. A single expert must provide the parties with a written estimate of fees, which must not be exceeded except with the consent of the parties or leave of the court. If the estimate is unacceptable to a party, there should be liberty to apply.

Fifthly, where there are experts of the same discipline on each side, the experts should confer and produce a joint report before trial which identifies the matters on which they agree and the matters on which they disagree, and the reasons for disagreement. What occurs in their conferences must not be disclosed and cannot be the subject of cross–examination at trial without leave of the court. The parties are jointly and severally responsible for payment of a court appointed expert's fees.

Sixthly parties should endeavour to agree on a common set of assumptions, or on competing assumptions, which the experts are to address. There should be liberty to apply to the court if there is disagreement about the assumptions to be submitted.

Seventhly, the experts' joint report is to be served before any individual expert report is served. The reason is that service of individual reports before experts have conferred, tends to lock experts into positions from which they find it difficult to shift.

Eighthly, before trial each party may clarify matters in a joint report by submitting a limited number of questions (say a maximum of 10) to the experts if the other party agrees; or, if the other party does not agree, may apply to the court for leave to submit questions.

Ninthly, leave of the court should be required to serve an individual report after production of a joint report.

Tenthly, at trial, the evidence of experts of the same discipline should be given concurrently.

Justice Biscoe's paper was delivered to the Australasian Conference of Planning and Environment Courts and Tribunals on 16 September 2006. Reprinted with permission.
