THE TRIAL OF THE EXPERT

A STUDY OF EXPERT EVIDENCE AND FORENSIC EXPERTS

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The Hon Justice MD Kirby CMG*

A VERY MODERN DILEMMA

The laws of evidence are the outgrowth of jury trial. The remarkable institution of the jury, developed in our legal history from a body with quite different purposes, has profoundly influenced the way litigious contests in our tradition are presented and resolved. Although the number and variety of cases for which jurors are summoned has diminished markedly in recent years, the institution survives to influence the way in which evidence is adduced in our courts. Typically, serious criminal trials still come for resolution before juries of lay people. The determination of disputed questions of fact is their province.

But how is this microcosm of the community, with its imputed commonsense and general knowledge of the world, to resolve conflicts when experts disagree? Indeed, how is any lay tribunal, whatever the other distinctions of its members, to decide between the competing evidence of experts, whose testimony is diametrically opposed? That is the dilemma which is at the heart of this timely book.

The dilemma is not new. But the urgency of finding solutions to it has lately been realised in Australia and, indeed, in other countries which share the common law tradition. A number of notable cases have captured the public imagination. They have occasioned public inquiries. Some of these have uncovered disturbing evidence on the fallibility of 'experts' and the uncertainty of their suggested expertise. Yet we live in a time of rapid scientific and technological change. Science and technology can be harnessed to assist the proof of matters previously left to a commonsense which might be misguided or to opinions which might be idiosyncratic or just plain wrong. As well, science and technology permeate many aspects of society today. The lay juror, indeed the lay judge and tribunal, may simply not understand the language of experts, without undergoing a sudden 'crash course' in the details of his expertise. Yet without such an understanding, the expert's testimony may not be subjected to effective scrutiny. If the expert looks and sounds good in the witness box, he or she may have a disproportionate and undeserved impact on the outcome of the trial. In an age of scientific and technological

advances, how can we harness such dynamic forces to promote the integrity of our trial system, while at the same time preserving its democratic and lay characteristics and protecting its lay decision makers against misleading or erroneous opinions?

More than four hundred years ago a judge in England declared that the approach of the common law to the expert was one of open-mindedness:

> '[I]f matters arise in our laws which concern other sciences and faculties we commonly call for the aid of that science or faculty which it concerns, which is an honourable and commendable thing. For thereby it appears that we do not despise all other sciences but our own, but we approve of them and encourage them . . .'[1]

MERCENARIES OF THE WITNESS BOX

In 1554 it might have been true that the courts adopted a generally encouraging attitude to the expert. But by the beginning of this century, a deep-seated suspicion had set in. Indeed, it was given voice in the 1870s by Sir George Jessel, Master of the Rolls, whose judicial life frequently obliged him to decide between the opinions of competing experts. According to him, the very system of the adversary trial, with its potential strength of submitting testimony to the gruelling scrutiny of cross-examination and conflicting evidence, encouraged the engagement of paid experts. Sadly, but inevitably, these mercenaries of the witness box tended to become locked into the forensic battalions of those who hired them. The expert might begin with integrity. But the whole pressure of the adversary system would, more often than not, force him or her to the limits of expertise. All too often, the litigant's cause would become the expert's cause, as the expert was pitched from familiar surroundings into the contest which is the hallmark of the adversary trial.

> 'Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual that we constantly see persons, instead of considering themselves witnesses, rather considering themselves as the paid agents of the person who employs them.'[2]

The judges of the common law have devised and developed most of the rules of evidence. They have done so, seeking to reconcile a number of competing objectives. These include recognition of the lay nature of the decision-making tribunals before which expert evidence was often taken; acceptance of the ever-expanding realms of suggested expertise and reflection

of the difficulty (particularly in a time of rapid scientific and technological change) of marking out boundaries of expertise that would be universally accepted. The need to make rapid decisions and to bring litigation to finality has also motivated them. Working within the adversary system, few of the judges would have been unmindful of the imperfections of much expert evidence as remarked upon by Sir George Jessel. Few who spend their daily lives in the courts could be ignorant of the powerful impact, in a forensic setting, of an impressive, articulate and experienced expert witness. But the business of the courts and the resolution of disputes require that expert evidence be received. To preserve lay decision-makers, and especially juries, from the abuse of expert testimony, a number of rules were devised. A good part of this book is devoted to scrutiny of those rules and to criticism of them. Suggestions are made for their improvement or abolition.

LIMITS ON THE EXPERT

Despite the encouraging words of 1554, a good deal of law has been developed to mark the bounds of the evidence of experts. They were forbidden from giving evidence of the 'ultimate issue'. This was reserved to the jury or other tribunal of fact. No expert could usurp the function committed to them, under the pretense of offering an expert opinion. Nor could the expert give evidence of matters of common knowledge. Thus attempts to secure expert opinions of current community standards were struck down. Attempts to lead psychiatric evidence on normal reactions of grief and rage were denied. Opinions about the veracity of witnesses were rejected. All of these were considered proper matters for the jury room, not the witness box. Likewise experts were prevented from giving opinions outside the defined area of their expertise. Sometimes this could be very narrowly defined as when, in the celebrated Chamberlain trial, a leading forensic pathologist had certain evidence disallowed on the grounds that it strayed into the field of anatomy.[3]

Another limitation involved confining experts to opinion evidence on the basis of facts which, if disputed, were strictly proved. It is upon this basis that survey evidence has been excluded by courts.[4] Not for the first time did the laws of evidence result in the exclusion from curial decision-making of data which would, without doubt, be used for business and other decisions of great moment.

The courts have also proved resistant to recognising new areas of suggested expertise. In this connection, for example, the book details the

controversies about post-hypnotic evidence, lie detectors and other conflicts between experts as disclosed in cases in the United States and as already presented in courtrooms in Australia.

Through all of these limitations on access to suggested expert testimony, runs the scepticism of the common law. It is an attitude born of the knowledge of the judges of the perils inherent in the use of experts in an adversary system. But it may also be that the suspicion of experts, the denigration of academics and the infatuation with and confidence in the opinion of the layman and the commonsense of the 'common man' are recurring features of English society and of its courts. They find their reflection in the law that has developed to control expert evidence. Such pervading attitudes, reinforced by institutions such as the jury, permeate our inherited law of evidence. And lately, in Australia and elsewhere such attitudes have been further reinforced by a number of notorious and highly publicised cases.

THE FALLIBILITY OF THE EXPERT

Much of this book is devoted to an analysis of some of the notorious cases in which the fallibility of expert testimony has been suggested and, on occasion, demonstrated, to the puzzlement of the mass audience which follows, in the media, superficial reports of the controverss. Woven through the pages of the book are details of a number of newsworthy homicides where a clash of opinionated experts has presented the lay tribunal with a difficult task. The Splatt case in South Australia resulted in a Royal Commission which reviewed the conviction by a jury following a prosecution which had succeeded in a case based almost exclusively on scientific evidence of trace materials linked to the accused.

In the Helen Smith inquest, a Leeds jury and Coroner in England, were confronted with a clash of expert evidence concerning the circumstances of a young woman's death in 1979 in Jeddah, Saudi Arabia. Expert pathologists disagreed utterly as to whether the injuries, as found, could have been caused by or during a fall from a balcony seventy feet high. Other experts contended that the injuries had preceded the fall.

There are other cases recounted in these pages. Every society has its causes celebres. But few cases have so gripped and sustained public attention in Australia as the Chamberlain case. It followed the disappearance in August 1980 at Ayres Rock of a baby, Azaria Chamberlain. Part of the Crown case, which secured the conviction of Mrs Chamberlain and her husband, was exceedingly complex and technical expert evidence relating to blood allegedly found in the Chamberlains' car, some time after their baby daughter's

disappearance. Eminent scientists, all of them of high reputation and ability, disagreed about complex and esoteric questions relevant to the presence of the blood. Concern about this evidence survived unsuccessful appeals against the Chamberlains' convictions to the Full Federal Court and the Full High Court. The publication of this book coincides with the release of Mrs Chamberlain and the ordering of a public inquiry into her conviction. By virtue of prolonged and detailed discussion of the Chamberlain case in the public media, many citizens have been confronted, probably for the first time in their lives, with the quandary which must often be faced in the courtroom. How, at a time when scientific and technological knowledge is exploding, can lay decision-makers, particularly juries, resolve in an accurate and rational way, conflicts between people who have spent a lifetime acquiring the expertise which is in conflict in the courtroom.

THE PATH OF REFORM

I have said that the book is timely. In part this is because of the notorious cases which have highlighted a long standing dilemma, inherent in our institutions of dispute resolution. Whether it is the Smith inquest in Leeds, the Chamberlain case in Alice Springs, the Van Beelen or Splatt cases in Adelaide or the Thomas case in New Zealand, the community is now increasingly aware of the fallibility of the expert and the difficulty which conflicts between experts present to non-expert decision-makers. The book is also timely because, in a number of jurisdictions, stimulated by such cases, law reform and other bodies have developed proposals designed to address the problems which the expert poses for the trial process. One such reform project is that conducted by the Australian Law Reform Commission. Its interim report, proposing reforms of federal laws of evidence in Australia, contains numerous suggestions for reform of the law of evidence governing expert testimony.[5] The author took a leading part in the work which produced this original and notable review of Australia's federal evidence laws. It was out of that project that he conceived the idea of this book. He is therefore able to combine an up-to-date survey of the current law with a comprehensive report on the proposals made in a number of jurisdictions designed to reform that law. By enlivening the text with references to well-known, and in some instances, notorious cases, he is able to illustrate more vividly than a law reform report may do, the need for our system to do better.

The suggestions for the improved handling of conflicting expert testimony reduce, basically, to proposals for institutional change and proposals for changes in procedures. The institutional changes would envisage replacing lay and therefore inexpert tribunals (such as juries, coroners and unaided judges and magistrates) with institutions which import the necessary expertise into

the decision-making process. This may be done by court appointed experts, by 'neutral' expert assessors or by the creation of a specialist jury. It can also be ensured by providing equal access by all parties to a neutral and respected source of expertise. Procedural reforms include suggestions for taking expert evidence in a different mode, so that it can be offered without the interruption of questioning and possibly with spontaneous interaction against conflicting opinions. The adoption of agreed standards in the conduct of scientific tests and other procedural safeguards (including a suggested Bill of Rights in respect of forensic evidence) are among suggested safeguards which are examined in this book. Some of the older safeguards devised by the judges to protect the jury from the usurping expert are criticised. What are needed, according to the author, are new protections to provide effective and real assurance for the integrity of forensic tests and the expert evidence based upon them. And it does appear that the simple protections, devised in earlier, less complex times, must give way to more effective protections involving greater sophistication than the law presently offers.

Some readers will doubtless conclude that we should adhere to the tried and tested rules developed over the centuries by the judges. But even those who urge the retention of jury trial will acknowledge the possible need for improved access to neutral experts. They may countenance the formulation of basic rights to assure greater equality of access to expertise, so that it can be effectively tested. But they will resist notions of the special jury. They will dismiss as a pipe dream the idea of objectively 'neutral' experts. And they will view as inescapable the occasional impact of a dynamic and impressive witness, sometimes dominating the decision-maker and effectively usurping his function.

Other readers will be more concerned about the unreasonableness of expecting complex questions of science and technology to be absorbed and rationally passed upon by a lay decision-maker, juror or otherwise. In that process too many risks of error may lie. The perception of such risks of error will set such readers searching for modified and improved institutions of decision-making and procedures by which better decisions are arrived at.

This book exposes all these controversies concerning expert testimony. Because it refers to a number of well-known and recent cases of high controversy it provides a text which is accessible to the interested lay reader. There is no doubt that the subject matter is one deserving of the closest attention within the legal profession and the general community. For what is at stake is nothing less than the continuance of the jury as it has been operating for centuries, and the adjustment of a legal system eight centuries

old to a world of nuclear physics, informatics and biotechnology. The reconciliation of ancient lay institutions with an age of mature science and technology presents our community with a number of fundamental choices. Enlisting community interest, stirred by a number of recent cases, this book does the service of inviting professional and community participation in the resolution of the dilemmas which it presents.

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FOOTNOTES

* President of the Court of Appeal, Supreme Court of NSW, Sydney. Former Chairman of the Australian Law Reform Commission and Judge of the Federal Court of Australia.

1. Buckley v Rice Thomas (1554) 1 Pl Com 118, 124 (Saunders J).

2. Jessel MR in Lord Abinger v Ashton (1873) 17 LR Eq 358, 373. See Chapter 8.

3. As reported, Canberra Times, 18 October 1982, 8. See Chapter 1.

4. See eg McDonald's System of Australia Pty Ltd v McWilliams Wines Pty Ltd (1979) 28 ALR 236, 251 (FCA); Cf Mobil Oil Corporation v The Registrar of Trade Marks (1983) 51 ALR 735 (SASC). See Chapter 6.

5. Australian Law Reform Commission, Evidence (ALRC 26) (Interim), AGPS, 1985.