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Communication as Performance and the Performativity of Communication:
Proceedings of the 2014 International Colloquium on Communication

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Collaborative Substantiation and Qualification of Expertise in Concurrent Court Testimony

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In 2002, Father Paul Shanley was accused of sexual abuse by an adult man, who recounted experiences while he was a child in Shanley's parish and under Shanley's care. The accuser claimed to have recovered memories of abuse after having heard in the news another accusation against the priest and having talked about his memories with a therapist. Once convicted, Shanley appealed the decision and asked a higher court to rule that the trial court had erred in allowing the testimony of an expert to validate that type of recovered memory. In this case, the court upheld the trial court's admission of that evidence (*Commonwealth v. Shanley* 2010). Decisions to allow such testimony, nonetheless, remain a matter of situational discretion. For example, an appellate court in North Carolina upheld the opposite decision by a judge in a similar case (*State v. King* 2012).

Expert testimony in cases like this can be pivotal, especially in a jury trial, since there is considerable scientific controversy about the validity of recovered memories (Loftus & Ketcham 1996), and research has shown jurors often draw on such opinion and explanation when evaluating these kinds of claims (Alison, Almond, Christiansen, Waring, Power, & Villejoubert 2012). Yet, regardless of the validity of the research, and, by extension, the relevance of such testimony, both of which the appeals courts acknowledged, the North Carolina court insisted on yet another consideration: that performances of conflicting testimony could be potentially disruptive and confusing for jurors (*State v. King* 2012, 14). In a sense, the court conducted a balancing test to see if the likely probative value of the evidence outweighed the simultaneously possible introduction of irrelevant or biased opinion. In the end, the North Carolina court decided against allowing the expert to testify, largely out of fear that an ensuing "duel of experts" would create more heat than light.

But what if there were another way in which experts could testify at a trial? For example, might there be a different format or procedure that could tip the balance and allow insights, even of disagreeing experts, to be of greater interpretive value than the drama of disagreement could pose as a potential distraction or detraction? Despite the grave caution, affirmed in the North Carolina case, that courts be wary of turning over their truth-finding authority to outside experts (who can be arcane, difficult to understand, and at odds with one another), there also is a move afoot to change the way in which experts, this time in the plural, might present knowledge that not only is relevant, but also decorous

and succinct. The practice is “concurrent testimony,” also known widely and informally as “hot-tubbing.” In this essay, I explain how this experiment in concurrent testimony began, how the process works, and some of the performative characteristics that contribute to its rather contrarian popularity.

Origin, Process, and Participant Observations

The method used to coordinate and present concurrent testimony was developed in a highly specialized court in Australia, the Land and Environment Court in New South Wales. Judge Peter McClellan experimented with the process there mainly because of the amount and variety of opinion he heard in public policy cases. The court’s mission was explicitly to serve community interests, and it had few formal requirements on the nature of allowable evidence. In a 2009 interview, McClellan described concurrent testimony as “a discussion between [sworn] experts,” chaired by the judge, and designed to help the judge “understand the perspective of each expert . . . and ultimately resolve the issue that the experts have given testimony about” (Carrick 2009; see also McClellan 2011, 3-4). He suggested concurrent testimony improved the judicial process in expertise-based decisions primarily because of efficiencies it provided in the use of court time, as well changes in the tone and quality of the testimony itself.

The actual process is more elaborate than McClellan’s simplification of it for that interview. Experts selected by the parties participate in subject-specific testimony, in groups as small as two and as large as fourteen. The experts meet on their own first, without lawyers. In that meeting, they respond to questions provided by the judge and produce a list of their own, later shown to the judge, of areas of agreement and disagreement in their responses to the judge’s questions. Later, in the actual hearing or trial, the group as a whole is invited to present their testimony at a non-partisan point of time, that is, either before or after individual parties present their own evidence. The judge opens the testimony session, identifies the issues that need to be decided, and sets up an initial speaking order for that purpose. A microphone is used to improve audibility and to designate who at any time is the speaker. After initial presentations, the judge, attorneys, and witnesses all may seek the floor, offer comments, and ask one another questions (Judicial Commission 2006).

Following McClellan’s model, this form of testimony has been used in a variety of cases. In Australia, it has been used in cases about intellectual property (Wardell 2012), property development compensation (Rares 2013), and the boundaries of wine-growing regions (Administrative Appeals Tribunal [AAT] 2001). In Great Britain, it has been used to evaluate liability for damaged cargo and responsibilities in vehicle delivery contracts (Hazel 2012). In the United States, where the prevalence of jury trials limits its applicability, a Tennessee judge has employed it in pre-trial hearings to inform decisions on matters of medical malpractice in order to admit expert testimony at trial (Judge Thomas 2005).

Despite growing interest in concurrent testimony as a method for the presentation of evidence, however, there are no comprehensive studies of the method's effectiveness or how its form or practice contributes to the various effects attributed to it. Dame Hazel Genn (2012) summarized survey results from participants in a pilot study in Manchester, noting high levels of satisfaction by witnesses and judges, while acknowledging skepticism by some attorneys about the rigor of cross-examinations in the format. Similarly, an evaluation of the process conducted by the Administrative Appeals Tribunal (AAT 2005) in Australia used a survey to conclude that 95% of the judges who had used the method were "satisfied" with it. Eighty-eight percent thought conflicting testimony could be compared more easily, 73% found it improved objectivity, 67% noted higher quality evidence, and 88% found concurrent testimony enhanced the decision-making process. Despite these various analyses of participants' perceptions, however, there remains relatively little analysis of the discourse itself to explain how it creates value for decision makers. This may be because researchers had other concerns. The two survey studies, for example, were more concerned with usability perceptions than with the dynamics of communicative or rhetorical functionality.

A separate barrier to research on the subject is accessibility to discourse samples. While transcripts of testimony can be obtained, for example of cases that were part of the pilot study in Manchester, they only can be seen in person at the courthouse. Other jurisdictions may have more lenient access policies, but there is not yet a clear context, place, or published collection where this kind of data can be compared and analyzed. The only widely accessible illustration of how concurrent testimony sounds and works is the DVD reenactment of excerpts from a case transcript (Judicial Commission 2006).

Given the present difficulty in obtaining and comparing the communication performed in concurrent testimony, this analysis uses excerpts from the educational DVD, anecdotal references by judges writing about the process, and published opinions that contain descriptions of the testimony. While these sources focus attention on particular moments and exchanges very possibly characteristic of this kind of testimony, what they fail to provide, of course, is rich interpretive context. Even so, as the remainder of this essay shows, this initial evidence suggests that concurrent evidence presentation allows competing experts to make coordinated knowledge contributions that compensate for the possible bifurcation and disorientation often associated with dueling experts.

Allowance for Conversational Dynamic

According to many participants, concurrent testimony serves judicial decision-making well because of its conversational dynamic. When asked to describe the process, its early pioneer McClellan recounts that what happens "is a discussion, which is managed by the judge or commissioner, so that topics requiring oral examination are ventilated" (McClellan 2004, 17). The process, McClellan explains, naturally reduces cross-examination, so much that it "rarely occurs" (18). Instead, "the parties, experts and the advocates engage in a

discussion with the Court, which is managed to crystallise the matters that require resolution" (18). These observations clarify that the conversation is never free-flowing or entirely self-regulating. Instead, the presiding judge managed it. Even so, McClellan repeatedly characterizes the communication as a discussion, rather than more formally as evidence presentation or an examination of witnesses. Additionally, several court opinions use the term "hot tub" to refer to the practice (e.g., AAT 2001 sect. 28), implying a somewhat easygoing quality to the interactions and relationships. So, while the precise nature and distinguishing qualities of these discussions surely warrant further examination, McClellan clearly recognizes that the performative norms of conversation are central to the function and value of the testimony.

Others have noted this quality as well. Steven Rares, a judge at the Australian Federal Court, attributes the tendency in such testimony to focus on relevant points of disagreement to an awareness that others simultaneously on the stand can and will step in to debunk an obfuscating answer or red herring. "Because each expert knows that his or her colleague can expose any inappropriate answer immediately, and can also reinforce an appropriate one, the evidence generally proceeds directly to the critical, and genuinely held, points of difference" (Rares 2013, 3). The process, reinforced by the presence of other similarly knowledgeable interlocutors, draws on a conversational dynamic and economy to focus on, as Hans-Georg Gadamer (1991, 367) and Hellmut Geissner (1982, 102-104) might put it, "die Sache," or the "matter of interest." In other words, a relational responsibility motivates the experts to hone in on the relevant issues in a timely and responsive manner.

There is an aspect to this that is messy, especially when compared to an attorney-controlled sequence of questions in a conventional direct or cross-examination. As Rares (2013) describes the process, there are times when experts, who up until that moment had been listeners, are free both to comment on and ask questions about testimony that just had been presented by another expert. There is no pre-set order according to which other experts are permitted to join in the conversation. The only limiting factors seem to be the restriction within the jury box to one microphone, so that only person can speak at a time, and the implied convention that a new speaker must wait until an ongoing interchange has ended or the new speaker is given the nod to join in by the current witness or interlocutor (cf., *Concurrent Testimony*, 8m40s). In other words, the rules governing turn-taking are very much like those that emerge in ordinary conversation.

Qualification of Relative Knowledge Claims

A further reason courts sometimes fear the dynamics of a duel of experts and consider them to carry high risks for decision makers is that differences of opinion, even amongst experts, can devolve into irreconcilable he said/she said standoffs. Decision-makers might come to believe that an expert can be found to say anything, that opposing experts cancel each other out, and that all a decision maker is left with is his or her personal intuition and experience (Gooday 2008,

Kaplan & Miller 1978, Slobodzian 2010). Although it is not a universal or logically necessary correlation, ordinary experience suggests that absolutist or unqualified knowledge claims may increase perceptions that opposing experts are at loggerheads or otherwise incompatible with one another (e.g., Andrews 1991, White 2002). As the following analysis shows, the practice of concurrent expert testimony encourages consciously and explicitly qualified knowledge claims, providing background information about assumptions, as well as acknowledging limitations that may apply to the conclusions presented.

In one case, the Administrative Appeals Tribunal (AAT 2001) in Australia was asked to decide whether a determination of an appointed committee, the Geographical Indicators Committee (GIC), was consistent with a law that governed, among other things, the process for region-specific labeling of wine. The GIC explained that it had used a two-step test in identifying regions: the degree to which relevant characteristics within a region were both internally homogenous and discrete or distinct when compared with neighboring or other regions (sect. 25). The intellectual question thus raised concerned the best way to demarcate a wine-growing region that was both consistent and distinctive.

The applicants in this case contended the committee had violated the law by insufficiently considering criteria required by the law when it refused a proposed expansion of the Coonawarra wine-growing area. In the course of the trial, the judge heard testimony from many experts grouped by the criteria under consideration. The topics most expansively discussed were horticulture, viticulture, soil science, climate, geography, and history (sect. 19-20).

While the court heard expert testimony on a wide range of factors, it also acknowledged that the opinions about which there were critical differences were largely about “soil and viticultural prospects” in selected localities (sect. 48). To illustrate how that testimony informed the final decision, the published opinion provided summaries of three instances of concurrent testimony devoted to those subjects. These substantive knowledge claims were presented and evaluated in ways that qualified and differentiated invoked perspectives.

Much of that summarized opinion was additive. In other words, the experts provided details and perspectives that were not in conflict with, but rather confirmed other opinions, extended them, or added attention to details or dimensions others had not addressed. In relation to one particular issue, however, the report on the testimony evaluated a disagreement between two of the witnesses, both of whom participated in two separate hot tubs on the characteristics of the soil and its implications for grape production.

At issue, in part, was whether the analysis identified “islands” of terra-rossa-like soil formations in the area south of a proposed border or whether the area as a whole could be seen as a homogenous extension of the Coonawarra region. Mr. Maschmedt, a soil scientist from the Department of Primary Industries and Regions for South Australia (PIRSA), argued that a limestone ridge extending six kilometers south of the initially proposed border shared sufficient characteristics with the reddish “terra rossa” soil of the original and oldest Coonawarra vineyards that it could sensibly be counted a part of an expanded Coonawarra wine region (sect. 66). Dr. Cass, an “International Consultant Soil

Scientist," questioned methods used in that analysis and critiqued the maps of the region that it yielded.

While reports on the two separate "hot tubs" acknowledged different mappings, data used, and explanatory concepts used by the two opposing experts, the second in particular provides a glimpse at the interactional dynamics that led the court to its conclusion that Mr. Maschmedt's analysis was more relevant to the legal decision. On the one hand, the report noted that Dr. Cass suggested that the terms "heterogeneity," "homogenous," and "proximate" were ill-suited for describing variations in soils. On the other hand, Dr. Cass had invoked those same criteria while defending a different boundary designation based on concentrated deposits of terra rossa soil in parts of the original identified region. In other words, in the course of the discussion, he conceded an inconsistency in his own perspective. Under questioning from other experts, Dr. Cass also acknowledged that he selectively had neglected available data in criticizing PIRSA maps and that he had made errors of scale and context in criticizing characterizations of soil types presented by Mr. Maschmedt and other experts.

After this relatively meticulous summary of the experts' positions, arguments, and points of disagreement, the report then stepped back and announced three related conclusions: (1) no criterion alone could be considered a decisive factor in demarcating the wine region (not climate, soil type, watershed limits, etc.), (2) the limestone ridge south of Penola could reasonably be considered a contiguous and relatively homogenous extension of the expanded Coonawarra region previously identified by the Geographical Indicators Committee, and (3) none of the possible extensions could be determined without reference to historical usage of the name Coonawarra, which then became the next topic for consideration and analysis in the report. In other words, the decision called for a holistic or balanced judgment, not driven by a single master criterion. Instead, the decision had to make sense from multiple perspectives at once.

Striking in this particular account of expert testimony is the care it showed in delineating fields of knowledge from one another, relating those knowledge claims to one another, and in filtering extant disagreements for concessions, inconsistencies, and relevance regarding the underlying legal question. Despite a sprawling law that insisted on multiple competing criteria and a bank of experts with wide-ranging specializations and allegiances, both the eventual ruling and the account of those testimonies reflect a delicate and achieved consensus on central issues. This outcome is achieved in this case by balancing and relating to one another competing considerations, and this, in turn, is achieved by the willingness of witnesses to qualify and limit the scope of their respective areas of knowledge.

Conclusion

Concurrent testimony in trials appears to be a new and widely welcomed way for expertise to be presented and performed. Although very little data are publicly available for researchers to assess how this form of communication functions in and especially across cases, anecdotal accounts and a transcript-based dramatization illustrate some of the features of the communication that participants have prized. Some of the performative qualities associated with participants' appreciation for the form are allowances for development of a conversational dynamic, the range and distribution of speech roles, and a highly conscious hedging of certainty in qualifications offered for knowledge claims.

These preliminary observations certainly are speculative, based as they are on selected anecdotes and reenactments. To judge either the pervasiveness of these qualities or the productive interpretive value they provide for decision makers, further research should conduct more systematic analysis of complete transcripts and recordings. Even so, the performative qualities identified here suggest that concurrent testimony does help courts circumvent the possible dangers of a distracting and confusing duel of experts and replace that with a performance of expertise that simultaneously is collaborative, qualified, and informative.

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