

Expert Witness - Role

National Justice Compania Navience SA v Prudential Insurance Co Ltd "Ikarian Reefer",
Commercial Court of the Queens Bench, Cresswell J 1993 CILL 838

The role of the expert witness has a central importance in the conduct of construction disputes and many other areas of litigation. These witnesses provide their expertise to assist a Court to determine technical issues in dispute. Often, because of the complexity and the vast amount of material reviewed and relied upon by the various expert witnesses retained by the parties, the technical issues consume large quantities of hearing time and expense.

As the Courts search for ways cheaply and efficiently to dispose of disputes they have come to focus on the resolution of technical issues. The Construction List of the Supreme Court of New South Wales has adopted a procedure by which issues of a technical nature are referred to a referee who is empowered to conduct a "conclave of experts" and report to the Court on his findings. Sometimes the conclave is conducted without legal representation or cross-examination.

Various difficulties arise with such conclaves as issues and findings of a technical nature blend with complex enquiries about legal obligations, causation and damage. Leaving those difficulties aside, one very real concern which arises is the role of the expert retained by the parties in the conduct of the litigation generally and in a conclave particularly.

There is always a temptation for an expert to adopt the interest of the party who is paying his fees. The temptation is elevated if the expert finds himself in debate with another expert furiously adopting the role of an advocate. What then is an expert to do in a conclave without lawyers?

In a timely judgment, the Commercial Court of the Queen's Bench division in England has recently commented on the duties and obligations of the expert witness. The observations were not apparently generated by the conclave procedure but they are nonetheless appropriate.

According to the learned Judge, the responsibility of the expert is to provide independent assistance to the Court by way of objective unbiased opinion in relation to the matters within his expertise. His evidence should be the independent product of the expert uninfluenced by the "exigencies of litigation". The expert should never assume the role of an advocate.

The Court also identified some of the important incidents of the role of the expert.

1. The expert should state the facts or assumptions upon which his opinion is based and should consider all the facts, even those which could detract from his concluded opinion.
2. He should make it clear when a particular question or issue falls outside his expertise.
3. He must identify whether the opinion is his

final and complete view on the matter. Where such matters as inadequate data, research or testing affect his views, the expert should so qualify his report.

4. Where there is an exchange of reports and an expert witness changes his view on a material matter, he should, without delay, communicate his change of view to the other side and, when appropriate, to the Court.

This last incident demands careful consideration. There may well be serious consequences in the costs award at the end of the matter where an expert changes his view (or should have changed his view) at an early stage in the litigation and fails to communicate that change to the other side.

The person who can identify the time at which the change in position occurs and when it should be communicated to the other side is the expert. If the expert does not act properly in this regard he exposes his client to an adverse costs order and himself to:

- (a) an attack on his credibility; and
- (b) liability in respect of the costs.

When so much is now demanded of the expert witness in conclaves and in litigation generally, there is a need for explanation of the expert's duties and obligations. The fundamental obligation remains that of independence. No client is adequately served by a partial expert.

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