



Experts in your Courtroom

Promoting settlement, saving time and getting the best evidence by appointing Single Joint Experts

Presentation given by Judge Burchell on 12 September 2023

Expert Witness Code of Conduct

(Rule 44.01 – Form 44A) of the County Court Civil Procedure Rules 2018

An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.

Civil Procedure Act 2010 (Vic)

S10(3): The overarching obligations to:

- act honestly (s17)
- to cooperate in the conduct of a civil proceeding (s20)
- to not mislead and deceive (s21)
- to narrow the issues in dispute (s23)
- to ensure costs are reasonable and proportionate (s24)
- to minimise delay (s 25)
- [other than ss18 proper basis, 19 to only take steps to resolve or determine a dispute, 22 use reasonable endeavours to resolve a dispute and 26 to disclose the existence of documents]

Civil Procedure Act 2010 (Vic)

S21: A person to whom the overarching obligations apply must not, in respect of a civil proceeding, engage in conduct which is —

- a) misleading and deceptive; or
- b) likely to mislead and deceive

Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd (No 8) [2014] VSC 567

Facts: Mrs Hudspeth, succeeded in obtaining an award of damages against her employer for injuries she sustained when she slipped on a soapy mess she was cleaning up in a school toilet block.

Subsequent Inquiry:

- Justice Dixon instituted an inquiry under s29(1) of the CPA into the conduct of the plaintiff's lawyers and one of her experts.
- His Honour found that the plaintiff's senior counsel breached s21 of the CPA (obligation not to mislead or deceive) and s26 (obligation to disclose existence of documents) in relation to the third report.
- His Honour further found that the expert breached s21 and failed to adhere to the Expert Code and that the plaintiff's solicitors had breached s26 (but not s21) concerning the third report.

Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd (No 8) [2014] VSC 567

The breaches: the three reports

- The problem arose because the expert produced three differing versions of his report, the last of which was found to have been altered at the suggestion of Senior Counsel.
- The change to the second report contradicted a fact which the expert had been told by the plaintiff; namely that she had not previously seen evidence of vandalism of the soap dispensers.
- The change was made by the expert's assistant at the request of the plaintiff's solicitor without his prior approval but adopted by him. The change was not marked up and nor was the date of the report changed.
- When giving evidence in chief, the expert was asked to read the assumed facts contained in his report. Unaware of the Second Report, he read from the First Report, while the plaintiff's barrister referred to the Second Report. Due to the inconsistencies between the two versions, it was discovered that each was referring to a different report.
- During cross-examination, the expert was questioned on the inconsistencies between the two reports. In his response, the expert disclosed that there was a Third Report, which had not been served on the other parties. The expert tried to explain this on the basis that the Third Report was a draft report he had prepared to assist with trial preparation, but the Court didn't accept this explanation.

Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd (No 8) [2014] VSC 567

Order 44.03(3) of the Rules provides that where an expert has changed his or her opinion on a material matter expressed in an earlier report or where a supplementary report is provided it must be served on all parties *forthwith*. In default of such service neither the earlier report or the supplementary report can be relied upon without the court's leave. The third report was never served.

Hudspeth v Scholastic Cleaning & Consultancy Services Pty Ltd **[2014] VSCA 78**

- On appeal in *Hudspeth v Scholastic Cleaning & Consultancy Services Pty Ltd* [2014] VSCA 78 the Court of Appeal found that the plaintiff was denied a fair trial by comments to the jury by the second respondent's counsel in final address about the performance of counsel and solicitors of their obligations regarding expert evidence
- The plaintiff's trial senior counsel and solicitors were ordered to indemnify the second respondent for 40% each of those costs.

Lessons from Hudspeth

The lessons for the Courts from *Hudspeth* included a move towards parties agreeing the facts and assumptions on which expert opinion is to be provided and that lawyers must comply with the provisions of Part 4.6 of the CPA, notably s65G which provides that unless the court otherwise orders a party must seek directions as soon as practicable if it intends to adduce expert evidence at trial or becomes aware that it may do so.

Civil Procedure Act Part 4.6 – Expert witnesses and expert evidence

S65F Objects of part 4.6

- enhancing case management powers of a court
- restricting expert evidence to what is “reasonably required” to resolve a dispute
- emphasising the primary duty of an expert witness to the court

S65H Court’s ability to give directions in relation to expert evidence

- limiting expert evidence to specified issues
- limiting the number of expert witnesses
- providing for the appointment of single joint experts

Civil Procedure Act Part 4.6 – Expert witnesses and expert evidence

S65I Court may give directions to experts – conferences and joint expert reports

- to hold a conference, to prepare a joint report or both
- to meet with or without attendance of parties, their lawyers or independent facilitator
- to provide a joint report, including issues to be dealt with, assumptions to be made and matters agreed and not agreed

S65J Use of conference of experts and joint reports

- unless parties agree and except as referred to in joint report, content of conference must not be referred to at trial
- use matters not agreed subject to rules of evidence and court
- **no** evidence from further expert on joint report matters without leave

Civil Procedure Act Part 4.6 – Expert witnesses and expert evidence

s65K Directions about concurrent evidence

- at any stage of trial (including after lay evidence)
- give oral exposition of opinion or give opinion of opinions of other experts
- sequence of examination, cross-examination etc, experts may ask question of other experts and court may ask questions

s65L Single joint experts

- A court may order that an expert be engaged jointly by 2 or more parties to a civil proceeding.
- A court may make an order for the engagement of a single joint expert at any stage of the proceeding.
- In making an order to engage a single joint expert, the court must consider—

Civil Procedure Act Part 4.6 – Expert witnesses and expert evidence

s65L Single joint expert: Court must consider whether

- engagement of 2 or more expert witnesses disproportionate to the issues and the amount in dispute
- issue falls within a “substantially established area of knowledge”
- necessary for court to have a “range of expert opinion”
- will expedite the trial
- selected by agreement
- failing agreement, by direction of the court
- the SJE must consent to the engagement
- parties must disclose previous communications on issues concerned
- is off-limits to parties on issues in case pending engagement
- report may be tendered by either party
- is not a court appointed expert (s65M)

Civil Procedure Act Part 4.6 – Expert witnesses and expert evidence

s65N Instructions to single joint expert

- parties must endeavour to agree on written instructions and facts and assumptions of fact
- if parties cannot agree, they *must* seek directions

s65O No additional expert evidence without leave In determining leave, the court must consider whether -

- one party does not agree with single joint expert
- allowing additional evidence disproportionate
- there is different expert opinion which may be material
- another expert knows of matters not known to the single joint expert

Expert Witness Code of Conduct

(Rule 44.01 – Form 44A)

Conference of Experts

7. Each expert witness shall -

- a) exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the Court and in relation to each report thereafter provided, and shall not act on any instruction or request to withhold or avoid agreement; and
- b) endeavour to reach agreement with the other expert witness (or witnesses) on any issue in dispute between them, or failing agreement, endeavour to identify and clarify the basis of disagreement on the issues which are in dispute.

Single joint expert—brief history

Recommended in 2008 by the VLRC *Civil Justice Review Report*

- “[o]ne of the main purposes of the rules is to ‘ensure that, if practicable and without compromising the interests of justice, expert evidence is given on an issue in a proceeding by a single expert agreed to by the parties or appointed by the court’”

NSWLRC Report and the NSW Uniform Civil Procedure Rules 2005:

- which was relied on by now retired Chief Judge of Common Law Peter McClelland who ordered SJE in the Land and Environment Court and in common law.
- Influenced by 1996 UK Woolf Report
- identified the use of expert witnesses as one of the most aggravating factors, finding that it added to the expense, delay and complexity of litigation.
- the remedy for addressing this was a shift in the role of the judge as a ‘judicial case manager’.
- The judge should be empowered to influence litigation in order that a degree of ‘proportionality’ be maintained between the importance and complexity of the dispute, and the costs on the individuals and the public.
- One of the most useful tools available to judges seeking to reign in proportionality of costs is the use of single joint experts, especially in areas of substantially established areas of knowledge, or in circumstances where the court believes it is not necessary to sample a range of opinions.

Single joint expert—pros

- Reduced time and cost
- Narrowing issues
- Promotes settlement
- Reduced bias inherent in adversarial system

Single joint expert—cons

- Limits on use
- Engagement of “shadow” experts and other factor, frustrating cost reduction
- May suppress legitimate differences of opinion
- Perceived abdication of court’s decision-making function

County Court Experience – 12 months later

- Since the introduction of G.13 in the County Court PN, the default position is the appointment of a single joint expert should parties wish to adduce expert evidence.
- In the 12 months from 1 August 2022 to 1 August 2023, the County Court Building Cases List reports that **32** cases were ordered to single joint experts, whereas **43** cases were ordered to own parties' experts.
- The data shows that since the introduction of the PN, **43%** of cases relying on expert evidence have consented to appointing SJE.

County Court Experience – 12 months later

- Litigants appearing in the County Court have benefitted greatly from this shift away from individual experts, as judges are able to deliver judgments quicker (saving on average 3 months writing time), trials are shorter (by 2-3 days), settlement is more probable, and the process leading up to trial is more efficient.
- The County Court is also confident that the quality of judgment handed down has improved, as the 'real issues' are more readily brought to the light, and the merits of each party's application can be more accurately assessed with the help of less adversarial expert evidence.



HER HONOUR JUDGE BURCHELL
CCVBCL@courts.vic.gov.au

