

2ND IPBA ASIA-PAC ARBITRATION DAY
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EXPERT EVIDENCE FROM A MARITIME PERSPECTIVE

PRESENTED BY
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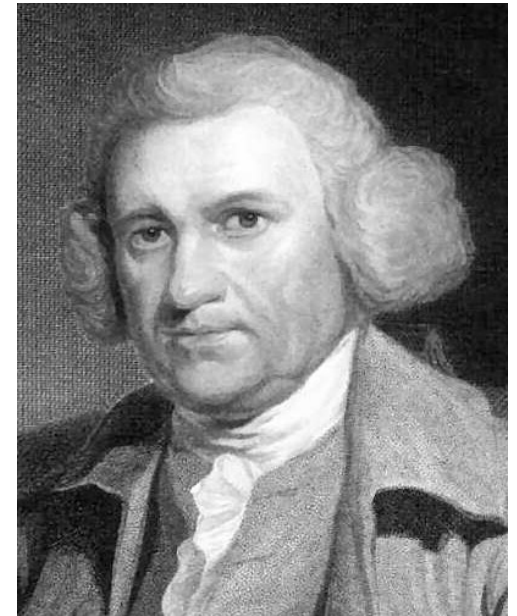
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What is the purpose of Expert Evidence ?

- to provide reliable material upon which a court or other tribunal can proceed in the resolution of a dispute
- to assist the court or tribunal for assistance in a particular discipline or field.
- In New Zealand, for example, the approach is that expert evidence must provide **'substantial help ...in understanding other evidence in the proceedings or in ascertaining any fact that is of consequence to the determination of the proceeding'**
- At the root of relevance and admissibility and utility of expert evidence, is the subject matter, training expertise or skill of the expert in that field.
- A specialized court or tribunal may rely less on the need for, or the manner of use or reception of, expert evidence.

Did you know ?



John Smeaton (1724 to 1792)

The earliest known use of an expert witness in English law came in 1782, when a court that was hearing litigation relating to the silting-up of Wells harbour in Norfolk accepted evidence from a leading civil engineer, John Smeaton. This decision by the court to accept Smeaton's evidence is widely cited as the root of modern rules on expert evidence



EXPERTS IN MARITIME DISPUTES

Experts in maritime disputes

- In maritime matters, the fields of expertise are wide, yet specialized and often technical.
- The common maritime disputes, which may require experts; for example:
 - master mariners
 - cargo surveyors
 - naval architects
 - pilots
 - engineers (eg. chemical etc)
 - ship brokers
 - adjusters
 - lawyers

Means of
providing
Expert
Evidence in
Collision cases



Means of providing Expert Evidence in Collision cases

- Nautical Assessors in the English Admiralty Court for Collision Disputes
- 19th century experience, Elder Brethren of Trinity House.
- ***Elefteria c/w Hakki Deval [2006] EWHC 2809***
- At CM the court allowed parties to bring their own surveyor to provide a “*speed and angle of blow*” of the collision survey and on “*seamanship and breaches of the collision regulations*”



Means of providing Expert Evidence in Collision cases

- At trial the Admiralty Judge held that seamanship expert evidence was inadmissible because the Court had the benefit of the assistance of two Elder Brethren of Trinity House as nautical assessors.
- The implication of such an order are well established: where the court has the assistance of nautical assessors, expert evidence on matters of navigation and seamanship may not be adduced



Means of providing Expert Evidence in Collision cases

- Trial court accepted that the rule is subject to some variation for example, where knowledge of ship type or geographic location were unlikely to be familiar to the nautical assessors or where specific expertise was outside the scope of their competence, such as computer reconstruction or modelling – present features did not fall into any category.



Means of providing Expert Evidence in Collision cases

- ***Global Mariner c/w Atlantic Crusader [2005] 1 Lloyd's Rep. 699***
- The standard admiralty practice for seamanship and navigation evidence in collision cases is that the court will appoint two nautical assessors to provide such expert assistance as is deemed necessary
- Assessors may make a pre-trial report for all parties to see and use before and during the trial proceedings



Means of providing Expert Evidence in Collision cases

Procedure for Consultation with Nautical assessors in the UK

- ☐ a range of topics which the Judge may consult the nautical assessors is agreed with counsel first
- ☐ The questions put to nautical assessors and their answers are disclosed to counsel before any draft judgment is handed down
- ☐ Counsel should have opportunity to make submissions to the judge on whether the advice of nautical assessors should be followed



Why are maritime experts needed ?

- Certain experts are needed than the others. For example, in a pilotage incident, they are;
- Master Mariner
- Pilot
- There are certain areas that are worthy of consideration here. Such includes the careful planning and implementation by the pilot. Also in the same vein, a master mariner's appropriate technique with the pilot on board, the proper method of close shiphandling which involves local weather, use of tugs, environmental and other such factors as well as the type of ship that is involved.

Role of the Judge or Arbitrator

- As mentioned, a specialist court (like an Admiralty Court) or Tribunal (Maritime qualified Arbitrator) is likely to restrict the use of expert evidence. Even specialist arbitration rules restrict the use of experts.
- Judge or Tribunal is the gate keeper
- For example, under the Singapore Chamber of Maritime Arbitration Rules, expert evidence can only be adduced with leave from the Tribunal
- Similar features are also found in the KLRCA Fast Track Rules 2013, in which leave to adduce expert evidence is required and must be made within 14 days after delivery of the Statement of Reply. Even for Supplementary Reports leave must be made within 14 days from exchange of the expert report

Role of the Judge or Arbitrator

- The facts are very important cannot be over emphasized. Facts presented go a long way in deciding who wins or loses.
- The expert can only assume facts, unless he was there in which case he is not an independent witness but witness of fact. Such expert can establish or manifest good practice, theorems and principles.
- Apart from these, such an expert could also be very useful in aiding the Judge or Tribunal in deciding or arriving at a conclusion about what transpired usually by employing deduction to practice and assumed events.
- Court cannot prefer the opinion of experts if the facts are undisputed or unchallenged

Role of the expert

- The expert:
 - - advises on the concept of good/bad practice
 - - advises on germane areas of a case
 - - expresses professional view/standpoint based on his/her area of competence
 - - demystifies theory
 - - refrains from giving main evidence based on facts

Role of the expert

- The difference between what actually happened and what could be proven to have is wide. This gulf could be buttressed by the inadequacy of evidence and mistakes in litigation. The defects may be so much that could not even be resolved by employing Expert Evidence.
- It is important to fashion out record keeping and make it as simple as possible
- The major function of the expert, be it an unconventional court or one maintained by a party, is to lend a hand of support to the court of the tribunal.

Role of the expert

- To understand further the clearly spelt out roles of an expert, please consult the Federal Court of Australia Practice Direction on the Guidelines for Expert Witnesses (useful to understand the independence of experts) and Part 35 and relevant Practice Directions in the United Kingdom Civil Procedure Rules.
- Apply to be on the Expert panel with the International Malaysian Society of Maritime Law

Counsel's tips

- Best tip – get them early on in the case!
- Due to restrictive use, quality and experience of experts is crucial for maritime cases so make sure the client is prepared to spend the money!
- Make sure the expert reports are easy to read (sometimes less is more)



Counsel's tips

- Don't ask hypothetical questions during cross examinations to an expert
- Get an expert to help you prepare your cross examination before you cross examine the opponent's expert.
- Read up on the subject as much as possible before you consult an expert



Acknowledgements

- Expert Evidence – Australian Marine Pilots Association Conference 2006 – The Hon. Justice James Allsop
- The Expert and Dispute Resolver – Lindsay Gordon 2010
- Federal Court of Australia Practice Note CM7
- CPR - Protocol for the Instruction of Experts to give Evidence in Civil Claims Oct 2009
- Online DMC – David Martin-Clark QC (Elefteria c/w Hakki Deval)
- Steamship Mutual 2005 Newsletter (Aug) - Global Mariner c/w Atlantic Crusader
- The Bow Spring and the Manzanillo II [2005] Lloyds. Rep. Vol. 1
- KLRCA Fast Track Rules 2013
- Singapore Chamber of Maritime Arbitration Rules

Thank you for listening



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