By George Hampel

A case against single experts

Concerns about expert evidence came into sharp focus following the publication of the Australian Judicial Perspective on Expert Evidence and Australian Magistrates' Perspective on Expert Evidence surveys in 1999 and 2001. The report of the findings is available from the Australian Institute of Judicial Administration (AIJA).

Of greatest concern were the expert witnesses' bias and their inability to communicate with judges and juries. There was also concern that barristers did not sufficiently grapple with the real issues where there was a conflict of expert evidence.

Since then, there have been a number of developments and suggestions in an attempt to deal with these problems and thus to shorten litigation and make it less expensive.

Most courts have developed rules that impose obligations on expert witnesses. The emphasis is on their duty to the court and the content of their reports. The reports must acknowledge their understanding and compliance with the rules and disclose the basis for their opinions.

There are rules for compulsory expert witness conferences and joint reports aimed at identifying the real issues. There is also use of concurrent evidence, a process in which all experts are heard at the same time and later examined. Attempts are being made to limit the number of experts which a party can call, particularly in complex civil litigation.

There are, however, some developments which, in my opinion, are inappropriate and likely to be counter-productive. One is the use of single experts, even where the parties agree on the choice of expert.

What would happen when a single expert expresses an opinion with which one of the parties disagrees and believes that other experts will contradict? Would a judge, confronted with an application by the party which does not accept the single expert opinion, refuse to allow another witness to be called? The problems caused by this situation have resulted, in some cases, in the use of 'shadow' experts, a practice prevalent in the USA. This is where the parties engage their own experts to sit in court and advise on the validity of the expert evidence called at the trial.

The problem could produce additional difficulties if the single expert was a court-appointed one. Such experts would be chosen from a pool of the established, conservative members of the professions, often resistant to new developments and approaches in their field. Consider a senior member of the Royal College of Surgeons as a court-appointed single expert in a case where it is contended that alternative medicine provides a sound conclusion to a medical problem.

An example from my own experience as a judge may illustrate a problem raised by the calling of single experts. A civil case had as its main issue whether documents had been forged. Each side called a competent, reputable and experienced handwriting expert, whose views were diametrically opposed. I had to choose between them by evaluating their evidence and the way they approached their task. Think of what would have happened had only one of them been appointed as a single expert?

The court must be at liberty to accept or reject any evidence, including expert evidence. Consider the problems if the court appointed a single expert whose evidence it then rejected.

There may be some cases in some jurisdictions where a single expert may be sufficient to assist the court, particularly if the parties do not take issue with the opinion expressed. In appropriate cases, this would save time and cost.

I agree that every attempt should be made to improve the quality of expert evidence and how it is used by the courts. One important way to do that is through the education and perhaps accreditation of experts. Experts can be taught in the writing of expert reports, presenting of evidence in court and given an understanding of the court's requirements. Basic skills of this kind can be assessed, and experts who achieve these skills can be accredited, to ensure quality of expert of evidence.

However, we must retain the fundamentals of our adversarial system and enable the parties to choose their battleground and support their cases with such evidence as they believe will advance the justice of their cause. ■

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