

# ADVOCACY

## Cross-examining the expert

**“There is nothing more horrible than the murder of a beautiful theory by a brutal gang of facts”**

La Rochefoucauld (1747 – 1827)

One of the great challenges of advocacy is the cross-examination of an expert witness in relation to a matter arising in his or her field. As with all other areas of successful advocacy preparation is the key.

When dealing with expert witnesses you have available to you advantages that are not always present in relation to other witnesses. In most (if not all) cases you will have received in advance of the trial details of the basis upon which expertise is claimed by the witness and you will also have a report or reports detailing the evidence that is proposed to be led from the witness. The claims to expertise will normally be in the form of detailed curriculum vitae. The report of the expert will usually set out the information made available to the expert, followed by a description of his or her reasoning process and then the conclusions reached as to relevant matters. With this information available you are in a position to thoroughly prepare your cross-examination.

To my mind the most efficient method of preparing for cross-examination of an expert witness is with the assistance of your own independent expert. That person should be sufficiently qualified and experienced to enable you to be sufficiently informed of, and schooled in, the matters in relation to which evidence will be given. You should sit down with such a person and work your way through the field in relation to which expert testimony is to be called. By the time you get to your feet for the purposes of cross-examination you should be, so far as this be possible, sufficiently informed as to the field, and knowledgeable of the issues arising, as to be on an equal footing with the expert

who is to be cross-examined. You will achieve this status by exhaustive preparation with the assistance of your own expert and by reading relevant texts, expert papers and other relevant writings in relation to the matter.

No matter how well prepared you are it will always be a difficult undertaking to match wits with an expert. You must therefore control the cross-examination and limit yourself and the witness to those areas where the evidence of the expert can be successfully challenged.

In most cases there will be four areas in which you will concentrate your efforts at preparation. The first of those will be the acceptance or rejection of the claim to expertise. In many cases it will be obvious that the person concerned is an expert and you can readily move on to the next area of consideration. However in some matters there may be doubt. Whilst a witness may have an impressive academic CV, this does not mean that he or she has sufficient relevant experience in the particular area in which opinion evidence is to be given to qualify as an expert. You should carefully examine the claimed expertise before making any concession that opinion evidence can be expressed.

Once you are satisfied that the witness is an expert then you need to look at other areas of potential challenge. One fruitful area is the information upon which the expert has based his or her opinion. In other words what the expert took to be the facts of the case. In many cases you will find that the opinion of an expert will be uncontentious. Rather it will be the material upon which the opinion is based that will be the source of contention. In nearly every case the expert will be informed as to the factual basis upon which his or her testimony is to be given. This information may be obtained from a letter of instruction from solicitors, from an inspection of the item or area concerned coupled with explanations provided by others



*Hon Justice Riley*

at the scene, by information provided by a plaintiff or a representative of the plaintiff direct to the expert and so on. You should closely examine the basis upon which the expert has proceeded in order to draw his or her conclusions.

No matter how eminent he or she may be, the opinion of the expert will be no better than the material upon which that opinion is based. You should therefore pay close attention to that material in order to consider the prospect that it may be undermined. This will involve a consideration of what has and has not been proved in the course of the hearing. Has the expert been invited to assume matters which are in contention or which cannot be established? In medical matters has a complete history been provided to the expert? Are there matters that have come out in the course of cross-examination of which the expert was unaware at the time of reaching his or her conclusions?

The next area worthy of consideration is the reasoning process of the expert. Having accepted the factual substratum the expert then proceeds by various processes to reach an opinion. In this area it is likely to be essential for you to have assistance in determining whether that has been a legitimate process or whether some flaw can be identified. Even if no flaw can be identified or demonstrated it may be that concessions can be obtained from the witness to the effect that other approaches to the questions arising are open and may lead to differing results. The witness may only have addressed his or her pet theory. You may, by emphasising alternatives, significantly reduce the damage that the initial opinion of the expert would have caused to the case for your client.

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This approach to the cross-examination also applies to the formulation of the conclusions reached by the expert. It may be that different conclusions can be reached from the same facts and thought processes. Ultimately it will be a matter for the tribunal of fact as to what opinion is accepted. The tribunal is not bound to accept expert evidence and it may accept or reject the whole or part of that evidence in the same way as evidence of other witnesses.

It is useful to remember that expert witnesses are a special class of witness. Generally speaking they are independent of the parties and they do not have a vested interest in the outcome of the proceedings. If they are independent in their thinking they may be of use to you in obtaining evidence which assists your case. There may be a number of matters that you would put to the witness in order to obtain concessions that may assist your case. Obviously if you seek to use the witness in this way you will do so at an early time in the cross-examination and before you make any challenge to the expertise of the witness or the opinion of the witness. You would undertake such a task by approaching the expert "as an ally who wishes, with you, to seek the truth".<sup>1</sup>

It will be a rare circumstance in which you would ever aggressively attack an expert witness. Given that such witnesses are supposedly independent and expert there will be little opportunity to suggest that the witness is untruthful or misleading or guilty of other similar shortcomings. If made, an attack of that kind is likely to lead to feelings of sympathy for the witness. It is far better to adopt a methodical and measured approach to the cross-examination in most cases. Such an approach will be directed to demonstrating that the witness was not fully informed by those who engaged him, or was provided with misleading information, or adopted a flawed approach or did not consider or adequately consider alternatives.

<sup>1</sup> Evidence and Advocacy, W A N Wells p188

## OBITUARY

# VALE MICHAEL SPARGO

Michael passed away unexpectedly on 25 May 2000. He was 39 years old.

During his relatively short and distinguished legal career (graduated when 29 years old) Michael established a reputation for fairness, honesty, modesty, and clarity of thought. He was also a fine communicator.

It goes without saying that a man possessed of all these attributes was a good lawyer, but to his eternal credit Michael had a life outside the law. His priorities were such that nothing – not even the law – stood between him and his time with his family. He was a very capable mediator. And most importantly he was a beautiful singer –



Michael Spargo, far left, joined university staff at the Law Careers Expo during Law Week 2000.

the clarity and quality of Michael Spargo's baritone High Priest in "Jesus Christ Superstar" (Darwin Entertainment Center 1999) was truly inspiring.

Michael will be fondly remembered and our thoughts are with his wife Chris and two children Josh and Jessica.

Tony Fitzgerald

## DARWIN: AIAL DRY SEASON SEMINAR SERIES

The NT Chapter of the Australian Institute of Administrative Law (AIAL) will be hosting speakers on a range of topics as part of their Dry Season Seminar Series sponsored by Clayton Utz.

Mr Bill Blick, Inspector General of Intelligence and Security started the series with a presentation titled: *The role and functions of the Inspector General* held in Darwin on 22 June 2000.

Mr Blick discussed the right of review of a refugee claimant after an adverse security assessment and the legality and propriety of information exchange between ASIO and other government departments.

Justice Von Doussa of the Federal Court of Australia will present the second seminar titled: *Natural justice in federal administrative law: some recent developments* to be held at the Darwin Entertainment Centre on Friday 7 July from 4.00 to 6.00pm.

Justice Von Doussa will examine the role of legitimate expectation (a possible extension of the scope of procedural fairness beyond the standard formulation), the content of procedural rights in investigative and disciplinary procedures and *Wednesbury* unreasonableness.

Practitioners wishing to attend the seminar should RSVP by Friday 30 June to Marian Trobbiana on 8999 1978.

The final seminar in the trilogy will be presented by Stipendiary Magistrate Mr John Lowndes. Titled: *The appropriateness of using magistrates for tribunal hearing*, he will discuss the new Mental Health Tribunal which he heads.

Mr Lowndes will speak in the Jury Muster Room, Supreme Court, Darwin on Thursday 20 July 2000 from 5.00 to 6.30pm. RSVP by Monday 10 July to Marian Trobbiana on 8999 1978.