cover story

Expert witnesses - the more the merrier?

A paper presented by Dr David F Morgan (an orthopedic surgeon from Brisbane) at the LawAsia DownUnder 2005 conference.

This paper deals specifically with the background and perceived problems with the garnering of expert witness advice to assist the court in civil litigation. The Uniform Civil Procedure Rules (1999) have been recently modified. Seven specific changes have been incorporated:

1. There is now an express statement of the obligation of the expert witness to the Court;
2. The Court encourages the appointment of a sole expert by either the agreement of the parties involved or by the order of the Court;
3. The appointment of the expert should take place before the litigation commences
4. Reports are to be tendered as Evidence in Chief
5. There will be limited rights to oral Evidence in Chief
6. Report requirements including layout and content have been specified explicitly
7. Detailed rules of appointment have been provided.

The Court has perceived at least four problems:

A. Increasing complexity of issues before the Court.
B. Polarisation of expert opinions
C. Adversarial bias
D. Wastes both time and money.

There have been a number of positive outcomes from the changes to the rules. No longer should the expert be left in any doubt as to whom he or she is reporting. The facts upon which the report are to based must now be clearly outlined by both parties, and there is an overriding obligation upon the expert to consider all the relevant data. The expert is encouraged to canvass all options and provide reasons for the ultimate opinion. A final confirmation of completeness and thoroughness of directions. I do have some concern however with the concept that a single [author's emphasis] expert witness only can be appointed. The fact that the Court has identified the existence of polarised opinion is in itself a danger warning. By choosing one expert only, one pole may be chosen, with potential damage to either of the parties involved. It may also have the effect of electing a "maverick expert" to something akin to papal status.

Whilst the law is adversarial by nature, most experts are usually not. Medical practitioners in particular are almost always in pursuit of absolute truth. They pride themselves upon objectivity, the ability to reason and the recognition of shades of grey. Whilst the courtroom environment may be of an adversarial nature, it is not necessarily the case that the expert should be drawn into the morass.

As the complexity of scientific issues increases, so it is possible that the single expert who is appointed may have subset sufficiencies in knowledge. That lack of knowledge may not be recognised. There is an old adage "you don't know what you don't know".

There is also some doubt that the process of appointment, instruction and review may actually increase time and cost. Additionally, there will still be two cross examinations.

Plaintiffs typically have a systemic distrust of the legal system. They feel as though they are at the mercy of the legal personnel and also greatly fear the "hired gun" engaged by the defence. Having an unrequited desire to have his or her own expert, the plaintiff may feel even more aggrieved with an adverse outcome to the proceedings. The defendants also have some concern, given the perspective of inherent lieniency of the Bench and the existence of "bleeding hearts" - so-called soft touch experts. The recurrent litigant can also be a problem for the defendant. Some of these individuals are wily and experienced, and may find it easier to outfox one expert rather than two or more.

The legal profession may feel equally uncomfortable having to accept one expert, albeit having been chosen from an agreed panel. This concept of "having all of the eggs in one basket" may be seen as undesirable by many. Access to the expert may also be more difficult because of the increased demands placed upon that single individual.

Issues of hindsight bias and paymaster loyalty on the part of the expert are not necessarily diminished or eliminated by the appointment of a single individual. Whilst relying upon a single opinion avoids conflict and controversy, it may not result in a just outcome for the litigants.

The primary problem is not the process of appointment but rather, the choice of the expert. Appointing just one expert may increase the odds of error. Instead of limiting the number of experts to be appointed, we should be ensuring that the quality of the experts who are chosen is of the highest order. Courts should be encouraged to draw up lists or panels of accredited experts. Additional emphasis should be placed upon the formation and maintenance of an Expert Witness Institute, and special resources should be directed at education, assessment, accreditation and certification of these experts. Links with the learned colleges, associations and universities will be vital. I would advocate that at least two experts be allowed, and possible a third should the Court require assistance with adjudication. We should not be reducing the number of experts, rather we should be improving the standard of the advice which is on offer. ①