



AUSTRALIAN MARINE PILOTS ASSOCIATION CONFERENCE MARCH 2006

EXPERT EVIDENCE

The Hon Justice James Allsop

Federal Court of Australia



INDEX

- 1 The Nature of Expert Evidence
- 2 The Vehicles for Delivering Expert Evidence
- 3 Occasions for the Need for Expert Evidence
- 4 The Need for Primary Facts
- 5 Being the Subject of Expert Evidence
- 6 The Independent Court Expert



1. The Nature of Expert Evidence (1)

- The ultimate purpose of expert evidence is to provide reliable material upon which a court or other tribunal can proceed in the resolution of a dispute.
- The essential element that grounds the utility of such evidence is the need of the court or tribunal for assistance in a particular discipline or field.



1. The Nature of Expert Evidence (2)

- Thus at the root of the relevance, admissibility and utility of expert evidence is the coherent expert subject matter – the field of expertise and the training or skill of the expert in that field.
- The degree of expertise of the court or the tribunal will affect the extent of the need for, or the manner of use or reception of, expert evidence.



1. The Nature of Expert Evidence (3)

- An essential attribute of the functions of the expert is the independent and unbiased assistance for the trier of fact in an area where trier of fact is less than fully skilled.
- The above can be seen embodied in ss 76(1) and 79 of the *Evidence Act 1995* (Cth):
- **s 76 (1)**
 - *Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.*
- **s 79**
 - *If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.*



2. The Vehicles for Delivering Expert Evidence (1)

- Using the phrase “expert evidence” in a broad sense one can see such evidence being delivered in a number of ways:
 - (a) the assessor in 19th century experience – eg the Elder Brethren of Trinity House who heard the primary evidence sitting with an Admiralty Judge and without the need for the assistance of expert evidence resolved factual questions of a navigation character related to fault



2. The Vehicles for Delivering Expert Evidence (2)

- (b) the assessor in modern day courts who can sit with and assist a judge – modern considerations of natural justice convert such a person into a species of court expert by the need for disclosure of the questions asked and answers given and the requirement for an opportunity for submissions: *The 'Bow Spring'* [2005] 1 Lloyd's Rep 1.
- (c) an appointed court expert who gives an opinion to the court which stands as evidence without private retainer by any party; parties may cross-examine.



2. The Vehicles for Delivering Expert Evidence (3)

- (d) a referee who gives a report to the court which may be acted upon by the court.
- (e) a party retained expert.



3. Occasion for its need (1)

- In maritime matters, because of the wide range of fields of expertise, expert evidence is common in disputes; for example:
 - master mariners
 - cargo surveyors
 - naval architects
 - pilots



3. Occasion for its need (2)

- In the field of pilotage the most obvious likely experts in relation to a pilotage incident are:
 - the master mariner
 - the pilot
- Such issues as the proper method of planning and executing by the pilot of the relevant passage, the proper approach to be adopted by a skilled mariner with a pilot on board, the appropriate techniques of close shiphandling including the use of tugs, the particular local weather, current and other environmental factors, the nature and character of the ship in question and the physics of her response may all be areas for examination.



4. The Need for Primary Facts (1)

- One proposition cannot be stressed too strongly: **the primary facts are crucial.**
- Cases are won and lost on the facts. This is especially so in cases involving pilotage and collision.



4. The Need for Primary Facts (2)

- The expert can only assume facts, unless he or she was present, in which case he or she would be a witness of fact and not an independent expert. He or she can prove principles, theorems and good practice. That said, the expert may be invaluable in assisting the trier of fact in any process of inference as to what did happen by the application of deduction to practice and assumed events.



4. The Need for Primary Facts (3)

- The expert:
 - gives an opinion of what is good/bad practice
 - gives an opinion on a relevant issue in the case
 - gives opinions only in his or her field of expertise
 - explains theory
 - does not give primary factual evidence.



5. Being the Subject of Expert Evidence (1)

- An unpleasant subject, nevertheless one that concentrates the mind.
- Too often people fail to appreciate, in the concentrated process of attempting to do a job, that there is painful reality to the phrase “for the sake of good order”.
- There is a basic need to prepare an accurate record of a task – its preparation and execution to enable explanation of the application of one’s learnt skill and craft.



5. Being the Subject of Expert Evidence (2)

- Pilotage or passage plan
- A practice of discussion with the master and of conduct of essential tasks
- It is not mere record keeping for the sake of it. The process of careful planning may throw up unexpected difficulties. If, as would often be the case, the basic task and passage is routine, prepare a careful routine flexible to factors that may alter. This provides a clear foundation for findings of fact in accordance with what did happen, based on routine practice



5. Being the Subject of Expert Evidence (3)

- There is often a gulf between what did happen and what is proved to have happened. The gap is explained by deficiency in evidence (often records) and litigation error. Expert evidence may not be able to cure such gaps.
- The record keeping task should be designed as not to be so complex as to be more honoured in the breach than the observance.



6. The Independent Court Expert (1)

- I recommend a close reading of a short but invaluable monograph by Michael Bozier entitled: “The Expert Witness: The Role of the Maritime Professional” published by the Nautical Institute.
- Essential role of the expert, independent court or party retained, is the unbiased assistance of the Court or tribunal. This is a duty to the Court or tribunal.



6. The Independent Court Expert (2)

- If the independent function is lost sight of, if the expert becomes an advocate, not only will the court or tribunal discount the evidence (and the client see its money wasted) but also the independent expert loses credibility, reputation and thus the likelihood of further work. There is deep self-interest in independence.



6. The Independent Court Expert (3)

- For a definition of the role and duties of an expert see the Federal Court of Australia Practice Direction on the Guidelines for Expert Witnesses* and Part 35 and relevant Practice Directions in the United Kingdom Civil Procedure Rules.

* See handout.



6. The Independent Court Expert (4)

- The form of the report should clearly identify:
 - the questions asked
 - the totality of the relevant material including documents considered
 - issues addressed
 - the opinions given
 - the facts assumed
 - the reasoning process
 - any inadequacies of underlying material
 - any relevant issues not addressed



6. The Independent Court Expert (5)

- How this is done is a matter for the expert, but the more thorough and meticulous the approach the better.
- Keep records of privileged meetings with lawyers entirely separate from general working papers.



6. The Independent Court Expert (6)

- Whilst respecting experienced lawyers familiar with an area, NEVER propound views other than those in which you YOURSELF have professional confidence.
- In the end, after cross-examination, the cry “the lawyer said to put it in” will not so much explain an expert’s conduct as damn it.



6. The Independent Court Expert (7)

- Draft reports (if kept) should be in a separate file with notes explaining why changes were made. (This will protect you).
- Conferences with lawyers: keep notes in a separate file.
- Examination.
- Cross-examination – beware!! The cross-examiner may well know the narrow track through the Black Forest; that is he or she may, in a very limited respect, know as much, or more, than you.

