

# ADVOCACY

## Experts and the jury

**“An expert is one who knows more and more about less and less”**

L. Long

**In any trial before a jury the calling of evidence from an expert witness requires special care in both preparation and presentation.**

The fact that expert testimony is necessary means that the subject matter to be addressed is such that inexperienced persons are unlikely to prove capable of forming a correct judgment on it without the assistance of a witness possessing special knowledge or experience in the area.<sup>1</sup> Expert evidence is likely to involve matters that members of the jury will find are beyond their every day experience and involve concepts and thought processes that they have not in the past had to address. In such cases it is your task as counsel to ensure that the evidence called from the expert is presented in such a way that the jury can understand it and fully appreciate the impact it has upon the case. If those goals are not achieved then the responsibility for the failure does not rest with the expert witness but rather with counsel.

Prior to calling an expert witness to testify you should, wherever possible, spend time with that person preparing for the giving of evidence. If the expert is a person who is not frequently before the courts then he or she is likely to need assistance in understanding their role and the nature of the evidence that they are to address. They will need to be reminded that they are not necessarily addressing people who have any understanding of even the basic concepts of the matters which are to be discussed. On the other hand they also need to appreciate that it is necessary to treat the jury with respect. Whilst they should not talk down to the jury they do need to explain matters in simple terms and, in particular, using plain language and avoiding the use of acronyms and jargon. The witness should be encouraged to adopt simplification techniques and to avoid raising unnecessary complicating

factors. The expert should be encouraged to use visual aids and other techniques that may assist the jury to understand what is being said. The explanations should, so far as possible, be confined to what is necessary for the jury to be told in order to achieve an understanding and appreciation of the evidence.

Even where the expert witness to be called is a person who has vast experience before the courts and familiarity with the diverse possibilities for the composition of the jury and the variables in the capacity of the individual jurors to understand, it will still be necessary to spend time devising methods of presenting the information to the jury to achieve the ends of understanding and appreciation of the impact of the evidence.

It will be necessary for you to make an assessment of the strengths and weaknesses of your expert in the context of a jury trial. Some experts are natural communicators and will need very little assistance. Their evidence and approach will only need to be fine tuned. Others are likely to be in need of a total overhaul of their methods of communicating with people outside of their field of expertise.

It is also necessary to assess the nature of the material that is to be presented to the jury. That material will range from the extraordinarily complex to the logical and simple. Some expert evidence is likely to be enthralling and little difficulty will be experienced in maintaining the interest of the jury. Other expert evidence may be interesting but complex and it will be necessary to present it in a way that maintains the interest of the jury. Yet other expert evidence is likely to be both boring and complex (eg an accountant explaining the detailed financial transactions in a complicated fraud case) and it will be necessary to employ all of the skills and strategies available to you and your witness to ensure that the interest and understanding of the jury is maintained. Where the matter is complex or boring (or both) you will need to keep in the forefront of your mind that once the interest of the jury has been lost it will be almost impossible to regain it. It is very



*Hon Justice Riley*

easy for individual jurors to be overwhelmed and simply give up. It is desirable for your expert to keep an eye on the jury whilst presenting his or her evidence to determine whether the explanation is being received and understood. Whilst it is desirable for your expert to adopt that approach it is vital that you do so. Where you see the interest of a member of the jury waning then it is time for you to take control and to restructure the evidence in order to maintain or regain the interest.

The approach you adopt will vary depending upon the character and skills of your expert and upon the nature of the evidence that is to be led. In some cases a step by step approach may be appropriate. In others it may be advisable to start with the conclusion and then go back to square one to explain to the jury how it is that the conclusion could be reached.

In preparing for and in presenting the evidence of an expert it is prudent to bear in mind that both the expert and yourself have a familiarity with the subject matter being discussed that is not available to the members of the jury. Further, it is likely your expert will be highly educated and, of course, you have also had the benefit of years of education. Members of your jury may not have been so fortunate. The expert has spent years dealing with the subject matter and you have spent a considerable part of your preparation becoming familiar with it. Your preparation and presentation should reflect an ever present awareness of the difference between the advantages enjoyed by your witness and yourself and the situation of the members of the jury.

<sup>1</sup> *R v Bonython* (1984) 38 SASR 45; *Clark v Ryan* (1960) 103 CLR 486.