

EXPERT EVIDENCE – A VIEW FROM THE BENCH

The Honourable Justice J D Henry
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Introduction

- [1] There is a conundrum inherent in the law’s use of expert evidence. Such evidence is adduced because its subject matter is beyond the common knowledge and experience of judges or juries. Yet where expert witnesses disagree it is for the judge or jury, not for an expert, to decide the issue. Judge Learned Hand described this conundrum long ago:

“The trouble with all this is that it is setting the jury to decide, where doctors disagree...but how can the jury judge between two statements each founded upon an experience confessedly foreign in kind to their own? It is just because they are incompetent for such a task that the expert is necessary at all.”¹

- [2] The theoretical answer to the conundrum lies in the premise upon which the Court receives expert evidence: the evidence will allow the Court to understand matters otherwise beyond its knowledge and experience so that the Court may reach a properly informed conclusion. I say that is a theoretical answer because it assumes expert evidence will be presented in a manner which its audience can comprehend. In practice, I regret to say, expert evidence is not always presented in such a manner. This heralds my theme today: that litigators place insufficient priority on expert evidence being prepared and presented in a form which its intended audience can comprehend and assess.
- [3] That theme crystallised when I came to give close thought to my allotted topic for today, *Expert Evidence – A View from the Bench*. In first considering the topic I was

¹ Learned Hand, *Historical and Practical Considerations regarding Expert Testimony* (1900), pp 15-16 (cited in Freckelton & Ors, *Expert Evidence in Criminal Jury Trials* (2016), p 3).

conscious the last 20 years of litigation in Australia have been replete with changes in procedures relating to expert evidence. Codes of conduct, practice directions, court appointed experts, single experts, joint reports, concurrent evidence – the diversity of procedural change has been significant. Focussing more closely though on my view of expert evidence “from the Bench”, that view is of how litigators actually present their expert evidence before me in the applications and trials in the civil and criminal jurisdictions over which I preside.

- [4] My view is not the view of a participant; it is the view of an audience member. It is, admittedly, a view influenced by some knowledge of what the effective presentation of evidence should involve. What though of an audience member, an observer, without that background? What, I asked myself, might a regular objective observer, uninformed about the effective presentation of evidence, make of what is now seen in our Courts when expert evidence is adduced? What rules of expert evidence might such an observer think litigators operate by?
- [5] Not knowing whether what is being done is done skilfully, such an observer would draw undiscerningly upon what is actually seen day in and day out in Court when expert evidence is presented. If asked to write down the top dozen rules of expert evidence based on those observations, I conclude the uninformed observer would come up with the following rules:

The uninformed observers’ rules of expert evidence

1. Expert evidence must not be comprehensible to lay persons.
2. You do not need to understand an expert’s evidence in order to lead, cross-examine or address on it.

3. Confer with your expert as little and as late as possible or, preferably, not at all.
4. The expert witness can draft a report properly addressing all relevant matters without any guidance as to its form or content from lawyers.
5. Do not allow your expert to have up to date information about the case before giving evidence.
6. The opening must not in any way be used as a device to help explain the expert evidence to be called.
7. The court should ideally never see the expert give evidence but, if it does, make sure it is only by video link and never in person.
8. Pictures, diagrams, graphs or other visual aids should not be used in presenting expert evidence but, if they are, try to avoid them being legible, in sufficient copies or accessible to the Judge or jury when the witness explains them.
9. Assume all technology intended to be relied upon when the expert gives evidence will work without any need for testing in advance.
10. The more impressive and relevant your expert's CV, the less you should highlight it.
11. Judges are impressed by the objectivity of expert witnesses whose main occupational pastime is preparing reports and giving evidence, particularly if it is always for the same side.
12. The foundational reasoning for the expert's opinion is sacred. It must never be the subject of elaboration or testing by lawyers' questions.

[6] You will hopefully appreciate these "rules" are not aspirational. They reflect an array of common shortcomings in the way litigators approach the preparation and presentation of the evidence of expert witnesses.

[7] It is not without irony that I have formulated these critical rules from my view as a Judge. You see many of the procedural changes regarding expert evidence of the last two decades were Judge led. Yet I suspect the abundance of procedural change has

unwittingly diverted practitioners from the elementary reality that an expert witness is still just a witness. Expert witnesses are not some separate species for whom core considerations relevant to the effective preparation, presentation and testing of a witness's evidence ought be discarded. As with any witness, they benefit from guidance in the manner by which they commit their account to writing. As with any witness their written account may contain error or omit relevant detail. As with any witness, both they and the party calling them will benefit from a pre-trial conference. As with any witness, they are vulnerable to the vagaries of human memory and reluctance to concede error once in the witness box. As with any witness their evidence may be biased. As with any witness their evidence may mislead if not properly tested. As with any witness their evidence will be unpersuasive if it is not properly understood.

- [8] These rules are in truth reflections of some of the worst mistakes courts see in the way expert evidence is prepared and led. I focus on them today so that you might avoid them and thus become more expert in your field of litigation. This theme was well articulated by the mathematical physicist Werner Heisenberg:

“An expert is someone who knows some of the worst mistakes that can be made in his subject and who manages to avoid them.”

- [9] With those observations in mind let us examine each of the uninformed observer's rules of expert evidence more closely.

Rule 1: Expert evidence must not be comprehensible to lay persons.

- [10] This rule is an overarching one, informing all of the other rules. It reflects the reality that expert evidence is seldom presented in a manner that is easily comprehended by laypersons. In this context laypersons include not only members of juries but also judges. While judges are hopefully of above average intelligence and while their

experience as practising lawyers and judges may have exposed them to a somewhat greater degree of knowledge of a particular field of expertise than the average layperson, that background does not make them experts. The safer course must always be to assume that your Judge does not have more than the average layperson's knowledge of the field of expertise in question. You should present the evidence accordingly.

[11] As I explained at the outset, for a Court to reach its own properly informed conclusion about the expert evidence before it, it is fundamental that the Court must be able to understand that evidence. From the point of view of the informed observer this rule should be more correctly stated as: "*Rule 1: Expert evidence must be comprehensible to lay persons.*"

[12] A parting word of caution about this rule: there is invariably a tendency for litigators to shift blame to the expert when it becomes apparent that an expert's evidence has been presented in a way that is incomprehensible. While expert witnesses may be experts in their field, it does not follow that they are experts at giving evidence. The law's evidentiary process is your field of expertise. It is the job of the litigation lawyer, trained in the rules of evidence and the art of effectively presenting it, to prepare the presentation of the expert's evidence with the expert and properly control the ensuing presentation, so as to ensure that it is comprehensible to laypersons.

Rule 2: You do not need to understand an expert's evidence in order to lead, cross-examine or address on it.

[13] It sometimes appears from the questions lawyers ask of experts and from what they say in their submissions to the Court that lawyers do not fully understand the expert

evidence. If you do not understand the evidence you are presenting, what possible hope can there be that the Judge or jury will understand it?

[14] The rule recast from the point of view of an informed observer should of course be: *“Rule 2: You must understand an expert’s evidence in order to lead, cross-examine or address on it.”*

[15] In a 2008 article published in the Australian Journal of Forensic Sciences, *Australian Forensic Scientists: A View from the Witness Box*,² Rhonda Wheate reported upon an Australia-wide survey of 132 forensic experts which investigated the views of forensic scientists on the process of collecting evidence, dealing with legal counsel before and during the legal proceedings, and their interaction with the judge, jury and other forensic experts. Participants in the Wheate survey complained their evidence was sometimes made to appear weak because the party calling them did not ask appropriate questions or re-examine in such a way that the appropriateness and reliability of the method supporting the opinion was communicated to the Court. Conversely, there was also a concern that scientific evidence sometimes appeared to be stronger than it in fact was because lawyers did not ask or explore abnormal or striking results or were unaware of how the results could be consistent with a different opinion. Participants perceived the failure to ask the right questions so as to ensure that evidence was not left incomplete or was misunderstood was a product of a lack of proper understanding.

[16] A commonly cited example of lawyers’ failure to understand the area of expertise they are dealing with is their poor knowledge of the meaning of terminology used in particular forensic disciplines. Participants in the Wheate survey expressed such concern. Wheate correctly observed:

² Australian Journal of Forensic Sciences Volume 40 No 2, p 123.

“Without the tools of language to properly describe what the expert has found, lawyers are naturally incapable of asking meaningful questions, truly comprehending the expert’s answers, or rebutting mistakes made by the opposing side. While experts may endeavour to minimise the jargon they use in Court, it is inevitable and sometimes necessary for particular terms to be used to describe particular things, so that the results are not misunderstood or misrepresented. In recognition of this, it is imperative for lawyers to have an understanding of the methodology and terminology used in forensic disciplines; a knowledge which cannot be imparted solely by reading an expert’s report...”³

- [17] As to how you may properly educate yourself in terminology and more generally in the field of expertise with which you are dealing, an obvious starting point is to use the expert you are calling as a source of learning. This heralds our third rule.

Rule 3: Confer with your expert as little and as late as possible or, preferably, not at all.

- [18] It is impossible to be entirely sure in my view from the Bench what, if any, conferencing has occurred with a party’s expert. However, there are often tell-tale signs of inadequate conferencing, apparent in the form and content of expert reports and the questions asked of experts in court.
- [19] Participants in the Wheate survey were particularly critical of lawyers for either not conferring at all in advance of trial with their expert witness or not conferring more thoroughly. The participants made the point that a proper pre-trial conference had utility not only as a matter of professional courtesy and in better informing the lawyer involved, it also provides an opportunity for experts to discuss how their evidence will be presented in Court.
- [20] We as lawyers, when dealing with expert witnesses, can sometimes be in awe of their expertise and knowledge, yet we forget that when experts come to Court, particularly

³ Ibid p 128.

with the knowledge their reliability is likely to be questioned in cross-examination, they are the ones who are in awe, they are the fish out of water. They will be less apprehensive, better functioning witnesses if they have been informed in advance about matters of process such as the concept of taking an oath or affirmation, refreshing memory before testifying, bringing along and referring to contemporaneous notes to refresh memory while testifying, the use of their report as evidence in chief, the notion of only answering the question asked of them, the rules of cross-examination and re-examination, and so on.

- [21] The question of how expert evidence should be presented is an important topic for pre-trial discussion and planning in conference with the expert. It is useful as part of that process to discuss what aids to explanation, including visual aids and analogies drawn from everyday life, might be used to make the expert's evidence more comprehensible to its lay audience.
- [22] Planning the presentation of the expert's evidence in collaboration with the expert will assist in you in identifying the right questions to ask in order for the expert's evidence to be properly explained or tested as the case may be. The failure to properly confer with witnesses was identified by participants in the Wheate survey as a major reason behind poor questioning by lawyers, not only in chief but also in cross-examination and re-examination. The confusion participants identified as occurring during cross-examination was seen as flowing not only from the inherent complexity of the evidence, but also from the inability of poorly-prepared lawyers to adequately lead the evidence, address difficult issues and set a firm foundation in the mind of the jury.

Participants were also frustrated by the inability of the party calling them to recover the initiative in re-examination.⁴

[23] Conferring with your expert ought not be reserved merely for the eve of trial. It should also occur in the early stages of the litigation. As you come to better understand the expert evidence by conferring with your expert early and using the expert as your teacher, you may also realise there are more issues to be addressed by the expert, resulting in an addendum or supplementary report or statement being requested, followed by another conference. Timely conferencing will also allow you to arrive at a better understanding of your opponent's expert evidence; its strengths, its weaknesses. An understanding of the expert issues in the case is essential not only to your eventual preparation for trial but also to your earlier work, for instance in properly pleading your case or pursuing a just and timely settlement.

[24] As you will appreciate then the rule as properly formulated should be: "*Rule 3: Confer with your expert as often as is needed to properly understand and prepare your case and to properly present the expert's evidence.*"

[25] Relevantly to this topic I remind you the rule that there is no property in a witness applies to all witnesses, including experts. The advantage likely to accrue to a potential cross-examiner in conferring in advance of trial with an opponent's expert is self-evident. Surprisingly, at least in my time at the Bar, it was very rare for my side's expert to have been contacted by the other side's lawyers with a view to them conferring with the witness. It appears from a study of lawyers and forensic scientists by Leone Howes of the Tasmanian Institute of Law Enforcement Studies, reported in her 2015 article, *Towards coherent co-presentation of expert evidence in trials:*

⁴ Ibid p 133.

Experiences of communication between forensic scientists and legal practitioners,⁵ that such conferral continues to be the exception. Ironically my experience was, subject to accommodating their availability, experts seemed more willing than lay witnesses to participate in conferences with lawyers acting for an opposing side. I suspect that was because most experts pride themselves on appearing objective rather than being seen as taking sides.

Rule 4: The expert witness can draft a report properly addressing all relevant matters without any guidance as to its form or content from lawyers.

[26] The lack of guidance given by lawyers to their expert witnesses is obvious from the content of many expert reports. Aside from laxity the explanation may be that some lawyers are unduly cautious about being seen to influence the expert as to what opinion should or should not be expressed.

[27] A superficial reading of cases such as *Phosphate Co-operative Co of Australia Pty Ltd v Shears (No 3)*⁶ may explain that undue caution. In that matter Brooking J concluded the expert's report did not contain a genuine opinion but rather was the product of an exercise carried out for the purpose of arriving at a desired result. His Honour was damning of an exercise in which the expert was engaged before any questions were identified for the expert to provide an opinion on. However that engagement involved the compromising of the expert's independence from the outset by involving the expert in a meeting involving the client and its lawyers in which their forensic aims were discussed.

[28] As the *Phosphate Co-operative* case demonstrates, it is important that your dealings with an expert do not seek to influence the expert's opinions. However few experts

⁵ (2015) 39 Crim LJ 252, 259-260.

⁶ [1989] VR 665, 686.

will be aware of the legal and ethical principles that should be complied with in the formulation of an expert report. If experts are left to their own devices without any, or any proper, guidance the prospect of them providing a useful report containing admissible and relevant evidence is remote.

[29] It is not improper, indeed it is desirable, to assist an expert with information about the form and content of expert reports. I speak of “content” not in the sense of what the ultimate opinion should be but in the sense discussed in Heydon JA’s seminal judgment in *Makita (Australia) Pty Ltd v Sprowles*,⁷ namely content articulating the foundation for the opinion, such as the facts, the assumed facts and the expertise and reasoning applied. It is also desirable at the outset that the expert be instructed to avoid incorporating jargon or technical terms without explanation.

[30] Lawyers should have nothing to fear from including advice about such content matters in the letter of instruction to an expert. They are of neutral import so far as issues of objectivity or bias are concerned, but are of critical import in ensuring the report satisfactorily meets the law’s expectations of an expert’s report and evidence. A little care at the outset in respect of your expectations of such matters will, in the long run, result in significant saving because you minimise the potential need for addendum or supplementary reports tending to matters that ought to have been tended to correctly and fully in the original report. Your guidance will also hopefully contribute to the generation of a comprehensible and thus potentially more persuasive report.

⁷ (2001) 52 NSWLR 705, 743-744 [85]; approved in *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, 604.

- [31] The rule properly stated should be: “*Rule 4: The lawyer should provide sufficient guidance to the expert witness to ensure the expert’s report is in proper form and that its content addresses all relevant matters.*”

Rule 5: Do not allow your expert to have up to date information about the case before giving evidence.

- [32] An elementary example of this rule is a personal injuries case in which the experts are divided as to whether or not the plaintiff’s condition is improving. The slow pace of litigation may mean that in the lead up to trial the plaintiff’s expert has not examined the plaintiff in over a year. Unfortunately arrangements are not always made for a re-examination to occur shortly before trial and an opinion that a plaintiff is unlikely to improve is thereby rendered less persuasive than it might have been.
- [33] Another common example of experts not having up-to-date information before giving evidence involves the evidence relevant to the foundation for their opinion that has actually been given at trial. The practice of having an expert sit in Court and observe the evidence unfold before being called as a witness is considerably rarer than it once was. Doubtless it would be a more cost efficient option to provide an expert with a transcript of what has transpired in the trial prior to the expert giving evidence, but again it is apparent from the answers given by experts at trial that the provision of such information is not common.
- [34] It is well enough known amongst students of cross-examination that it is easier to undermine an expert witness by reference to the facts, of which the cross-examiner is the master, rather than by reference to the field of expertise, of which the witness is the master. It is fundamental that the evidence establishes the foundational facts upon which an expert’s opinion is based. If there is any variation between those facts as

initially understood by the witness in first articulating the opinion and as ultimately given at trial, the expert needs to be aware of that fact in advance in order to properly consider what, if any, bearing that has upon the opinion previously expressed. Misapprehension of facts is the expert's Achilles heel. You will do your expert and your case a disservice if you do not ensure that your expert is forewarned of the relevant evidence actually given at trial and, more particularly, of any variation in it as compared to the facts the expert was asked to assume for the purpose of giving the opinion.

- [35] The rule correctly stated should be: "*Rule 5: Ensure your expert has up-to-date information about the case before giving evidence.*"

Rule 6: The opening must not in any way be used as a device to help explain the expert evidence to be called.

- [36] The quality of openings generally is patchy. It is difficult to avoid the impression sometimes that little preparation time is invested in preparing the opening and that little priority is given to it as a tool of persuasion. Yet it is difficult to imagine a field where the opening could be of more utility and persuasion than expert evidence. The formidable challenge in ensuring that expert evidence is comprehended by the Court can be considerably eased by opening the evidence in a manner which explains it in lay terms.

- [37] The rule correctly stated is: "*Rule 6: The opening should be used as a device to help explain the expert evidence to be called.*"

Rule 7: The court should ideally never see the expert give evidence but, if it does, make sure it is only by video link and never in person.

- [38] The profession's zombie like drift into expert witnesses giving evidence only by video-link, or worse still only by telephone, rather than giving evidence in person at Court is an anathema to the effective presentation of expert evidence. That is not merely because technical problems with connections and audio and visual quality abound. It is because of what is lost in comprehensibility and persuasion.
- [39] Lest it be overlooked, the easiest witness to see is the witness who is present in person. The easiest witness to hear is the witness who is present in person. The easiest witness to ask questions of is the witness who is present in person. The easiest way for a witness to explain a physical exhibit or use a visual aid or to demonstrate is for the witness to be present in person. In short, the full armoury of the persuasive tools of your trade in presenting evidence effectively is only present when your witness is present in person.
- [40] Yes, the physical presence of the expert will be more important in some cases than others. Yes, the professional convenience of experts will sometimes trump all other considerations. However it is obvious from the ubiquity of use of video link and telephone for giving expert evidence that its use is undiscerning. Insufficient consideration is given to considerations favouring physical attendance, including assisting the court's proper understanding and assessment of the evidence.
- [41] The rule correctly stated should be: "*Rule 7: It is preferable that expert evidence be given by the expert in attendance at Court but, if it must be done remotely, video link is preferable to telephone.*"

Rule 8: Pictures, diagrams, graphs or other visual aids should not be used in presenting expert evidence but, if they are, try to avoid them being legible, in sufficient copies or accessible to the Judge or jury when the witness explains them.

[42] Many participants in the Wheate survey suggested that permitting experts to use more visual aids would improve the quality of the presentation of expert evidence to laypersons.⁸ That is undoubtedly correct. Visual aids invariably assist in the comprehensibility and persuasiveness of expert evidence. Unfortunately, in my view from the bench, they are under utilised. Further, when they are used and are explained by the witness, insufficient consideration is given to ensuring they are then legible, in sufficient copies and accessible to the Judge or jury.

[43] The reason is almost certainly a lack of planning and preparation for the presentation of the expert's evidence, as already discussed.

[44] The rule correctly stated should be: "*Rule 8: Pictures, diagrams, graphs or other visual aids should be used appropriately to present and enhance the understanding of expert evidence.*"

Rule 9: Assume all technology intended to be relied upon when the expert gives evidence will work without any need for testing in advance.

[45] Parties intending to rely upon the use of technology in the presentation of expert evidence often encounter problems with that technology once underway with the evidence. It is readily apparent that most of those problems can be avoided if parties would only double-check that the technology is working and that they are able to operate it before the Judge comes into Court.

[46] The rule correctly stated should be: "*Rule 9: Test in advance any technology you intend to rely on during the expert's evidence.*"

⁸ Supra p 136.

Rule 10: The more impressive and relevant your expert's CV, the less you should highlight it.

[47] Parties calling a particularly well-qualified expert, with expertise of greater than ordinary relevance to the case, often overlook highlighting the expert's qualifications and expertise. It appears satisfaction at the merely neutral development that there is no challenge to expertise diverts attention from extracting positive persuasive value out of the witness's expert qualifications and experience.

[48] Participants in the Wheate survey perceived the practice of an opposing side stipulating or agreeing to accept the witness as an expert and, in turn, the party calling the witness not exploring the witness's credentials in Court, denies or at least blunts the opportunity for the court to properly grasp the true force of the expert's experience and knowledge.

[49] The rule correctly stated should be: "*Rule 10: The more impressive and relevant your expert's CV, the more you should highlight it.*"

[50] In connection with this topic it is noteworthy that Wheate survey participants also expressed concern at lawyers' lack of familiarity with experts' qualifications, training, experience and accreditation. They considered this resulted in experts being called upon to answer questions outside their field of expertise and in lawyers misunderstanding the witness's expertise, asking inappropriate questions and failing to ask appropriate ones.

Rule 11: Judges are impressed by the objectivity of expert witnesses whose main occupational pastime is preparing reports and giving evidence, particularly if it is always for the same side.

[51] When expert evidence was identified by the Woolf report as one of the major problems facing the civil justice system in the United Kingdom Lord Woolf MR decried the use

of experts as “hired guns”, “hangers-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients”.⁹ Such experts are occasionally still used. Often the provision of expert reports and testimony by such witnesses is their main occupational pastime

[52] Beware of such experts and more generally beware of the overuse of the same expert. The expert that is easily swayed by the lawyer retaining him or her has rightly been described as “a cross-examiner’s dream and a decision-maker’s irrelevance”.¹⁰

[53] Remarkably, some legal practitioners fail to realise that if experts become typecast amongst those in practice, then they most certainly will have developed the same reputation amongst the Bench. It becomes readily apparent to the Bench over time that such experts are engaged, not because of their reputation and experience, but because their views are known to match the needs of legal representatives. Such experts may tick the box of notionally providing the expert evidence one side is looking for to live on in the battle, but their evidence is most unlikely to prove persuasive in the long run.

[54] The rule correctly stated should be: “*Rule 11: Judges are sceptical about the objectivity of expert witnesses whose main occupational pastime is preparing reports and giving evidence, particularly when it is always for the same side.*”

Rule 12: The foundational reasoning for the expert’s opinion is sacred. It must never be the subject of elaboration or testing by lawyers’ questions.

[55] The expert’s statement of reasoning for the foundation of the opinion given is fundamental to the admissibility of the expert’s evidence.¹¹ This requirement allows

⁹ Lord Woolf MR, Access to Justice Interim Report to the Lord Chancellor on *The Civil Justice System in England and Wales*, HMSO, London 1995, p 183.

¹⁰ P Wass SC, *Expert Evidence Since Makita*, Salvos Legal-March Lecture Series, 12 March 2015, p 10.

¹¹ *Dasreef Pty Ltd v Hawchar* [2011] CLR 588.

the parties to litigation to properly explain in evidence-in-chief and test in cross-examination the true force of the expert's opinion.

[56] Unfortunately litigants often seem to avoid exploring or testing an expert's foundational reasoning, as if it is a no-go zone. This may, in part, be due to the view that lawyers are on more sure footing when dealing with the facts upon which an opinion is based, than with the expert reasoning behind the opinion.

[57] If the foundational reasoning for the expert's opinion is built on a solid factual base and on well-established professional expertise then that should be made apparent in evidence-in-chief or in the report serving as evidence-in-chief. Conversely if it lacks such reasoning that should be revealed by proper questioning in cross-examination.

[58] I remind you of the conundrum I identified at the outset: the difficulty in laypersons deciding which expert opinion is to be preferred. If that decision is to turn, as it should, upon the state of the evidence, then the force of the foundational reasoning for each expert's opinion exposed in evidence will be pivotal to the decision. If that reasoning is compelling, then it is important that it be elaborated upon and explained properly. If it is not, then it is equally important its weaknesses are demonstrated through cross-examination.

[59] The rule properly formulated should be: "*Rule 12: It is imperative that the foundational reasoning for the expert's opinion be properly explained and tested.*"

[60] A parting note on this rule: where the process giving rise to the opinion is supported by published or peer reviewed opinion, it will be all the more compelling. When expert reports and opinions advanced in Court are supplemented by annexed or exhibited

journal articles or other professional publications on point, such material invariably makes the opinion it supports both more comprehensible and more credible.

Conclusion

[61] I have today endeavoured to highlight a lack of priority given by some litigators to the presentation of expert evidence that can be properly comprehended and assessed by its audience, the judge or jury.

[62] Thankfully it is not a shortcoming of all litigators. In my view from the bench I sometimes see litigators who are a model of professional focus and skill in effectively presenting expert evidence. A hallmark of their method, which I commend to all, is that they are not diverted from the elementary reality that an expert witness is still just a witness, a witness to whom our profession's long established methods of effectively preparing, presenting and testing evidence still apply.