

Cost of evidence provided by experts

Is it recoverable on a party/party basis?

Evidence provided by experts is essential to many court cases. When a party wins a court proceeding, a costs order is ordinarily made in that party's favour, under which it can seek its costs of litigation from the other party. The entirety of the winning party's costs is almost never recoverable.

The test for recovery of legal costs on a party/party basis is different in each Australian state and territory. These tests are as follows:

- Vic – 'all costs reasonably incurred and of reasonable amount'.¹
- NSW – 'fair and reasonable amount of costs for the work concerned'² (particularly costs 'proportionately and reasonably incurred' and 'proportionate and reasonable in amount').³
- Qld – 'costs necessary and proper for the attainment of justice'.⁴
- NT – 'all costs reasonably incurred' or 'reasonable in amount'.⁵
- ACT – all costs 'fair and reasonable for the attainment of justice or for enforcing or defending the rights of the party whose costs are being assessed'.⁶
- SA – all costs 'reasonably incurred in the proceeding (or the relevant part of the proceeding)' determined by reference to the relevant costs scale in force when the costs were incurred.⁷
- Tas – costs 'necessary or proper for the attainment of justice or for maintaining or defending the rights of any party'.⁸
- WA – costs not 'unnecessarily or unreasonably incurred'.⁹

Questions have arisen time and again as to the types of expert costs recoverable by the winning party from the other party.

On 26 May 2022, NSW costs assessor Brian Camilleri provided reasons for determination of party/party costs payable to the costs applicant, a coal mining company, by the costs respondent, a prosecutor alleging health and safety risks to drivers of the costs applicant following a fatal incident.¹⁰

The costs applicant was found not guilty and was entitled to recover costs. The bill of costs filed by the costs applicant, which itemised costs and disbursements of over \$5.9 million, was assessed in detail by Camilleri. The statement of reasons accompanying the Certificate of Determination highlighted, among other things, principles that would apply to the allowance and non-allowance of several types of expert evidence from a costs assessment perspective.

EXPERTS WHO GIVE EVIDENCE AT TRIAL

Costs of experts who provide evidence at trial are almost always recoverable. The County Court of Victoria also confirmed that experts whose reports are exchanged (served on the other side) are treated as though they were called to give evidence at trial,¹¹ and accordingly their costs are recoverable. Such expert fees may be moderated only if they are unreasonably excessive and disproportionate to market rates of a comparable expert.¹²

EXPERT EVIDENCE NOT SERVED ON THE OTHER SIDE

While some argue that costs of expert evidence not served on the other party during the proceeding must not be recoverable, the unreported decision of *Hadjoannou v Zylinski*¹³ (*Hadjoannou*) allowed recovery of costs associated with obtaining a treating doctor's medical reports on the basis that it was considered 'necessary and proper for a plaintiff to obtain a report from his treating doctor as a foundation for his case, and for it to be allowed on taxation even though not exchanged'.¹⁴ The judge further allowed recovery of costs associated with obtaining a medico-legal report on the basis that 'investigation of this aspect [the plaintiff's symptoms] was warranted, and [the report], although not exchanged, was properly obtained and should be allowed'.¹⁵

However, the County Court did not allow costs of supplementary reports obtained and not exchanged as it was presumed the plaintiff did not intend to call this additional report into evidence. The current test for recovery of *inter partes* costs is 'fair and reasonable',¹⁶ which is a lower threshold than the 'necessary and proper' test applicable at the time of the decision in *Hadjoannou*.¹⁷ This suggests that unserved expert reports are recoverable on a party/party basis if it can be established that it was 'fair and reasonable' to obtain such a report to advance the matter.

In Costs Assessment 2021/00088441, costs assessor Camilleri accepted that the correct test in determining which costs are fair and reasonable was stated in *Cretazzo v Lombardi*¹⁸ – whether the work was reasonable at the time it was done. The costs assessor allowed costs of evidence not served where the costs applicant provided sufficient particulars to justify whether or not the costs were fair, reasonable and necessary to prepare a foundation for and advance the costs applicant's defence.¹⁹ By way of example, evidence obtained by an expert who was engaged to respond to a 'hard wired switch' particular of a claim by the prosecution was allowed because the only reason the report

was not served was because the prosecutor chose not to lead evidence on that particular. The costs assessor said:

'Given that the Prosecutor did not abandon the charge, it was reasonable for the Costs Applicant to incur the costs of preparing Mr Ferrier's evidence at the time these costs were incurred, albeit that in the result his evidence was not required.'²⁰

Another example of expert fees that were allowed in full despite evidence not being served or relied on in the proceeding was an expert engaged to undertake a project regarding the knowledge of surge style bins and how they were operated at the time of the incident. The costs applicant argued that it was reasonable for the defendant to engage the expert as the expert's evidence had relevance to the particulars of the work commenced, and the only reason the project was abandoned was that the expert found that other similar operations were unwilling to provide access or information.²¹

EXPERTS WHO PROVIDE VERBAL ADVICE

Costs assessor Camilleri allowed the fees of an expert who did not provide a report or give evidence, but provided verbal advice, on the basis that the expert played an important and necessary role by enabling the costs applicant's legal representatives to gain the technical understanding they required to properly conduct the defence of the costs applicant.²² The expert assisted the legal team in acquiring an understanding of the relevant Australian Standard so that they could properly cross examine a particular witness.

INADMISSIBLE EXPERT EVIDENCE

The costs assessor disallowed recovery of costs of an expert whose evidence was inadmissible because it 'contradicted or sought to qualify... [an] agreed fact'.²³ The costs applicant's argument that 'had the Prosecutor run a consistent case ... the evidence would not have needed to be prepared',²⁴ was not considered a sufficient reason to justify allowing the costs connected to the expert's affidavit.

ERROR IN EXPERT'S REPORT

In Costs Assessment 2021/0008844, the costs respondent objected to the costs of an expert report because there was an error in the figures in the expert report, which was not disclosed until the day on which counsel gave evidence.

Costs assessor Camilleri allowed costs related to this expert report, along with ancillary costs, and held that it is not unusual for expert witnesses to discover corrections they wish to make, which counsel has to make disclosure of while the witness is in the box or during an adjournment on the

day itself.²⁵ It may have also helped that the revisions to the report were not an inversion of numbers but were general corrections to the calculations included in the expert's report.

EXPERT REPORT THAT PREDATES THE PROCEEDING

The costs assessor allowed 50 per cent of the costs of a report that was obtained in relation to a coronial inquest prior to the commencement of the proceeding, because it also assisted with evaluating the factual basis of the charges in the proceeding.²⁶

Costs assessor Camilleri also confirmed that costs, including costs of experts, incurred in anticipation of threatened litigation are allowable, though he disallowed one such report because the nature of the work carried out by the expert and how this contributed to the defence was not clarified in the expert's invoice, the costs applicant's bill of costs, or the response to objections.²⁷

DUPLICATION

Costs of an expert report that essentially duplicates an earlier report of a different date are rightly unrecoverable.²⁸

CONCLUSION

Ultimately, depending on the jurisdiction, all costs, including expert costs, that are fair and reasonable, reasonably incurred and of a reasonable amount, or are necessary and proper, are recoverable on a party/party basis. ■

Notes: 1 *Supreme Court (General Civil Procedure) Rules 2015* (Vic), r63.30. 2 *Legal Profession Uniform Law Application Act 2014* (NSW), s76. 3 *Legal Profession Uniform Law* (NSW), s172. 4 *Uniform Civil Procedure Rules 1999* (Qld), r702(2). 5 *Supreme Court Rules 1987* (NT), r63.26. 6 *Court Procedures Rules 2006* (ACT), r175.1. 7 *Uniform Civil Rules 2020* (SA), rr191.1, 193.1(1). 8 *Supreme Court Rules 2000* (Tas), r859. 9 *Rules of the Supreme Court 1971* (WA), r66.1(2). 10 Costs assessment number 2021/00088441. 11 *Hadjoannou v Zylinski* (Unreported, County Court of Victoria, 19 July 1988) (*Hadjoannou*), 3. 12 *Legal Profession Uniform Law Application Act 2014* (NSW), s76. 13 *Ibid.* 14 *Ibid.* 15 *Ibid.* 16 *Legal Profession Uniform Law Application Act 2014* (NSW), s76. 17 *Hadjoannou*, above note 11. 18 (1975) 13 SASR 4. 19 Costs assessment number 2021/00088441, [11.32]. 20 *Ibid.*, [11.46]. 21 *Ibid.*, [11.40]. 22 *Ibid.*, [11.41]. 23 *Ibid.*, [11.34]. 24 *Ibid.* 25 *Ibid.*, [11.35]. 26 *Ibid.*, [11.36]. 27 *Ibid.*, [11.37]. 28 *Hadjoannou*, above note 11, 4.

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