THE ACTUARY AS AN EXPERT WITNESS

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Judges and juries frequently rely on the evidence of expert witnesses. Actuaries who are requested to prepare a report and/or give evidence should be aware of what courts expect of them. This paper outlines recent developments in relation to expert evidence and provides some guidance for those involved in this field.

Introduction

1. The basic rule of evidence in court proceedings is that witnesses can only give evidence of observed or perceived facts, not opinions. This rule, known as the opinion rule, now has a statutory formulation in section 76 of the *Evidence Act*[1]. Section 79 provides an exception to that rule by permitting opinion evidence "[i]f a person has specialised knowledge based on the person's training, study or experience". Of course, such evidence must be relevant to the issues in the proceedings, as required by section 55.

2. Opinion evidence is led from actuaries on a variety of issues such as:

   (a) the present value of a claim for loss of earnings or the cost of future care, most commonly in personal injuries litigation;

   (b) the present value of superannuation benefit entitlements or loss thereof, a not uncommon issue in Family Court proceedings;

   (c) questions relating to individual life and general insurance contracts which can arise under consumer protection statutes;

   (d) valuations of life offices, general insurance companies and superannuation funds due to merger, acquisition or demutualisation;

   (e) the valuation of life interests and remainder interests arising under wills;

   (f) projections involving future cash flows, particularly under conditions of uncertainty, including scenario analysis;

   (g) the valuation of both financial and real options; and

   (h) the valuation of other commercial interests where the experience and expertise of an actuary is relevant.

3. The just resolution of such disputes requires that the Court (ie judge or jury as the case may be) understand the expert evidence, an objective more readily accomplished if the actuary correctly understands what the Court is seeking to achieve. It is also important to bear in mind that expert evidence is often accorded greater weight than the evidence of lay witnesses. Hence the Court will usually be relying on the evidence of the actuary in relation to an issue in the proceedings.

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[1] The Evidence Act 1995 (Cth) and the Evidence Act 1995 (NSW)

4. A survey conducted by the Australian Institute of Judicial Administration in 1997 disclosed judicial concerns in relation to opinion evidence, commonly referred to as expert evidence. Although the comments may have differed, the principal area of concern was the independence of experts. As Lonergan[2] noted, the following suggestions have been made in the light of the results of the survey:

   (a) the need for training of experts;

   (b) improved presentation;

   (c) procedural change;

   (d) court appointment of experts, assessors and referees; and

   (e) changing the culture of partiality.

5. In January 1999 the Australian Law Reform Commission published a paper[3] which contained the following recommendations in relation to expert evidence:

   (a) the use of case management to control the use of expert evidence;

   (b) pre-trial communication between experts;

   (c) the development of a Code of Practice for expert witnesses;

   (d) a review of the training needs of experts;

   (e) use of a single expert by agreement of the parties;

   (f) adducing evidence in a panel format.

6. The Federal Court of Australia has since issued Guidelines for expert witnesses and the Supreme Court of New South Wales now has a mandatory Code of Conduct for expert witnesses. Such standards provide the best starting point for any actuary who has been asked to prepare a report and/or give evidence in any court proceedings. This paper is intended to be a supplement to, not a substitute for, those standards.

Federal Court

7. The Chief Justice of the Federal Court has issued Guidelines for expert witnesses. They are set out in Appendix 1 to this paper. The content of the Federal Court's guidelines drew heavily on a passage contained in the

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2 Australian Judicial Perspectives on Expert Evidence, NSW Law Society Journal, August 2000, 54 at 55.

3 Australian Law Reform Commission, Background Paper No 6, Australian Government Publishing Service, 1999.

lengthy judgment in the *Ikarian Reefer* case[4] in which the presiding judge considered "that a misunderstanding on the part of certain of the expert witnesses … as to their duties and responsibilities contributed to the length of the trial". Although the announcement of those guidelines attracted considerable publicity, they did little more than set out what has been proper conduct for many years. That the guidelines were considered necessary reveals the extent to which prevailing practice has fallen short of the required standards.

8. Apart from the Guidelines, it is worth noting the Federal Court's rules in relation to expert evidence. Order 34A rule 3(2) gives the judge the power to direct that expert witnesses confer and produce a report setting out the matters and issues about which they agree and those about which they disagree. Obviously, such a direction would usually be given prior to the commencement of the substantive hearing with a view to identifying areas of common ground and narrowing the issues in dispute thereby shortening the hearing with consequential savings in time and cost. For example, it may be that the only difference between the experts is due to the factual foundations on which their opinions are based. In such a case there may be no need for oral evidence from any expert since findings of fact would dictate a result with which the experts would agree.

9. Secondly, Order 34 rule 3(2) permits the judge to defer hearing expert evidence until some or all of the factual evidence has been led. Such a direction would alter the usual course or proceedings whereby the Applicant (Plaintiff) leads all its factual and expert evidence followed by that of the Respondent (Defendant). Since expert evidence is often based on factual premises, deferring the expert evidence can thus overcome difficulties such as that which arises when the Applicant's experts are giving evidence prior to the Respondent's lay witnesses.

10. Further, this rule provides greater flexibility as to how the expert evidence may be received. For example, a judge could hear all the expert evidence on a particular liability issue or all the expert evidence in a particular field rather than first hearing from all the Applicant's experts followed by all the Respondent's experts. This would, of course, be desirable in long, large or complex cases.

11. Order 34B rule 2 enables the Court, in a non-jury matter, to appoint an expert to assist the Court on any issue of fact or opinion arising in the proceedings. However, such an appointment can only be made with the consent of the parties. Such an "expert assistant" is required to prepare a written report, copies of which are provided to both the Court and each party to the proceedings. An expert assistant does not give evidence: the parties can either comment on the report or lead other evidence on the relevant issue(s).

12. It is easy to see how an actuary could be usefully appointed pursuant to Order 34B to quantify some loss which has been established by the lay (ie

4 [1993] 20 FSR 563 at 565

non-expert) witnesses in a case thus minimising or even eliminating both the need for the parties to each retain an actuary to give evidence and the need for a judge to hear other evidence on that issue.

Supreme Court (NSW)

13. The response of the Supreme Court of New South Wales to concerns in relation to the reports and evidence of expert witnesses was to introduce, on 28 January 2000, a mandatory Code of Conduct for expert witnesses which may be found in Schedule K to the Rules. A copy of the Code of Conduct is Appendix 2 to this paper.

14. The Supreme Court Rules (Part 36 rule 13C) now provide that a report will not be admitted into evidence, and oral evidence will not be received from an expert witness, unless he/she has acknowledged in writing that he/she has read the Code of Conduct and agrees to be bound by it. Part 39 rule 2 imposes a similar requirement in the case of a Court-appointed expert. These rules apply to reports written on/after 1 March 2000.

15. It is convenient to here note that Part 36 rule 13CA enables the Court, on application by a party or of its own motion, to direct that a conference between experts be held with a view to reaching agreement on outstanding matters and providing the Court with a joint report indicating the matters agreed, the matters not agreed and the reasons for any non-agreement. Such conferences may be held in the absence of the lawyers for the parties.

District Court (NSW)

16. Schedule 1 to the rules of the District Court of New South Wales contains a Code of Conduct for Expert Witnesses in the same terms as the Supreme Court's code. The only difference is the addition of paragraph 1(c) which specifically provides that the Code applies to a Court-appointed expert. There are also provisions in the District Court rules corresponding to the Supreme Court rules referred to above.

Content of reports

17. The following framework for an expert's report is provided as a general guide, not as a fixed format. It should be modified as circumstances dictate.

    (a) Instructions

    (b) Qualifications and experience

    (c) Issues

    (d) Material provided

    (e) Factual foundation(s)

    (f) Assumptions

(g) Opinion(s)

(h) Reasons

(i) References

(j) Acknowledgment

18. ***Instructions***. Details of who requested the report and for what purpose should be provided. For greater transparency, a copy of a letter of instructions may be annexed.

19. ***Qualifications and experience***. It must be borne in mind that the Court needs to be satisfied that the author of the report has qualifications and experience relevant to the issues in dispute. Many experts simply reproduce their standard form *curriculum vitae* or add same as an appendix to the report. The preferable course is to include some narrative linking the qualifications and experience to the relevant issues.

20. ***Issues***. Many reports do not set out clearly what issues the expert is seeking to address. Setting out the issues the report addresses improves clarity and saves time for those reading the report: the judge, solicitors, barristers and other experts.

21. ***Material provided***. A fundamental question for anyone reading an expert's report is what the expert has read. Setting out details of documents or other material which have been considered carries the practical advantage that the advocate relying on the report can ensure that all this material is tendered during the hearing.

22. ***Factual foundation(s)***. The mental discipline involved in this step usually serves to distill what the expert considers significant in the material provided. Furthermore, since opinion evidence depends on the proof or admission of the facts on which the opinion is based, it is important for such facts to be stated.

23. ***Assumptions***. Actuarial evidence usually requires assumptions as to matters such as mortality and an interest/discount rate. Any such assumptions should be clearly stated. Sufficient information should be provided to enable any calculations to be replicated.

24. ***Opinion(s)***. Even if opinions are expressed at the conclusion of each section within the report, it is helpful to include a section containing a summary of the author's opinions on each of the relevant issues. The Federal Court's Guidelines require such a summary where several opinions are provided in the report.

25. ***Reasons***. Both the Guidelines and the Code of Conduct require the expert to give reasons for each opinion expressed.

26. ***References***. Relevant details of any books, papers, articles or other references upon which the author of the report relies are now required and should be provided either via footnotes or endnotes.

27. ***Acknowledgment***. For a report which is to be used in Federal Court proceedings the following wording is required:

> I have read the Court's *Guidelines for Expert Witnesses* and I hereby declare that I have made all inquiries which I believe are desirable and appropriate and that no matters of significance which I regard as relevant have, to my knowledge, been withheld from the Court.

28. If the report is being prepared in respect of Supreme Court or District Court proceedings the necessary wording is as follows:

> I have read the Court's *Expert Witness Code of Conduct* and I agree to be bound by it.

29. In former times some of the above matters did not appear in many reports. There has been a decline in "trial by ambush" in favour of exchange of experts' reports prior to the substantive hearing. Any perceived disadvantage in greater disclosure of an expert's report is at least matched by the benefit of the greater disclosure similarly required of the experts retained by the other parties to the proceedings.

30. The majority of cases settle prior to the hearing. A well-prepared expert report not only facilitates such settlements but also serves to confine attention to the matters genuinely in dispute.

Rules of evidence

31. When issues requiring expert evidence arise in court proceedings, a two-way process occurs: the judge (or jury) endeavours to understand the field of the expert and the expert tries to understand how court proceedings are conducted. Accordingly, those drafting reports or preparing to give oral evidence should be assisted by an outline of the rules of evidence. Within the confines of a paper such as this, it is sufficient to indicate that the structure of the statutory provisions[5] is such that the first three issues are:

    Is the evidence relevant?

    Does the hearsay rule apply?

    Does the opinion rule apply?

32. First, the basic principle is that only relevant evidence is admissible. For evidence to be considered relevant it must be "evidence that, if it were

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5 Evidence Act 1995 (Cth) and Evidence Act 1995 (NSW)

accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding."[6]

33. Secondly, it is necessary to be aware of hearsay. This is probably the most complex and confusing rule of evidence. Simply stated, the hearsay rule provides that an assertion other than that made in the witness box in the proceedings is not admissible as evidence of the truth of that assertion. Numerous exceptions to the hearsay rule were developed via case law. The 1995 Evidence Acts defined the hearsay rule[7] and relaxed the hearsay rule in respect of "first hand hearsay"[8]. Fortunately, the hearsay rule is unlikely to arise in relation to the personal opinions of an expert. However, it may render inadmissible some of the facts upon which an expert relies. The hearsay rule may cause a legal representative of the party retaining the expert to request that portions of a written report be omitted or reworded.

34. Thirdly, as to expert evidence in particular, it has been suggested[9] that there are five rules governing the admissibility of expert evidence. The *expertise rule* requires that the witness is genuinely expert in the field to which his/her evidence relates. This rule is likely to be easily applied in respect of the evidence of actuaries.

35. The *area of expertise* rule focuses on the issue rather than the expert by requiring that there be an area of expertise that is either generally recognised or sufficiently reliable before expert evidence will be permitted on that issue. In the traditional fields of the actuary, such as life insurance and superannuation, this rule should not pose any problems. As the scope of the actuarial profession broadens it may be necessary to cover this rule by demonstrating how the skills of the actuary relate to the issue at hand.

36. The *basis rule* requires that the factual bases for the opinion evidence must be formally proved before the opinion can be admitted. In practice, this may mean that an actuary loses some factual foundation for his/her opinion. It can also lead to questions being asked on the basis of assumed facts, being facts which it is hoped will be ultimately established and this linked to the opinion evidence.

37. Although abolished by statute in 1995[10], the following two rules appear to have been the subject of attempted judicial resuscitation[11] on the basis that the statutory abolition does not operate to exclude the principles developed in prior cases.

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6 *Ibid*, section 55

7 *Ibid*, section 59

8 *Ibid*, sections 62 to 68

9 Freckleton & Selby, Expert Evidence, Law Book Company, loose leaf service

10 Evidence Act 1995 (Cth) and the Evidence Act 1995 (NSW), section 80

11 *O'Brien v Gillespie* (1997) 41 NSWLR 549 at 557. See also *Symonds v Egan National Valuers (NSW) Pty Ltd (No 15)*, unreported judgment, Dowd J, 22 February 1996

38. The *common knowledge rule* precludes expert evidence on matters of ordinary knowledge since the judge (or jury) does not need, and is not assisted by, such evidence. Some of the simpler mathematical calculations may have been caught by this rule. Such evidence might now be excluded via the discretion which the courts now have to exclude evidence which might "cause or result in undue waste of time"[12].

39. The *ultimate issue rule*. This rule appears to derive from the fear that juries would decide cases on the basis of an expert's opinion rather than on the evidence as a whole. It is perhaps best stated by saying that an expert witness should not be permitted to state his/her opinions in terms of a legal standard. For example, a suitable expert would be permitted to give opinion evidence, based on proven acts or omissions, as to the risks involved in a particular system of work and how such risks might be minimised or eliminated, but would not be allowed to state that a defendant who adopted that system or work was negligent. This rule can be avoided by careful drafting of a report.

Procedural aspects

40. The usual sequence of events for an expert is that he/she is first retained to consider issues and provided with any necessary material or information. The report is then *drafted*, amended (lawyers use the word "*settled*") and a copy provided to the other party/parties (lawyers use the word "*served*"). An expert witness will usually *confer* with counsel prior to the hearing. Prior to or at this conference the expert is likely to be asked to consider the report(s) of the other party/parties. Arrangements may be made, either following a direction by the Court or by agreement between the parties, for the experts to confer, with or without the lawyers (this is sometimes referred to as a *conclave*).

41. Come the hearing, it may be that the report is tendered and the expert's attendance not required. Hence, if an expert is called to give evidence, that is likely to involve *evidence-in-chief, cross-examination* and *re-examination*. Prior to the evidence-in-chief there may be a preliminary hearing (called a *voir dire*) if the qualifications and/or experience of the expert are to be challenged. At some time prior to the hearing, the expert may receive a *subpoena* to produce documents. Usually, the proceedings will be determined by a judge. However, *juries* are still used in some civil cases.

42. *Drafting*. Every report must comply with the relevant Guidelines or Code of Conduct. The content and format of an expert's reports been covered earlier.

43. *Settling*. When the proposed report has been forwarded, usually to the solicitor acting for the party, there may follow a request for the report to be amended. This is an important area. There is nothing wrong with a lawyer seeking to have a report re-worded in order to prevent a portion of the report being ruled inadmissible. However, an expert should be very cautious where the request seeks an alteration of the expert's opinion or supporting reasons. The form-substance distinction is important as amendments of the latter variety

12 Evidence Act 1995 (Cth) and the Evidence Act 1995 (NSW), section 135

may involve at least a loss of independence and at worst render the expert an advocate. Removal of material from the report at the request of either the lawyer or the client may be an "orange light" but is usually a "red light".

44. *Conference*. If the matter is being properly prepared, a conference with the advocate will usually cover: the proposed evidence-in-chief of the expert, preparation for cross-examination and the expert's comments/criticisms of the reports of any opposing experts. This also provides the best opportunity for the expert to ask questions with a view to clarifying any matter of concern.

45. *Conclave*. An expert must not accept or act on any instruction or request to withhold or avoid agreement at a meeting of experts. It is comforting to note that there is recent English authority for the proposition that an expert cannot be sued in respect of any concession or agreement made by an expert at such a meeting[13]. The immunity was considered justified on the basis that the public interest required that there be full and frank pre-trial discussions between experts who should each be free to make proper concessions without fear of being sued. In reality, a concession made at such a conference is no different to the concession an independent, impartial and honest expert would make under cross-examination during any hearing.

46. *Voir dire*. This is a trial within a trial. In the context of expert evidence, it is a preliminary hearing to decide whether or not the proposed witness has the requisite qualifications and experience. Such a hearing will usually be confined to questions asked of the proposed witness, first by the opposing advocate and then by the advocate who called the witness. The issue can be the nature and extent of the qualifications and experience of the witness *per se* or it can be whether the qualifications and experience of the witness are such as to entitle him/her at law to give opinion evidence on the issues in the subject proceedings. If such a preliminary challenge is unsuccessful the witness proceeds with his/her evidence. However, if the challenge is successful, the witness is not permitted to give evidence.

47. *Evidence in chief*. Many advocates do little more in evidence-in-chief than identify and tender the expert's report. Indeed, where a written report has been served, further evidence-in-chief from the expert may sometimes only be led with leave (ie permission) of the Court. Ideally, counsel will lead the expert through his/her report emphasising the aspects most favourable to the case of the party which has called the expert. Tables, diagrams and other presentation aids often assist in the understanding of expert's reports and are especially useful when calculations or amounts are involved. However, there should be enough copies available. Bear in mind that the judge (or jury) is entitled to take into account not only what a witness says but also the demeanour of the witness. Leading questions are objectionable in evidence-in-chief. Hence the advocate will "steer" the witness to a topic: it is then for the witness to give the evidence on that topic. This process can work well if the witness is carefully listening to the question and answering

13 *Stanton v Callaghan* [1998] 4 All ER 961

completely but concisely, bearing in mind that an expanded answer can be obtained, if desired, via further questions.

48. *Cross-examination*. What will a cross-examiner be seeking to achieve? The following list may be of assistance:

(a) looking for a breach of the applicable Guideline or Code of Conduct;

(b) challenging the expert's qualifications and experience;

(c) cross-examining as to the expert's approach to the task;

(d) ascertaining the matters on which the opinion depends;

(e) obtaining opinions based on hypothetical facts;

(f) challenging the opinions and/or the supporting reasons; and

(g) exposing any links to the client or possible bias.

49. An expert witness may not able to answer straightaway a question asked in cross-examination. In such circumstances, time can be sought and an answer provided later. Sometimes a written response can be provided after cross-examination has concluded.

50. *Re-examination*. The importance of re-examination is often overlooked. It provides an opportunity for the advocate to obtain answers from a witness which supplement or explain matters arising in the course of cross-examination in order that the Court is not left with distorted or incomplete evidence on a topic. Good expert witnesses legitimately indicate during cross-examination, to the advocate who called them, the matters they wish to be covered in re-examination. This is done through a qualified answer or via the words used. Conversely, good advocates may well leave an answer truncated by the cross-examiner safe in the knowledge that the remainder of the answer can be elicited in re-examination where answers are immune from subsequent challenge.

51. *Subpoena*. An expert witness may receive a subpoena to produce documents issued by the lawyer acting for another party to the proceedings. All documents falling within the wording of the subpoena will need to be produced. When an expert witness for a party receives a subpoena to produce documents he/she should notify the solicitor for that party who will usually provide assistance in relation to any claim for privilege or any claim of confidentiality. Such a claim in respect of a document will, if successful, result in that document being produced to the court but withheld from inspection.

52. Jury hearing. While the issues and hearing procedure are the same, different presentation is required when an expert gives evidence before a jury. It is important to ascertain as soon as possible, even when first retained, whether the matter involves a jury or non-jury hearing.

Miscellaneous matters

53. There are a number of matters that may be conveniently summarised in point form:

(a) When an expert expresses an opinion, either in a written report or oral evidence, he/she does so as a witness and not as an advocate whose task it is to present arguments in support of the client's case.

(b) On matters not requiring the skill, knowledge or experience of the expert, he/she is in no better position than a lay witness and expressions of opinion on issues of fact not requiring expertise are inadmissible.

(c) Evidence from an illustrious expert is likely to be rejected if it lacks objectivity.

(d) There is a danger when an expert's time is devoted solely to the preparation of reports and giving evidence, especially when he/she is regularly or exclusively retained by a particular party or kind of litigant.

(e) Flexibility is often necessary: the expert may be required to reconsider his/her opinion if the facts on which it is based are not established. Unflinching adherence to a view which supports the case of the party relying on the expert may be viewed as demonstrating a lack of impartiality.

(f) It may be possible for the actuary to present an opinion that can be used depending on the determination of the issues of fact. For example, evidence of the present value of a payment of $1 per week for the remainder of the working life of a 25 year old man can be used in a claim for loss of future earnings whatever the Court finds the plaintiff's weekly loss to be.

(g) The receipt of fees for preparing reports and giving evidence is not a problem if those fees are commensurate with the other work of the expert and if he/she is not unduly dependent on such work.

Related roles

54. It is worth noting other roles an actuary might play in the area of dispute resolution other than that of an expert witness retained by a party.

55. Court-appointed expert. The objective here is to have only one expert instead of a separate expert witness retained by each party. This may be viewed as an expert who is retained by the court in which proceedings have been commenced rather than by a party to such proceedings. Under the Federal Court Rules[14], an expert may only be appointed with the consent of the

[14] Order 34B

parties, is not subject to cross-examination and is referred to as an "Expert Assistant". The Supreme Court Rules[15] permit the Court to appoint an expert, called a "Court Appointed Expert", who may be cross-examined.

56. Arbitrator. Here the expert is required to decide the outcome of proceedings rather than give evidence. Arbitrations can range from very informal processes to hearings which closely resemble court proceedings. The Australian Branch of the (UK) Chartered Institute of Arbitrators and the Institute of Arbitrators and Mediators Australia both conduct courses for those who need to acquire the necessary skills. Arbitrations usually arise due to the inclusion in contracts of clauses which require disputes to be referred to arbitration and specify the rules which shall apply. The outcome of an arbitration is an award which can be enforced by having it registered as a judgment.

57. Referee. Courts nowadays refer matters to an expert for determination. This is a cross between a court hearing and an arbitration: it differs from a court hearing in that it is conducted by an expert rather than a judge and it differs from an arbitration in that it is the result of a court order rather than an agreement between the parties. The report of the referee is provided to the court which then decides whether it should be adopted, with or without modification.

58. *Mediator*. A successful mediation avoids the need for a courtroom-style hearing. The mediator endeavours to achieve a settlement through conferences with the parties and will usually involve the mediator speaking to each party in the absence of the other parties in order to highlight the perceived strengths and weaknesses of each party's position. The outcome of a successful mediation is agreed between the parties rather than imposed upon them. As in the case or arbitration, there are a number of training courses available for those who wish to become involved in this field as mediators.

Selected examples

59. The following illustrations serve as a warning for those who value their professional reputation and wish to avoid judicial criticism.

60. In an action for breach of copyright in relation to a code-numbering system used by a manufacturer of oil seal products, the plaintiff's expert said in his witness statement "As far as I am aware no other previous seal manufacturer has used such a system." However, it became apparent that such a system was being used by others in the trade. The plaintiff's expert neither knew what systems were used nor had he made any effort to find out. The judge said:

> The special weight and respect given to expert evidence carries with it the responsibility to approach the task seriously

15 Part 39

> and an expert should not be surprised if the Court expressed strong disapproval if that was not done.[16]

61. An expert witness came in for much stronger criticism from the same judge the previous month in *Cala Homes (South) Limited v Alfred McAlpine Homes East Limited*[17]. The architect who gave evidence for the defendant had published an article in which he suggested:

> … the man who works the Three Card Trick is not cheating, nor does he incur any moral opprobrium, when he uses his sleight of hand to deceive the eye of the innocent rustic and to deny him the information he needs for a correct appraisal of what has gone on. The rustic does not have to join in: but if he does he is "fair game".[18]

62. The response of the judge to this was as follows:

> The whole basis of Mr Goodall's approach to the drafting of an expert's report is wrong. The function of a court of law is to discover the truth relating to the issues before it. In doing that it has to assess the evidence adduced by the parties. The judge is not a rustic who has chosen to play a game of Three Card Trick. He is not fair game. Nor is the truth… "Pragmatic Flexibility" as used by Mr Goodall is a euphemism for "misleading selectivity".[19]

63. During a lengthy defamation case, a psychiatrist called as an expert witness made damaging admissions. His conduct was summarised in the following terms:

> Dent conceded in court late last year that he has cut two pages of the report at [Marsden's solicitor's] request. He also acknowledged writing a letter that he knew to be a lie to help justify removing the material from the report. When Channel 7's Bob Stitt, QC, suggested he was party to collusion, Dent replied: "It appears that way." He added: "That is something that is absolutely regrettable."[20]

64. Contrast the judicial approval of the expert witness who refused to extend his evidence-in-chief to the extent desired by counsel who called him:

> Mr Rummery showed a refreshing attitude for any expert witness in that he refused to put his evidence any higher

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16 *Autospin (Oil Seals) v Beehive Spinning* [1995] TLR 469

17 (1995) FSR 818

18 At 841-842

19 At 842-843

20 Wendy Bacon, A Matter of Opinion, Sydney Morning Herald, 6 July 2000, p11

> than a careful expert should and that was to tell the court what he would have done in the circumstances or to criticise a particular thing that [the solicitors] did or did not do.[21]

65. Expert witnesses sometimes cross the line separating the witness from the advocate. Guidance on this point is provided by the passage of the Full Court of the Federal Court in *Arnotts Ltd v Trade Practices Commission*[22] which adopted the following words of Sir Richard Eggleston[23]:

> The difficulty arises because the expert often finds it difficult to distinguish between arguments on the assumption that the 'facts' put forward by his side are the correct ones, and telling the judge or jury which facts they should accept as true. If he makes his assumptions clear, there is no objection to his arguing what the consequences of accepting those assumptions should be; but he is not to do the jury's fact-finding for it, where this depends on accepting one or other of contradictory witnesses.

Relevant Institute of Actuaries documents

66. In December 1994 the Institute of Actuaries of Australia adopted a "Policy Statement on Appointment of Experts and Arbiters" which was reviewed by the Institute's Council in December 1995. A copy of that Policy is Appendix 3.

67. At the Institute's Annual General Meeting on 25 May 1998 (well in advance of the introduction by the courts of a Code of Conduct for expert witnesses) the following wording was adopted:

> *Role and Duties of an Expert Witness in Litigation*
>
> 1. *The role of the expert witness in litigation is to assist the court in the administration of justice by providing an opinion or factual information based on the expert's competence in a subject which is outside the knowledge, skill or experience of most people.*
>
> 2. *It follows that the opinion is only useful if it is based on the expert's area of competence, includes all relevant matters and is impartial and dispassionate. Thus the primary duty of an expert is to the court because of his or her role in the process as defined above. An expert is subject to the normal duty in respect of evidence of fact to be complete, accurate and truthful.*

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21 *Permanent Trustee Aust Ltd v Boulton* (1994) 33 NSWLR 735 at 739 per Young J

22 (1990) 97 ALR 555 at 596

23 Evidence, Proof and Probability (Weidenfeld and Nicholson, 1983) at 154

3. *The expert owes a second duty to the body of knowledge and understanding from which his or her expertise is drawn. This implies recognition of its limitations and the humility which should flow from such recognition, since the outcome of litigation is likely to influence the practical application of such knowledge and understanding in the future. It also implies dealing with the opinions of other competent experts in a respectful manner. It is important to the overall process that the integrity of the processes by which knowledge is acquired and understanding is developed should not be degraded. Thus the secondary duty of the expert witness is to the body of knowledge and understanding.*

4. *The expert witness owes a third duty to the party which has sought his or her opinion. That duty is to provide the advice in the context of the first and second duties above, which implies that the expert should not be an advocate for a party. This is a tertiary duty.*

68. Of course, the Code of Conduct is also relevant to the work of an actuary as an expert witness and such work could give rise to disciplinary proceedings. Perhaps most notably, an actuary should not to agree to act as an expert if he or she has insufficient practical expertise in the relevant field(s).

Frequently asked questions

69. It is intended to present this paper in a manner which permits time for questions such as those considered below.

Should life expectancies make any allowance for future improvement in mortality?

70. When the Court has to make an assessment of life expectancy it is seeking to do the best it can as part of a dispute resolution process. Published tables provide a practical solution, often enabling agreement between the parties. Potential improvement in mortality rates provides another potential area for dispute. The paper by Cumpston & Sargeant in the May 1998 issue of the Torts Law Journal at pp85-97 suggests that life expectancies should be based on the mortality rates assumed by the Australian Bureau of Statistics in their most recently published population projections. That seems to be a sensible way of making an allowance via official, published figures. However, I would expect that such a change in approach will need to be established in one case, perhaps at an appellate level, before it becomes widespread.

What if legal precedent conflicts with actuarial theory?

71. A trial judge is unlikely to depart from a prior decision in similar circumstances, especially if such a decision is that of the High Court or an intermediate appellate court. Hence, the law will not develop if actuaries slavishly follow legal precedent. Where there is a conflict between legal precedent and actuarial theory I would suggest that two figures be provided: one based on the legal precedent and the other based on actuarial theory. Of course,

reasons in support of the latter figure should be provided. Such a course provides the court with the conventional answer and with the ability to develop the law if urged and persuaded to do so. It should be borne in mind that the court is deciding the case on the evidence before it: if the only available evidence is from the past and there is no expert evidence as to the likely future course then the court will be highly likely to assume that the past is the best available indicator of the future.

Should actuarial reports be marked "draft"?

72. With the advent of word processors, draft reports can "disappear" when a revised version is created on a computer. Numbering the versions of a document, common practice among engineers and architects, usually causes the opposing lawyer to seek the earlier versions. Mediation is now quite common. It is unusual for the parties to agree that what is said and the documents which are exchanged during mediation are confidential and cannot be used in subsequent litigation. Reports circulated during mediation are best marked "Draft" and "Without Prejudice". It is often desirable to include a sentence to the effect that the report is based on the information provided and may need to be revised if further information comes to hand. That is especially important where an attempt is made to achieve a mediated settlement early in the life of a dispute, before all relevant documents are available.

Responding to yes/no questions?

73. Usually, a judge will not let the cross-examiner insist on a "yes" or "no" answer unless either the witness has been prolix or has not been directly answering questions or if the question really does not require more than such an answer. There is a middle ground between a lengthy answer and "yes" or "no". For example: "On the basis of the assumptions you have asked me to make, yes" will make the position of the witness clear to the judge or "No, and I can give reasons for that answer if you like" will legitimately signal to the lawyer who called the witness that reasons can be given in re-examination if no opportunity is provided in cross-examination.

Jury trials

74. Lawyers have a different form of presentation before a jury and so should an actuary who is a witness in a jury trial. Indeed, an actuary should check at the outset whether the case is being heard with or without a jury as more explanation will usually be required than in the case of a judge with prior experience in such cases. It should be observed that juries are becoming less common in civil cases, other than in defamation matters. The danger of an actuary's report being put before the jury is that they may disregard the oral evidence.

Replicable calculations

75. Should sufficient information be provided to enable calculations and results to be replicated? On the one hand there is forensic advantage. On the other hand, transparency is likely to be viewed favourably by the court. If sufficient

details are not provided then they may be sought via cross-examination. A similar problem arises in relation to the evidence of valuers, some of whom are reluctant to provide full details of their comparable sales in the expert witness report. Which approach is adopted in a particular case may depend on such matters as the jurisdiction and the tactical approach of the lawyers who have engaged the actuary.

What is an actuary?

76. This is a question which may need to be answered for the benefit of a jury (and sometimes for a judge). The appropriate explanation depends on the individual case, which may not be in the traditional fields of life insurance, general insurance or superannuation. I would expect to see included some reference to the value of a sum of money depending on the amount, when it is received (the time value of money) and the chance of it being received (the risks or contingencies) coupled with the explanation that the actuary's qualifications and experience enable him/her to make calculations in such circumstances. Perhaps the best suggestion is that the actuary should make sure that the lawyer who is calling him/her as a witness has a good answer ready.

Conclusion

77. The importance of the Guidelines and Code of Conduct is such that it is advisable for actuaries to use such documents as a checklist each time they prepare a report for use in court proceedings.

78. An expert must always bear in mind that his or her duty as an expert witness is to provide independent, objective evidence to the Court. Any request to be responsive to the needs of the client should be carefully considered and never permitted to override that duty. Impartially and integrity are vital.

79. Expert evidence should be well prepared and well presented. It can significantly contribute to the resolution of disputes, whether via settlement or judicial determination. If the time and cost associated with expert evidence cannot be contained then it is likely there will be greater use of court-appointed experts.

80. As with other areas of the actuary's work, communication skills play an important role. Both through written reports and oral evidence, an actuary will not only create a personal reputation but also impact on the reputation of the profession. Simply put, the role of the actuary as an expert witness is not to seek to be a master of the proceedings but to be a servant of the court.

Appendix 1 : Guidelines for Expert Witnesses in proceedings in the Federal Court of Australia

General Duty to the Court

* An expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise.

* An expert witness is not an advocate for a party.

* An expert witness's paramount duty is to the Court and not to the person retaining the expert.

The Form of the Expert Evidence

* An expert's written report must give details of the expert's qualifications, and of the literature or other material used in making the report.

* All assumptions made by the expert should be clearly and fully stated.

* The report should identify who carried out any tests or experiments upon which the expert relied in compiling the report, and give details of the qualifications of the person who carried out any such test or experiment.

* Where several opinions are provided in the report, the expert should summarise them.

* The expert should give reasons for each opinion.

* At the end of the report the expert should declare that '[the expert] *has made all the inquiries which* [the expert] *believes are desirable and appropriate and that no matters of significance which* [the expert] *regards as relevant have, to* [the expert's] *knowledge, been withheld from the Court*.'

* There should be attached to the report, or summarised in it, the following (i) all instructions (original and supplementary and whether in writing or oral) given to the expert which define the scope of the report; (ii) the facts, matters and assumptions upon which the report proceeds; (iii) the documents and other materials which the expert has been instructed to consider.

* If, after exchange of reports or at any stage, an expert witness changes his or her view on a material matter, having read another expert's report or for any other reason, the change of view should be communicated in writing (through legal representatives) without delay to each party to whom the expert witness's report has been provided and, when appropriate, to the Court.

* If an expert's report is not fully researched because the expert considers that insufficient data is available, or for any other reason, this must be stated with an indication that the opinion is no more than a provisional one. Where an expert witness who has prepared a report believes it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report.

* The expert should make it clear when a particular question or issue falls outside his or her field of expertise.

* Where an expert's reports refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the opposite party at the same time as the exchange of reports.

Experts' Conference

* If experts retained by the parties meet at the direction of the Court, it would be improper conduct for an expert to be given or to accept instructions not to reach agreement. If, at a meeting directed by the Court, the experts cannot reach agreement on matters of expert opinion, they should specify their reasons for being unable to do so.

Appendix 2 : Expert Witness Code of Conduct (Supreme Court of New South Wales)

Application of code

1. This code of conduct applies to any expert engaged to:

   (a) provide a report as to his or her opinion for use as evidence in proceedings or proposed proceedings; or

   (b) give opinion evidence in proceedings or proposed proceedings.

General Duty to the Court

2. An expert witness has an overriding duty to assist the Court impartially on matters relevant to the expert's area of expertise.

3. An expert's paramount duty is to the Court and not to the person retaining the expert.

4. An expert witness is not an advocate for a party.

The Form of Expert Reports

5. A report by an expert witness must (in the body of the report or in an annexure) specify:

   (a) the person's qualifications as an expert;

   (b) the facts, matters and assumptions on which the opinions in the report are based (a letter of instructions may be annexed);

   (c) reasons for each opinion expressed;

   (d) if applicable – that a particular question or issue falls outside his or her field or expertise;

   (e) any literature or other materials utilised in support of the opinions; and

   (f) any examinations, tests or other investigations on which he or she has relied and identify, and give details of the qualifications of, the person who carried them out.

6. If an expert witness who prepares a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report.

7. If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.

8. An expert witness who, after communicating an opinion to the party engaging him or her (or that party's legal representative), changes his or her opinion on a material matter shall forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect which shall contain such of the information referred to in 5(b), (c), (d), (e) and (f) as is appropriate.

9. Where an expert witness is appointed by the Court, the preceding paragraph applies as if the Court were the engaging party.

Experts' Conference

10. An expert witness must abide by any direction of the Court to:

    (a) confer with any other expert witness;

    (b) endeavour to reach agreement on material matters for expert opinion; and

    (c) provide the Court with a joint report specifying matters agreed and matters not agreed and any reasons for any non agreement.

11. An expert witness must exercise his or her independent professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement.

Appendix 3: Policy Statement on Appointment of Experts and Arbiters

Institute of Actuaries of Australia
December 1994

Policy Statement on Appointment of Experts and Arbiters

Background

1. From time to time, the Institute (or its President, CEO or Council) is asked to:

   (i) nominate an arbiter or expert where the interested parties have agreed to accept the nominated person's decision in respect of a dispute; or

   (ii) recommend the name of an actuary (or list of actuaries) to perform a particular task.

2. The Institute needs to be able to respond quickly and professionally to such requests to fulfil its obligations to the community.

3. Additionally, the Institute needs to protect itself and its members from any legal liability which may arise as a result of such nominations and recommendations (eg due to the negligence of the person nominated or recommended).

4. Ken Watson of Middletons, Moore & Bevins (the Institute's solicitors) has advised that, whilst the Institute must exercise care in its nominations, our risk is less in nominating an arbiter or an expert than in recommending someone for a job. This is because, in accepting to be bound by the decision of the arbiter or expert, the parties to a dispute have agreed to accept the nomination whereas the act of recommending someone implies a level of endorsement of their qualifications for the job.

5. Ken Watson has also advised that the mere nomination of an "expert" or arbiter does not imply liability on the part of the nominator for the expert's subsequent advice.

Procedure

6. Council has therefore adopted the following procedure:

   (i) The Institute Office will maintain up-to-date lists of members who have agreed to act as arbiters, experts and/or have their names put forward as experienced practitioners in particular areas of actuarial activity.

   (ii) The person nominated as an arbiter or expert should normally be drawn from the list maintained by the Institute Office but need not be. The President may seek the advice of other members of the Institute

(in particular the Vice Presidents and the Convenors of the relevant committees) before nominating an arbiter of expert.

(iii) When asked to nominate an arbiter or expert, the President will normally nominate a single person unless specifically requested by the parties to nominate a list of persons. The person requesting such a nomination will be advised in writing and the advice shall include the following, suitably amended:

> *"In accordance with your request of I nominate (or if they are unable to act)* to act as arbiter/independent expert* for your reference purposes.*
>
> *This nomination is made on the basis that neither the Institute nor myself as President (Vice President)* accepts any responsibility or liability for the services provided by the actuary (or either of the actuaries)* named above."*

The President will first obtain the agreement of the proposed arbiter or expert, and will formally advise that person in writing that they have been nominated and include in such written communication a paragraph substantially in the following form:

> *"Before agreeing to act as an arbiter (or expert)*, you should satisfy yourself that you have sufficient practical experience for the particular assignment, as required by the Institute Code of Conduct."*
>
> ** Delete as appropriate*

(iv) When asked to recommend an experienced actuary for a particular task, the President should generally provide a list of individuals drawn from those who have put their names forward for such a purpose, supplemented (at the President's discretion) by additional names where appropriate. No details of the assignment for which the expert is required other than the general practice area should be sought (otherwise the level of endorsement as to the suitability of the person(s) recommended is much stronger and our potential liability greater). The list of persons recommended should be advised to the person/body making the request in writing and include a paragraph substantially in the following form:

> *"The enclosed list has been drawn from those members of the Institute who have put their names forward as being available and qualified to provide advice in the area of (life insurance, general insurance or whatever). In providing this list, the Institute makes no recommendation, implied or otherwise, as to the suitability of those*

included on the list for the task proposed. You should make your own enquiries to satisfy yourself that the person chosen has sufficient practical experience."

Notes

(a) Although the above Procedure refers to the President of the Institute, responsibility for selecting a member for nomination may be delegated to the Institute's CEO, Vice President, the convenor of the relevant Institute committee or other person as the President sees fit. The President (or delegate) may consult with all or any of such persons before making a nomination or recommendation.

(b) In cases where the request is for the President or Vice President (or next most senior officer) to nominate a member to act as arbiter or expert, the formal nomination must be made by that officer.

(c) Members of the Institute putting their names forward for inclusion on the list of arbiters, experts and experienced practitioners must be reminded in writing of their obligation under the Code of Conduct not to accept work for which they have insufficient practical expertise.

(d) Where the President nominates an arbiter or expert or recommends someone who has not previously put their name forward for inclusion on the Institute's list of such people, the prior permission of the person nominated or recommended should be obtained and that person reminded in writing at the time of their obligation under the Code of Conduct not to accept work for which they have insufficient practical experience.

Reviewed by Council – December 1995