ACCREDITATION AND ACCOUNTABILITY OF EXPERTS

**A Paper presented by Justice G N Williams
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One of the more contentious issues in recent debates about procedural law reform has centred on the use of expert witnesses in civil litigation. In that context the terms accreditation and accountability (amongst others) have been used, though without any clearly defined or uniform meaning. I do not propose to focus unduly on either term, but rather I will address some of the real problems as I see them. In the course of doing that, questions as to accreditation and accountability of experts will be answered.

In the United Kingdom Lord Woolf's Report '*Access to Justice*' focussed attention on the use of experts in the course of civil litigation. Directly arising out of that Report the Expert Witness Institute (EWI) was formed and, along with The Academy of Experts, it has set about changing the culture associated with the expert witness. 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. As yet no similar body has been formed in Australia though we are getting closer. In October 1997 and March 1998 I delivered papers to the Medico-Legal Society of Queensland and the Australian Council of Professions, Queensland Branch, respectively, in which I strongly advocated the formation of such an organisation. On each occasion there was general support for the proposal but, largely because of administrative and economic

considerations, nothing eventuated. Justices Alan Abadee and Hal Spurling of the New South Wales Supreme Court head a group in that State working towards the formation of such an organisation.

In April this year Sir Michael Davies, a retired High Court Judge from England and the Founding Chairman of Directors of the EWI, had a number of meetings in Sydney with persons interested in the formation of an Institute in Australia. In addition to seeing Justices Abadee, Spurling and myself he had meetings with Dr Maurice Wallin, President of the Australian College of Legal Medicine, Dr Tjong, Chairman of United Medical Protection in Australia, and Mr Barraclough, President of the Royal Australasian College of Surgeons. Further meetings involving the people named are to be held and I am confident that something positive will be achieved in the foreseeable future. It is important that we get an administrative base which will provide the focal point; we are not looking at anything too elaborate for a start. I make those observations this afternoon in the hope that at least some of you present will become actively involved in the formation of such an organisation.

In Australia procedural law reform, particularly with regard to rules of court, has seen many of the superior courts adopt special rules regulating the use of expert witnesses in civil trials. All of the innovations have been successful to some extent, but in my view the reform can be taken even further.

There are at least three problems which require further consideration.

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 recently published study "*Australian Judicial Perspectives on Experts 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 received gifts from drug or biotechnical companies admitted that the donors expected to and did exert influence over their work, including 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.

These concerns are not fanciful, theoretical criticisms. During the 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. An AIJA study in 1992 found that in the County Court of Victoria (mainly personal injury cases) expert witnesses consumed 16% of the cost of cases

that proceeded to verdict and 27% of the cost of cases settled at pre-trial conference. (P Williams and Ors, "*The Cost of Civil Litigation before Intermediate Courts in Australia*"). Anecdotal evidence suggests that in some commercial litigation the percentage would be much higher. Sometimes one party wishes to prevent the other from engaging a particular expert and in consequence gets in first; the idea is to retain a number of the "best" experts to shut out the opposition by relying on the doctrine of legal professional privilege. Then, if the party wishes to recover the fees payable, each of the retained experts has to be called as a witness. Again the impact is not just in the cost of retaining and calling those witnesses, but in the delay occasioned by the lengthening of the trial. Disputes are often more difficult to resolve because of slight differences of opinion between the array of experts called by the one party. Even if the only retained expert called is the most favourable, the practice is undesirable because it restricts the availability of experts to the other side.

3. Where numerous experts are called the litigation is often side tracked - time is spent 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.

Having identified some of the problems one can ask whether "accreditation" would alleviate or remove them? Before that question can properly be answered other issues must be addressed. Who should be responsible for accreditation? What criteria should be applied? What are the consequences of accreditation? When and how should the accreditation be reviewed? None of those questions is susceptible of a ready answer.

It is not appropriate that the Court be responsible for the accreditation. Neither a Judge nor a Court collectively would be suitably placed to perform that task. If the Court accredited a witness in a particular area of expertise that may wrongly give the impression that the person stands in particular favour with the Judges or is considered to be more highly qualified than others who practice in the same field. If a professional body administered the accreditation process it may again be open to allegations of favouritism, and nepotism. There may be a perception of bias if the Court accepts the evidence of a witness to whom it has given accreditation over strong contrary evidence from a non-accredited witness. Any suggestion that more weight was being given to the opinion of an accredited expert over that of a highly qualified but

non-accredited witness would undermine confidence in the litigation process.

Accreditation by a professional organisation could be useful in some ways, but would be of little or no relevance in the trial process. Courts could not restrict expert evidence to those who had received accreditation from a professional body. Such a system would at least indicate to litigants who were regarded by the professional body as persons qualified to provide expert evidence in a particular area. One possible benefit is that a witness so accredited may be less likely than others to go beyond the limit of relevant expertise, a common failing with experts. But the downside is that often those who obtained such accreditation would reflect the common wisdom in the often conservative controlling body. In recent times much previously accepted scientific knowledge has been abandoned or modified and contentious litigation often highlights the changing face of science. The bright young specialist with new ideas should not have to carry the burden of want of accreditation when entering the witness box. If accreditation by the professional organisation is limited in operation to notifying the public who is available to be retained as an expert witness in a particular field then it is unobjectionable and fulfils a necessary role.

That also appears to be the view of Dr Freckelton; he said at p 115 of his Study:

> "Professional organisations have a constructive role to play in credentialling expert witnesses who can speak on

> their behalf. Representatives of medical colleges have advocated this concept for some time. Such a system would not preclude the commissioning of persons from outside such a regulated professional accreditation system but it would provide a significant impediment to the way of the use of experts whose views are ill-regarded by their colleagues. The onus in a practical sense would shift onto the party calling a non-accredited expert to explain the need for, and the legitimacy of, such a step."

It is interesting that to date there has been little impetus for accreditation in common law countries. The Royal Australasian College of Surgeons is desirous of instituting a system of recognition for expert medical witnesses. I have a copy of a document which was circulated by Mr Barraclough at the meeting in Sydney earlier this year; it says: "The College plans to institute a system of recognition for expert witnesses. Fellows may apply for recognition as an Expert Witness - Personal Injury Assessment or Expert Witness - Medical Negligence." Immediately one wonders why the distinction when it comes to accreditation. To my mind that indicates that a system of accreditation may often create its own problems; there will be more bureaucratic hurdles to overcome. Insofar as the RACS proposal involves specialist training then it is commendable. Such accreditation would not, of course, prevent the Court from receiving evidence from a non-accredited expert in the field. If the system narrowed the field of choice of witnesses it may not be a good thing.

Accreditation was considered by Lord Woolf and rejected. The following extract from page 150 of his Final Report is worth quoting:

> "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 failed 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 were out of touch with current practice in their field of experience."

I have recently discussed the issue of accreditation with Directors of the EWI. The current view of the Institute is that it is opposed to accreditation. It considers that it would result in a closed shop and be anti-competitive. The Institute recognises a party has the freedom to instruct a particular expert, it is part of a person's freedom of choice. Interestingly, Justice Sir Robin Jacob, a Governor of EWI, wrote in the Newsletter of the Institute (Spring 2000):

> "I turn to consider how single experts will be chosen. I cannot envisage a system of the continental sort where, in some countries at least, the Courts keep a list of "experts". I have had some experience of that: it can be deeply unsatisfactory for several reasons, not the least because the list is unlikely to be kept well up to date and is unlikely to be sufficiently precise to identify really appropriate expertise for the case in hand. Much better is to make the parties find an acceptable expert or lists of people they think would do and let the Court choose."

Sir Robin was there referring to the position which pertains particularly in France. I understand from discussions, though I cannot give precise details and examples, that the system of accreditation there simply does not work. It has apparently exacerbated rather than alleviated the problems.

However, it should be noted that the EWI has welcomed the recent formation of the Council for the Registration of Forensic Practitioners which is primarily concerned with accreditation in the field of criminal law. Ultimately it is proposed that there will be a disciplinary committee, but in the immediate future the Council's role will be limited to approving people who hold themselves out as available experts to give evidence in criminal trials.

At the Council of Professions seminar to which I referred previously, Dr Graham Row, a specialist nephrologist, and Mr John Moore, a Brisbane solicitor, presented papers in which each argued against a

system of accreditation of experts. I wholeheartedly agree with what each said and it is worth quoting their remarks. Dr Row said:

> "I am against creating sub-specialists (expert medical experts) experienced in the ways of the law. Some areas of medicine lend themselves to sub-specialisation and this is appropriate; Forensic Psychiatry, Forensic Pathology, etc. The pool of practitioners available to the Court and its conciliation processes should … be as large as possible."

Mr Moore said:

> "I am against creation of a Court accredited "pool of available experts". I consider this will create a lack of confidence within the system and could destroy all of the very good initiatives that are being developed. The rationale for the concept is good, but in practice it may be perceived as creating a pool of "professional experts" who, while seeing many many problems, may eventually become out of touch or be perceived as being out of touch with current practice in their particular field of expertise. Some people suggest it will create an uncompetitive monopoly or there may be Court appointed "favourites" because of their ability to respond quickly and succinctly with well defined conclusions but who, from the professional community's point of view, may be perceived as being predictable in their professional outlook or who

> are known to adopt an academic approach as opposed to a test of the "real world".

The references to the "professional witness" are interesting. A number of American studies have dealt with the problem of the "professional 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" background blunts objectivity. Those issues are more fully discussed in the American context by Margaret Berger in her contribution "*Evidentiary Framework*" to the Reference Manual on Scientific Evidence published by the Federal Judicial Centre in 1994.

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 and one who only occasionally fills that role.

N Miltenberg, writing in the American journal Trial in January this year, observed: “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.

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 required.

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* (UCPR) have made some changes to the pre existing law, but the Rules Committee is about to consider more far reaching provisions dealing with expert evidence. Rule 423 requires a party to make disclosure of expert evidence within 21 days after the trial date is set. 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. It was disturbing to read newspaper reports of the treatment meted out to the expert appointed to assist the Coroner inquiring into the Thredbo disaster whilst he was in the witness box. The expert was a highly credentialled engineer who was very well qualified to investigate and report on the causes of the landslide. As noted he was appointed by the Coroner to report to the Court. He was cross examined, it would have to be said viciously, by the legal representatives for each party who had an interest in a finding as to the cause of the disaster. He was attacked as being biased because his report was given to the Court before being shown to or considered by the affected parties. The fact that the legal process obliged him to do just that was obviously deliberately overlooked by the lawyers desperate to find some grounds for attacking an objective report. It is of little consolation for the expert for me to say that I would not have permitted such a line of cross examination in my Court.

It is because of incidents such as that that I have already said that it will be necessary to change the legal culture surrounding the use of expert evidence before all necessary reform in this area is complete. This again is where an organisation along the lines of

the EWI can play an important role. Such an Institute does not exist solely to educate expert witnesses as to their role in the litigation process; it is also there to educate the lawyers. Unfortunately, as is often the case, those (both lawyers and experts) most in need of education will be the last to become involved in such programs. It is important to note that the EWI is a multi-disciplinary body; there are now about 1,000 individual members covering a wide range of professions and disciplines. Significantly lawyers do not dominate. There are at least five different professions or disciplines represented at Board level. That is another key to its success.

The present English Rules and Practice Direction provide a good starting point for further reform in Queensland. Rule 35.1 states that expert evidence "shall be restricted to that which is reasonably required to resolve the proceedings." A simple proposition, but something that needs not only to be asserted but vigorously implemented. That rule provides the basis upon which the other rules relating to the use of expert evidence are built. The next critical Rule is 35.3; it is a central pillar which is presently lacking in the Queensland Rules. It 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 must 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). The role of the expert and the attendant duty are also recognised in the Practice Direction which requires that the "report should be

addressed to the Court and not to the party from whom the expert has received his instructions". Finally in this regard it should be noted that Rule 35.10 also requires that the expert's report "must state the substance of all material instructions, whether written or oral, on the basis of which the report was written". Those instructions are not privileged against disclosure. That is taken further by the Practice Direction which also requires that the maker of the report to identify "any literature or other material which the expert has relied on in making the report", to detail "any test or experiment which the expert has used for the report and whether or not the test or experiment has been carried out under the expert's supervision", and to summarise the range of opinion and give reasons for the expert's own opinion.

It can readily be seen that if those requirements of the Rules and Practice Direction are complied with the expert will not be a "hired gun" promoting the case of a particular party, but rather an adviser to the Court, objectively assessing the facts and stating an independent opinion for the assistance of the Court. It is, or at least ought to be, immediately obvious that if an expert faithfully complies with those requirements then there should be no need in most cases for a plethora of experts to be called.

Consequent upon the fact that expert evidence must be reduced to the form of a report provided to all opposing parties, the English Rules provide a procedure whereby the opposing parties may put written questions to the expert about his report. The questions must be answered and the answers form part of the report for evidentiary purposes. Lord Woolf envisaged that whether the

expert was instructed by a party or was a single joint expert appointed by the Court such questioning would in most cases obviate the necessity for reports to be obtained from other experts. His judgment in *Daniels v Walker* (2000) 1 WLR 1382 reveals how he envisages those Rules should operate in practice.

Rule 35.12 of the English Rules also provides that the Court may at any stage direct a discussion between experts for the purpose of requiring those experts to identify issues and reach agreement where possible.

Finally for present purposes I would refer to two further English Rules. Rule 35.11 provides that where a party has disclosed an expert's report, any party may use that report as evidence at the trial (Rule 35.1). Also any party who fails to disclose an expert's report may not use the report at trial or call the expert to give evidence without the leave of the Court (Rule 35.13).

Whilst such Rules do not remove all problems associated with expert evidence they go a long way towards ensuring that a trial is not unnecessarily protracted by the calling of numerous experts thereby probably creating false issues. There will always be cases where the litigation is essentially the result of the fact that there are irreconcilable differences between eminent experts. No procedural rules can resolve that problem. But if rules along the lines of the current English model have been complied with during pre-trial preparation, the Trial Judge should be able to identify quickly and clearly the real issues in dispute and ensure that the trial is focussed on such matters. Whilst that does not make the ultimate

decision making process any the easier, it should at least ensure that the Trial Judge will not be distracted by false issues, and the litigants will not have to bear the cost of experts disputing issues of no, or only peripheral, relevance.

The more I have been forced to consider these questions over recent years the more convinced I have become that the problems associated with expert testimony will be largely overcome if the following requirements are entrenched:

(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 must 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 must be fully detailed in the report;
(iv) All the evidence of the expert must be stated in the written report;
(v) Reports must be exchanged well before 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.

That brings me to another matter of real significance - payment of the expert witness. In Lord Woolf's Interim Report and the accompanying Draft Rules there was a recommendation that the Court should decide what fees were payable to an expert and when and by whom. That has not been implemented yet in England. The matter has been of great concern both to the EWI and The Academy of Experts. In 1999/2000 a Working Party was formed by each of those organisations under the direction of the Vice-Chancellor to prepare a Code of Guidance on Expert Evidence. I have read a copy of the final report which has been submitted but apparently has not yet been finally approved by the Court.

However, there seems no doubt that the following provision therein as to payment reflects the prevailing view in the United Kingdom and will be implemented:

> "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 otherwise would contravene the expert's overriding duty

> to the Court and would contravene the Law Society's Guide to the Professional Conduct of Solicitors."

To my mind that is a critical provision which ought to be implemented and rigorously enforced in this State. Rule 428 of the UCPR provides that where the Court appoints an expert it must set the remuneration and specify who is liable to pay that remuneration in the first instance. That amply demonstrates that the Court has jurisdiction to deal with the remuneration of experts by rule, and there is a real possibility that a provision will be inserted into our rules outlawing payments to expert witnesses depending upon any contingency.

Before leaving the Draft Code of Guidance in England it is also worth noting that it has drawn a distinction between an advisory expert and an evidentiary expert. Before litigation is commenced a party may engage an expert to advise on the prospective litigation. Legal professional privilege attaches to that report and the rules which I have previously quoted do not apply to it. However, once litigation is commenced and a report is commissioned for use as evidence then all of those rules apply. Further, the Code recognises that during the period of the litigation a party may seek advice from an expert (say as to matters which should be the subject of cross examination) without the rules in question applying to that expert; but of course such expert could not be called to give evidence. In other words there is a dichotomy recognised between an expert instructed to act solely in an advisory capacity and an expert providing evidence for use in the litigation.

In my view that is a proper distinction to draw. The only concern I have is whether or not, if the expert who gave an advisory opinion prior to litigation being commenced ultimately was retained as an expert to give evidence at trial, the initial advisory report would remain privileged. My present view is that privilege should continue to attach to such an initial advisory opinion. However, that is a matter which will require further consideration in the future, particularly if Queensland were to follow the English rules and guidelines.

If all of the provisions I have referred to were adopted in Queensland, and all expert witnesses acted in accordance with the underlying philosophy, most of the presently perceived problems would be overcome. If an expert was discredited on a number of occasions that would impact upon that expert's standing in the Courts and in his peer group. That is perhaps the most significant sanction compelling compliance with such rules. If there was some system of accreditation of experts then arguably accountability could be enforced by the threat of dis-accreditation. But again that raises similar problems to those discussed when considering accreditation itself. Who is to dis-accredit? On what basis is that decision to be made? What would be the consequences of dis-accreditation?

In the end the only real sanction can be peer pressure and standing in the eyes of the Court.

Again I return to the theme that an Institute such as the EWI would go a long way towards ensuring that formal requirements for

accreditation were unnecessary. Once the expert has a greater understanding of his role in the legal process and how the legal process works many of the current problems will vanish. That process will be accelerated if lawyers also become appreciative of the problems facing experts in difficult litigation and understand the role which the expert will ultimately play in the resolution of the dispute.

In our civilised society it is important that the rule of law be upheld. That includes the proposition that a judgment, particularly of a superior Court, is accepted even by the losing party. No one expects the loser to be happy with the outcome, but it is important that the loser recognises that there has been a fair trial, and the judgment pronounced by an impartial arbitrator who has considered all of the relevant evidence and given reasons for the decision. Inherent in that is the proposition that the parties to hotly contested litigation have the right to select, where necessary, the expert on whose testimony that party's case depends. If a party is arbitrarily deprived of the right to nominate and call the most critical witness in the eyes of that party, that party will never accept the decision as being a fair and impartial decision in accordance with the rule of law. For that reason it is important that rules restricting the right of a party to call expert witnesses should be carefully crafted to ensure that such principles are not abrogated. My experience with litigation over some 40 years, about half of which has been spent on the Bench, convinces me that procedural rules can be drafted which respect that principle and yet ensure that the trial is not delayed and derailed by the calling of numerous expert witnesses whose evidence would tend to create false issues.

Ultimately the challenge is for the Courts to find the right balance but I am confident that it can be done. Hopefully the task will ultimately be made easier because of the work of an expert witness institute.