RESEARCH ARTICLE

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THE ROLE OF EXPERT EVIDENCE IN CIVIL MATTERS: A CRITICAL ANALYSIS (PART 2)

SUMMARY

In the first part of this article, the author analysed the development and role of expert evidence in civil matters in the South African law (Bekker 2023:160-178). In the second part of this article, the author conducts an in-depth discussion of the position in England, Wales, and Australia in relation to the application of expert witness testimony in civil matters. It is argued that, although there has been considerable progress in terms of the presentation of expert evidence in civil litigation in the South African law, a number of problematic aspects still need to be addressed. It is recommended that the Rules Board should intervene and that the rules relating to the presentation of expert evidence in civil matters should be amended in its entirety. In this regard, valuable insight can be gained from the English and Australian experiences.

11. ENGLAND AND WALES

11.1 Lord Woolf Report on Access to Justice

In his interim Report on Access to Justice, Lord Woolf stated the following in relation to expert evidence:

> The need to engage experts was a source of excessive expense, delay and, in some cases, increased complexity through the excessive or inappropriate use of experts. Concern was also expressed as to their failure to maintain their independence from the party by whom they had been instructed.[1]

Moreover, in his final Report on Access to Justice, Lord Woolf was of the opinion that the presentation of expert evidence did not enhance access to justice:

1 Lord Woolf 1995.

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> In the interim report I made it clear, in general terms, that I wanted to retain what was best in the English adversarial system. Any substantial curtailment of the parties' rights to adduce the expert evidence of their choice would certainly be a significant move away from the adversarial tradition. For that reason alone, many contributors to the Inquiry regard it as unacceptable. My concern, however, is with access to justice, and hence with reductions in cost, delay and complexity. The argument for the universal application of the full, 'red-blooded' adversarial approach is appropriate only if questions of cost and time are put aside. The present system works well for lawyers and judges, but ordinary people are being kept out of litigation. Where commercial litigants are concerned, the English courts are becoming uncompetitive because of unacceptable cost and delay.[2]

To alleviate these problems, Lord Woolf recommended that the courts should have complete control over the presentation of expert evidence. He suggested that new rules should be enacted to provide that no expert evidence may be adduced without the leave of the court, either on the court's own directions or on application by a party. Lord Woolf stated that the courts should have a discretion in limiting the scope of expert evidence in the following ways:[3]

- Directing that no expert evidence is to be presented at all, or no expert evidence of a particular type or relating to a particular issue is to be adduced.
- Limiting the number of expert witnesses per party, either generally or in a given speciality.
- Directing that evidence is to be given by one or more experts chosen by agreement between the parties or appointed by the court.
- Requiring expert evidence to be given in a written form without the expert's attendance at court.

Lord Woolf also recommended that any expert's report prepared for the purpose of presenting evidence to a court should end with a declaration stating that it includes everything which the expert regards as being relevant to the opinion which he has expressed in his report and that he has drawn to the attention of the court any matter that would affect the validity of that opinion.[4]

In light of the aforementioned, Lord Woolf made the following recommendations for legal reform:[5]

- As a general principle, single experts should be used wherever the case is concerned with a substantially established area of knowledge and where it is not necessary for the court to directly sample a range of opinions.
- Parties and procedural judges should always consider whether a single expert could be appointed in a particular case; and, if this is considered inappropriate, indicate the reasons why.

2 Lord Woolf 1996:Ch. 13:par. 6.
3 Lord Woolf 1996:Ch. 13:par. 13.
4 Lord Woolf 1996:Ch. 13:par. 34.
5 Lord Woolf 1996:Ch. 13:par. 60.

- Where opposing experts are appointed, they should adopt a co-operative approach. Wherever possible, this should include a joint investigation and a single report, indicating areas of disagreement that cannot be resolved.
- Expert evidence should not be admissible, unless all written instructions (including letters subsequent upon the original instructions) and a note of any oral instructions are included as an annexure to the expert's report.
- The court should have a wide power, which could be exercised before the start of proceedings, to order that an examination or tests should be carried out in relation to any matter at issue, and a report submitted to the court.
- Experts' meetings should normally be held in private. When the court directs a meeting, the parties should be able to apply for any special arrangements such as attendance by the parties' legal representatives.
- Training courses and published material should provide expert witnesses with a basic understanding of the legal system and their role within it, focusing on the expert's duty to the court, and enable them to present written and oral evidence effectively. Training should not be compulsory.

11.2 Civil Procedure Rules

The Civil Procedure Rules (hereafter the CPR) in England and Wales were made on 10 December 1998 and came into force on 26 April 1999. The purpose of these rules was to consolidate the existing rules of civil procedure in England and Wales and to give effect to the recommendations by Lord Woolf as set out in his Access to Justice Report of 1996. CPR 35 deals exclusively with the presentation of expert evidence and is summarised below.

11.2.1 General

CPR 35.1 provides that expert evidence shall be restricted to that which is reasonably required to resolve the proceedings. One of the leading decisions on the admissibility of expert evidence is *Midland Bank Trust Company Limited v Hett Stubbs & Kemp*.[6] The court held that evidence, which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks that he would have done had he been placed, hypothetically and without the benefit of hindsight, in the position of the defendants, is of hardly any assistance to the court.

In *Barings Plc v Coopers & Lybrand*,[7] the court referred with approval to the decision in *United Bank of Kuwait v Prudential Property Services Limited*,[8] where it was held that the purpose of expert evidence is to ensure "that the Court should reach a fully informed decision".

6 *Midland Bank Trust Company Limited v Hett Stubbs & Kemp* 1979 1 CH 384.
7 *Barings plc v Coopers & Lybrand* (No 2) [2001] EWHC 17 (Ch):par. 20.
8 *United Bank of Kuwait v Prudential Property Services Limited* [1995] EWCA Civ J1127-1:par. 11.

In *Vilca and 21 others v Xstrata Ltd and another*,[9] it was held that there was no "objectively ascertainable standard or consensus against which to judge the defendants' behaviour". In this case, certain principles on Security and Human Rights[10] were clearly articulated and unambiguous and the court, therefore, held that it could measure whether the defendants had complied with these principles without the need for expert assistance.

In *British Airways Plc v Spencer*,[11] the court held that, when considering the relevance and admissibility of an expert's opinion, the party wanting to adduce the expert evidence must meet the requirements of a three-stage test. First, is the expert evidence reasonably necessary to resolve the issue? Secondly, if not, would the evidence assist the court? Thirdly, is the evidence (considered on an issue-by-issue basis) reasonably required to resolve the proceedings?

In *JP Morgan v Springwell*,[12] the court held that:

> [i]t is the duty of parties, particularly those involved in large[-]scale commercial litigation, to ensure that they adhere to both the letter and spirit of [CPR 35.1]. And it is the duty of the court, even if only for its own protection, to reject firmly all expert evidence that is not reasonably required to resolve the proceedings.

11.2.2 Court's power to restrict expert evidence

No party may call an expert or present evidence of an expert's report without the court's permission. When parties apply for permission, they must provide an estimate of the costs of the proposed expert evidence and identify:

- the field in which expert evidence is required and the issues which the expert evidence will address, and
- where practicable, the name of the proposed expert.[13]

In *Barings Plc v Coopers & Lybrand*,[14] the court stated that the fact that an expert report comes within the meaning of the words "expert evidence", as

9 *Vilca and 21 others v Xstrata Ltd and another* [2016] EWHC 2757 (QB).

10 A United Nations-backed set of principles "designed to guide companies in maintaining the safety and security of their operations within an operating framework that encourages respect for human rights".

11 *British Airways Plc v Spencer* [2015] EWHC 2477 (Ch):par. 68.

12 *JP Morgan v Springwell* [2006] EWHC 2755 (Comm):par. 23.

13 CPR 35.4. If permission is granted, it shall be in relation only to the expert named or the field identified. The order granting permission may specify the issues which the expert evidence should address. Where a claim has been allocated to the small claims track or the fast track, if permission is given for expert evidence, it will normally be given for evidence from only one expert on a particular issue.

14 *Barings plc v Coopers & Lybrand* (No 2):par. 45.

described in sec. 3(1) of the *Civil Evidence Act*,[15] does not mean that the court must admit it in evidence and it will not be admitted, unless it is relevant to any of the issues which the court has to decide. In this instance, the word "relevant" means "helpful" to the court in resolving any issue in the case justly.

In *Darby Properties Ltd v Lloyds Bank Plc*,[16] the court rejected the expert evidence because it was not necessary. The court held that, if there is no recognised body of expertise governed by recognised standards and rules of conduct relevant to the issue on which the court must decide, the court should not admit evidence that is the subjective opinion of the intended witness rather than the evidence of any body of expertise.

It is, therefore, clear that the presentation of expert evidence falls under the exclusive control of the courts in England and Wales.

11.2.3 Expert bias

CPR 35.3 states that it is the duty of experts to assist the court on matters within their expertise. This duty overrides any obligation to the party from whom experts have received instructions or by whom they are paid.[17]

Practice Direction 35.2[18] of the CPR provides that expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.[19] Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate.[20] They should consider all material facts, including those that might detract from their opinions.[21] Experts should make it clear when a question or issue falls outside their expertise and, when they are not able to reach a definite opinion, for example, because they have insufficient information.[22]

If, after producing a report, an expert's view changes on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the court.[23]

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15 *Civil Evidence Act* 1972. This section provides that: "Subject to any rules of Court made in pursuance of Part 1 of the Civil Evidence Act 1968 or this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence".

16 *Darby Properties Ltd v Lloyds Bank Plc* [2016] EWHC 2494 (Ch):par. 14.

17 CPR 35.3.

18 The practice directions to the CPR apply to civil litigation in the Queen's Bench Division and the Chancery Division of the High Court and to litigation in the county courts, except for family proceedings. Where relevant, they also apply to appeals to the Civil Division of the Court of Appeal.

19 Practice Direction 35.2:par. 2.1.

20 Practice Direction 35.2:par. 2.2.

21 Practice Direction 35.2:par. 2.3.

22 Practice Direction 35.2:par. 2.4.

23 Practice Direction 35.2:par. 2.5.

An expert's report must contain a statement that the expert:

- understands its duty to the court, and has complied with that duty, and
- is aware of the requirements of Part 35 and Practice Direction 35 of the CPR as well as the Guidance for the Instruction of Experts in Civil Claims.[24]

An expert's report must at the end be verified by a statement of truth in the following format:

> I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

In *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd*,[25] the court held that, in some jurisdictions, partisan expert evidence is the norm, but that the English jurisdiction is not one of them. Experts and the legal advisers who instruct them should, therefore, take very careful note of the principles that govern expert evidence.

In *Dana UK Axle Ltd v Freudenberg FST GmbH*,[26] the court found the defendants to be in breach of CPR Part 35 and the 2014 Guidance,[27] noting that previous case law on the subject reflected that expert evidence should both actually be and be regarded as being independent.[28] One of the duties of experts, as described in Practice Direction 35, is to "assist the court by providing objective, unbiased opinions within their expertise" and not to "assume the role of an advocate".[29] The court also noted from previous case law that, where experts are not familiar with their duties and the principles governing expert evidence, those principles should be explained to them by their instructing solicitors.[30] The court reminded the parties that the ability to rely on expert witness evidence is "a matter of permission from the Court, not an absolute right and such permission presupposes compliance in all material respects with the rules".[31] As a result, the court excluded all of the defendant's expert evidence.[32]

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24 The Civil Justice Council published the *Guidance for the Instruction of Experts in Civil Claims* in 2014, which replaced the Protocol on experts in Practice Direction 35. The purpose of the guidance is to assist litigants, those instructing experts and experts to understand best practices in complying with Part 35 of the CPR and court orders.

25 *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd* [2018] EWHC 1577 (TCC):par. 237.

26 *Dana UK Axle Ltd v Freudenberg FST GmbH* [2021] EWHC 1413 (TCC).

27 *Dana UK Axle Ltd v Freudenberg FST GmbH*:par. 87.

28 *Dana UK Axle Ltd v Freudenberg FST GmbH*:par. 67.

29 *Dana UK Axle Ltd v Freudenberg FST GmbH*:par. 68.

30 *Dana UK Axle Ltd v Freudenberg FST GmbH*:par. 66.

31 *Dana UK Axle Ltd v Freudenberg FST GmbH*:par. 94.

32 *Dana UK Axle Ltd v Freudenberg FST GmbH*:par. 87.

In *Beattie Passive Norse Ltd & Anor v Canham Consulting Ltd (No. 2 Costs)*,[33] the court cautioned that there is a "worrying trend" developing of failures by experts generally in litigation to comply with their duties. The court emphasised that CPR 35.3 makes it clear that an expert's duty is to the court and that this overrides any duty to the instructing client.

In *Pal v Damen*,[34] the court reminded expert witnesses regarding the format of an expert report and the view that a court will take if it does not comply with the basic provisions of CPR 35. The court held that the first defendant's expert's reports "failed to comply with practically every requirement" of CPR 35. The court stated that it appeared as if the first defendant's expert acted as an advocate for his client's position, which was perhaps not surprising as he acted for the first defendant (a surgeon in Belgium). The court was of the opinion that he did not fully consider the available documentary evidence with the inevitable result that he did not provide a balanced opinion covering the range of possible opinions. The most obvious illustration of this tendency was his abrupt observation that the claimant's expert report contained many mistakes and incorrect information. As a result of this non-compliant expert report, the court concluded that it could place no weight upon the evidence of the first defendant's expert[35] and, therefore, ruled in favour of the claimant, finding that the claimant had an arguable case against the first defendant.[36]

11.2.4 Expert's report

Expert evidence is to be given in a written report, unless the court directs otherwise. If a claim is on the small claims track or the fast track[37], the court will not direct an expert to attend a hearing, unless it is necessary to do so in the interests of justice.[38]

The contents of an expert's report must comply with the requirements set out in Practice Direction 35. At the end of an expert's report, there must be a statement that the expert understands and has complied with his or her duty to the court. In terms of Practice Direction 35.3, an expert's report should be addressed to the court and not to the party from whom the expert has received instructions.

An expert's report must contain the following information:

- Details of the expert's qualifications.
- Details of any literature or other material relied on in compiling the report.

33 *Beattie Passive Norse Ltd & Anor v Canham Consulting Ltd (No. 2 Costs)* [2021] EWHC 1414 (TCC):par. 38.
34 *Pal v Damen* [2022] EWHC 4697 (QB):par. 56.
35 *Pal v Damen*:par. 55.
36 *Pal v Damen*:par. 59.
37 The small claims track is used for claims below £10 000 and the fast track for claims between £10 000 and £25 000.
38 CPR 35.5.

- A statement setting out the substance of all facts and instructions which are material to the opinions expressed in the report or upon which those opinions are based.
- A clear indication of which of the facts stated in the report are within the expert's own knowledge.
- A statement of who carried out any examination, measurement, test or experiment which the expert has used for the report, provide the qualifications of that person, and state whether or not the test or experiment has been carried out under the expert's supervision.
- Where there is a range of opinion on the matters dealt with in the report, summarise the range of opinions and give reasons for the expert's own opinion.
- A summary of the conclusions reached.
- If the expert is not able to give an opinion without qualification, state the qualification.

The expert's report must also state the substance of all material instructions, whether written or oral, on the basis of which the report was written. The instructions shall not be privileged against disclosure but the court will not, in relation to those instructions, order disclosure of any specific document, or permit any questioning in court, other than by the party who instructed the expert, unless it is satisfied that there are reasonable grounds to consider the statement of instructions to be inaccurate or incomplete.[39]

11.2.5 Written questions to experts

A party may put written questions about an expert's report which must be proportionate to an expert instructed by another party or a single joint expert appointed by the court.

These written questions may be put once only, must be put within twenty-eight days of service of the expert's report, and must be for the purpose only of clarification of the report.[40]

An expert's answers to these questions shall be treated as part of the expert's report. Where a party has put a written question to an expert instructed by another party and the expert does not answer that question, the court may order that the instructing party may not rely on the evidence of that expert or that the party may not recover the fees and expenses of that expert from any other party.[41]

39 CPR 35.10. In terms of CPR 35.11, if a party has disclosed an expert's report, any party may use that expert's report as evidence at the trial.
40 Unless the court grants permission or the other party agrees thereto.
41 CPR 35.6.

11.2.6 Court's power to direct that evidence is to be given by a single joint expert

Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by a single joint expert. Where the parties, who wish to submit the evidence, cannot agree as to who should be the single joint expert, the court may select the expert from a list prepared by the parties or order that the expert be selected in such other manner as the court may direct.

When considering whether to give permission for the parties to rely on expert evidence and whether that evidence should be from a single joint expert, the court will take into account all the circumstances, in particular, whether:

- It is proportionate to have separate experts for each party on a particular issue with reference to the amount in dispute, the importance to the parties, and the complexity of the issue.
- The instruction of a single joint expert is likely to assist the parties and the court to resolve the issue more speedily and in a more cost-effective way than separately instructed experts.
- Expert evidence is to be given on the issue of liability, causation, or quantum.
- The expert evidence falls within a substantially established area of knowledge which is unlikely to be in dispute or there is likely to be a range of expert opinion.
- A party has already instructed an expert on the issue in question and whether or not that was done in compliance with any practice direction or relevant pre-action protocol.
- Questions put to the expert are likely to remove the need for the other party to instruct an expert if one party has already instructed an expert.
- Questions put to a single joint expert may not conclusively deal with all issues that may require testing prior to trial.
- A conference may be required with the legal representatives, experts, and other witnesses which may make instruction of a single joint expert impractical.
- A claim to privilege makes the instruction of any expert as a single joint expert inappropriate.[42]

42 CPR 35.7. Where the court gives a direction under rule 35.7 for a single joint expert to be used, any relevant party may give instructions to the expert and simultaneously send a copy to the other relevant parties. In terms of CPR 35.8, the court may also give directions about any inspection, examination or experiments which the single joint expert wishes to carry out.

11.2.7 Power of court to direct a party to provide information

Where a party has access to information that is not reasonably available to another party, the court may direct the party, who has access to the information, to prepare and file a document recording the information and serve a copy of that document on the other party. The document served must include sufficient details of all the facts, tests, experiments, and assumptions which underlie any part of the information, to enable the party on whom it is served to make, or to obtain a proper interpretation of the information and an assessment of its significance.[43]

11.2.8 Discussions between experts

The court may, at any stage, direct a discussion between experts for the purpose of requiring the experts to identify and discuss the expert issues in the proceedings and, where possible, reach an agreed opinion on those issues. The court may specify the issues which the experts must discuss.

The court may direct that, following a discussion between the experts, they must prepare a statement for the court setting out those issues on which they agree and disagree, with a summary of their reasons for disagreeing.

The content of the discussion between the experts shall not be referred to at the trial unless the parties agree. Where experts reach agreement on an issue during their discussions, the agreement shall not bind the parties, unless the parties expressly agree to be bound by the agreement.[44]

Unless directed by the court, discussions between experts are not mandatory. Parties must consider, with their experts, at an early stage, whether there is likely to be any useful purpose in holding an expert's discussion and if so when. The purpose of discussions between experts is not for experts to settle cases but to agree and narrow issues and, in particular, to identify:

- The extent of the agreement between them.
- The points of, and concise reasons for any disagreement.
- Action, if any, that may be taken to resolve any outstanding points of disagreement.
- Any further material issues not raised and the extent to which these issues are agreed.

Where the experts are to meet, the parties must discuss and, if possible, agree whether an agenda is necessary, and if so, attempt to agree on one that helps the experts focus on the issues that need to be discussed. The agenda must not be in the form of leading questions or hostile in tone.

Unless ordered by the court, or agreed by all parties and the experts, neither the parties nor their legal representatives may attend experts' discussions.

43 Practice Direction 35.4.
44 CPR 35.12.

If the legal representatives do attend, they should not normally intervene in the discussion, except to answer questions put to them by the experts or to advise on the law. The experts may, if they so wish, hold part of their discussions in the absence of the legal representatives.[45]

11.2.9 Expert fees

The court may give directions about the payment of a single joint expert's fees and expenses. The court may, before a single joint expert is instructed, limit the amount that can be paid by way of fees and expenses to the expert and direct that some or all of the relevant parties pay that amount into court. Unless the court otherwise directs, the relevant parties are jointly and severally liable for the payment of the single joint expert's fees and expenses.[46] Where each party appoints its own expert, the court may limit the amount of a party's expert's fees and expenses that may be recovered from any other party.[47]

12. AUSTRALIA

The procedure for the presentation of expert evidence is, for the most part, similar to that which is followed in England and Wales, but there are also some differences. Some of the Australian provisions will be discussed below.

12.1 Obligations of expert witnesses

Expert witnesses have some or all of the following explicit obligations in the majority of Australian jurisdictions:

- An overriding duty to assist the court.
- A paramount duty to the court.
- They must not act as advocates for any of the parties.
- They must comply with court directions or cooperate with other expert witnesses.[48]

Rule 31.17 of the Uniform Civil Procedure Rules of New South Wales[49] illustrates the rationale for these duties as follows:

- Ensuring that the court has control over the presentation of expert evidence.
- Restricting expert evidence in proceedings to that which is reasonably required to resolve the proceedings.
- The avoidance of unnecessary costs associated with parties to proceedings instructing different experts.

45 Practice Direction 35:par. 9.
46 CPR 35.8.
47 CPR 35.4:par. 4.
48 Charrett 2018:332.
49 *Uniform Civil Procedure Rules* 2005 (NSW).

- If it is practicable to do so, without compromising the interests of justice, to enable expert evidence to be presented on an issue in proceedings by a single expert appointed by the parties or the court.
- If it is necessary to do so, to ensure a fair trial of proceedings, to allow for more than one expert (but no more than are necessary) to give evidence on an issue in the proceedings.
- Declaring the duty of an expert witness in relation to the court and the parties to proceedings.

12.2 Control of the court over the presentation of expert evidence

In the majority of the states and territories in Australia, there is considerable control by the courts over the presentation of expert evidence.

In New South Wales, Procedural Rule 31.19 provides that any party intending to adduce expert evidence at the trial must promptly seek directions from the court in that regard.[50] These directions may be sought at any directions hearing or case management conference or by notice of motion or pursuant to liberty to restore. Expert evidence may not be adduced at the trial, unless directions have been sought in accordance with this rule, and if any such directions have been given by the court, otherwise than in accordance with those directions.[51]

In Queensland, chapter 11, part 5 of the Uniform Civil Procedural Rules[52] was replaced by the Uniform Civil Procedure (Expert Evidence) Amendment Rule[53] in 2022. Sec. 426 provides that, if a party to a proceeding intends to present expert evidence in the proceeding, the party may, at any time, apply to the court for directions about the use of expert evidence in the proceeding.

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50 The rule does not apply to proceedings with respect to a professional negligence claim.

51 Directions under this rule may include any of the following:
(a) as to the time for service of experts' reports,
(b) that expert evidence may not be adduced on a specified issue,
(c) that expert evidence may not be adduced on a specified issue except by leave of the court,
(d) that expert evidence may be adduced on specified issues only,
(e) limiting the number of expert witnesses who may be called to give evidence on a specified issue,
(f) providing for the engagement and instruction of a party's single expert in relation to a specified issue,
(g) providing for the appointment and instruction of a court-appointed expert in relation to a specified issue,
(h) requiring experts in relation to the same issue to confer, either before or after preparing experts' reports in relation to a specified issue,
(i) any other direction that may assist an expert in the exercise of the expert's functions,
(j) that an expert who has prepared more than one expert's report in relation to any proceedings is to prepare a single report that reflects his or her evidence in chief.

52 *Uniform Civil Procedure Rules* 1999 (Qld).

53 *Uniform Civil Procedure (Expert Evidence) Amendment Rule* 23 of 2022.

In Western Australia, rule 1 of Order 36A[54] provides that a party may not adduce expert evidence at a trial unless the case manager for the case has directed that the party may do so and the party has complied with all directions given in relation to that expert evidence.

In the Australian Capital Territory, Court Procedure Rule 1200[55] states that one of the purposes of the provisions of the presentation of expert evidence is to ensure that the court has control over the presentation of expert evidence. Rule 1205 provides that the court may, on its own initiative or on a party's application, give one or more directions in relation to the presentation of expert evidence.

In Tasmania, Supreme Court Rule 460[56] provides that the court or a judge, at or before the trial of an action, may direct that the number of medical or expert witnesses, who may be called at the trial, be limited as specified by the direction.

In the Federal Court of Australia,[57] a party can apply to the court for an order that an expert be appointed to enquire into, and report on any question or on any facts relevant to any question arising in a proceeding.[58] In addition, in terms of Rule 5.04, the court may make directions relating to the disclosure and exchange of reports of experts, the number of expert witnesses to be called, the parties jointly instructing an expert to provide a report of the expert's opinion in relation to a particular issue in the proceeding, and requiring experts, who are to give or have given reports, to meet for the purpose of identifying and addressing the issues in dispute between the experts.

12.3 Code of conduct

In five of the nine superior court jurisdictions in Australia, there is a formal expert witness code of conduct. In those jurisdictions that have an explicit expert code of conduct, experts are bound by its provisions, and usually have to acknowledge in their report that they have read, understood, and complied with the code.[59]

There are strict consequences for non-adherence of these provisions. In New South Wales, for example, an expert's report may not be admitted in evidence, unless the report contains an acknowledgment by the expert witness by whom it was prepared that he or she has read the code of conduct[60] and agrees to be bound by it.[61] Moreover, oral evidence may not be received from an expert witness, unless the court is satisfied that the expert witness has acknowledged, whether in an expert's report prepared in relation to the

54 *Rules of the Supreme Court* 1971.
55 *Court Procedures Rules* 2006 (ACT).
56 *Supreme Court Ru*les 2000 (Tas).
57 *Federal Court Rules* 2011 (Cth).
58 *Federal Court Rule* 23.01.
59 Charrett 2018:334.
60 As set out in Schedule 7 of the *Uniform Civil Procedure Rules* 2005 (NSW).
61 Rule 31.23(3).

proceedings, that he or she has read the code of conduct and agrees to be bound by it.[62] Court Procedure Rule 1203 of the Australian Capital Territory provides that, if an expert report does not contain an acknowledgement by the expert witness who prepared the report that the expert witness has read the code of conduct and agrees to be bound by it, service of the expert report by the party who engaged the expert is not valid service.

12.4 Content of expert report

Western Australia is the only jurisdiction that does not specify some or all of the following requirements for the content of an expert report:

- Statement that expert has understood and complied with his or her duty.
- Statement that expert has made all inquiries that he or she believes appropriate.
- Summary of expert's qualifications and experience.
- Statement that opinion is provisional when available information is insufficient.
- Statement that opinion is qualified when available information is incomplete or inaccurate.
- Statement that a particular question or issue is outside the expert's expertise.
- Statement that opinion is genuinely held by the expert.
- Acknowledgement that opinions are based on the expert's specialised knowledge.
- Report to be signed by the expert.
- Details of the expert's fees or communications with the expert.[63]

New South Wales and South Australia have explicit provisions that require an expert to reveal certain details about their fees. In New South Wales, an expert must include information on any contingency fees or deferred payment schemes.[64] In South Australia, experts must provide, on request, details of their fees and of any communications relevant to the preparation of their report with their instructing party, or any other expert.[65]

62 Rule 31.23(4).
63 Charrett 2018:335.
64 *Uniform Civil Procedure Rules 2005* (NSW) Rule 31.22.
65 *Supreme Court Civil Rules* 2006 (SA) Rule 160(5).

12.5 Concurrent expert evidence ("Hot-tubbing")

A novelty relating to the presentation of expert evidence in Australia is the concept of concurrent evidence. Concurrent evidence can be described as the ability of a court to order experts to collaborate and collectively present evidence. Competing experts will give evidence together in the witness box under examination by opposing counsels to resolve the outstanding issues of fact.[66] The phrase "hot-tubbing" is often used to describe the process because the expert witnesses physically sit together in the witness box at all times.[67]

The concurrent witness procedure was first used in the Trade Practice Tribunals of Australia in 1985. Beginning in the mid-1990s, this evidential practice was formally incorporated into other Australian tribunals and the Australian federal courts by amendment to their Federal Court Rules in 1998.[68] In due course, the concurrent expert session procedure became the prevailing evidentiary approach in the Australian Land and Environmental Court. In 2005, the New South Wales Law Reform Commission conducted a review of the use of the hot-tub method and recommended its much wider implementation.[69]

As a result, within the last decade, hot-tub expert evidence procedures have been formally adopted in the Australian Federal Court, the Administrative Appeals Tribunal, the Supreme Courts of New South Wales and the Australian Capital Territory, and the Land and Environmental Court of New South Wales.[70] Concurrent expert evidence is now used in Australia in both judge-alone trials and jury trials, in both criminal and civil proceedings.[71]

The procedure of "hot-tubbing" aims to direct expert evidence to the issues that are genuinely contentious and to subject expert evidence to expert criticism. By reducing the quantity of evidence and increasing the quality of discussion, the Court avoids unnecessary adversarialism, delays, and cost.[72] The relevant experts are sworn-in together and remain together during the entirety of their evidence, as opposed to the traditional approach where each expert presents his or her evidence and is separately made available for cross-examination. This approach facilitates a discussion between the experts, the advocates, and the judge, and helps narrow the issues in dispute.[73]

66 McClellan 2010:259.
67 Pepper 2015:par. 43.
68 Edmond 2009:159, 162.
69 Devitt & Sannicandro 2017:156-157; NSW Law Reform Commission 2005:par. 6.58.
70 Edmond 2009:166.
71 Pepper 2015:par. 44. In the Land and Environment Court, and in many other jurisdictions in Australia (including the Federal Court of Australia), the preferred method of receiving expert evidence is to do so concurrently, or together, rather than individually in the course of each party's case.
72 Wilson 2013:495.
73 Pepper 2015:par. 45.

While the precise process will vary between jurisdictions, concurrent evidence typically involves the following seven distinct stages:

1. There is an identification of the issues, upon which expert evidence is required.
2. The preparation of individual expert reports.
3. A conference between the experts, without lawyers, in order to prepare a joint report that sets out the matters upon which there is agreement and the matters upon which there is disagreement, including, where possible, short reasons as to why they disagree.
4. The preparation of the joint report (again, without lawyers).
5. The experts are called to give evidence together, at a convenient time in the proceedings, usually following the tendering of the lay evidence.
6. The experts are given an opportunity to explain the issues in dispute in their own words. Each expert is then allowed to comment on or question the other expert.
7. Cross-examination of the experts. During this process, each party is permitted to rely on his or her own expert for clarification of an answer. The parties usually prepare and hand up to the trial judge a list of cross-examination topics (written at a high level of generality) prior to the commencement of the cross-examination.[74]

The purpose of the third stage, the joint expert conferencing (or expert conclave, as it is sometimes known), is important and is designed to allow the experts to discuss the issues in dispute in a neutral context where questions can be asked and the issues in dispute narrowed and clarified. This facilitates the identification, investigation, and resolution of the real issues in contest between the experts.[75] Discussions between the experts should be full and frank. The content of discussions between the experts cannot be disclosed at the hearing, unless the parties agree, or bad faith during the conclave is alleged.[76]

74 Pepper 2015:par. 46.
75 Biscoe 2009:par. 19.
76 UCPR Rule 31.24(6).

An expert joint conference has the following advantages:

- Any extreme or biased views adopted by experts are quickly moderated when they need to be justified before peers.[77]
- Factual concessions are easier to make in private rather than in court where there is pressure, in front of the client, on the expert to adhere to the original opinion.
- They often disclose facts and/or relevant information not always known or appreciated by other experts.
- Significant points of disagreement can be identified and more adequately defined, while peripheral issues are often isolated and agreed upon.[78]

The conference should result in a joint report stating what is agreed and what remains in dispute and why.[79] Depending on the case, it may be appropriate to produce a table setting out the issues that are agreed upon and the issues that are in dispute, together with brief reasons as to the nature of the dispute.[80]

It is important, at the conference, that the experts make a concerted effort to agree. On occasion, experts have met and refused to agree on matters that are subsequently agreed upon on the first day of the hearing. This merely puts the parties to extra cost with no beneficial outcome.[81] It is also a likely breach of the Expert Code of Conduct.[82]

It is also important that experts maintain their independence throughout the process. There have been instances where experts have agreed at the conference, but subsequently withdrawn or modified their position after further discussions with lawyers. If this occurs, it defeats the purpose of expert evidence, as the experts are no longer giving their opinion, but an opinion "filtered by the lawyers".[83] It will also subject the expert to rigorous cross-examination that may damage his or her credit.[84]

77 As reported by the New South Wales Law Reform Commission, the hot-tub approach enables the presentation of expert testimony as a discussion rather than a series of questions and answers between a lawyer and a witness. This method removes the lawyers from the process during this conversation stage of the trial testimony.
78 Wood 2003:137.
79 UCPR Rule 31.24(6).
80 Pepper 2015:par. 49.
81 McClellan 2010:11.
82 Pepper 2015:par. 50.
83 McClellan 2010:12.
84 Pepper 2015:par. 51.

The procedure for giving concurrent expert evidence is not presently prescribed in the court's Practice Notes, but it is a flexible process that varies from case to case and judge to judge. This has been aptly described as whichever expert "has the microphone has the floor".[85]

It has been noted that expert evidence in the Land and Environment Court can now be taken in at least half the time when using the concurrent evidence procedure.[86]

13. CRITICAL ANALYSIS

If one analyses the current position in relation to the presentation of expert witness testimony in South Africa, it seems clear that there are four main areas of concern, which will be discussed below.

13.1 Expert witness bias

Unlike the position in most of the foreign common law jurisdictions, there are no specific provisions in the Uniform Rules of Court to guard against expert witness bias. Although there are several decisions where the courts emphasised the fact that expert witnesses should be independent and that their primary duty should be to the court and not to the instructing party, expert bias still remains an unfortunate reality in civil proceedings. It is contended that expert bias will continue to exist, unless the Uniform Rules are amended. It is submitted that the following provisions should be incorporated in the Uniform Rules of Court:

- A Guide for the Instruction of Experts in Civil Claims (similar to that of England and Wales) or an Expert Code of Conduct (similar to that of Australia), or both, in the Uniform Rules of Court.
- A provision that makes it compulsory for expert witnesses to sign a written declaration stating that they understand their duty to the court, have complied with that duty and have read and complied with all their obligations in terms of the Instruction of Experts in Civil Claims and/or the Expert Code of Conduct.

85 Rares (2010:11) argues that the concurrent evidence procedure narrows the issues in dispute, allows all evidence to be presented to the decision-maker at the same time, reduces the likelihood of adversarial bias, and saves costs and time. He states that hot-tubbing is beneficial because it reduces the chance of the first expert "obfuscating in an answer" and, because "each expert knows his or her colleague can expose any inappropriate answer immediately, and can also reinforce an appropriate one, the evidence generally proceeds to the critical… points of difference". See also Garling 2011:60.

86 McClellan 2010:19. Canada has now also codified expert concurrent evidence procedures into its Competition Tribunal Rules for use in contested antitrust proceedings. In December 2009, during his comprehensive review of civil litigation costs in England and Wales, Lord Justice Jackson determined that "[a] number of experts, practitioners and judges have expressed support for the use of concurrent evidence" and called for the creation of a pilot program, which would allow the use of concurrent witnesses in trials when all parties consent.

- The Court should have full control over the presentation of expert evidence and no expert evidence may be adduced without the express permission of the court on application or during the process of judicial case management or during a formal pre-trial conference. Unless impractical in the circumstances, the court should endeavour to appoint a single expert witness, which will eradicate any adversarial bias.
- A court panel of reputable expert witnesses may be established or expert witnesses may be accredited in some objective way. If it seems clear that expert witnesses presented any bias whatsoever during the trial or in their reports, the court should have the authority to remove the experts' names from the panel or cancel the experts' accreditation, which will disqualify the experts from adducing evidence before any court in future.
- Biased experts can be penalised by reducing all or part of their fees.
- Adequate training should be provided to ensure that expert witnesses clearly understand their duty towards the court when presenting evidence.
- A provision relating to the presentation of concurrent expert evidence should be inserted in the Uniform Rules. This process of immediate "peer-review" may go a long way in preventing any expert bias.

13.2 The appropriateness of expert testimony

There are no provisions in the Uniform Rules of Court to ensure that an expert indeed qualifies to adduce expert evidence or, if indeed, that the expert's testimony will help the court come to a decision. It is contended that this problematic aspect will only be resolved where the court is given full control over the presentation of expert testimony. A formal written application should be brought to the court or judicial case manager, if applicable, which should clearly state that:

- The intended witness indeed qualifies as an expert in relation to the proceedings. Purely academic qualifications should not be sufficient and the expert should also be able to demonstrate adequate practical experience in the relevant field of study.
- The expert testimony will adequately assist the court to come to a decision in the matter before the court.

If both of these requirements are not met, the court should refuse to grant permission for the expert evidence to be presented.

Once again, the establishment of a panel of reputable experts and/or accreditation of expert witnesses may also assist the court in this regard, but it is contended that it should still be stated in the application for permission to adduce expert evidence, that the evidence will adequately assist the court in coming to a decision. The court should have a judicial discretion in this regard.

13.3 The excessive use of expert testimony

As stated earlier, the presentation of expert evidence should be under the full control of the courts. The adversarial system and, more specifically, party-control, should be tempered in favour of access to justice in civil matters. Similar to the position in Australia and England and Wales, no party should be allowed to adduce expert evidence unless permission has been obtained by the court on application or by a judicial case management officer at a pre-trial conference or during judicial case management. The court should only allow expert evidence to the extent to which it is necessary to resolve the proceedings. If the court authorises the presentation of expert evidence, the court should also provide directions as to the following:

- A single joint expert should be appointed by agreement between the parties, or if agreement is not possible, by the , unless there are sufficient grounds to appoint more than one expert.[87]
- The time period in which the expert report should be delivered to the opposing party and the court. Only one comprehensive expert report should be delivered containing the information, as set out above. The first notice in terms of Rule 36(9)(a), stating the identity of the expert to be used, should be abolished in its entirety.
- Expert evidence may not be adduced on a specified issue.
- Expert evidence may not be adduced on a specified issue, except by leave of the court.
- Expert evidence may be adduced on specified issues only.
- Limiting the number of expert witnesses who may be called to give evidence on a specified issue.
- Providing for the engagement and instruction of a party's single expert in relation to a specified issue.
- Providing for the appointment and instruction of a court-appointed expert in relation to a specified issue.
- Requiring experts in relation to the same issue to confer (preferably without the legal representatives being present), either before or after preparing experts' reports in relation to a specified issue.
- If the court deems it fit for the expert/s to testify orally in court, and if indeed, if the experts should testify concurrently.
- Any other direction that may assist an expert in the exercise of the expert's functions.

87 Currently Rule 36(9)(A) only requires that the parties (without any judicial intervention) should endeavour to appoint a single joint expert.

13.4 The scope of an expert's report

Another problematic aspect, which is not adequately addressed by the Uniform Rules of Court, is the content and scope of the expert witness report. All that is required by Rule 36(9)(b) is that a party who wants to adduce expert evidence should deliver a summary of the expert's opinion and the reasons therefor. This is in stark contrast to the position in foreign jurisdictions such as Australia and England and Wales where an expert must serve a comprehensive report signed by the expert. The summary of the expert's opinion in South Africa is, in many instances, not adequate enough and often gives rise to unnecessary evidence being led and/or costly postponements. It is contended that a comprehensive expert report should be delivered to the opposing party and the court, which should at least include the following information:

- Full details of the expert's academic qualifications.
- Full details of the expert's practical experience.
- Details of any literature or other material, which has been relied on by the expert in compiling the report.
- A statement setting out the substance of all facts and instructions which are material to the opinions expressed in the report or upon which those opinions are based.
- A clear indication of which of the facts stated in the report falls within the expert's own personal knowledge.
- An explanation of who carried out any examination, measurement, test, or experiment which the expert has used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under the expert's supervision.
- Where there is a range of opinion on the matters dealt with in the report, summarise the range of opinions and give reasons for the expert's own opinion.
- A summary of the conclusions reached.
- If the expert is not able to give an opinion without qualification, state the qualification.
- Any other information that the court or judicial officer deems necessary after permission have been sought to present expert evidence.

Currently, no provision is made for a party to request amplification of the opponent's expert report. It is contended that the Uniform Rules should be amended to provide that a party will have the opportunity to deliver written questions to the opposing party's expert for clarification and amplification purposes.

The abovementioned information will give more substance to the purpose of Rule 36(9), namely, to ensure that the opposing party is not caught by surprise at the hearing of the matter and thus prevent subsequent delays and postponements.

14. CONCLUSION

The presentation of expert evidence no longer conforms to sec. 34 of the *Constitution* which guarantees access to justice in civil matters. In the recent past, South African courts also frequently criticised the content of Rule 36(9) and advocated for legal reform. All the problematic aspects relating to the presentation of expert evidence such as expert bias, and the inappropriate and excessive use of expert evidence have also been encountered in foreign jurisdictions such as Australia and England and Wales. Over the past few decades, these jurisdictions have adopted certain measures, which have eradicated most of these concerns. It is contended that some of these measures can serve as a valuable starting point for the modification of the South African rules relating to the presentation of expert evidence. It is recommended that the Uniform Rules of Court should be significantly amended to ensure that the presentation of expert evidence will contribute to speedy and cost-effective civil trials and thereby enhance the ideal of access to justice as enshrined in the *Constitution*.

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