THE ACCOUNTANT AS EXPERT WITNESS:
Paper delivered to Institute of Chartered Accountants
Sydney - 12 March 2000.

Although the topic given to me focuses on accountants performing the function of expert witnesses it is, I think, necessary to say something more generally about the legal rules relevant to the admission of expert evidence. I have tried to keep to a minimum the treatment of this more general aspect of expert evidence but one has to have regard to a broader context for a better appreciation of the subject. Accountants occupy only one branch of learning which is specialised and rightly qualifies for the description "expert". The legal rules were developed not with respect to one area of specialist knowledge but to all those which can only be obtained after an extended period of particular training and education.

An examination of the role expert witnesses play in litigation is topical. As you will all have realised from reading your conference programme, if not from other sources, courts and judges and those concerned professionally with the management of trials are presently preoccupied with the part being played by expert witnesses in litigation. This preoccupation flows from a perception that the reception of expert evidence is responsible for increasing the length and the cost of trials. It has led in recent times, to the formulation of standards, or codes of conduct, to which experts are expected to adhere when preparing and giving evidence. The role of the expert is, to an extent, undergoing reappraisal and critical evaluation.

This is part of a wider consideration of how trials can be made quicker and cheaper in the interest of the community. Perhaps unfairly expert witnesses have been singled out as a significant cause of trials becoming longer, more complicated and therefore more expensive.

My own opinion may not correspond with that of a majority of judges on this point. However I think sufficient momentum has built up to force a substantial change to the way in which judges, and therefore, barristers and solicitors, will utilise the services of experts. The new

dispensation is upon us and it is important for those whose practice includes providing expert testimony to be aware of the changes.

Firstly I will deal in more general terms with he nature of expert evidence.

The role of the expert witness

The function of such a witness has been said to be

> ". . . to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence."

For "scientific" you can substitute "expert" or "accounting". The point is that the expert is meant to educate or inform the court about the relevant aspects of the witness's speciality to enable the court itself to asses the evidence, which, without that tuition, the court would be unable to do.

Nature of expert evidence

As a general rule, courts of law will not admit into evidence opinions offered by witnesses. The common law has been preoccupied with proof of facts and evidentiary rules have been developed to provide the best means of proving the material facts on which a party relies to establish its case or defence. An early exception to the prohibition was the reception of the opinions of witnesses who possessed special skill or knowledge. An expert may give opinion evidence where the opinion is relevant to the issues being determined by the court. The distinction between fact and opinion and what is opinion evidence, are not particularly clear. However opinion evidence may be described as evidence of a conclusion, usually judgmental in nature, debateable as to accuracy and reasoned from facts.

The early expression of the necessary conditions to make the opinions admissible were that:

(a) the witness must possess some special skill or knowledge;

(b) the subject matter of the witness's knowledge must be such that the court would not be able to arrive at a correct decision without the assistance of the expert, i.e. the subject matter of expert evidence must be beyond the ordinary limits of experience and knowledge possessed by the tribunal, whether it be a judge sitting alone or a jury.

A corollary to the second condition is that the courts will not regard as "expert" an opinion on a matter which the court could determine for itself having regard to its own knowledge and experience.

The "common knowledge" rule has been abolished for trials in the Federal Court, and in courts in New South Wales, by s. 80 of the Evidence Act 1995.

In the vast majority of cases it is obvious that one is dealing with a "branch of learning" that is out of the ordinary and is the subject of study by a small class of society who are knowledgeable and therefore expert in that field. The test remains whether the expert opinion is a necessary aid to the court because it provides a relevant technical or scientific knowledge which the court does not itself possess.

The services of accountants are often engaged to provide a computation of losses which it is claimed a plaintiff has suffered by reason of personal injury or loss of property or interruption to business. This evidence is not strictly "expert" because it involves mostly mathematical calculations which are not, or at least should not be, beyond the knowledge of the court. It is always accepted by the judge without question and with gratitude.

If there is a contest about whether what an expert proposes to say is properly a subject of expert knowledge the court will normally determine the contest by hearing evidence on a *voir dire*. That is, the judge will receive evidence as to whether or not the expert's opinion derives from a particular branch of learning known to a group of people who have systematically studied the subject and/or amassed the knowledge. If satisfied that there is an appropriate field of study the court then will receive the evidence. If not it will rule the proposed testimony to be inadmissible. It is hard to see such a controversy arising with respect to accounting evidence.

Qualification of expert

This poses no problem when one is dealing with a witness who has academic and/or professional qualifications in an established faculty, such as chartered accountants. The opinions of doctors, engineers, valuers, and accountants is admissible (subject to relevance) upon proof of their holding the requisite academic qualification or membership of the appropriate professional body.

I mention for the sake of treating the topic completely that witnesses may be accepted as experts although they have no formal educational or professional qualifications. They may instead qualify as experts on the ground of self-instruction or on occupational experience. Usually an expert will have formal qualifications as well as experience in his field of study, and if that field is one in which there are centres for systematic instruction it is unlikely that a court would admit expert evidence from one who had not completed such a course. It is inconceivable, for example, that a court would accept as an expert medical opinion the evidence of one who had not attended a university medical faculty or been registered to practice as a doctor. But if the subject in question is shown to be a proper subject of specialist knowledge and it is a subject in which the theoretical is important someone qualified by self instruction or experience in the theoretical knowledge will be accepted as an expert.

As with existence of a field of study, the qualification of an expert is determined by the court on a *voir dire*. If it appears on such examination that the proffered expert is not sufficiently familiar by reason of experience or instruction in the designated subject his evidence will not be received.

Factual foundation of expert opinion

It is, of course, obvious that to be admissible an expert's opinion must be relevant to some issue which the court is asked to determine. The opinion will not exist in a vacuum. It must be expressed with reference to some issue of fact which the court must determine as part of its adjudication of the case before it. In all but the most exceptional of cases the retained expert will have no first hand knowledge of the facts of the disputed issues. His opinion will be expressed by reference to "facts" which are given him by the client or, or usually, the solicitors representing one of the parties. For the opinion to be admissible, the facts must be proved in the ordinary way by witnesses or documents other than the expert and his report.

Before a court can assess the value of an opinion it must know the facts on which it is based. If the expert has been misinformed about the facts or has taken irrelevant facts into consideration or has omitted to consider relevant ones, the opinion is likely to be valueless. A party calling an expert should, in examination in chief, ask the witness to state the facts on which his opinion is based. In these days of written experts' reports, the expert should identify in his report the facts he has been asked to assume in order to express an opinion. The facts have to be proved before the expert's opinion can be admitted into evidence.

Opinion evidence based upon facts which are only proved or based upon material that contains a mixture of objectionable hearsay and admissible evidence, can still be received perhaps "trimmed" to the extent that the opinion is supported by the facts actually proved by the admissible material. Where the inadmissible and the admissible are so inter-twined that they cannot be separated, the opinion will be rejected. The same result follows where it is not

possible to say which of the evidence is admissible, which is not, or to what degree the expert has relied upon the inadmissible evidence.

There are exceptions to the requirement that the facts on which an opinion is based must be independently established. One is where the expert has personal knowledge of the facts on which he bases his opinion.

Another is the case in which experts are asked to express an opinion based upon general factual materials. Such evidence is not entirely opinion but is partly knowledge based upon hearsay. This is permitted as an exception to the rule against the admission of hearsay. Information of the type which experts ordinarily treat as data on which they can rely in forming opinions may be the subject of evidence by an expert even though he has not personally obtained or verified the information. Facts and opinions contained in articles or reports in professional publications may be adduced in evidence as "fact". Expert witnesses may not only base their opinions on such information but may give evidence of fact based upon that data even though it is hearsay in the sense that the data relied on is not the expert's own knowledge but that of someone else. In relying on such data the expert need not have any previous knowledge of it.

The rationale for this latitude is that the scope of specialist knowledge is so vast even in particular fields that no one expert can know it all. Hence every expert must rely on the reported data of fellow professionals learned by reading their books and journals. The law accepts this kind of knowledge from "scientific men" (a term used by Wigmore, the leading authority on the law of evidence). By contrast:

> "A mere layman, who comes to court and alleges a fact which he has learned only by reading a medical or a mathematical book, cannot be heard. But, on the other hand, to reject a professional physician or mathematician because the fact or some facts to which he testifies are known to him only upon the authority of others would

> be to ignore the accepted methods of professional work and to insist on finical and impossible standards."[1]

To decide whether the opinion is that of the "mere layman" or a "scientific man" the court has regard to:

(a) the professional experience of the witness which allows him to know which are reliable authorities and the proper sources of information;
(b) practical experience in the relevant field which enables the expert to estimate the general plausibility or likelihood of soundness of the views expressed;
(c) the impossibility of obtaining information on the particular technical detail other than by means of resort to reported data.

The judge expert

What I have said earlier about the impermissibility of laymen seeking to instruct themselves in the intricacies of some science applies equally to the judge. He or she is to be regarded not as Wigmore's "man of science" but only as a "mere layman" who is to take instruction on the matters in hand from an appropriately qualified expert. So that if a judge should, by diligently reading into the small hours should decide the case by reference to what he has learned and not by reference to what expert evidence told him in the presence of the parties at the trial, his judgment will be set aside as breaching the rules of procedural fairness[2].

The ultimate issue

In many cases, common examples of which are found in claims for professional negligence, the court must decide whether the defendant was negligent or, as part of the same exercise, whether a risk was foreseeable or whether the defendant exercised reasonable care. This is the ultimate question for the court. May an expert be asked to express his opinion on that ultimate issue? May he be asked in terms, "was the defendant negligent" or "was the risk

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1 Wigmore on Evidence, 3rd ed, vol.2, para.665.

2 Australian & Overseas Telecommunications Corporation Limited v. McAuslan 47 FCR 492 at 495.

foreseeable?". Predictably, the answer is confused. It has been clarified for jurisdictions which have adopted the Evidence Act but for cases which are tried in the Supreme Courts of states other then N.S.W. or the Territories, the position is not clear.

An obvious case in which an expert may give an opinion on the very subject of decision for the court arises in valuation cases. Where an issue in litigation is the value of shares in a private company or the value of a business, accountants will invariably be engaged. Valuation is an opinion and qualified experts give their opinions for which the court forms its own.

The orthodox view that an expert may not be asked to opine on the ultimate issue can be found expressed in e.g. R.W. Miller & Co Pty Ltd v. Krupp (Australia) Pty Ltd[3]. The judgment explains that earlier attempts to confine the giving of opinion evidence by forbidding the expression of an opinion upon an ultimate fact in issue have not been persevered with because of the near impossibility for consistently or coherently applying the rules[4]. However a lesser restriction has been recognised, namely that an expert may not give an opinion on an ultimate issue where that issue involves the application of a legal standard or norm to particular facts in order to arrive at the ultimate issue. Examples are those I have mentioned, the defendant was negligent; a risk was reasonably foreseeable; that a company's accounts were deceptive.

Attempts to circumvent this restriction by having the expert express his opinion by reference to other norms such as whether the defendant's conduct was wrong, or improper or unjustifiable should not be countenanced. This is for the reason tellingly advanced by Glass that the expert is expressing his opinion by reference to a legally irrelevant standard.

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3 34 NSWLR 129 at 130-131; see also Grey v. Australian Motorists & General Insurance Co Pty Ltd (1976) 1 NSWLR 669 at 675-6 and Glass "Expert Evidence" (1987) Aust.Bar.Rev. 43.

4 Murphy v. The Queen 167 CLR 94 at 110, 126-127.

The opposing view was expressed by Pincus J when a judge of the Federal Court[5]. Pincus J said[6]:

> "It can be seen that difficulties might arise in strict application of the rule where the question is one of negligence in some activity in which a judge or jury might have no knowledge at all ... in such cases are expert witnesses to be prevented from criticising the acts complained of by describing them as mistaken or ill-judged or simply careless? The objection to the use of these expressions may be that they are too close to the notion of negligence - the ultimate issue ... whether or not, where negligence is in issue, there is a ban upon use of the word "negligence" itself and its synonyms in the framing and answering of questions of those called to give their opinion on what was done, I cannot accept that there is any longer an established practice preventing a suitably qualified expert from saying that what is complained of was not in accordance with good practice, was excessively risky, poorly conceived or other such criticisms. This is so,..even if acceptance of evidence of that kind might lead fairly directly to a conclusion that what was done was negligent.... There now seems to be an established trade or business of advising on investments.... and, assuming it to be relevant to know what an adviser might reasonably be expected to have done in the circumstances of this case, I think (the witness) may approach that directly..."

As I mentioned, s.80 of the Evidence Act 1995 has removed the problem in jurisdictions which have adopted it. It provides that evidence of an opinion is admissible even though it is about a fact in issue or an ultimate issue such as whether an auditor was negligent or whether a prospectus was misleading.

Working papers and draft opinions

The Court of Appeal of the Supreme Court of Queensland in Interchase Corporation Ltd (In Liquidation) v. Grosvenor Hill (Queensland) Pty Ltd (No 1) 1999 1 Qd R 141 decided that documents generated by an expert, and information recorded in one form or another by the expert, in the course of forming an opinion are not subject to a claim of legal professional privilege and cannot therefore be withheld from the opponent. In Queensland the rules of court provide that an expert opinion obtained by a party to litigation must be disclosed to its

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5 Thannhauser v. Westpac Banking Corporation (1991) 31 FCR 572.

6 At p.574.

opponent as part of the ordinary process of discovery. The rules are silent as to the expert's working papers and draft report but the decision allows the opposing party to have access to them. The reasoning which led to the decision would, if accepted, produce the same result even in jurisdictions where there is no obligation to disclose an expert opinion obtained for the purposes of litigation.

One of the judges who decided the case put forward this rationale:

> "It would seriously jeopardise the proper testing of (expert) witnesses if privilege were extended to documents of the kind which I described . . . in the present case".

Subsequent experience provides both an endorsement and a rejection of those remarks. In one case I heard of, an accountant was cross-examined for six weeks on his draft reports before attention turned to the reports which were tendered in the case. In the trial of Interchase itself a valuer was discredited by having to produce three draft reports all for differing amounts the discrepancy being explained by requests from the client to produce a more favourable opinion.

As far as I know the decision is the only one on the point. It has been severely criticised[7]. I must of course give my loyal support to the judgment though I can point out that I was counsel for the unsuccessful party on the appeal. The decision only binds Queensland courts. It would not be greatly surprising if courts in other jurisdictions took a different view. In Queensland certainly and in other places, for the moment probably, the rule is that your drafts and working papers can be view by your client's opponent.

Acceptance of the expert opinion

From a litigant's point of view, the only reason for engaging an expert to give evidence is to have the expert's opinion accepted by the court and so aid in obtaining a favourable verdict. But as the opposing litigant will have engaged experts who will only be called if their opinions controvert the other expert's, the court will be confronted with the task of choosing between

two, usually, eminently qualified experts expressing opinions in respect of a subject about which the court is, ***ex hypothesi,*** ignorant. How is the court to resolve the dilemma?

Normally a judge will endeavour to express a preference for the views of one expert over another's. It has been said (one wonders why it was necessary to say it) that the truth between conflicting expert opinions is not to be based on the number of experts called for one side as against the other. What is important is the quality of the evidence not the number of the persons who give it.

The court is to apply logic and common sense to the best of its ability to decide which expert opinion is to be preferred or which parts of the evidence are to be accepted[8]. The court is to determine, by the application of its own intelligence, which opinion is better supported by the quality and cogency of the reasoning and exposition which supports it. Other factors are the qualifications and experience of the experts and the extent to which they have, or fail to demonstrate, a correct grasp of the basic objective facts relevant to the problem or the theory of their own field of expertise[9].

Expert evidence does not necessarily carry any more weight than the evidence of lay witnesses of fact. It is for the judge to assess the relative value of the evidence and he may reject an expert opinion in preference for the evidence of eye witnesses[10]. A trial judge may resolve a conflict between experts by reference to lay evidence[11]. The court may decline to accept the opinion of the only expert called on a particular topic[12].

The Australian Institute of Judicial Administration recently surveyed a number of judges in relation to their assessment of expert witnesses. The survey recorded the judges' subjective

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7 1998 Vol 19 of the Queensland Lawyer p18.

8 Holtman v. Sampson (1985) 2 Qd R 472 at 474.

9 Munroe Australia Pty Ltd v. Campbell (1995) 65 SASR 16 at 27.

10 Hollingsworth v. Hopkins (1967) Qd R 168.

11 Munroe Australia Pty Ltd v. Campbell (1965) 65 SASR 16.

impressions of expert evidence rather than any objectively verifiable phenomenon by which expert evidence could be assessed to be "correct". Nevertheless, it is interesting as showing the factors which led judges (and juries) to accept expert evidence. The results were

Factors	**Judges**	**Juries**
Clarity of explanation	28%	37%
Impartiality	26%	18%
Experience in the field	23%	3%
Familiarity with the facts	18%	23%
Experience as an expert witness	3%	8%
Qualifications	1.5%	3%
Appearance	0.5%	8%

The cynical comment has been made that in a jury trial a good looking witness who appears to be familiar with the facts and whom the jury can understand will almost always beat a person who actually knows what he or she is saying.

Of more concern to this conference is the fact that both judges and juries found evidence from accountants and psychiatrists the most difficult to understand. I do not myself know why this should be so but it is of obvious importance to accountants who are retained as expert witnesses to ensure that what they say is comprehensible to the tribunal of fact.

The taint of partiality

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[12] Minister v. Ryan (1963) 9 LGRA 112.

A factor much relied upon by judges intending to reject the views of an expert is that the witness lacked impartiality or appeared an "advocate" for the litigant in whose case he was called. In Clark v. Ryan Windeyer J quoted from Taylor on Evidence[13]:

> "These witnesses are usually required to speak, not to facts, but to opinions; and when this is the case, it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond with the wishes or the interests of the parties who call them."

To the same effect Thomas J said in Interchase:

> "It is undesirable to encourage any tendency to make experts part of a team captained by one party. Opinion evidence is a special kind of evidence, and Courts have traditionally encouraged experts who are qualified to give such evidence to be objective. In my view an expert's duty to the Court is more important than the duty to a client."

It will be remembered that according to the AIJA survey in 26% of cases the appearance of impartiality in the expert was important in the acceptance of the evidence.

The recently expressed implied criticism appeals nostalgically to an Aristotelian "ideal expert witness" ignoring the reality that a litigant will have expended thousands, perhaps tens of thousands of dollars in an endeavour to obtain support for his case, the loss of which may ruin him. The expert practising in the new age of fierce market competition must provide the court with his opinion unaffected by any of these factors. His duty is to the court and to philosophy, the search for truth. He is not to be seen to be affected by any of the sordid concerns of commerce or the emotions which affect ordinary human beings. Let there be a suspicion that he is influenced in any way and he will be derided as having forsaken the sacred duty of impartiality and his evidence will be rejected without the need for the court to consider carefully whether or not his opinions are supported by compelling argument.

The new dispensation

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[13] 103 CLR at 509-10.

There is an obvious tension between the judicial desire for a "pure" expert and the reality of litigation conducted by adversaries. Our system is based upon each party putting forward the best evidence it can muster in support of its case and the most telling criticisms of the opponent's case. Evidence, including expert evidence, is selected on the basis of what will help the party win, not on the basis of whether it will lead the court to the ultimate truth.

The judge's decision is aided and informed by hearing the best that can be said for each side and the most telling criticism that can be put against each side.

The actual role of an expert witness, at least in major litigation *is* to become part of a team. The expert contributes to the way the case, or part of it, is formulated and assists with decisions as to what evidence is necessary to support the case. The report is finalised in consultation with solicitors and counsel and at trial the witness argues his client's case on the technical issues.

Courts have recently sought to relieve the tension by the adoption of rules which have as their aim reducing the scope for partisan influences to effect the expert's evidence. The two most populous courts, the Supreme Court of New South Wales and the Federal Court have both issued practice directions which are similar though not identical in content. They contain specific requirements as to the manner in which expert evidence is to be prepared and given. The Federal Court direction also contains a preamble stating in general terms the obligations of an expert in the court. The requirements are obviously intended to reduce the scope for obfuscation and unnecessary controversy.

I think it likely that the Supreme Court of Queensland will move to producing its own practice direction along similar lines. Without being presumptuous I would think it likely that practice in other jurisdictions will move in the same direction.

The terms of the Federal Court direction, which was the first in time, is worth noting.

"**Guidelines**

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 enquiries 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; and (iii) the documents and other materials which the expert has been instructed to consider.

- If, after exchange of reports or at any other 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 opinion 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 that 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 report 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."

The practice directions were built upon statements which had been made by judges in a number of cases in the two decades since 1981. Those comments appeared in a variety of cases and expressed concern about various aspects of expert evidence. They were collected and systematised by Mr Justice Creswell in a case that has come to be known as the "Ikarian Reefer"[14]. What the judge said has come to be regarded as a code of the duties and responsibilities of expert witnesses. It is in these terms:-

> "The duties and responsibilities of expert witnesses in civil cases include the following:
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> > 1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (*Whitehouse v. Jordan*, [1981] 1 W.L.R. 246 at p.256, per Lord Wilberforce).
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> > 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise (see *Polivitte Ltd. v. Commercial Union Assurance Co. Plc*., [1987] 1 Lloyd's Rep. 379 at p.386 per Mr. Justice Garland and *Re J*. [1990] F.C.R. 193 per Mr. Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.
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> > 3. An expert witness should state the facts or assumption upon which his opinion is based. he should not omit to consider material facts which could detract from his concluded opinion (*Re J* sup.).

[14] 1993 2 Lloyd's Reports 68 at 81-82.

> 4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
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> 5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (*Re J* sup.). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report (*Derby & Co. Ltd. And Others v. Weldon and Others. The Times.* Nov. 9 1990 per Lord Justice Staughton).
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> 6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.
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> 7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports (see 15.5 of the Guide to Commercial Court Practice)."

What is remarkable about the Federal Court practice direction and the judicially prepared code of conduct is the assertion that the expert witness's primary obligation is to provide "independent assistance to the court". It is put more emphatically in the preamble to the Federal Court practice direction. It is remarkable because an expert witness is retained by a client between whom there is a professional and contractual relationship. What the courts are doing is to insist that there be included in the relationship a term the effect of which is that the expert's primary obligation is not to the client but to the court. This is another way of saying that the witness must help the court achieve the correct legal result. In a sense this is no different to the obligation of a lay witness who must tell "the truth the whole truth and nothing but the truth".

The more specific contents of the codes are clearly meant to ensure that expert opinions are carefully and competently compiled and that the bases for them are revealed. The obvious intention is to make the process of forming the opinion transparent, to the court and to the opponent, so that the court may have more confidence in what is said by the expert.

The emphatic statement that expert witnesses owe their primary duty to the court is really a repetition of the traditional rationale for the admission of expert evidence. As I mentioned, it was to provide tuition to the court to equip it for the task of making findings of fact from evidence which lies beyond common understanding. The practice direction now requires the point to be expressly brought to the attention of the expert so that it lies in the forefront of his consciousness rather than in the back of the laywers' minds.

It is, I think, true that the more things change the more they stay the same. There is nothing in the practice directions nor in the judicial code which will change things much for the competent and honest expert called upon to give evidence. The requirements of the code and practice direction in my experience has been adhered to by all reputable professionals who practice forensically. This, of course, is how it should be. What you have to offer your clients as expert forensic practitioners is your professional skill and reputation for integrity. If a court begins to suspect an expert lacks either his opinions will not find favour, and his practice will suffer.

If for those who do not understand this concept, or do not care about it, the practice directions oblige them to behave as though they did, it is not a bad thing.

Conference between experts

This is something which is occurring with more regularity. As part of the management of cases involving substantial expert evidence the parties are directed to have their experts confer with a view to removing or reducing the differences between them. The conferences often do result in a degree of agreement or compromise between differing opinions. In cases where a difference remains the meeting is often helpful in bringing into sharper focus what the basis for the difference is thus assisting to shorten the time spent on the issue at trial.

The conferences usually occur in the absence of the lawyers. The Federal Court direction seems to anticipate a lack of good faith on the part of experts who have advised opposing sides. I do not know the reason for such an apprehension but of course it is right that if such a conference occurs the experts should explore frankly whether there is any common ground between them. Equally they should not give up a position defensibly held on behalf of the client.

"Hot Tub"

This is an invention of the Federal Court. Even there it is used sparingly. I am not aware of its use anywhere else though it may have been tried. The expression refers to a new manner of dealing with expert evidence. Conventionally, as you know, each side presents its case in turn and its expert witnesses are called during the presentation of its case. The witnesses are examined and cross-examined. Their reports would have been exchanged and read beforehand. The experts for the plaintiff will give their evidence before the defendant's case starts. Often a considerable length of time will elapse before the defendant's experts are called. If the "Hot Tub" method is adopted all the experts are present and give evidence on the same occasion. Each expert gives an oral exposition of his or her evidence followed by a comment on the opposing opinions. There follows cross-examination of the experts, either witness by witness on all issues, or witness by witness topic by topic.

It has the advantage of having the expert evidence dealt with at the one time so there is greater scope for understanding it and appreciating the differences between experts and forming opinion as to the preferable outcome. Unless strictly controlled it has the potential to become a general melee. An alternative is to structure the parties' cases so that the expert evidence is dealt with as a separate segment in the trial. What can happen is that the plaintiff calls its expert on a particular topic, say an accountant who is examined and cross-examined. The defendant then called its accountant who was examined and cross-examined. If there were other experts in different fields the same procedure is followed. The advantage of the Hot Tub is maintained without the potential for uncontrolled and perhaps rancorous debate.

Court appointed expert

The rules of all the Supreme Courts and the Federal Court provide that if a question for an expert arises the court may appoint an expert and authorise the expert to inquire into the question and report back. In such a case the "client" is the court. The appointment may be made from a list of experts supplied by the parties. The court may issue directions as to the mode of inquiry. The court appointed expert's report is admissible in evidence but typically is not binding on a party "except to the extent the party agrees to be bound by it". One can pause to observe that if the parties do not agree to be bound by the report, there seems little point in obtaining it. If they do agree to be bound by such a report, it would have been quicker and cheaper to have their dispute determined by an expert in the first place.

The parties have a right to cross examine the court appointed expert on his report. With the leave of the court a party may call expert evidence of his own on the same question. It would seem to me that if a party has not agreed to be bound by the court appointed expert report and has cross examined that expert with any effect at all, the court would be obliged to give leave to call further expert evidence.

Very limited use has been made of the courts' powers to appoint an expert to advise it on a point in issue in litigation. The reason is, I think, that the appointment by the court of its own expert is contrary to the fundamental premise of the adversarial system which is that the parties have a right to present their own case and to call witnesses of their own choice to support that case. The strength of the system is that errors or misconceptions which appear in a case are exposed by the testing of evidence, including expert evidence, by cross-examination informed by the retained expert. There is no certainty that because an expert is appointed by the court his opinion will necessarily be right. If the court appointed expert opinion is to be tested by cross-examination and contraverted by experts called by the parties there will be no saving in time or money.

More fundamental is the concern that parties have invoked the decision of the court and not the "oracular announcement of an expert". To similar effect Turner J said in Blackie v. Police[15].

> "I approach the problem with an acute sensibility that there is always danger in allowing an expert witness, or indeed any witness, to answer the very question which the court is called upon to decide. Once this is done an and answer given which is accepted by the court, the chances of success on an appeal on fact are slight indeed."

These considerations are fundamental to the role of courts in society and the vindication of rights according to law. Litigants go to court for the protection of their rights or just redress for an infringement of them. For this reason it is unlikely that courts will often surrender the ultimate decision in a case to an expert.

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15 (1966) NZLR 910 at 919.