PROBLEMS WITH EVIDENCE

SPEECH FOR THE GOVERNMENT LAWYERS' ANNUAL DINNER
NSW PARLIAMENT HOUSE
By the Honourable Justice Peter McClellan
Chief Judge
Land & Environment Court

7 SEPTEMBER 2004

It is now twenty years since the Maralinga Royal Commission into British Nuclear Tests in Australia. I was fortunate to be given the task of counsel assisting the Commission.

One important body of evidence which the Commission received was the accounts by hundreds of service personnel of their experiences at the bomb test sites. There were so many that I could not interview them all myself and the solicitors to the Commission were sent out to collect their statements. Many of these statements were tendered without the witness being called to give oral evidence, although, if the witness asked to be able to talk to the Commission, that request was granted.

Most gave evidence about proximity to an explosion or the tasks they were required to do to check or clean equipment. Many expressed a

belief that the illness which they had contracted was caused by exposure to nuclear radiation.

One sultry afternoon in Brisbane oral evidence was taken from a number of people. Mixed up with the routine evidence, I called a man who emerged from the many people in the public gallery wearing an Hawaiian shirt, dark sunglasses and carrying a plastic bag with some rocks in it. Although the solicitors had already interviewed him I had not previously seen him and had to take his evidence "cold." To say the least, his appearance was odd. After being sworn, he sat down and carefully arranged the rocks in the plastic bag, but did not remove the sunglasses.

The witness said that he had been stationed by the army at Maralinga as a driver. One afternoon his superior had told him to go and get his truck and take it over to stores where it would be loaded with bombs. He was to take the bombs out into the dessert to an identified location where he would be met by an earthmoving machine which would dig a hole for him. He was then to set fire to the bombs. When they had finished burning, the grader would cover the remains.

You can imagine my disquiet. Not only was the courtroom full with at least one hundred people, many Australian and British media organisations were present to report our doings. My concerns that perhaps my staff were playing a joke on me heightened as the witness continued.

He recounted that he did as asked and loaded his Bedford truck with A bombs and then drove off into the dessert to the designated location. There to his amazement, "out of nowhere" over the horizon, an earthmoving machine arrived and proceeded to create a hole. They then off-loaded the bombs and, although using newspaper and matches, he could not get the "damn things" to burn.

Concerned that he had failed, the soldier went back to base and confessed to his commander that although everything else had been fine the bombs would not burn. "You dope", the officer replied "didn't you know you needed water. Out the back of the shed there are some beer bottles - go and fill them up and then go back and throw them at the bombs and you'll be right."

The former soldier solemnly recounted how he retrieved the beer bottles, filled them with water and headed back into the dessert. The

earthmoving man was still there. Together they threw the beer bottles at the bombs which smashed on contact causing a significant conflagration. The hole was filled in and the man returned to normal duties. He told us that he had been troubled ever since about the consequences for his health from these activities but, sworn to secrecy, had not told anyone about them.

Well, as you can imagine, the reaction to the story was one of amused incredulity. The Brisbane Courier Mail, known, of course, for its restrained reporting, went to town filling the complete afternoon front page with the headline "I threw bottles at the A Bomb" followed by a detailed account of the story.

On the previous day Jim McClelland had delivered one of his verbal assaults on the British Government for withholding information from the Commission. During his acerbic speech he included comments on the matrimonial difficulties of Henry VIII. It led to the celebrated Moir cartoon with Queen Victoria progressing into court to tick him off for his impertinence. Not only were we in hot water with the monarchists, we now appeared to be encouraging elements of grand farce.

I shall return to the man with the rocks later.

Some years ago 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 what I believed to be the conventional principles which bind the 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 falling 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.

There has been a good deal of discussion recently about court processes for the gathering of evidence and the making of decisions. The difficulties of identifying who is telling the truth when there are conflicting accounts of events have not diminished. The demeanour of the witness, which is so often the ritual formulation by which credibility is tested, has been suggested to be an unreliable guide. Science has not been able to give us any objective tests universally accepted to be useful in separating the liar from the truthful witness. Are our instincts as to the inherently credible fashioned by experience and learning a truly reliable guide?

Whatever may be the problems of evidence as to the truth of a matter, it is in the area of expert evidence where there has been the most intense discussion and debate and where, notwithstanding the expressed opposition of some and the uncertainty of others, real change is happening. For my part, I believe significant change is inevitable. It comes both as a response to the rapid expansion of our knowledge in all fields of learning together with an increasing community expectation that courts will more effectively manage the litigation process. The public investment in the administration of justice is such that the community is no longer tolerant of dispute resolution conducted by rules which are perceived to favour the clever, articulate or wealthy but may not

ascertain the truth. It is not acceptable for cases to be decided in favour of the party with the best expert witness rather the best expert evidence.

In his final report on Access to Justice, the Master of the Rolls, Lord Woolf said:

> "A large litigation support industry, generating a multi-million pound fee income, has grown up among professions such as accountants, architects and others, and new professions have developed such as accident reconstruction and care experts. This goes against all principles of proportionality and access to justice. In my view, its most damaging effect is that it has created an ethos of what is acceptable which has in turn filtered down to smaller cases. Many potential litigants do not even start litigation because of the advice they are given about cost, and in my view this is as great a social ill as the actual cost of pursuing litigation.
>
> It was to meet these concerns that, in chapter 23 of the interim report, I recommended that the calling of expert evidence should be under the complete control of the court. Within that framework, I argued for a wider use of 'single' or 'neutral' experts who would be jointly selected and instructed by the parties, or, if the parties could not agree on a single expert, appointed by the court. I also put forward a number of other recommendations designed to achieve a more economical use of expert evidence in cases where opposing experts were involved, by narrowing the issues between them as early as possible."

Lord Woolf also said:

> "There is widespread agreement with the criticisms I made in the interim report of the way in which expert evidence is used at present, especially the point that experts sometimes take on the role of partisan advocates instead of neutral fact finders or opinion givers. My detailed proposals on experts, however, have provoked more opposition than any of my other recommendations. Most respondents favour retaining the full-scale adversarial use of expert evidence, and resist proposals for wider use of single experts (whether court-appointed or jointly appointed by the

> parties) and for disclosure of communications between experts and their instructing lawyers."

These remarks and the discussion which followed have stimulated various responses from courts including in Australia. In the Land and Environment Court, the initial response 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 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 problems identified by Lord Woolf will be readily understood by anyone who has practiced to any degree in trials which involve expert evidence. 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.

The Land and Environment Court faces particular difficulties in these areas. 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 have

considerable doubt about the assumption and share the reservations expressed by Justice Davies in his paper "The Reality of Civil Justice Reform: Why we must abandon the essential elements of our system" delivered at the 20th Australian Institute of Judicial Administration Annual conference in Brisbane in July 2002.

As Davies J points out, 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.

The problem is more acute in the Land and Environment Court. 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 or the outcome, 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 to increase the length and cost of hearings.

Recognising these problems the Land and Environment Court has moved to use its rules, which were already in place, to appoint court experts in appropriate cases.

Commencing in March of this year, 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 160 experts have

been appointed under the rules and 53 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 persuaded 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 are not sufficient to obtain any statistically reliable information. However, it would appear that in cases where a court expert has been appointed, many have settled without the need for a hearing and others have taken significantly less time for the hearing to be completed.

In recent weeks I have received reports from members of the Court, practitioners and experts themselves of their observations about 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. This is not surprising when discussions with the experts confirms the pressure which they feel to ensure that the report they produce considers all relevant matters and, most importantly, provides a balanced analysis of the situation. Given our understanding of the problems with expert evidence in the past these comments are not surprising, but, they are a significant confirmation of the need for change in the system.

As I would have expected, 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.

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 relevant

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.

This change in procedure has met with overwhelming support from the experts. They find that they are better able 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. Their expertise is not distorted by the advocate's skill.

There are many other changes which the Court has made to its processes designed to facilitate a cheaper and more efficient resolution of planning disputes. I do not have time to discuss them tonight. 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 to express their views without the distortions that can come from the adversarial process.

I promised to return to the man with the rocks.

Months after that extraordinary afternoon one of my scientific research people came to me in great excitement. Diligently searching the records they had found that the story which the witness had told could be confirmed but for one matter. He was not at Maralinga but was stationed nearby at Woomera where the British were testing prototype casings for the delivery of atomic and hydrogen bombs. Many different configurations were tried and now needed to be destroyed for the British did not want the Russians, or the Americans for that matter, to know what they had been doing.

The water. Well the casings were made from a magnesium compound which, when you added water, would readily ignite.

The man had been telling the truth.

*****