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**EXPERT WITNESSES - THE EXPERIENCE OF THE LAND &  
ENVIRONMENT COURT OF NEW SOUTH WALES**

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Shortly after my appointment to the Supreme Court I was asked to preside at the trial where the plaintiff alleged that tobacco smoke in the workplace had caused her cancer: *Sharp v Port Kembla Hotel & Port Kembla RSL Club*, 19 March 2001, NSWSC. The case was decided with a jury which was required to determine whether to accept the evidence of experts called by the plaintiff or the defendant. The issue was whether the plaintiff's cancer of the larynx had been caused by her exposure to tobacco smoke during her employment as a bar attendant in a club - a complex scientific issue.

Both the plaintiff and the defendant called doctors of undoubted qualifications and experience. The witnesses called by the plaintiff were all Australian which, I suspect, although, of course, one will never know, was a significant factor in the outcome of the trial. The defendant called some Australian witnesses and two American scientists. The Americans were professors from eminent universities with considerable experience in relation to issues of smoking and cancer. Some of the defendant's witnesses were prepared to accept that at some future stage the research may show a link between "passive" smoking and cancer although they did

not believe that it could presently be demonstrated. The Americans were more emphatic. As far as they were concerned, there was no link between passive smoking and cancer.

If there had not been a jury I would, of course, have been required to decide the "scientific" issue. Both then and since I have contemplated the answer I may have given. It would have been a difficult task. However, I suspect for the jury it was made relatively straightforward.

Counsel for the plaintiff did not directly cross-examine the American professors about the scientific issue. Rather he concentrated on the fact that for many years they had both travelled the world and been paid handsome sums giving evidence on behalf of tobacco companies to the effect that there was no link between "active" smoking and cancer. As a result of one of the "smoking case" settlements in the United States, the information as to their past work for the tobacco industry was available on the Web, including the substantial fees paid to them.

One does not know, but I suspect that the jurors, once they were aware of the extent that the professors had been "advocates" for the tobacco industry, formed a negative view about the defendant's evidence which caused them to discard the whole of the defendant's scientific case notwithstanding the quality of the Australian evidence. Apart from pondering the verdict I may have given, I have also wondered what the outcome may have been if the court had appointed an expert to assist in the resolution of the scientific issues.

Some years ago, when I was a barrister, I was asked to address a seminar about expert evidence. I was the first speaker and an engineer, much respected for giving expert evidence in litigation, was the other. There was the usual discussion period.

I gave an account of the conventional principles which bind an expert who is giving evidence. In particular, I emphasised the fact that experts were required to give objective evidence to assist the court in understanding matters which fall within the expert's area of "special learning". The expert's overriding obligation to the court was emphasised.

To my surprise the engineer who spoke after me, having explained how he conventionally approached his task of gathering evidence, preparing his report and handling the "dangers" of oral evidence, finished with a flourish saying "and of course at the end of the day your fundamental obligation is to do the best you can for your client." Although the discussion which followed was lively, I doubt whether the engineer understood, much less accepted, the error in his approach.

It was also my common experience as a barrister in the early stages of preparation of a case that there would be two typical responses from experts at the first conference. Some experts, having been briefed with the relevant papers, would commence the discussion by indicating that they held a view about the matter which would either be favourable or unfavourable to the client. Accordingly, if they held a view which was adverse to the project they would offer the opportunity for their services to be appropriately dispensed with - and they were.

Other experts would begin the discussion by saying "well I have had a look at the project, what can I say to help you."

I recall, on one occasion, having a discussion with a professor of one of the leading universities about the qualities of experts who traditionally gave evidence in the court. He himself commonly gave evidence on town planning issues. The professor was able to describe for me those experts who would approach the matter with a genuine endeavour to achieve an objective evaluation of the project and those who saw their task as providing the client with the best argument irrespective of the merits of the proposal.

### **The Land and Environment Court**

The Land and Environment Court was created by the New South Wales Parliament with two primary functions. It has jurisdiction to declare and enforce environmental law. It also has jurisdiction to review the merits of the decisions of various bodies. By far the greatest volume of cases undertaken by the Court relate to merits review of development applications made to local councils. The average number of cases of this type each year is about 1,200.

When exercising its merit review function, the Court is given all the functions and discretions of the body whose decision is the subject of the appeal (Land and Environment Court Act s 39(2)).

The Court is also required by the legislation to conduct its proceedings with "as little formality and technicality as possible" (s 38(1)). The Court is not bound by the rules

of evidence and “may inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the court permits” (s 38(2)). Of course, the process must be fair.

The Court is also provided with an express capacity to obtain the assistance of any person “having professional or other qualifications relevant to any issue arising for determination in the proceedings” (s 38(3)).

Commissioners of the Court must have special qualifications which are listed in s 12 of the Act. The matters in that list relate to the types of problems which they must commonly resolve: planning, engineering, architecture and the like.

The intention of the legislature is clear. When providing an administrative review function within the structure of the Land and Environment Court, it was intended that by the appointment of persons with expertise in relevant areas, decisions in merit matters would be made, if possible, without the conventional trappings of adversary litigation. The Court was provided with authority to make its own enquiries and obtain information, subject, of course, to the right of the parties to respond to any information which is obtained in this manner.

In recent years, it became increasingly apparent that the expectations of the Parliament have not always been fulfilled. In large part, this is the fault of the legal profession. It comes from our inability to contemplate the resolution of any dispute without the conventional adversarial processes. This has meant that merit review is often an intense forensic contest in which there are “winners and losers”, when the

legislation intended instead that public and private resources would be applied to achieving the “best community outcome.”

Because merits review has come to be seen as an adversarial contest, there has been an investment of significant political and intellectual capital in achieving a “win”, very often irrespective of the cost in terms of time, money and other resources. Solutions to problems are secondary, the primary object being to beat the opposition. One consequence is that many cases are visited with a plethora of experts, sometimes each party calling more than one expert on the same issue. The purpose of this evidence is, in some cases, to influence the Court by providing a weight of opinion, without recognising that the Court is more likely to be influenced by the intrinsic quality of the opinion. The purpose for which expert evidence is admissible in proceedings is often lost. Rather than the evidence being tendered to inform the Court about an area of special learning, where the Court may need assistance, it is designed to found a submission which says that the number or weight of opinions in one direction should determine the outcome of the case.

Although the Commissioners of the Land and Environment Court are appointed because of their expertise in particular areas, the range of problems which the Court deals with mean that, in many cases, it must rely upon the evidence of expert witnesses to resolve the issues. Accordingly, as the volume of litigation in the Court has increased, so too has the work available to people with expertise who are prepared to give evidence.

Many of the merit appeals in the Land and Environment Court involve the same or similar issues. A project may be criticised as too large, too dense, providing unreasonable impacts on views, sunshine or raising a variety of other problems. Because the adversarial system encourages the expectation that each issue will be addressed by an expert, there are a significant number of persons holding professional qualifications, for whom the majority of their professional work is the giving of expert evidence in court. Many experts depend, for their incomes, upon being retained to give evidence on behalf of particular clients or upon a steady stream of work from a few solicitors. In courts, such as the Land and Environment Court, where expert evidence is common place, this can give rise to problems with the intellectual integrity of the evidence [1].

### **The integrity of expert evidence**

The difficulties with the integrity of expert evidence when a court is required to resolve a dispute have been recognised for a considerable period of time. In his well known article, Learned Hand, writing in the Harvard Law Review in 1901, challenged the accepted utility of expert evidence and the procedures by which it was received in a court:

"No one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes. The only question is as to how it can do so best. In early times, and before trial by jury was much developed, there seemed to have been two modes of using what expert knowledge there was: first, to select as jurymen such persons as were by experience especially fitted to know the class of facts which were before them, and second, to call to the aid of the court skilled persons whose opinion it might adopt or not as it pleased. Both these methods exist at least theoretically at the present day, though each has practically given place to the third and much more recent method of calling before the jury skilled persons as witnesses. No doubt, there are good historical reasons why this third method has survived, but they by no means justify its continued existence, and it is, as I conceive, in fact an anomaly fertile of much practical inconvenience." [2]

The article contains a comprehensive discussion of the history and use of experts in the common law system and the perceived difficulties. These difficulties include the observation that in an adversary system the expert becomes the hired champion of one side. Further problems arise from the fact that, generally, the Court is a "lay tribunal", without any expertise, but is required to resolve a dispute between persons who may have expertise at the highest level of a particular scientific or professional discipline.

Learned Hand was writing at a time when the complexity of litigation and the issues which needed to be decided were significantly less than today. That growth in complexity has of course been accompanied by an enormous increase in the available knowledge in all areas of intellectual endeavour. Courts can be required to resolve disputes between experts as to the cause of accidents, the past and future financial consequences of the acts of others, the appropriateness of professional action, whether or not the exposure to tobacco smoke or other products can cause life threatening diseases and many other complex matters. The questions which a court must answer may have significant consequences for the reputations of individuals and, of course, very significant financial consequences.

Writing in the Journal of Judicial Administration Andrew Cannon, the Deputy Chief Magistrate and Senior Mining Warden, South Australia said:

"Once their livelihood depends upon the continuing goodwill of either side of the adversarial process, they are under substantial pressure to take slanted, if not outright biased, point of view. If we really want experts who will offer a



conscientious, moderate and accurate opinion, there is much to be said for making them responsible directly to the court."[3]

Professor Langbein, writing in the University of Chicago Law Review, outlined a number of what he deemed "advantages" of the German system of civil litigation over the American system, principally in relation to the court-driven selection, engagement and conduct of the expert evidence [4]. He criticised the coaching of witnesses by the lawyers, selective evidence and the desire of the expert to become an advocate for his client's case [5]. Langbein went so far as to suggest that the German system, whereby the court made the inquiry, was necessary in the US.

The expert who sees his or her task as being to help the client, whether it be consciously acknowledged or subconsciously assumed, has been observed by every experienced advocate. Upon the assumption that our civil litigation processes are designed to elicit the truth, we have assumed that the adversarial system, with its emphasis on rigorous debate, is the most appropriate structure within which to achieve this outcome. For my own part, I question that assumption in relation to the evidence of experts.

As Davies J points out in his paper "The Reality of Civil Justice Reform: why we must abandon the essential elements of our system" delivered at the 20<sup>th</sup> Australian Institute of Judicial Administration Annual conference in Brisbane in July 2002, when the adversarial system is employed to resolve civil disputes and parties are allowed to call evidence from their "own" experts, it is inevitable that the evidence will be infected by adversarial bias. It could hardly be otherwise. Only the most extraordinary person who has been engaged to prepare and give evidence for a

client would, when cross-examined, readily confess error, accept their view was wrong and the client's money wasted. It would be even harder to do this if the client is a regular litigator or the solicitor for the client is commonly looking for experts to help in forensic contests.

It is not hard to appreciate that the prevailing "culture" in which expert evidence is given needs to be constantly reviewed [6]. And in the Land and Environment Court the financial incentive to do the "right thing" by your client is the more powerful given the potential profit from major development and the fact that many developers will have multiple projects before the Court in any one year.

Whereas ordinary civil litigation involves a dispute between private corporations or individuals where the rules of the contest are known and accepted, even if discovering the truth is not always the object of the parties or the outcome of the case, litigation in the Land and Environment Court requires a decision which not only has regard to private interests but must incorporate the aspirations of the general community. Whether a high rise residential building should be approved will involve the interests of the developer who seeks to profit from the development, the immediate neighbours who may be impacted by it, the local community who may also experience negative impacts from traffic, a drain on community resources or a change in the built environment, and the wider community which has an interest in ensuring that acceptable housing is provided for all who wish to live within the metropolitan area.

Given the overriding community interest in the outcome, there will be many cases where leaving the parties to call their own experts is obviously unsatisfactory. It can also serve to unnecessarily duplicate the primary research which must be undertaken and increase the length and cost of hearings.

### **The response of the Land and Environment Court**

In the Land and Environment Court, as in other courts, the initial response to the identified problems was to articulate through Practice Directions the expectations which the Court had of the objective and impartial exposition of the issues requiring special expertise. As my experience at the seminar to which I referred makes plain, it must be doubted whether that message has been received, at least by some who give evidence.

The Court has also moved to require experts to confer before the hearing with a view to identifying the matters upon which they agree and those in respect of which they disagree. By this means, it was intended that issues could be narrowed and the views of the experts objectively defined, thereby enhancing the quality of the ultimate decision and reducing the time for the hearing.

Although, in some cases, the pre-hearing conferencing can be demonstrated to have worked efficiently, in others it is apparent that it has not. Two problems have emerged. One is the tendency of some experts to meet but not agree even the straightforward matters. This causes unnecessary and sometimes significant costs. Often those matters are agreed on the first day of the hearing, after the judge or commissioner has spoken with the experts.

The second problem which occurs with sufficient frequency to be of real concern is where the agreement of an expert given in joint meetings is withdrawn or modified when the expert has had "further discussions" with the lawyer engaged for the expert's client. The joint report required of the experts becomes not so much the expert's opinion, but that opinion filtered by the lawyers.

### **The Court Expert**

Commencing in March of 2004, the Court has imposed a presumption that in relation to any issue requiring expert evidence, a court expert will be appointed. To date, in excess of 300 experts have been appointed and 156 cases involving court experts have been completed.

Although each case must be looked at individually, a court expert will be appointed where the Court is satisfied that there may be cost savings to the parties or where the issue involved is such that the integrity of the ultimate decision will benefit from the appointment of an expert by the Court. When a court expert has been appointed a party may, with the leave of the Court, seek to call an expert who that party has retained. Generally, provided the Court is satisfied that the additional expert will add useful information to the discussion, leave is granted. Experience has shown that the court expert's opinion is not always accepted by the judge or commissioner but that in every case the integrity of the decision made has been significantly enhanced.

The number of cases which have been completed utilising court experts is not sufficient to obtain any statistically reliable information. However, I understand that in

the 156 cases where a court expert has been appointed, 53 have settled without the need for a contested hearing and others have taken significantly less time for the hearing to be completed.

Although appointed by the Court, the parties are required to agree on the person who is to carry out the task. The parties are jointly and severally liable for the expert's fees which are generally agreed with the expert by the parties and fixed by the Court. To date it has been unnecessary for the Court to intervene and independently fix fee arrangements.

The Court has found, and I understand that this has been the common experience in England, that in only very few cases, two so far, have the parties not been able to agree on who the expert to be appointed by the Court should be. The English view, which I share, is that the parties faced with the fact that the court will appoint an expert will always prefer to have a person of their own choosing rather than run the risk that the court might appoint a person in whom they have no confidence.

It has been said on a number of occasions that one of the concerns with the use of court appointed experts is that the Court may be denied the complete perspective of available expertise in relation to particular issues. It is said that because the parties must choose one expert the tendency will be to agree on someone who occupies the middle ground of any particular scientific or professional debate and as a consequence the expert evidence will be "bland". The experience of the Court is that this does not occur. Although those experts who have a reputation for being "partisan" that is favouring one client or one side of the process, may not often be

appointed, the fact that the Court will, with leave, allow a party to call an expert who it has engaged, is a sufficient protection against this possibility.

In recent weeks, I have received reports from members of the Court, practitioners and experts themselves about their opinion of the quality of the evidence given by court appointed experts. The consistent comment from the judges, commissioners and legal practitioners is that the evidence from persons appointed as court experts reflects a more thorough and balanced consideration of the issues than was previously the case, even when the evidence came from the same person. This is not surprising when discussions with the experts confirm the pressure that they feel as the "court expert" is to ensure that the report they produce considers all relevant matters and, most importantly, provides a balanced analysis of the situation.

It was made plain to me at a seminar some weeks ago, where a number of experts spoke, that at least some experts are prepared to publicly acknowledge that when engaged by a particular party, their evidence has previously been structured to favour that party but, when appointed by the Court, greater objectivity and balance return. The preparedness to publicly confirm that which we have previously suspected is no doubt a result of the pressure which experts now feel to put forward their credentials for appointment as an expert capable of unbiased assessment of a particular problem. When we made the changes, I anticipated that the appointment of court experts would raise the quality of all expert evidence. That expectation is being confirmed.

Not all issues which the Court must resolve are suitable for the appointment of a court expert and not all matters are amenable to the process. However, typically matters such as noise, traffic, parking, overshadowing, engineering, hydrology, contamination issues, among others, appear suitable for a court expert. Increasingly matters of heritage, urban design and general planning are also being dealt with by court experts, often at the request of both parties and commonly after a request from the council. The court expert has the responsibility to prepare a report after consultation with the parties. In some cases, this may mean consultation with experts which the parties have retained to advise them, but often the court expert will be the only expert who looks at a particular problem.

The advantages of this approach to expert evidence are many. Because the costs are shared in many cases the costs of expert evidence to both parties are significantly reduced, probably halved. A saving in costs cannot always be achieved. However, there is no doubt that the integrity of the expert evidence is enhanced and this must be reflected in the quality of the ultimate decision.

Although the move to appoint court experts initially met significant resistance from the legal profession, I believe that resistance is now diminishing. With the change has come a clearer understanding of the deficiencies of the old approach and the benefits which change can bring. For the experts, it is about giving back to them the opportunity to use their expertise, without obligation to a client, and the ability to express their views without the distortions that can come from the adversarial process. Those lawyers who remain sceptical of the process typically argue that the client (although in many cases they mean the lawyer) loses control of the evidence

which is tendered. Although it might be seen as a problem if the court was taking control of the lay evidence I cannot accept that it is inappropriate where expert evidence is involved.

It is apparent that some individuals are being more commonly appointed as experts than others. The pool will, I am sure, grow, but it will be the pressure to perform to a high standard which will ensure that the pool maintains its quality.

Another significant advantage of a court expert in merit appeals is that the parties have an opportunity to discuss with an expert, who has no brief for either side, and who both sides have confidence in, the merits and problems of the particular proposal. This may lead to a recognition by a council that the project is satisfactory, or, with modest amendments or the imposition of suitable conditions, can be made to be appropriate. It may also lead to the applicant recognising problems and either modifying the application or withdrawing it altogether. Both situations have already arisen in a number of cases. In the language of Alternative Dispute Resolution this process is, of course, referred to as "Neutral Evaluation."

If it is necessary for the matter to go to a hearing the Court will have the benefit of analysis by an expert, who is not beholden to either party, of the issue or issues falling within that person's area of expertise. Even if the opinion of that expert is not accepted by the Court, it has been the experience of judges and commissioners that the confidence with which they can approach the resolution of the problem is significantly enhanced. In these cases the costs to the parties may be increased a



little although this is likely to occur only if a party seeks to call its own expert in addition to the evidence given by the court expert.

Many people raise the question of whether or not parties will engage experts to shadow the court expert. It has been the court's experience that this happens in some cases, although the extent of the practice has not been able to be adequately identified. It generally occurs where a project has been prepared with the assistance of experts and those persons continue to be retained to monitor the work of the court expert. In those cases unless the client's experts give evidence the need to prepare a written report, which is often the most costly part of the expert's work, is removed. Because a party will only pay half of the cost of the court expert, the consequence is that the total cost to a party is unlikely to have been increased, although it has probably not been reduced.

### **Concurrent Evidence**

At the same time as the Court has moved to appoint experts, we have also changed the process by which expert evidence is given in Court. This is now done concurrently and all experts in relation to a particular topic are sworn to give evidence at the same time. What follows is a discussion, which is managed by the judge or commissioner, so that the topics requiring oral examination are ventilated. The process enables experts to answer questions from the Court, the advocates and, most importantly, from their professional colleagues. It allows the experts to express in their own words the view they have on a particular subject. There have been cases where as many as six experts have been sworn to give evidence at the same time.

For hearings in my court, the procedure commonly followed involves the experts being sworn and their written reports tendered together with the document which reflects their pre-trial discussion - matters upon which they agree or disagree. I then identify, with the help of the advocates and in the presence of the witnesses, the topics which require discussion in order to resolve the outstanding issues. Having identified those matters, I invite each witness to briefly speak to their position on the first issue followed by a general discussion of the issue during which they can ask each other questions. I invite the advocates to join in the discussion by asking questions of their own or any other witness. Having completed the discussion on one issue we move on until the discussion of all the issues has been completed.

Experience shows that provided everyone understands the process at the outset, in particular that it is to be a structured discussion designed to inform the judge and not an argument between the experts and the advocates, there is no difficulty in managing the hearing. Although I do not encourage it, very often the experts who will be sitting next to each other, normally in the jury box in the courtroom, end up referring to each other on first name terms. Within a short time of the discussion commencing, you can feel the release of the tension which normally infects the evidence gathering process. Those who might normally be shy or diffident are able to relax and contribute fully to the discussion.

This change in procedure has met with overwhelming support from the experts and their professional organisations. They find that they are better able to communicate their opinions and, because they are not confined to answering the questions of the advocates, are able to more effectively respond to the views of the other expert or

experts. They believe that there is less risk that their expertise will be distorted by the advocate's skill. It is also significantly more efficient. Evidence which may have required a number of days of examination in chief and cross-examination can now be taken in half or as little as 20% of the time which would have been necessary.

As far as the decision-maker is concerned, my experience is that because of the opportunity to observe the experts in conversation with each other about the matter, together with the ability to ask and answer each others questions, the capacity of the judge to decide which expert to accept is greatly enhanced. Rather than have a person's expertise translated or coloured by the skill of the advocate, and as we know the impact of the advocate is sometimes significant, you actually have the expert's own views expressed in his or her own words.

I am sometimes asked, particularly by advocates, whether concurrent evidence favours the more loquacious and disadvantages the less articulate witness. In my experience, the opposite is true. Because each expert must answer to their own professional colleague, the opportunity for diversion of attention from the intellectual content of the response because of the manner of its delivery is diminished. Being relieved of the necessity to respond to an advocate, which many experts see as a contest from which they must emerge victorious rather than a forum within which to put forward their reasoned views, the less experienced or perhaps shy witness becomes a far more competent witness in the concurrent evidence process. In my experience, the shy witness is much more likely to be overborne by the skilful advocate in the conventional evidence gathering procedure than by a professional colleague who under the scrutiny of the courtroom must maintain the debate at an

appropriate intellectual level. Although I have only rarely found it necessary, the opportunity is, of course, available for the judge to step in and ensure each witness has a proper opportunity to express his or her opinion.

## **Conclusion**

Both the use of experts appointed by the court and the taking of the evidence of the experts concurrently are bringing a very significant change in the "culture" of expert evidence in the Land and Environment Court. The general view of the experts is that both measures free the experts from the control of the client and its lawyers and allow them to reclaim their proper role in the dispute resolution process. That role is, of course, to assist the Court in areas of special learning without being troubled by which party may win the case. There are now significant moves to adopt our approach in a number of other jurisdictions and I have no doubt that the process of change will quicken. It will bring benefits both in relation to the efficiency of the court process and the integrity of its decision-making.

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- [1] Justice H D Sperling, "Letter to the Editor" (2003) 6 The Judicial Review 223.
- [2] Justice Learned Hand, "Historical and Practical Considerations Regarding Expert Testimony" (1901) 15 Harvard Law Review 40, p 40
- [3] Cannon A, "Courts Using their Own Experts" (2004) 13(3) Journal of Judicial Administration 182, p 185
- [4] Langbein J H, "The German Advantage in Civil Procedure" (1985) 52 University of Chicago Law Review 823.
- [5] Langbein J H, supra, pp 835-836.
- [6] See Justice G L Davies, "Court Appointed Experts" (2004) 23 Civil Justice Quarterly 367.