THE NEW EXPERT WITNESS RULES

Breakfast Address to Australian Insurance Law Association

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Justice Margaret Wilson

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1. The new expert witness rules were debated at length by the Rules Committee, both within the Committee itself and with various representatives of professional bodies. While it is fair to say that the initiative did not command the support of the Bar Association or the Law Society, there was a considerable groundswell of support from experts themselves, both individually and through professional organisations. And the new rules are in keeping with the trend of developments in other jurisdictions.

2. Why the need for new rules? What was perceived to be awry with the way expert evidence was being presented? We all know that litigation has a voracious appetite for the consumption of public and private resources. Our system is largely an adversarial one, which relies on the parties to present

their opposing cases in their best light and on the impartial umpire (be it judge or jury) to determine whether the claimant has established his or her case on the balance of probabilities. Expert evidence is admissible to enable the judge (or jury) to reach a properly informed decision on a technical matter.

3. In a paper presented to a conference of Supreme and Federal Court Judges earlier this year[1], Justice Davies of our Court of Appeal summarised the problems inherent in the old rules as –

(a) polarization of opinions on questions involving expertise – when many questions involving expertise, including scientific ones, do not admit of an unequivocal answer, let alone one which necessarily favours one side rather than the other;

(b) adversarial bias – the natural human tendency to feel the need to do your best for the side you represent;

(c) the difficult question and the non-expert judge – (i) the more complex the question is, the more difficult it becomes for a judge or jury to determine the extent to which opinions given on each side are polarized by the adversarial process; and (ii) the more complex the question is, the more the judge or jury needs the help of an independent expert who can assist the court to understand the question and consequently to resolve it;

(d) the waste of time and cost – a great deal of time and money is spent by both sides in preparation for trial and in the conduct of the trial, with the aim of persuading the judge of the correctness of the client's cause, with inevitable duplication, and often not directed to the just resolution of the question.

4. His Honour's insights were expressed with his trademark clarity and incisiveness. They were a distillation of disquiet which was, and still is, being expressed throughout the common law world. For example, in this country the Ipp Report[2] referred to widespread perceptions that, in many instances, expert witnesses consciously or subconsciously slant their testimony to favour the party who retains them and that, in many instances, the trial process does not afford a reliable means of adjudicating between what might crudely be described as biased experts. The authors of that report identified a particular problem in those States were case-management practices and the prevailing legal culture have resulted in expert evidence being given completely in writing – that is, where the evidence in chief is in writing and there is no cross-examination, resulting in the Judge having to choose between competing views contained in expert reports. They recommended that consideration be given to implementing trials of a system of court-appointed experts. In NSW the Law Reform Commission is currently inquiring into the operation and effectiveness of

the rules and procedures governing expert witnesses in that State. Its terms of reference[3] require it to have regard to –

- Recent developments there and in other Australian and international jurisdictions in relation to the use of expert witnesses, including developments in the areas of single or joint expert witnesses, court-appointed witnesses, and expert panels or conferences;

- Current mechanisms for the accreditation and accountability of expert witnesses for the purposes of court proceedings, including the practice of expert witnesses offering their services on a "no win, no fee" basis;

- The desirability of sanctions for inappropriate or unethical conduct by expert witnesses; and

- Any other related matter.

The Commission is to report by 31 March 2005.

5. How have we sought to address these problems? Essentially by a three-pronged approach:

(i) by providing an express statement of the obligations of an expert witness;

(ii) by encouraging the appointment of a single expert, either by agreement of the parties or by order of the Court; and

(iii) by allowing an expert, who will become the only expert in the case, to be appointed before litigation commences.

I will discuss each in turn. The new rules apply to proceedings commenced before they came into effect (other than in relation to an expert already engaged).[4]

6. An expert's overriding duty has always been to the Court, to present his or her honestly held opinion in a non-partisan way. I am reminded of an English copyright infringement case[5] in which an architect who was called as an expert witness had previously written an article *The Expert Witness: Partisan with a Conscience*. He had described the expert as the man who works the Three Card Trick – someone who goes through three phases:

(i) that of the candid friend, who tells the client all the faults in his or her case;

(ii) that of the hired gun, who writes a report intended to be shown to the other side;

(iii) that of the witness in court whose earlier pragmatic flexibility is brought under sharp curb, whether of conscience, or fear of perjury, or fear of losing professional credibility.

The article was used against him in cross-examination to devastating effect, and his evidence was rejected. But perhaps it contained more than a grain of truth, at least in some cases.

7. Well, hopefully no more. The main purposes of the new rules are to –

> "(a) declare the duty of an expert witness in relation to the court and the parties; and
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> (b) ensure that, if practicable and without compromising the interests of justice, expert evidence is given on an issue in a proceeding by a single expert agreed to by the parties or appointed by the court; and
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> (c) avoid unnecessary costs associated with the parties retaining different experts; and
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> (d) allow, if necessary to ensure a fair trial of a proceeding, for more than 1 expert to give evidence on an issue in the proceeding."[6]

8. Under the new rules the expert's duty to the Court is express –

> **"426 Duty of expert**
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> (1) A witness giving evidence in a proceeding as an expert has a duty to assist the court.

(2) The duty overrides any obligation the witness may have to any party to the proceeding or to any person who is liable for the expert's fee or expenses."[7]

9. The new rules deal with expert opinions intended to be relied on as evidence rather than opinions expressed in providing advice to a client. An expert may give evidence by a report[8] which cannot be tendered as evidence unless it is disclosed to the other parties as required by the rules[9] or the Court gives leave[10]. There are restrictions on calling oral evidence from experts[11].

10. There are certain mandatory requirements for an expert's report. I will deal with these in a moment. Before doing so, I want to say a few things generally about the obligations of a legal representative in commissioning an expert report.

(a) He or she must be clear as to the issue on which an expert opinion is to be tendered. Barristers have sometimes been heard to complain about solicitors who bundle up their files, (metaphorically at least) tie pink ribbon around them, and have them delivered to barristers' chambers with instructions "to advise generally" – ie without having performed any analysis of the issues or of the materials the barrister is likely to need. I suspect that sometimes expert witnesses are confronted with a similar dilemma: *The plaintiff*

child was admitted to hospital under the care of Dr X for a surgical procedure to correct a lazy eye. She is now blind in that eye. Your opinion is sought upon whether the surgeon was negligent.

(b) The question must be one on which expert evidence is properly admissible – ie one outside the realms of common experience and in an established field of knowledge which is within the expertise of the expert. There is a tendency for parties, at great expense, to engage competing experts to make points which can be made by recourse to common experience. Recently Justice Heydon of the High Court lavished praise on Justice Wells, a former Judge of the SA Supreme Court, for his use of common experience in fact finding, and decried the modern tendency to rely too heavily (and often inadmissibly) on expert opinions on such matters; His Honour referred to the change as "a slide from greatness to decadence [that] is apparent within a single generation".[12] Perhaps it is also a reflection of the different life experiences of this generation of lawyers (and Judges). Whatever it is, I suggest that in many cases more prudence needs to be exercised before too readily outlaying clients' money on obtaining expert opinions on matters such as negligent driving, relatively simple workplace accidents and arithmetical calculations of damages.

(c) Ultimately an expert's report is admissible in evidence only if the facts on which it is based are proved to the satisfaction of the Court. Too often an expert is asked to provide an opinion without any clear indication of the facts of the case. Documents provided to him or her when the report is commissioned by a party are inevitably somewhat one-eyed and the expert does not know what conflicting facts the Court will eventually hear. The new rules deal with this problem in two ways:

(i) by requiring the expert to set out in his or her report a statement of all material facts, whether written or oral, on which the report is based[13]; and

(ii) in the case of a jointly appointed expert, requiring the parties to agree in writing on the issue to be put to the expert[14] and to provide the expert with an agreed statement of facts on which to base the report[15]. If the parties do not agree on a statement of facts, then, unless the Court directs otherwise, each of them must give the expert a statement of facts, and the Court may give directions about the form and content of the statement of facts[16]. An expert faced with competing versions of the facts should set out both versions, and express an opinion on each scenario. If the competing versions turn on credibility, he or

she should not try to choose between them, although there may be cases where the expert can use his or her expertise and experience to express an opinion on which sequence of events is the more likely – for example, the lead up to an explosion or its sequelae.

11. Now, returning to the requirements for the report. These apply to any expert report that is to be tendered in evidence – not just to the report of an expert jointly appointed by the parties or appointed by the Court.

(a) First, it must be addressed to the Court and signed by the expert.[17] The requirement that it be addressed to the Court reflects the expert's pre-eminent and overarching duty to assist the Court. It may seem to be stating the obvious to say the report has to be signed – but the point is that the report is, and remains, the expert's independent evidence rather than a document prepared on behalf of one or more of the parties.

(b) The expert must establish his or her credentials: the report must contain a statement of his or her qualifications[18].

(c) It must contain a statement of all material facts, whether written or oral, on which it is based[19].

(d) It must contain details of any literature, reference work or other information the expert relied on to set the scientific or technical background of the case or to support the opinion[20].

(e) Details of any inspection, examination or experiment relied on[21];

(f) If there is a range of opinion on matters dealt with in the report, a summary of that range of opinion and reasons for adopting a particular opinion[22];

(g) A summary of conclusions[23];

(h) A statement of any qualifications to the opinion[24]: If the expert's conclusion is in some way tentative, but he or she would be able to express a firmer conclusion with the benefit of access to some readily ascertainable facts, that must be stated. The Court may direct a party with access to such information to provide it to an expert appointed jointly by the parties or by the Court[25]. Further, such an expert may apply to the Court for directions to facilitate the preparation of the report[26].

(i) The list of mandatory requirements comes full circle in reminding the expert that his or her duty is to assist the Court. It begins by requiring the report to be addressed to the Court, and ends with the

requirement for a quite detailed statement that the expert has complied with his or her obligations. The expert must confirm –

(i) that the factual matters stated in it are, as far as he or she knows, true;

(ii) that he or she has made all enquiries considered appropriate;

(iii) that the opinions stated in it are genuinely held by him or her;

(iv) that it contains reference to all matters that the expert considers significant; and

(v) that the expert understands his or her duty to the Court, and has complied with it.[27]

12. Finally, what I hope will prove a useful practical tip. Because expert reports must be addressed to the Court, sometimes an expert will send the report directly to the Court rather than to a party. Indeed, an expert is required to do so if he or she is appointed jointly by the parties or by the Court[28]. There is the potential for the report to go astray if it is not properly identified. I suggest that any report should have a coversheet identifying the litigation (eg In the matter of *Smith v Brown*), the author of the report, the Court to which it is addressed, by whom the expert was appointed, and the date of the report.

13. The expert's obligation to the Court does not cease when the report is presented. If, subsequently, the expert changes his or her opinion in some material way, then there is an obligation to provide a supplementary report setting out the change and the reason for it[29]. And where there are conflicting opinions, the Court may direct the experts to meet to identify matters of agreement and matters of disagreement, and to attempt to resolve matters of disagreement[30].

14. The rules relating to experts appointed jointly be the parties or by the Court apply only to proceedings in the Supreme Court. This reflects the measured reformism with which they were introduced. If they work well in the Supreme Court (which I am confident they will), their operation will probably be extended to the District Court and the Magistrates Courts. But it is a new regime, and its full implementation will require some change in the legal culture – something which can be expected to take a little time.

15. After a proceeding has started, an expert may be appointed under the rules in one of 3 ways[31] . The expert appointed under one of these provisions will be the only expert to give evidence in the proceeding on the issue, unless the Court orders otherwise[32].

    (a) If 2 or more parties agree that expert evidence may help in resolving a substantial issue in the proceeding, they may, in writing, jointly appoint an expert to prepare a report on the issue;

(b) If parties cannot agree on the appointment of an expert, any party who considers that expert evidence may helping resolving a substantial issue in the proceeding may apply to the Court for the appointment of an expert to prepare a report on the issue;

(c) The Court may, on its own initiative and at any stage of a proceeding, if it considers that expert evidence may help in resolving a substantial issue in the proceeding, appoint an expert to prepare a report on the issue.

Where the expert was appointed by the Court, another expert may be appointed by the Court to prepare a report on the same issue if, after receiving the first expert's report, the Court is satisfied –

(a) there is expert opinion, different from the first expert's opinion, that is or may be material to deciding the issue;

(b) the other expert knows of matters, not known by the first expert, that are or may be material to deciding the issue; or

(c) there are other special circumstances.[33]

16. The Court will not approach the appointment of an expert lightly. It may take into account the complexity of the issue, the impact of the appointment on the costs of the proceeding, the likelihood of the appointment expediting or delaying the trial, the interests of justice and any other relevant

consideration[34]. It does not keep a list of experts from which to make an appointment. It will consider lists of qualified and willing experts put forward by the parties, although it is not confined to choosing an expert from such lists[35]. It will require the parties to state any connection between an expert named and a party to the proceeding[36] – but if it considers an expert is the appropriate person to help resolve an issue, it may appoint that expert even though he or she has already given a report to one of the parties on the issue or another issue in the proceeding.[37] It may make its own inquiries to help it decide which expert to appoint.[38]

17. A Court appointed expert must furnish his or her report to the Registrar of the Court, who must file it in a sealed envelope and forward copies to the parties.[39]

18. The Court may give directions in relation to a Court appointed expert, including directions about the supply of information to him or her and the extent to which a party may communicate with him or her; when the report must be given to the Registrar; liability for the expert's fees and expenses, and payment of any expenses incurred by the Registrar[40].

19. A similar regime of Court appointed experts was introduced in the NSW Land and Environment Court in March this year. The Chief Judge of that Court said in an address to the annual conference of the Australian Institute of Judicial Administration last month[41] that in recent weeks he had received

reports from members of the Court, practitioners and experts themselves about their opinion of the quality of the evidence given by Court appointed experts. The consistent comment from judges and legal practitioners had been that evidence from persons appointed as Court experts reflected a more thorough and balanced consideration of the issues than was previously the case. Discussions with the experts confirmed the pressure they felt as "the Court expert" to ensure their reports considered all relevant issues and, most importantly, provided a balanced analysis of the situation. At least some experts had been prepared to acknowledge publicly that when engaged by a particular party, their evidence had been structured to favour that party, but, when appointed by the Court, objectivity and balance had returned. His Honour observed –

> "Although the move to appoint court experts initially met significant resistance from the legal profession, I believe that resistance is now diminishing. With the change has come a clearer understanding of the deficiencies of the old approach and the benefits which change can bring. For the experts, it is about giving back to them the opportunity to use their expertise without obligation to a client and the ability to express their views without the distortions that can come from the adversarial process."

I venture to predict that the Queensland experience will be similar.

20. For more than 2 and a half years I have been the Judge constituting the Mental Health Court. This is a specialist Court which deals principally with questions of criminal responsibility (whether an accused person was of unsound mind at the time of an alleged offence), mental fitness for trial and appeals against treatment decisions. It is constituted by a Supreme Court Judge, assisted by 2 psychiatrists, whose role is to help in the understanding of clinical issues. It is a court of inquiry rather than an adversarial forum, and it makes very extensive use of Court appointed experts. I know from my experience in the Mental Health Court the high degree of objectivity and thoroughness which Court appointed experts bring to their task. The cases in which one of the parties has called his or her own expert have been comparatively few in number; on some, if not most, of those occasions the expert has been partisan in his or her evidence; the contrast with the approach of the Court appointed expert has been patently obvious; and the Court has preferred the evidence of the Court appointed expert.

21. The system of jointly appointed experts and Court appointed experts will not achieve its goal of saving cost and delay if, by the time such an appointment could be made, one or both of the parties have already retained their own experts. Part of the solution is to ensure early and effective case management, and I think we still have some way to go in devising best practice in this area. Case management needs to be tailored

to the demands of the particular litigation, and there is no doubt that an excessively intensive approach can be counter productive, adding to cost, delay and frustration. On the other hand, one of the reasons for the apparent success of the new approach in the NSW Land and Environment Court (albeit early success) is that the parties are required to attend a case management conference at a very early stage, and it is then that directions are given about expert evidence. Of course, the jurisdiction of the Supreme Court is much more diverse, and its resources may not be sufficient to cope with such a requirement in every case. However, I think this is an area which calls for more attention.

22. Another way of tackling the problem of comparatively late appointment of an expert intended to be the only expert on an issue is to allow the appointment before the commencement of litigation. Suppose a building under construction has collapsed causing all manner of economic and personal damage; the cause of the collapse needs to be established; there will no doubt be litigation between the owner, the designer and the builder, but that can be expected to take months if not years to reach a conclusion; in the meantime the site needs to be cleared and construction recommenced. Under the new rules an expert witness, intended to be the only witness to give evidence on an issue in the likely litigation, may be appointed now, by agreement of the disputants[42] or by the Supreme Court on the application of one of them[43]. The scheme is a novel one, but it is

one with great potential to change the face of litigation and to change it for the better.

23. These are challenging times for everyone involved in litigation – parties, insurers, witnesses, legal practitioners, Judges and court administrators. If we allow litigation processes to be, or to remain, excessively costly, cumbersome or inflexibly resistant to change, we allow the judicial process to fall into disrepute. The maintenance of an impartial and effective system of judicial resolution of disputes according to law is a critical aspect of the rule of law, which is the foundation of our free society. I encourage you to take advantage of the new rules, to be forthright and constructive in your criticisms of their operation, and to be part of what I perceive to be a growing momentum for re-examination and reaffirmation of our system of judicial dispute resolution.

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[1] Davies GL *Court Appointed Experts* (a paper delivered on 29 January 2004 at the Annual Supreme and Federal Court Judges' Conference, Auckland, New Zealand)
[2] *Review of the Law of Negligence* (Final Report September 2002)
[3] Terms of reference received 16 September 2004
[4] *UCPR* r 996
[5] *Cala Homes (South) Limited & ors v Alfred McAlpine Homes East Limited* [1995] FSR 818
[6] *Uniform Civil Procedure Rules* r 423
[7] *UCPR* r 426
[8] *UCPR* r 427(1)
[9] *UCPR* r 427(2)(a)
[10] *UCPR* r 427(2)(b)
[11] *UCPR* r 427 (4)
[12] Heydon JD *Outstanding Australian Judges* (a paper delivered on 3 October 2004 to the Adelaide Colloquium of the Judicial Conference of Australia) at pp 60 – 65. His Honour gave as examples of Wells J's use of common experience his judgments in *Trocko v Renlita Products Pty Ltd* (1971) 2 SASR 1 and *Stoeckel v Harpas* (reprinted as a note to *Noble v Edwards* (1971) 1 SASR 155 at 172 – 173).
[13] *UCPR* r 428(2)(b)
[14] *UCPR* r 429H(1)(a)(i)
[15] *UCPR* r 429H(3)

[16] *UCPR* r 429H(4)
[17] *UCPR* r 428.
[18] *UCPR* r 428(2)(a)
[19] *UCPR* r 428(2)(b)
[20] *UCPR* r 428(2)(c)
[21] *UCPR* r 428(2)(d)
[22] *UCPR* r 428(2)(e)
[23] *UCPR* r 428(2)(f)
[24] *UCPR* r 428(2)(g)
[25] *UCPR* r 429O
[26] *UCPR* r 429P
[27] *UCPR* r 428(3)
[28] *UCPR* r 429L(1)
[29] *UCPR* r 429A
[30] *UCPR* r 429B
[31] *UCPR* r 429G
[32] *UCPR* rr 429H(6), 429N(2)
[33] *UCPR* r 429N (3)
[34] *UCPR* r 429K(1)
[35] *UCPR* rr 429I, 429J
[36] *UCPR* rr 429I(2)(c), 429J(1)(b)
[37] *UCPR* r 429K(2)
[38] *UCPR* rr 429I(3), 429J(1)(c)
[39] *UCPR* r 429L
[40] *UCPR* r 429M
[41] McClellan P *The Recent Experience of the Land & Environment Court* (a paper delivered on 18 September 2004 to the 22nd AIJA Annual Conference in Sydney)
[42] *UCPR* 429R
[43] *UCPR* r 429S