THE ROLE OF THE EXPERT IN MARITIME MATTERS

- AN OUTLINE OF LEGAL AND PRACTICAL CONSIDERATIONS

1. This paper provides a short outline of the key legal and practical considerations concerning the preparation and presentation of expert opinion evidence. The points are of general application and will arise in maritime disputes where experts are instructed, just as they do in many other fields.

2. The general position at common law (now restated in the Evidence Act 2006) is that a statement of opinion is not admissible in a proceeding to prove the truth of what is believed.[1] The reason for this is that witnesses in a case give evidence as to the matters they have experienced, not their beliefs or opinions, and that factual evidence has to be evaluated and a decision made on the legal and factual issues in dispute by the tribunal.

3. However, from the earliest times, the common law recognised that there were technical areas which are outside common knowledge where a tribunal might benefit from the assistance of expert opinion in understanding the matters which it had to evaluate. At common law, the courts admitted expert evidence provided the judge was satisfied that the matters which the expert evidence addressed were outside "*common knowledge*" and expert opinion was required.

> *"…at common law… The opinions of skilled witnesses are admissible whenever the subject is one upon which competency to form an opinion can only be acquired by a course of special study or experience.[2]"*

A classic description of the need for expert evidence is:

> *"… the opinion of witnesses possessing a peculiar skill is admissible whenever the subject matter of enquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it.[3]"*

Maritime matters

4. Maritime disputes often concern technical issues upon which expert opinion evidence will be admitted by the courts. You will all, no doubt, have experiences from your own work.

---

[1] Section 23 Evidence Act 2006
[2] *Folkes v Chadd* (1782) 3 Doug 157
[3] J W Smith's note to *Carter v Boehm*, I Smith LC 7th Ed (1876) p.577 as quoted by Dixon CJ in *Clark v Ryan* (1960) 103 CLR 486 at 491

By way of example only, disputes about the safety of a port to which a ship is ordered by a charterer, the stowage of a vessel, the conduct of a master in a situation such as a grounding, may all require expert opinion evidence on both sides of any dispute as to liability. In criminal matters, allegations such as the dangerous operation of a vessel in contravention of section 65 of the Maritime Transport Act 1994, may well see both the prosecution and the defence call expert evidence as to the way in which the vessel was operated. Similarly, an allegation that a contaminant has been discharged, whether in the Coastal Marine Area or the Exclusive Economic Zone, may involve differing expert scientific opinions concerning the source of the contaminant and any alleged "match" between the contaminant found and the contaminants present on an alleged offending ship.

5. In a case where an expert is instructed, it is vital that both expert and lawyer understand the role of the expert and the legal requirements. A case can founder because an expert or the lawyer instructing the expert does not understand his or her role.

The legal framework

6. The law of evidence in New Zealand has recently been the subject of significant reform in the Evidence Act 2006 ("**EA**"). The EA includes (in sub-part 2, sections 23 to 26) a statement of the law relating to expert evidence. While the provisions do make some change from the established position at common law, in general terms, they state the law as it has been applied by the courts under the common law.

Expert evidence

7. Expert evidence is defined under the Act in terms which reflect the position at common law:

> *"The evidence of an expert based on the specialised knowledge or skill of that expert and includes evidence given in the form of an opinion."* [4]

8. It is for the court to consider whether an expert is properly qualified to give expert evidence and whether the evidence which they will give is within the expert's area of expertise. A court will rule on this if there is a challenge to the evidence. Opinions by non-experts on technical matters are inadmissible.

Opinions by non-experts

9. Non-expert opinion can be given as an exception to the general exclusionary rule where such an opinion "*is necessary to enable the witness to communicate, or the fact-finder to*

[4] EA, section 4

understand, what the witness saw, heard, or otherwise perceived".[5] In general, non-expert opinion is accepted where the statements by a witness are a mixture of fact and inference. A simple example would be an opinion as to whether a car is speeding. A witness may give evidence as to the way in which they saw the car being driven, and be asked to give an opinion as to whether the car was speeding. This kind of non-expert opinion is admitted by the courts. Whether such non-expert opinion will be admitted will be decided on a case by case basis.

Admissibility of expert opinion

Substantial helpfulness

10. Where expert opinion evidence is put forward, section 25 EA sets out new rules for the admissibility of the evidence. For expert evidence to be admitted, the opinion must be that of an expert and it must provide *"substantial help… in understanding other evidence in the proceedings or in ascertaining any fact that is of consequence to the determination of the proceeding".*[6] This "substantial helpfulness" test was seen as restating the position reached at common law in New Zealand. The test effectively involves the court asking whether the evidence has sufficient reliability and worth to provide "substantial help".

Ultimate issue

11. At common law, there was a rule that an expert could not give opinion about the ultimate issue to be determined in the proceeding. This was a way of safeguarding the role of the court. By way of an example, on a strict view of the rule, an expert could give evidence about how a vessel was operated, but not direct his or her evidence to the question whether that operation had amounted to *"dangerous operation"* under section 65 of the MTA. The rule was frequently departed from by the courts or avoided by reframing the terms on which the expert provided an opinion. Under section 25(2) EA, the fact that evidence concerns the "ultimate issue" in a proceeding does not make the expert evidence inadmissible.

12. Section 25(3) provides that "*if an opinion from an expert is based on a fact outside the general body of knowledge that makes up the expertise of the expert, the opinion may be relied on by the fact finder only if that fact is or will be proved or judicially noticed in the proceeding*". This is a statement of the well established at common law requirement that an expert must base his or her opinion on facts which will be or have been proved in the proceeding.

---

[5] EA, section 24
[6] Section 25(1) EA

Role of judge

13. The question whether expert evidence can be admitted is a matter for the judge who will act as a "gatekeeper" on such a question. As noted, the general test under the EA is to require the judge to consider whether evidence will be "s*ubstantially helpful*" in determining issues in the proceeding. The general tendency is for more and more areas of expertise to be opened up. A judge may have to determine whether expert evidence offered in novel areas is truly expert and reliable and "*substantially helpful*". While under the common law the test was whether the matter covered by the opinion was outside "*the common knowledge*" of a judge or jury, this was seen as too restrictive a test in formulating the provisions of the EA. In most cases, however, the replacement of the common law approach with a consideration whether evidence will be "*substantially helpful*" seems unlikely to create a different outcome on admissibility issues.

14. The rule that evidence must be based on proven facts is important and should be noted. The factual basis for any opinion is crucial and has to be proven because, if there is no proven factual basis for the opinion, then it is reduced to mere assertion and can have little or no weight. However, an expert will be permitted to give opinion evidence based on the body of knowledge that is the general body of knowledge in his or her area of expertise without such matters being formally established in evidence. An expert can also provide opinion on assumed facts or on theories or hypotheses that do not require a factual basis. While this kind of evidence may well be admissible on the "s*ubstantial helpfulness*" test, the weight which will be given to the evidence will depend upon the soundness and relevance of the theory and hypotheses used. The approach adopted by an expert will be tested by cross-examination.

15. Overall, it seems unlikely that the restatement of the law in the EA will bring about a significant change of the rules relating to the admissibility of expert opinion evidence. The removal of the bar on giving evidence about the "*ultimate issue*" will mean that experts can frame their opinions in terms of the issue which the court has to address. An expert should, nevertheless, be careful in giving an opinion about the "ultimate issue" in a case, because, ultimately, that is a matter for the court to determine. An expert who strongly asserts opinions on the issue which the court has to decide may do considerable damage to a case, if his or her evidence is successfully undermined by cross-examination in the course of the trial.

The conduct of experts in disputes

16. It is vital that both expert and lawyer understand the dual role of an expert. While an expert will be instructed, briefed and called at a hearing as a witness on behalf of a party to the dispute, his or her primary role is to assist the court in providing expert opinion relevant to the issues in the case. The expert provides expert opinion to assist the party

which instructs him or her, but owes a primary duty to the court. This has important consequences for the instruction of an expert, the preparation of the expert's evidence and the giving of evidence before the court.

17. There are particular court rules for the conduct of experts in both civil and criminal proceedings. In civil proceedings, experts have to conduct themselves in preparing and giving expert evidence in accordance with the applicable rules of court relating to the conduct of experts. If an expert does not comply with the rules of court, even if admitted, the expert evidence is likely to be given little weight.[7]

18. In the High Court, specific rules govern expert evidence.[8] Schedule 4 of the High Court Rules is fundamental and is **attached** to this paper. The obligations set out in Schedule 4 all follow from the nature of the role of an expert. An expert who breaks these rules is likely to damage the case of the party that he or she represents irretrievably. The expert and the lawyer who instructs the expert must be familiar with the rules and what they mean in practice. Schedule 4 provides a check list for the process of preparing and giving expert evidence which can be gone through in the process of preparing the expert evidence. It should be noted that similar requirements apply where an expert gives evidence in criminal proceedings.[9]

19. The amended High Court Rules (at Part 9, sub-part 5, Rule 9.36 to 9.46) restate the earlier High Court Rules in relation to the preparation and calling of expert evidence.

20. The power to appoint a court expert under the High Court Rules should be noted. In earlier times, mercantile law was developed by Lord Mansfield sitting with a jury of commercial assessors. Similarly, in collision cases in the Admiralty jurisdiction in the United Kingdom, a judge will sit with nautical assessors. The closest we may be able to get to this in New Zealand under our Rules is, possibly, the appointment of a court expert who provides a report to the court. Court experts are not appointed very regularly in New Zealand, but, if such an approach is adopted, there will be one expert reporting to the court rather than a battery of experts on both sides.

21. In most cases the parties will instruct their own experts. In my experience, it is vital, if a client is to be properly advised and a case properly prepared, that experts are instructed as early as possible in any dispute. Of course, in many maritime incidents, an expert may be instructed at the outset to obtain information and report on an incident which may lead

---

[7] See, new EA section 26 for the conduct of experts in civil proceedings.
[8] The District Court will apply the same rules by default.
[9] See *R v Hutton,* [2008] NZCA 126 where the principles relating to the conduct of experts are set out.

to litigation. In that situation, the legal advisers need to do all they can to maintain privilege over dealings with the expert.[10]

22. Where an expert is instructed to assist with a dispute, the expert should be instructed in such a way that his or her brief of evidence, and the evidence which will be given at trial, is "*the independent product of the expert uninfluenced as to form or content by the exigencies of litigation*"[11]. If this is not the case, the evidence given is likely to be not only incorrect, but detrimental overall for the case of the party calling the expert. This follows from the role which the court will expect an expert to fulfil which has been outlined above.

23. Just as it is wrong for a lawyer to take over the preparation of an expert's evidence, a lawyer fails in his or her duty to a client if he or she fails to work with the expert to produce their brief of evidence. A combined effort is vital if the lawyer is to understand the expert's evidence and is to be able to make proper use of the expert's knowledge and evidence at trial. The expert should, if possible, be a member of the litigation team, although one with an important independent role.

24. The basic requirements for an expert's brief of evidence are set out in Schedule 4. Perhaps the most important area concerns the questions which the expert is asked to answer in his opinion and the factual material upon which the expert bases the expert opinion. An expert is most vulnerable to attack in cross-examination if all relevant factual information has not been provided to the expert for consideration, or the expert has been asked to make assumptions which can subsequently be seen to be wrong on the facts of the dispute.

The trial process

25. An expert who gives evidence at trial needs to be as well prepared as those who present a party's case. However, the expert must remain, at all times, conscious of the need not to become an advocate for that case. If the lawyers do not remind the expert of this, then the expert must do it (and, perhaps, remind the lawyers of the true nature of the role!).

26. An expert's evidence is no different from the evidence of any other witness and will be subject to cross-examination in the same way. The expert evidence may be accepted in full, or in part, in the same way, or rejected, in full, or in part, like that of any other witness.

27. In criminal cases, an expert will usually give evidence in chief by answering questions from the advocate representing the party which calls the expert.[12] In civil cases, an expert

---

[10] Section 56 EA – requirements for litigation, privilege, section 54 privilege for communications with legal advisers.
[11] *Whitehouse v Jordan* [1981] 1 WLR 246 and 256
[12] Note the new obligations of the defence to disclose expert evidence in advance of trial in the Criminal Disclosure Act 2008.

will usually read a brief of evidence or have a brief of evidence taken as read. In both situations, the expert will be cross-examined by the lawyers for other parties. In many ways this is the "*acid test*" for an expert, and for the lawyer who cross-examines on behalf of a client.

Tips for the expert in trial

- Be well prepared.
- Listen to all the questions all the time, in particular any question from the judge.
- Questions in cross-examination will be put in a closed form – do not agree with propositions which are poorly informed or incorrect.
- Where a concession is appropriate, make it.
- Do not back down unnecessarily. If your position can properly be justified, then answer accordingly.
- Do not put on any kind of a "show" for judge or jury. Keep your evidence as simple as possible.
- Do not become an advocate for the case of the party which instructs you.

For the lawyer

- If you lead evidence in chief from an expert called to support your client's case, make the most of the opportunity to elicit the expert opinion evidence in a clear, logical manner.
- Use the expert instructed by your client intensively, if this is possible, to assist with preparing the cross-examination of the witnesses for the other parties, particularly expert witnesses.
- Examine critically the expertise of an expert called by the other side and the factual basis for any opinion. Isolate the assumptions made and assess whether they are appropriate.
- Prepare succinct questions in each area for cross-examination. Use language precisely.
- Generally, elicit first in any cross-examination the information which is favourable to your client.

- Direct your questions to those particular matters which you consider relevant in undermining the testimony of the expert.

- Keep cross-examination to those matters which are relevant. Keep it as short as is possible.

- Make sure that you put fairly to the expert any contrary expert opinion evidence which you intend to call.

- Do not get involved in an argument with an expert witness on matters on which you are not an expert.

Tips of this kind can only go so far. There is no substitute for actually preparing and conducting the cross-examination of an expert. This is one of the most challenging aspects of an advocate's work.

Concluding comments

28. The rules of evidence under the Evidence Act 2006 are important for all lawyers, whatever their level of experience. The law of evidence is at the centre of legal process and the new legislation should be a good prompt for all to take a refresher course. In the area of expert opinion evidence, the Act has brought some significant changes, but, generally, the approach of the courts to the admissibility and assessment of expert evidence is likely to remain little changed.

29. With the increasing technical nature of many disputes in the maritime field, it seems likely that the use of expert evidence will only increase. For all those who provide expert assistance in maritime matters, or wish to do so in the formal court or arbitration process, an understanding of the independence and impartiality of the role is the most important element. This quality in an expert gives relevant expert opinion evidence its force. An absence of this quality may mean that an expert is seen as a "hired gun" for a party rather than a "true" expert who has the trust and confidence of clients, lawyers and the court.

Paul David

Barrister
Eldon Chambers
Auckland

21 May 2010