EXPERT ASSESSORS ON THE BENCH

Bringing Experts into the Courtroom Workshop

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1. Bringing experts into the courtroom is by no means a new phenomenon, and doing so in the way most likely to produce an outcome that is fair and according to law has long been a vexed question. I have recently read a fascinating account of the history of scientific expert evidence in English and American Courts – *Laws of Men and Laws of Nature* by Tal Golan (Harvard University Press, 2004). The author places the emergence of the modern partisan witness in late 18th century England in the context of the rise of the adversarial system in the courts and the agrarian and industrial revolutions that enveloped society. He traces the interplay between the law and developments in the sciences including engineering, chemistry, medicine and psychology. It is compelling reading.

2. One message which comes through loudly and clearly is that the disquiet about expert evidence which has been expressed by many across the common law world in recent times is nothing new. Problems perceived by modern commentators were much debated in legal and scientific circles more than 150 years ago. One of those

problems was described by Davies JA (then of the Queensland Court of Appeal) in a paper delivered to a judges' conference in January 2004 as –

> "the difficult question and the non-expert judge –
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> (i) the more complex the question is, the more difficult it becomes for a judge or jury to determine the extent to which opinions given on each side are polarized by the adversarial process; and
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> (ii) the more complex the question is, the more the judge or jury needs the help of an independent expert who can assist the court to understand the question and consequently to resolve it."

3. You are no doubt familiar with moves to formulate an expert witness's duty as primarily to the court rather than to the party who engages him, moves to restrict the number of experts called on a topic, and other procedural changes which have been made or are likely to be made in various jurisdictions. Some of these changes have provoked passionate debate in professional circles. I do not intend canvassing their relative merits and demerits this afternoon. Rather, I have been asked to speak about what is really a very old mechanism for assisting the tribunal of fact (be it judge or jury) to understand and resolve conflicts in relation to matters beyond the reach of common experience – namely, the use of assessors.

4. A useful article *The Province and Function of Assessors* was written by Anthony Dickey and published in the Modern Law Review (1970) 33 Mod L R 494. As he recounted –

> "Assessors do not, in the modern sense of the word, assess anything. The title of the office derives directly from the Latin *assessor*, meaning one who sits with another, or an assistant, and in English law denotes a person who, by virtue of some special skill, knowledge or experience he possesses, sits with a judge during judicial proceedings in order to answer any questions which might be put to him by the judge on the subject in which he is expert."

An assessor assists the judge, but decision-making remains the function and responsibility of the judge.

5. According to Golan, the use of an expert nominated by the court to advise it, rather than to produce evidence to be evaluated by the jury, goes back more than 700 years. The earliest reference he found was in 1299 when physicians and surgeons in London were called to advise the court on the medical value of the flesh of wolves. He says medical advice was most often sought in cases of malpractice or when the nature of wounds was an issue, and he refers to cases in the 15th and 16th centuries where grammarians were consulted on the meaning of Latin pleas and commercial instruments.

6. Assessors are comparatively rare in the major trial courts these days, except perhaps in admiralty and patent matters. The English admiralty practice of consulting Trinity Masters (senior members of a famous club of sea captains chartered by Henry VIII) may have been adopted during the fifteenth century from the international court of the Councils of the Sea, which in earlier times sat in

Barcelona and settled disputes among members of the Merchants' and Mariners' Guilds. In most Australian jurisdictions, as in England, there are provisions in rules of court and other legislation for the use of assessors in a wide range of litigation, but these provisions are seldom invoked. About 7 years ago Heerey J of the Federal Court appointed an assessor under s 217 of the *Patents Act* 1990 to assist him in a case involving an invention in relation to the use of certain DNA techniques to produce commercial quantities of a protein, normally produced in the liver of a foetus and in the kidney of an adult, and which plays a major role in regulating the rate of red blood cell formation. See *Genetic Institute, Inc v Kirin-Amgen, Inc (No 2)* [1997] 1058 FCA, 17 September 1998. In his judgment on the substantive dispute, His Honour recorded his indebtedness to the professor of microbiology who was selected as the assessor: *Genetic Institute, Inc v Kirin-Amgen, Inc (No 3)* [1998] 740 FCA, 1 July 1998. See also Heerey *Expert Evidence in Intellectual Property Cases* (1998) 9 Australian Intellectual Property Journal 92.

7. For some time now there have been murmurs among some judges, legal practitioners and others that we are likely to see greater use of assessors. Interestingly, the Australian Medical Association has recently reviewed its position on expert witnesses. After proposing procedures for the parties' selection of expert medical witnesses, it went on to advocate court appointed medical practitioners to assist judges in accordance with the following:

(a) In the event a case proceeded to hearing with medical issues remaining in contention, the court would determine at a directions hearing whether the complexities of the case required a court appointed medical practitioner to

assist the judge at the hearing. The adviser would be drawn from the court's pre-appointed panel of advisers.

(b) Court medical advisers would be selected in accordance with normal selection criteria for part time or full time statutory appointments for a limited term of 3 to 5 years, by selection committees that included a College or Association medical representative.

(c) The medical adviser would sit with the judge in court, his or her role being limited to assisting the judge in understanding the evidence, advising on what other information might be required, and suggesting questions that might be asked of the parties or witnesses. The medical adviser would not need to be qualified in a specialist field relevant to the issues before the court. The adviser would not have decision-making power, nor would he or she advise on outcomes, or provide his or her own opinion.

A more or less classic description of an assessor!

8. Traditionally the precise mode of using an assessor has been in the discretion of the court, and there have been divergent views on whether he or she may be a source of evidence as well as providing assistance to the court in understanding the evidence otherwise before it. See *Richardson v Redpath, Brown & Co Ltd* [1944] AC 62; *SS Australia (Owners) v SS Nautilus (Cargo Owners; The Australia* [1927] AC145 at 149 – 150. An assessor may not be questioned by the parties: *The Queen Mary* (1947) 80 Ll L Rep 609 at 612; 82 Ll L Rep 303 at 321. Questions are formulated for the assessor to advise on, but at least over the last 150 years or so

the answers have not been announced in open court: *The Hannibal* (1867) LR 2 A & E 53 at 56. Generally, an assessor has retired with the judge and given advice in private: *The Banshee* (1887) 6 Asp MLC 130. Of course, the court has never been bound to accept an assessor's advice: *SS Australia (Owners) v SS Nautilus (Cargo Owners); The Australia* [1927] AC 145 at 151 – 153.

9. In England these practices are changing, as I predict they will in this country also. A couple of years ago the English Court of Appeal heard an appeal in a case involving the grounding of a chemical tanker in the Suez Canal: *Owners of the Ship Bow Spring v Owners of the Ship Manzanillo II* [2005] 1 WLR 144. The trial judge sat with nautical assessors. He sought the assistance of counsel in formulating questions to be put to the assessors, but did not disclose the answers to counsel so as to give them an opportunity to make submissions whether they should be accepted; in the traditional way, he simply announced that he accepted the assessors' advice. The Court of Appeal considered that he had been correct to seek counsel's input into the formulation of the questions, but wrong not to have disclosed the answers and sought counsel's comment on them. This was necessary under the fair trial provisions of the *Human Rights Act* 1998. As the Court of Appeal observed, those provisions were anticipated by the common law principles of natural justice by many years, and I am confident that the same result would be reached by an Australian court applying principles of natural justice.

10. In Queensland we have a specialist court set up on the inquisitorial model which always uses assessors – the Mental Health Court. That court's role is to determine questions of criminal responsibility (unsoundness of mind, diminished

responsibility) and fitness for criminal trial, as well as to hear appeals from the Mental Health Review Tribunal and to investigate the detention of patients in authorized mental health services.

11. The Mental Health Court's duty is to inquire into the matter before it. It may inform itself of any matter relating to the inquiry in any way it considers appropriate. It is not bound by the rules of evidence. Of course, it is bound by the rules of procedural fairness, and it must respect parties' rights to be heard and to unbiased determinations.

12. The *Mental Health Act* 2000 by which the court was established provides that it be constituted by a judge of the Supreme Court assisted by psychiatrists. The decision is that of the judge. The Act provides that the assisting psychiatrists are:

    (i) to examine material received for a hearing to identify matters requiring further examination and to make recommendations to the Mental Health Court about the matters;

    (ii) to make recommendations about the making of court examination orders;

    (iii) to assist the court by advising it on the meaning and significance of clinical evidence, and about clinical issues relating to the treatment and detention needs of persons under the Act.

    Their functions are limited to matters within their professional expertise.

13. Out of court the assisting psychiatrists perform an indispensable and onerous task in reviewing files (in the absence of the judge, but with the assistance of the registrar), making recommendations about matters requiring further examination and about orders by the court for the examination of persons whose mental state is in issue. The judge is generally guided by their recommendations in ordering examinations. This is not to overlook the considerable time the assisting psychiatrists spend in reading for hearings.

14. The parties are usually the person whose mental state is in issue, the Director of Public Prosecutions and the Director of Mental Health (who plays an amicus curiae role). They are free to call their own experts, and sometimes do.

15. To avoid any perception that matters go on behind closed doors, the Act contains provisions requiring any advice given by the assisting psychiatrists to the judge before the hearing commences or during any adjournment (other than an adjournment for the Court to make its decision) to be relayed to the parties. Any advice given during the hearing must be audible. If the assisting psychiatrists give the judge advice while the decision is reserved, the rules of procedural fairness require the judge to draw it to the attention of the parties if it raises new issues or approaches to issues not canvassed during the hearing, and to give the parties the opportunity to make further submissions. The judge is required to state in the reasons for decision any advice tendered by the psychiatrists which materially contributed to the decision.

16. In practice the assisting psychiatrists are encouraged to take an active part in the proceedings. “Assisting” will often involve expressing views about the evidence given. They ask questions where appropriate, which may highlight those views, or the possibility of them. They may help the judge in approaching the difference between apparently contradictory conclusions in the expert field. They may assist the judge in understanding the effect and meaning of technical evidence. See, generally, *AG v Kamali* (1999) 106 A Crim R 269 (a decision of the Court of Appeal on earlier but similar legislation).

17. Allowing the assisting psychiatrists to ask questions is a departure from the traditional approach to assessors. But the Court’s powers over its own procedure are very broad, and they have been interpreted as allowing this. It has proved valuable from a number of perspectives. The Court has a large caseload: in 2004-2005 it dealt with 264 matters (220 references relating to criminal responsibility and or fitness for trial, 41 appeals from the Mental Health Review Tribunal and 3 inquiries into detention), sitting on 56 days. There is only 1 judge appointed to constitute the court and a panel of 3 assisting psychiatrists (2 of whom sit at any one time). Those whose mental state is in issue are almost invariably without means and represented by Legal Aid Queensland (which has a small but highly competent specialist Mental Health unit). The charges they face range from the most serious to comparatively minor indictable offences (and often also simple offences; the court may deal with these so long as the defendant is charged with an indictable offence). The reality is that there are simply not enough resources to enable counsel to undertake as thorough a preparation of the medical issues and as

thorough a cross-examination of experts as would occur in an ideal world. Often a few questions put to the expert witnesses by the assisting psychiatrists quickly get to the heart of pertinent issues and greatly assist the judge in resolving them. I vividly recall one of our leading forensic psychiatrists coming up for air after being questioned by one of the assisting psychiatrists and observing that he felt as though he had just sat a College exam! As in all things, the court has to strive for balance, and not allow the assisting psychiatrists to assume the role of cross-examining counsel. This is not always easy, and I do not suggest that the goal is always attained. But as a general proposition allowing the assisting psychiatrists to play an active part in the proceedings seems to add to the satisfaction levels of all participants, and to assist the Court to arrive at a just outcome.

18. There are various professional disciplinary bodies and other tribunals constituted by a judge, or other legally qualified person, assisted by professional or lay members. No doubt each has its own procedural peculiarities.

19. If we are to bring assessors into the courtrooms, we must make provision for them in courthouse design and administration. Public resources allocated to the construction and maintenance of courthouses will always be limited, and it would be unrealistic to think that there will be courtrooms built that are dedicated for use when a judge sits with assessors. Nor can we expect that there will be vacant appellate courtrooms which might be commandeered. The courtroom is the public stage on which litigation is brought to its climax, and much energy, care and ingenuity should properly be invested in striving for courtroom design which meets

high standards of functionality, symbolism and aesthetics. We should aim at flexible designs which allow for multi-purpose courtrooms.

20. In many existing courtrooms the bench is really too small for 2 or 3 people to occupy it comfortably. Access to the bench from the corridor behind the courtroom is awkward. The acoustics are such that at least one of the persons sitting with the judge cannot hear counsel or witnesses, and or counsel or witnesses cannot hear something said by someone on the bench. Where audio visual equipment is used, often the camera cannot pick up three people on the bench at once, or there is only one microphone which cannot pick up the voices of those on either side of the judge. Where simple polyphone telephone equipment is used, there are not enough microphones and it is distracting in the extreme for equipment to have to be moved from one person to another and cords stretched across the courtroom.

21. I said "court<u>house</u> design and administration" deliberately. We need to think also about what goes on behind the scenes of the courtroom. Where are the assessors to go during an adjournment, especially if there are no spare judge's chambers? Where are they to perform their out of court functions? There should be office space/conference room facilities with associated utilities available for their use. A court (such as the Mental Health Court) which functions on the inquisitorial model places different demands on its Registry from those of an adversarial court, and so throws up different issues for the designers of Registry premises.

22. Some of these examples may seem petty and easily fixed. But when they are not foreseen or attended to, they not only have the potential to strain the nerves of the

participants in the proceedings; they also have considerable impact upon perceptions of the professionalism with which justice is administered in our courts, and thus upon the degree of respect accorded to our judicial system.

23. None of these are insurmountable hurdles from the architectural or construction perspective, I am sure. The greatest challenge may lie in establishing and maintaining a meaningful dialogue between the participants in court proceedings and those who allocate and administer the spending of public funds for courthouse construction and maintenance. The legal system is a living, evolving organism. Unless the judges and legal practitioners who appear regularly in the courts become and remain an integral part of planning processes, I fear that the outcomes will be suboptimal, and a poor reflection of the system itself. We must strive to work cooperatively together.