

What Can the Court Do About Expert Witness Bias?

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Bias in Expert Witnesses

One ongoing area of discussion in legal reform is that of unconscious bias in expert witness evidence and how it may be avoided. Is it possible for an expert to undertake their task without, on some level, shaping their opinion to better suit the case of the party that has briefed them?

A distinction is made here between those experts who consciously engage in adversarial bias and willingly offer whatever opinion is required and those experts who genuinely endeavour to give honest, objective opinions on the facts and assumptions provided to them but nevertheless unconsciously drift into advocating for their client beyond what those facts and assumptions suggest.

By adhering to the Expert Witness Code of Conduct and providing an unbiased, objective opinion, an expert assists the court by identifying the real issues in dispute and helping the decision maker to decide upon those issues.

However, if the expert provides evidence that is no better than advocacy for their client's position then the opposite is achieved: the decision maker is not assisted, and time and money are wasted.

A Long Running Problem

This is hardly a new issue. As early as 1843, Lord Campbell was complaining about expert bias,^[1] and a 1999 study of 244 Australian judges revealed that 85% of the judges surveyed had encountered partisanship in expert witnesses.^[2]

The basis for criticism about bias has mainly focussed on the fact that experts are employed by lawyers, creating the impression that they will therefore advocate for the lawyers' position, if only from a natural instinct to find favour with an employer. Put another way by Justice Peter McClellan, "*it is the fact of joining the litigation team and the influence of the inevitable human desire to win the debate which is the greater problem*".^[3]

Common Concerns with Expert Evidence

In *Dasreef Pty Ltd v Hawchar*, Heydon J listed various concerns with expert witness evidence, drawn from a number of previous cases, including:^[4]

1. The partiality of expert opinion witnesses;
2. Experts who contradict themselves in different cases, each time to the supposed advantage of the party paying them;
3. The skewed manner in which experts are selected, as each side changes experts until the most favourable one is found;
4. The tendency of experts to drift into giving the courts reasons why they should accept or reject the evidence of lay witnesses on matters of primary fact; and
5. The tendency of experts to dominate proceedings [and] take over the conduct of cases and exert excessive influence over their outcomes.

There have been numerous cases where expert evidence has been given little weight or even dismissed because the court found the evidence to lack objectivity. For example, in *Universal Music Australia v Sharman Licence Holdings* [2005] FCA 1242 at [26] his Honour Wilcox J said:

"The principal parties relied heavily on evidence from so-called 'independent experts'. Much of this evidence was helpful, some of it extremely valuable. Some of this evidence was not helpful, either because it related to a peripheral, even irrelevant, matter or because I was compelled to form an adverse view about the objectivity or intellectual integrity of the

witness. I mention, in this context, particularly Dr Roger Clarke, whose evidence on behalf of the Altnet parties was little more than a partisan polemic.”

Nevertheless, the court’s position is that an expert is entitled to give evidence regardless of having a connection to a case that would appear to create bias. As Justice Austin said in *ASIC v Rich*:^[5]

“The fact that the expert may have had a family, personal or business relationship with the party retaining him or her, of kind that might cause a reasonable bystander to apprehend or even expect a lack of impartiality in the expert’s opinions, is not of itself a ground for determining that the expert lacks testimonial capacity or competency, or otherwise for holding that the expert’s opinion evidence is inadmissible...

There may, however, be additional factors that would make the evidence inadmissible or, at least, would cause the court to exclude it in the exercise of its discretion. For example, the court might exclude an expert’s evidence if it appeared that the expert, having formed his or her opinions for another purpose, was not prepared to consider changing his or her mind for the purposes of giving evidence in court.”

The Court Response

Given that it sometimes occurs on an unconscious level, there is likely no truly effective way to completely eradicate the instinct by some experts to tailor their opinions to better suit their client’s position. However, by being aware of the issue, the courts have attempted various strategies to minimise the effect. Judge ME Rackemann Judge of the District Court of Queensland and the Planning and Environment Court noted that:

While it would be naive to suggest that expert opinion evidence is never tailored, either consciously or subconsciously, the extent of “adversarial bias” should not be overstated nor the effectiveness of the adversarial system in exposing such bias understated.^[6]

Those who favour this view believe that robust cross examination can uncover bias in an expert witness and that judges are themselves well equipped to assess when bias is present. Justice Kunc of the Supreme Court of NSW went a step further by suggesting that potential bias could be curtailed by briefing experts in ignorance of which party had retained them. For example, rather than the usual letter of instruction stating, ‘*We act for Party X*’, it could begin with ‘*We act for one of the parties in the matter of X v Y*’.

While his Honour acknowledged that in practice it may not always be possible for an expert to remain unaware of which side had briefed them, it was still a potential way to enhance the objectivity of an expert’s report.^[7]

Another proposal has been the appointment by the court of a single expert only, rather than competing experts sourced by opposing parties.^[8] However, this could also eliminate the potential value of competing expert views where, for example, there may be genuine peer disagreement between experts about methodology etc.

Others believe that adversarial bias is relatively uncommon and the incidence of it has been exaggerated.^[9]

Conclusion: Onus on Experts

Ultimately, whatever measures the court can put in place to control or eliminate unconscious bias in expert witnesses, the onus falls upon each expert to be vigilant in the preparation of their report. Experts must maintain objectivity and respond only to the facts and assumptions put to them, and be open to change their opinions in the face of new information rather than allow a desire to win their side of the argument for the team to affect their reasoning.

References

^[1] *The Tracy Peerage* (1843) 10 Cl & F 154 at 191 [8 ER 700 at 715].

^[2] I Freckelton, P Reddy, I Selby ‘Australian Judicial Perspectives on Expert Evidence: An Empirical Study’ Australian Institute of Judicial Administration, Carlton, 1999, cited in:

Sperling J 'Expert Evidence: The Problem of Bias and Other Things' (2000) 4 TJR 429 at 430.

[3] Justice McLellan P, 'Expert Evidence— Aces Up Your Sleeve?', presented at the Industrial Relations Commission of New South Wales Annual Conference on 20 October 2006.

[4] [2011] HCA 21 at [56]-[59].

[5] [2005] NSWSC 149 at [346]-[347].

[6] Judge Rackemann ME, "The Management of Experts", presented at the Judicial Conference of Australia Colloquium 'Innovation in Court Procedures', Alice Springs, Northern Territory, October 2011.

[7] Justice Kunc F, keynote address at the Australian Accountants Lawyers and Directors Conference, Aspen, Colorado, 7 January 2017.

[8] See for example Justice Davies GL, 'Court Appointed Experts', [2005] QUTLawJJI 5; (2005) 5(1) Queensland University of Technology Law and Justice Journal 89.

[9] See for example Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure 2009 Law and Contemporary Problems, vol 72 at p 159.

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