EXPERT EVIDENCE: A JUDGE'S ASSESSMENT

A paper presented by Justice G N Williams at the Australian Institute of Quantity Surveyors Expert Witness Workshop 21 July 2001

Many recent debates about procedural law reform have centered on the use of expert witnesses in civil litigation. In the United Kingdom Lord Woolf's Report "Access to Justice" focused attention on the use of experts in the course of civil litigation. Directly arising out of that Report the Expert Witness Institute was formed and, along with The Academy of Experts, it has set about changing the culture associated with the expert witness in the United Kingdom. Much of the success of those bodies to date is due to the fact that each organisation brings experts in many fields into dialogue with the lawyers (including judges) involved in the litigation process.

After some 3 to 4 years of lobbying, in which I was heavily involved, the Expert Witness Institute Australia Limited has now been constituted. Formal registration took place in December 2000, and there have been a number of meetings this year with a view implementing the objectives of the Institute. The objectives stated in the Constitution are as follows:

> "(a) To create, constitute and establish a mutual organisation for experts of all professional disciplines and for persons qualified to give expert opinion evidence.
> (b) To provide support to experts who are members of the Institute in order to achieve the objectives of the Institute.
> (c) To provide training, education and support to experts who are members, whether by way of courses, seminars, conferences or otherwise to maintain and enhance high standards in expert witnesses and their status.
> (d) To act as a voice for expert witnesses, who are members.
> (e) To encourage the use of experts, who are members, wherever specialised knowledge is required.
> (f) To make representations to Government, Government Departments, Authorities and to other Professional Bodies and Associations wherever appropriate in order to achieve the objectives of the Institute.
> (g) To work actively with other relevant bodies and associations to further the objectives of the Institute and to protect, support and safeguard the character and interests of experts, who are members."

The initial Chairman is Mr Alan Abadee QC, a recently retired Supreme Court Judge from New South Wales. The Vice-Chairman is Mr Tom Baxter, a civil engineer, who is probably well known to most of you, and who has been very actively

involved in engineering organisations in Australia. I am a director, and there are currently three other directors, including a doctor and a chartered accountant.

The Constitution makes provision for both individuals and corporate professional bodies to be members. A membership drive will be undertaken in the near future and undoubtedly your Institute, and you as individuals, will be asked to consider joining. In August the Institute will be conducting a 3 day intensive workshop for the National Institute of Forensic Science in Melbourne and it is hoped that that will be but the first of many such seminars held under the auspices of the Institute. Of course, there will be a charge in order to generate funds for the Institute, but the fee would be in keeping with what you are paying for a workshop such as this.

There is, in my view, a need in Australia for such an Institute if the courts are to benefit fully from reforms of the type suggested by Lord Woolf. In New South Wales a committee of judges, lawyers, and expert witnesses has just furnished a report to the Chief Justice dealing specifically with expert evidence in professional negligence cases and the use of conferences of experts to facilitate the resolution of such litigation. In Queensland, the Rules Committee of which I am currently Chairman, will be reviewing rules relating to expert witnesses in the near future and there is no doubt that Queensland will incorporate most, if not all, of the Woolf reforms into the Uniform Civil Procedure Rules.

If all of these changes and advances are to be fully productive then it will be necessary for those who are called to furnish reports as experts, or to give expert evidence, are conversant with the rules and the philosophy behind them. It is the aim of the Institute to provide the necessary education in that regard.

There are at least three major problems associated with expert testimony which need to be recognised and addressed:

1. Currently most experts are perceived by observers, including trial judges, to be at least to some extent "partisan" – a hired gun. There is a growing body of evidence to support that proposition. The study "Australian Judicial Perspectives on Expert Evidence: An Empirical Study" by Dr Freckelton and others for the Australian Institute of Judicial Administration ascertained as a result of a survey of 244 Australian judges that 27% of them considered that experts were "often biased" and 67% considered experts to be "occasionally biased". A similar result was established by a recent United States Study which found that more than one half of the university scientists who receive gifts from drug or biotechnical companies admitted that the donors expected to and did exert influence over their work, including a review of academic papers before publication. That appears to be but another example of money shaping the truth. Often the influence is subtle, and the expert may not even be consciously aware of the influence. For example, an expert opinion is often sought on a set of facts put forward by the client paying the bill. In those circumstances there is a temptation not to question the factual correctness of the data provided; the opinion will be

given on the data without questioning its accuracy in circumstances where objectively that should be done. The fear is that if the data is questioned the fee will be lost. There is a fine distinction between clarifying, at the request of a lawyer, a statement to make it compatible with a legal test, and permitting the lawyer to have a substantial involvement in the preparation of the report.

This concern is not fanciful, theoretical criticism. During the recent long-running Marsden defamation trial in Sydney a psychiatrist admitted under cross-examination that he had removed material of significance from his original report at the solicitor's request before the report was put into evidence. Notwithstanding the doctor's eminence in his field of expertise his credibility was totally destroyed. Undoubtedly the implications for that doctor will extend well beyond his credibility as a witness in that particular trial.

2. The uncontrolled use of expert witnesses can add greatly to the length of the trial thereby increasing costs to the litigants without significantly advancing the case for either side. The use of numerous experts can become prohibitively expensive. A party with a deep pocket often adopts the view that calling numerous experts to give the same evidence will increase the chances of the court making a finding in accordance with that evidence. In that way the "little person" can be swamped, though objectively his position is readily supportable.

3. When numerous experts are called the litigation is often sidetracked – time is taken exploring differences of opinion between experts where that difference is not material to the resolution of the dispute. It is a fact of life (possibly derived from professional jealousy) that an expert is reluctant to concede a point under cross-examination. At that stage no professional likes to make a concession in the face of the report from the expert on the other side. That frequently leads to false issues being raised and much time spent in endeavouring to resolve them. The dispute between experts generates a trial within a trial at the expense of the litigants.

A number of American studies have dealt with the problem of the "professional witness" as distinguished from the expert witness. Experience in that country has established that there are a number of "experts" who spend the bulk of their time testifying in court rather than working in their field of expertise. Those studies have also demonstrated that when that occurs the "professional" soon asserts an expertise in an "extraordinary array of dissimilar fields". In one case it emerged that the witness had testified on behalf of insurance companies in 18 dissimilar fields. Whilst there is nothing wrong with an expert concentrating on litigation, and while some experts may of necessity have to concentrate on litigation, there is a real concern that in such instances the "hired gun" aspect blunts objectivity.

Again in that context it is worth noting that under the new English procedural rules where a single expert can be appointed by the court, a vital consideration is whether or not the proposed appointee regularly appeared for the same side. That is seen as a matter casting some doubt on the objectivity of the expert. There is clearly a significant difference between a full-time expert witness and one who only occasionally fills that role. It has been said by an American writer that "judges should be wary of experts who portray themselves as independent, neutral, objective and free of all biases, as neutrals are non-existent in science". That exhortation should be kept in mind in those cases where a single expert is appointed by the court. Some commentators, not without some justification, are concerned that judges will abdicate their decision-making responsibilities to a perceived neutral expert appointed by the court.

Probably the greatest need is the training or education of experts in their role as witnesses in the trial process. Scientists, for example, do not usually make assessments on the balance of probability, and there is often a distinction between scientific and legal causation. Because of such considerations expert witnesses will be more effective where they have knowledge of the trial process and how the legal issues are defined and are to be resolved. It is for that reason that an educational Institute is require.

Rules of court in various jurisdictions have recently addressed the problem of handling expert evidence in the civil justice system, and rules relating to the reception of expert evidence have changed markedly in recent years. Rules 423 to 429 of the Uniform Civil Procedure Rules have made some changes to the pre-existing law, and as already noted more far reaching changes are in the pipeline. Rule 423 requires a party to make disclosure of expert evidence within 21 days after the trial date is set; a report for use in court is not the subject of legal professional privilege. Evidence cannot be adduced, without the leave of the court, from an expert whose report is not so disclosed. The court may also make an order requiring the experts on either side to confer and prepare a document setting out areas of agreement and disagreement and the reasons for the disagreement. That rule has been utilised to good effect in a number of cases over recent months.

Rules 424 to 429 of the UCPR deal with court appointed experts; they have not yet been used extensively, and it will probably be necessary to change the legal culture before they operate to optimum effect. There is no doubt in my view that in the foreseeable future Queensland will adopt a rule along the lines of English Rule 35.3 which provides that it is the "duty of an expert to help the court on the matters" within the expertise of the witness, and that duty "overrides any obligation to the person from whom he has received instructions or by whom he is paid". To ensure that the expert is conscious of that duty the report will have to contain a statement to the effect that "the expert understands his duty to the court; and he has complied with that duty" (Rule 35.10). In England the report must be addressed to the court and not to the party from whom instructions have been received.

Against all of that background I would now like to turn to a number of topics for discussion.

ROLES OF EXPERTS

(a) Assisting a party to establish facts, to assess the merits of a case and to help with the preparation of the case (the initial decision whether to litigate or not).

(b) Providing expert opinion evidence to the court where such evidence, other than from an expert, would not be strictly admissible.

(c) Giving factual evidence, on a particular subject where, because of expertise, the evidence will have greater weight than that from an unqualified witness.

(d) Conducting inquiries on behalf of the court (appointed by the court) and reporting findings to the court;

(e) Sitting as assessors with judges to assist the court to understand the technical evidence which the court will have to consider.

Distinction between advice prepared prior to action (designed to indicate to the party whether or not litigation should be commenced) and a report prepared for use at trial. Advice from an expert as to whether, for example, an offer of settlement should be accepted, should fall within the first category.

Advice before action attracts legal professional privilege – it need not be disclosed to the other side.

When giving such advice the expert owes a duty to the client.

When preparing a report for the court the experts' over-riding duty is to the court. Such a report must be disclosed – it is not privileged.

Experts are witnesses not judges. The expert evidence is admissible to enable the judge to reach a properly formed decision on a technical matter. The judge is not bound to accept the evidence of an expert witness if there was a proper basis for rejecting it, such as other evidence before the court, or the expert evidence was such that for some stated reason the judge was not convinced by it.

APPOINTMENT

In determining who should be appointed as an expert the following matters should be taken into account:

- what evidence will be necessary from experts to prove matters in dispute;
- can evidence from a single expert satisfy that requirement;
- does the expert have the necessary experience, expertise and training;
- is the appointment appropriate to the value, complexity and importance of the case;
- will the expert be able to produce a timely report;
- will the expert be able to deal with all the questions raised;
- will the expert be able to participate in discussions with other experts;
- is the cost proportionate to the matters in issue.

Terms of appointment should be agreed at the outset and should include:

(a) the basis of the expert's charges (either daily or hourly rates and an estimate of the time likely to be required, or fee for the services);
(b) any travelling expenses or other disbursements;
(c) rates for attendance at court and provision for payment on late notice of cancellation of a court hearing;
(d) time for delivery of reports;
(e) time for making payment;
(f) whether fees are to be paid by a third party;
(g) arrangements for dealing with questions for experts and discussions between experts and providing for the cost.

Payments contingent upon the nature of the expert evidence given in legal proceedings, or upon the outcome of a case, must not be offered or accepted. To do so would contravene the experts overriding duty to the court. This is strictly recognized in England and will probably be formalised here.

Agreement to delay payment for an expert's fees until after the conclusion of the case is permissible as long as the amount of the fee does not depend on the outcome of the case.

INSTRUCTIONS

What information should the expert have before considering his report? Should the expert have an input into that question? What if the expert considers that some critical fact has not been disclosed? What are the expert's options?

It is far from unknown for solicitors to send bundles of documents for the expert to study, saying "we look forward to your report as soon as possible" without any guidance on what the issues are and what expert opinion they need. It is the lawyer's duty to identify the relevant issues for the expert.

The expert should not hesitate to raise any query relating thereto before completing his report. If a stated fact appears improbable to the expert that should be made clear at an early stage.

Since the procedure in both courts and arbitrations is adversarial, an expert is not obliged to speak out, or write in his report, about matters concerning which he is not asked to deal with.

The expert is entitled to assume facts for the purpose of this report. If so, the assumed facts should be clearly stated. The report should also state the source relied upon by the expert for assuming the fact in question.

An expert witness should make it clear when a particular question or issue falls outside his expertise.

What use can be made by an expert of statistical data relevant to the issues compiled by others? How should the expert in his report deal with that data? What is necessary in order to allow use of such data?

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.

Those instructing experts should ensure that they give clear instructions, including the following:

(a) basic information, such as names, addresses, telephone numbers, dates of birth and dates of incident;

(b) the nature and extent of expertise which is called for;

(c) the purpose of requesting the advice or report, a description of the matter to be investigated, the principal known issues and the identity of all parties;

(d) the statement of case (if any), those documents which form part of the standard disclosure and witness statements which are relevant to the advice or report;

(e) where proceedings have not been started, whether proceedings are being contemplated and, if so, whether the expert is asked only for advice;

(f) where proceedings have been started, the date of any hearing and in which court;

(g) where it is a report to the court that a declaration will be required that the expert has complied with his duty to the court.

Experts who do not receive clear instructions should request clarification and indicate that they are not prepared to act unless and until such clear instructions are received.

DUTY OF EXPERTS

It is the duty of experts:

(a) (i) in the case of advice, to explain to those instructing them both the strengths and weaknesses of the party's cases;

(ii) to explain in their reports to the court the range of opinion and the reason for their own opinion;

(b) to agree to a time limit with those instructing them for preparation of the report and to give notice of any delay beyond the deadline as soon as possible;

(c) to maintain professional objectivity and impartiality at all times;

(d) when giving or preparing a report for use in court, or giving oral evidence, to advise and assist the court;

(e) to supply references in respect of relevant literature or other material which might assist the court in deciding the case.

REPORTS FOR USE IN COURT

1. In providing a report for use in court, experts:

(a) must address it to the court and not to any of the parties;
(b) must express any qualification of, or reservation to their opinion;
(c) if such opinion was not formed independently, should make clear the source of the opinion;
(d) must not be asked to and must not amend, expend or alter any part of the report in a manner which distorts the expert's true opinion;
(e) may be invited to amend, or expand the report to ensure accuracy and internal consistency, completeness and clarity.
(f) should define or explain in clear terms any technical matters.

2. All expert's reports should contain the following information:

(a) academic and professional qualifications;
(b) a statement of the source of instructions and the purpose of the report;
(c) a chronology of relevant events;
(d) a statement of the methodology used, in particular what laboratory and other tests (if any) were employed, by whom and under whose supervision;

(e) details of the documents or any other evidence upon which any aspect of the report is based;
(f) a summary of conclusions reached;
(g) a statement setting out the substance of all instructions (whether written or oral). The statement should summarise the facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;
(h) a declaration that the report is being prepared for the court and verifying the truthfulness and accuracy of its contents.

The expert's report should be written objectively – it ought not be presented in the form of a special pleading rather than an impartial report – those instructing the experts should be careful to avoid indicating to the expert what the expectations of the solicitor and client are – the report should not be written so as to justify the hoped for outcome of the litigation.

DISPUTED FACTS

Where there are facts in dispute, experts:

(a) should not express a view in favour of one or other disputed set of facts, unless, because of their particular learning and experience, they perceive one set of facts as being probable or less probable, in which case they may express that view, and should give reasons;

(b) should express separate opinions on every set of facts in dispute.

CONFERENCE OF EXPERTS

Conference of experts – identify and clarify issues arising within their area of expertise for purpose of resolving or narrowing the points of difference between them – lodge a report signed by each expert certifying that they have conferred and stating the outcome of the conference by succinctly identifying where they are in agreement and where they are not – in the latter case stating the basis of their disagreement.

Such conference should also resolve:

(a) the action, if any, which may be taken to resolve the outstanding points of disagreement;

(b) what issues not on the agenda ought to be the subject of future consideration.

Agendas for consideration at such a meeting should be circulated (28? days) before the date of the meeting.

Questions on the agenda should be clearly stated and incorporate the appropriate legal test.

Any agreement at a meeting of experts should not be subject to subsequent ratification by the lawyers for the parties.

Before experts can be expected to meet and to narrow the issues, it is necessary for the lawyers to define what is in dispute. The problem which occurs in many cases is that experts are invited to provide their views in relation to a complex piece of litigation without being provided with a properly defined list of issues upon which their opinion is sought.

- Meetings can be better organised with an agenda and time to complete the paperwork.
- Timetables expected by lawyers and the courts are often too short. In appropriate cases the experts should make that clear to the court.
- Meetings between experts and the subsequent requirement to report to the court as to the areas of continuing disagreement are becoming increasingly more important where the expert evidence is crucial to the determination of the case.
- Should lawyers be present at conferences of experts.

In November 1999, the Clinical Disputes Forum in England produced guidelines for conferences between experts in clinical negligence cases. Those guidelines provided that unless otherwise agreed lawyers for all parties would attend. If lawyers do attend such discussions they should not normally intervene save to answer questions put to them by the experts or advise them on the law.

The English Expert Witness Institute working paper on guidelines for experts has proposed that lawyers for the parties will not normally be present at such discussions unless the experts so request.

One of the reasons for the CDF deciding as it did was the belief that clients would feel alienation from the dispute resolution process if lawyers were not present. This was partly based on concerns that claimants may feel professional solidarity among doctors is a barrier to justice for ordinary people.

If lawyers are not present the doctors may fail to apply the correct legal test.

WOOLF RECOMMENDATIONS

- Experts should be given clear guidance that, when preparing their evidence or actually giving their evidence to a court, their first responsibility is to the court and not to their client.
- Any report prepared for the purposes of giving evidence to a court should be addressed to the court.

- Such a report should end with a declaration that it includes everything which the expert regards as being relevant to the opinion which he had expressed in his report and that he has drawn to the attention of the court any matter which would affect the validity of that opinion.

- Once an expert has been instructed to prepare a report for use of a court, any communication between the expert and the client or his advisers should no longer be the subject of legal privilege.

- An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.

- An expert witness should make it clear when a particular question or issue falls outside his expertise.

- If an expert's opinion is not properly researched because he considers insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one.

- 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.

PROBLEMS

- Unwillingness to concede issues.

- Wandering from the confines of expert evidence into the realm of rival submissions.

- Taking on the role of partisan advocate.

- Delays in reporting.

- Experts are sometimes told by their instructing solicitors not to reach agreement.

- Experts are sometimes pressed by instructing lawyers to alter their reports.

- Experts sometimes stray beyond their own field of expertise.

ETHICS

In *Whitehouse v Jordon* (1981) 1 WLR 246 at 256, Lord Wilberforce observed: "It is necessary that 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".

Mr Justice Jacob in *Honeywell Ltd v Alliance Components Ltd* said:

> "It may be noted that I have referred to two lots of experiments conducted for the purposes of this action which were not put in. I think it is highly desirable in future, if experiments are conducted which are not relied upon, the opposite party is told of this. Indeed the principle would seem to apply to all cases (not just intellectual property cases) where a party seeks to rely upon experiments. It can hardly be right for the party to put forward an argument (whether supported by experiments or not) and suppress experiments he has conducted which do not support that argument or indeed undermine or destroy it. I do not say that experiments not relied upon should be placed before the court. But the opposite party should know about them. It may well be that, at least some cases, leave to adduce evidence of experiments conducted for the purpose of the action should only be given on condition that all such experiments are disclosed to the opposite party".

Mr Justice Laddie in *Electrolux Northern Ltd v Black & Decker* referred to that passage and went on:

> "I would not lightly disagree with a judge of Jacob J's eminence in this field, not only out of respect for his views but because it is hardly helpful to have conflicting views from two current patent judges. However I must differ".

He considered that in many cases experiments turned out to be valueless or irrelevant. In his view to disclose in accordance with *Honeywell* would lead to further experiments. The reasons for jettisoning an experiment would have to be given, possibly with forced waiver of privilege. If *Honeywell* is right other "unfruitful avenues" would have to be disclosed.

There is a distinction to be drawn between lawyer involvement in the content of a report which is merely an extension of posing the questions, and lawyer involvement which distorts the answer.

If an expert is able to present the data in his report so that they seem to suggest an interpretation favourable to the side instructing him, that is within the rules of our particular game, even if it means playing down or omitting some material consideration.

Is that statement correct?

LOGIC

Often the plethora of technological or expert evidence obscures the very essence of the case being advanced.

The following is an example. If a structure fails around a suspect weld, then the weld is often held to be responsible. An impressive array of evidence in the form of radiographs, metallurgical reports and macro sections will show that the weld was indeed of questionable workmanship.

But all of that impressive evidence must be set aside and the argument broken down to its skeletal form. In this case it goes as follows:

- If the weld was poor it could cause failure.
- There was failure.
- Therefore it was caused by the poor weld.

This form of reasoning is invalid because it fails to discount competing probabilities. In the case of the weld these could include unanticipated dynamic loading or a hostile environment, either of which could have caused a good weld to fail.

Those preparing opinion evidence must consider all competing probabilities and discount the less likely. To find the cause one must look for:

1. an event C;
2. that is prior to E, the event to be explained;
3. is such that if C had not occurred E would not have occurred, all other things being equal;
4. is such that if C had occurred in other similar circumstances E would have occurred.

All four of those must be fully considered and satisfied.

There ought not be an assumption that every loss was occasioned through fault or negligence. There are risks associated with almost all human activity, and it may be that the loss in question is such a loss that in those circumstances the party carrying out the activity in question should normally bear the loss. There should be no pressure on an expert to come up with a finding that one particular side is negligent.

It is the aim of the Expert Witness Institute Australia to ensure that all of its members are conversant with the matters just discussed and generally adhere to those principles. It is not the intention of the Institute (either in England or Australia) to grant accreditation to experts. Accreditation was considered by and rejected by Lord Woolf in his Final Report at 150 where he said:

> "Some people would like to see a compulsory system of training and accreditation of experts in particular fields, along the lines of what is already provided by bodies such as The Academy of Experts. . . . Such a system would include the exercise of sanctions against experts who fail to meet the required standards . . . I certainly support the provision of training for experts . . . Professional people who take on responsibilities as expert witnesses need a basic understanding of the legal system and their role within it . . . I do not recommend an exclusive system of accreditation. Such a system could exclude potentially competent experts who choose for good reason not to take it up. It might, in fact, narrow rather than widen the pool of available experts. It could foster an uncompetitive monopoly and might encourage the development of 'professional experts' who are out of touch with current practice in their field of experience".

However, a member of the Institute would be able to state such membership in a CV, and would be able to refer to that membership in a report or when giving oral evidence. Generally a member of the Institute would have to accept a Code of Practice formulated by the Institute. Such a Code has been drawn up in England and in due course a similar Code will be formulated in Australia. Such a Code would in broad terms provide that a member would only accept instructions in matters where the member held the necessary expertise and would comply with all ethical duties and standards. For example, a member would acknowledge that the primary duty was to the court and that there was also a duty to comply with the Code of professional behaviour of the professional body of which he/she is a member. That would include obligations such as that of confidentiality.

In England there is also a requirement that a member maintain appropriate Professional Indemnity Insurance; it remains to be seen whether that will be a requirement of membership of the Australian body, but obviously there are good grounds for such a requirement. If a member of the Institute in England commits any act or default likely to bring to discredit the members of the Institute then that member may be liable to disciplinary action, including expulsion. Again, no decision has yet been made as to whether we will go that far in Australia, but obviously there must be mechanisms in place to ensure that standards are maintained.

I mentioned previously that the rules of court provide for the appointment by the court of a single expert to report to the court on a particular matter. The judges in England in such circumstances generally prefer the parties to submit a list of experts, if they cannot agree on one, and then the judge makes the appointment from that list. That is considered to be a better course than the Continental system, where the court itself keeps a list of experts and makes the appointment from that list. The problem with that system is that the list is never really kept up-to-date, and persons with the greatest expertise on the particular issue for consideration may not be on the list.

Lord Woolf in his judgment in *Daniels v Walker* (2000) WLR 1382 made a number of observations on the procedural problems where a single expert is

appointed. So far as possible the parties should agree on the instructions to be given to the expert. If they cannot agree then each should give separate instructions.

The critical point in that case was whether or not, having initially agreed to a single joint expert, one party could, because of dissatisfaction with the report, get the leave of the court to obtain a further report. In that regard, Lord Woolf said at 1387:

> "In a substantial case such as this, the correct approach is to regard the instruction of an expert jointly by the parties as the first step in obtaining expert evidence on a particular issue. It is to be hoped that in the majority of cases it would not only be the first step, but the last step. If, having obtained a joint expert's report, a party, for reasons which are not fanciful, wishes to obtain further information before making a decision as to whether or not there is a particular part (or indeed the whole) of the expert's report which he or she may wish to challenge, then they should, subject to the discretion of the court, be permitted to obtain that evidence.
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> . . .
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> In a case where there is a substantial sum involved, one starts, as I have indicated, from the position that, wherever possible, a joint report is obtained. If there is disagreement on that report, then there would be an issue as to whether to ask questions or whether to get your own expert's report. If questions do not resolve the matter and a party, or both parties, obtain their own expert's reports, then that will result in a decision having to be reached as to what evidence should be called. That decision should not be taken until there has been a meeting between the experts involved. It may be that agreement could then be reached; it may be that agreement is reached as a result of asking the appropriate questions. It is only as a last resort that you accept that it is necessary for oral evidence to be given by the experts before the court. A cross-examination of expert witnesses at the hearing, even in a substantial case, can be very expensive.
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> The great advantage of adopting the course of instructing a joint expert at the outset is that in the majority of cases it will have the effect of narrowing the issues. The fact that additional experts may have to be involved is regrettable, but in the majority of cases the expert issues will already have been reduced. Even if you have the unfortunate result that there are three different views as to the right outcome on a particular issue, the expense which will be incurred as a result of that is justified by the prospect of it being avoided in the majority of cases".

Being appointed a single expert to report to the court will undoubtedly call for even more careful analysis by the appointed expert of the issues. The element of objectivity to which I have already referred becomes of even greater importance. A single court appointed expert would have to carefully consider the issues from each of the competing sides and make a careful objective valuation of the position. All of the

matters to which I have referred previously would be relevant and in a major case, if the court appointed expert had some real concern, the appropriate course would be for the expert to apply to the court for directions.

Given the complexities of modern life, including the greater reliance on technology, it is likely that more and more cases before the courts will necessitate the calling of expert evidence. That undoubtedly will affect both cost and delay, the factors which are making the attainment of justice more difficult. The adoption of a number of simple procedural steps will keep the cost and delay associated with the calling of expert evidence to a minimum. Those steps would include at least the following:

(i) the duty of the expert witness must be to the court and not to the party retaining the expert;

(ii) all instructions to the expert should be fully detailed in the expert's report;

(iii) details of assumptions made and all tests carried out by, or on the instruction of, the expert should be fully detailed in the report;

(iv) all the evidence of the expert should be stated in the written report;

(v) reports should be exchanged well before the trial and no privilege should attach to the reports or any detail referred to therein;

(vi) experts should be required to answer written questions from the opposing side and such answers should form part of the report;

(vii) where there are expert witnesses on either side there should be a conference of experts well before trial at which areas of agreement and disagreement are noted and reasons for disagreement stated;

(viii) except with the leave of the court, only one expert in a particular area of expertise should be called by each party, and wherever possible only a single expert on a particular issue should be allowed;

(ix) the retainer of an expert should not preclude an opposing party engaging that person to be an expert witness at trial.

Your Institute is to be commended for holding this workshop. It is only by discussing these matters that judges, lawyers and experts can facilitate the resolution of disputes where technical and scientific issues are involved.