

HAZARDS OF AN EXPERT WITNESS – AN AUSTRALIAN EXPERIENCE

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INTRODUCTION

This paper is not, strictly, about process safety *per se*, it's about what can happen after a failure of process safety, that is, an inquiry into what has happened. Then it concerns the hazards faced by someone who becomes involved in the investigation, namely, the expert witness, in which role the author of this paper has acted for several years, investigating over a hundred incidents. The paper based on this abstract will outline some example cases of interest which illustrate the investigation process, how an answer was found for each, what can be learned from them, and how they demonstrate hazards of performing the expert witness function.

WHAT IS AN EXPERT WITNESS?

The author has found the expert witness is defined in both an English reference (well, one from part of the UK) and one from the USA. The first is brief and is quoted here in full (Stewart, 2001):

Expert witness in the law of evidence, a witness who is allowed to give opinion evidence as opposed to his evidence of his perception. This is the case only if the witness is indeed skilled in some appropriate discipline. An exception to the usual rule of practice whereby witnesses are heard one after another and do not hear the evidence of the preceding witness is made in relation to competing experts. The term skilled witness is preferred in Scotland.

The American definition covers much the same ground and with more detail, hence is worth reviewing also in full (Gifis, 1996):

Expert witness a witness having "special knowledge of the subject about which he is to testify; that knowledge must be such as is not normally possessed by the average person. The expert witness is thus able to afford the tribunal having the matter under consideration a special assistance". This experience may derive from either study and education, or from experience and observation. An expert witness must be qualified by the court to testify as such. To qualify, he or she need not have formal training but the court must be satisfied that the testimony presented is of a kind which in fact requires special knowledge, skill or experience. Such testimony, given by an expert witness,

constitutes EXPERT EVIDENCE or EXPERT TESTIMONY. Hypothetical questions [asking the witness to assume certain stated facts] may be asked of an expert witness as a way of educating the trier of fact in the area of the expert's knowledge or experience.

(The above reference also has, within its text, references to USA statutes, which have not been included in this extract.)

Summing up: an expert witness is a person with special knowledge related to the matter under consideration, must be qualified as having that special knowledge, the court must be satisfied the person has the qualifications and special knowledge, and based on that the person can give opinion testimony rather than observed or factual evidence.

The essential feature of the above definitions is that although the expert witness may be hired by one of the parties he is not truly responsible to them, his loyalty is to the Court. His function is that of an *amicus curiae*, a “friend of the Court” (also defined by both Stewart and Gifis), and as such, if he discovers something contrary to either party he should, indeed, must disclose that.

The acceptance of opinion evidence is an interesting feature of expert witness testimony as it's almost contrary to the general rules of evidence in British and similar legal systems, which “normally” accept only factual, observed, recorded, physical evidence.

AND WHAT IS AN “EXPERT”?

It would have been reasonable, before proceeding to defining “expert witness”, to have defined “expert” more generally, and we are fortunate in having available a reference which discusses the expert and its position in society very thoroughly, though with some satire and tongue-in-cheek cynicism, with a definition (Ford, 1982):

Experts are unassailable and superior individuals who use a language of their own to cloak their inner whims in a spurious aura of authority.

That does not *quite* mesh with our understanding of the above definitions of an expert witness, only demonstrating how we can find humour in serious matters. However, let's proceed . . .

THE NEW SOUTH WALES CODE OF CONDUCT

The Australian judicial system is as complex as the English, with Local Courts presided over by a magistrate (named, years ago, as “Petty Sessions”) in city suburbs and country towns, then there are the District Courts in major cities, the Supreme Court which is at the State level and hence in the state capitals, and the High Court of Australia which is nominally in Canberra but has branches elsewhere such as in Sydney. The District, Supreme, and High Courts are all presided over by judges. It's still possible to go one step higher to the Privy Council, but these days that happens very rarely.

One result of these divisions is different details in different states, and in New South Wales (where this author has worked) an expert witness must abide by a “Code of Conduct”. Until recently this was District Court Procedures Part 28, rule 9c and Part 28A, rule 2, then in 2005 the Civil Procedure Act was proclaimed which led to the Uniform Civil Procedure Rules (Amendment No 12) in which there’s Schedule 7 Expert Witness Code of Conduct (Rule 31.23) (cf SCR Schedule K). The full statement of this Code is attached here as Appendix A.

The essential features of the Code are: an expert witness is responsible to the Court, not to a party; must work or confer with other experts if so directed; and must include in the report his qualifications, plus the facts and assumptions on which his opinions are based, and reasons for those opinions.

THE DIFFICULTY OF AN OPINION BASED ON JUDGEMENT

The general rule followed in legal argument is that witnesses are only allowed to give facts as evidence, and these must be facts as they know them, not hearsay, what’s been told to them by others, which is excluded as evidence. In similar manner a witness cannot in general give a conclusion, an inference, or an opinion in evidence, the exception being an expert witness who is permitted to give accepted evidence based on his opinion. This is a convention which has developed in English law through several centuries, progressively accepted by the courts (Jones, 1994).

The use of the word “opinion” immediately introduces one of the hazards, simply because an opinion is based on human judgement. In general, we humans try to make decisions objectively, but some decisions cannot be made entirely by use of objective techniques, and require use of the mysterious element we term “judgement”, which can be faulty. The type of decision-making in which an individual’s judgement is required has been given the title “judgement call”, originally, it seems, by the USA military, but the term has by now been taken up by business. Expressing the need for such a type of decision is often indicated by another person saying to the decision-maker: “It’s your call.”

The characteristics or parameters of judgement calls are such that some risk is usually involved because there is a choice, in a high stakes environment, between two or more poorly-identified options, and the choice must be based on lack of accurate information, perhaps ambiguous information, while facing conflicting goals, often with time constraints and a close time-horizon, finally with a background awareness that getting it wrong may have serious consequences. All *that* is why a judgement-call-decision needs to be a correctly-made decision. There is, almost always, no second chance, to allow going over and correcting what was done. (For a good coverage of this see Mowen, 1993.)

An expert witness’s opinions are certainly based on knowledge of the particular matter under review, but in practice one must qualify that by terming it *some* knowledge, for it’s very rare the expert witness knows, intimately and in complete detail, all the facts and background applicable to the case. So the mind makes an agile chamois-like “leap of faith” from what’s *known* to what can be *speculated* from that knowledge, and that’s expressed as an opinion.

WHAT DOES AN EXPERT WITNESS DO? ON WHAT DOES HE DEPEND?

For continuity of work the expert witness depends, of course, on getting cases come to him. Most of the cases on which this author has worked have come from agents, the majority having come from the commercial departments of two Sydney universities, a few from independent agents, and a small number direct from law firms. The agents act as intermediaries between law firms and the experts, and the law firms are of course acting for an injured party or a defendant. So we have a problem: for whom is the expert working? Not for the agent, who usually sets operating procedures, “rules of engagement”. Strictly, business-wise, for the law firm. But, morally and ethically, for the party who has hired the lawyers. Resolving this distinction is sometimes tricky.

First impressions suggest that what an expert witness does is *to find answers*. That’s undoubtedly true, but recognizing that leads back to asking: how does one find those answers? The obvious answer is: look at the facts. But facts are, sometimes, indeed very often, hard to find, they may be hidden by a lack of expert knowledge, they may be buried under a mountain of contradictory statements, they may be obscured by irrelevant information, or they may simply be confused by statements made by persons directly involved in the matter under investigation. Or the persons providing the facts may be avoiding the truth, or distorting the truth, or providing disinformation, or, putting it simply, telling lies.

Sometimes the expert witness has specialised knowledge, which is the trick Sherlock Holmes used so often he has been accused of cheating when solving some of his cases. In real life such knowledge is often picked up through previous work situations, then remembered. The author’s experience contains two examples of that, both under the title: The Cases of Spontaneous Combustion.

But without such specialised knowledge there is a simple procedure: *ask questions*. Having said that there is the further problem of asking the right questions, to excavate deep into contradictions, to throw away the irrelevancies, and to come as close as possible to what really happened. The examples illustrating use of those questions are The Case of the Chinese Restaurant, The Case of the 45 kg LPG Cylinder and The Case of the Pumpkin Soup.¹

These cases, all now well in the past, illustrate what an expert witness has to do to serve the client’s interests. They also illustrate how frustrating the task can be, when faced with contradictions, irrelevancies, and statements provided by others. But, most of all, they reinforce the need to ask questions. We don’t know the answers, so we may not know what questions to ask when we begin, but there’s no alternative to hunting through question after question, perhaps groping blindly to begin, in seeking “the most probable truth”.

THE HAZARDS OF THE EXPERT WITNESS

The paragraphs above have outlined in narrative the hazards of the expert witness; here, now, is a summary.

¹Although none of these cases are still active we believe the full reference details of these cases should not be given, that is, names of those involved in them, dates, etc. We can only assure the reader they are real cases, not at all fictional.

The need to give an opinion based on professional judgement
Lack of “the best evidence”, which is seeing what’s happened.
Contradictory statements.
Irrelevant information.
Avoidance or distortion of the truth, or complete fabrication of non-truth.

But experience has shown there’s been an inherent hazard in all the investigations this author has performed: the length of time between the event and being requested to look into the matter. Two years is uncommonly short, four or five years is frequent, more has happened. By which time footprints in the garden outside the French windows have been raked over, the parlour maid has wiped fingerprints from the door handles, the kitchen has washed all the wine glasses, and the butler has moved all the chairs away from the card table. In addition memories have become frayed into disjointed fragments. The expert has to deal with what little remains, enough to puzzle Hercule Poirot into a frenzy.

THE CASES OF SPONTANEOUS COMBUSTION

The first of these was a small factory located in part of an old building in Sydney, and while operating a fire started and burned down the whole building. The small firm’s product was plastic shavings, the material used to surround and protect packaged items, and the fire apparently started in the production system which used air flow to transport the plastic through ducts. Unfortunately for the owner of the business another part of the building was being used as a store by a major airline, which lost several million dollars of stock and of course sued the business in which the fire occurred. The owner tried to cover losses via insurance, and the insurance company’s lawyers hired the author as expert witness.

The case came to this author months after the fire, indeed several months after the building had been demolished, a common and frustrating occurrence, meaning no direct evidence was available. Not even photographs. Only statements, of severe indignation by the airline and “it was purely an accident” from the business in which the fire started. We asked questions about the design and construction of the air flow conveyor system and it appeared to have been put together by relative amateurs, leading to asking: “Was the system earthed?” The only available answer was: “Apparently not.”

That question came from experience in synthetic resin plants, in particular design of resin solution tanks, into which solvent is delivered to thin the resin. One of the design rules is the hydrocarbon solvent should not be allowed to fall through the air space in the tank, which would generate static electricity, but must be directed onto the side so the stream is earthed, promptly. This memory led to *the opinion* that blowing the pieces of plastic around the ducts generated static electricity, eventually building up a strong enough charge to ignite small particles, which led to a major fire. The result of the case was not disclosed (they very rarely are) but it seems likely the insurance company would have refused to cover losses.

The second case occurred in a warehouse, located in a relatively isolated industrial area well away from the city. Some vegetable oil was spilled, and an absorbent material

was spread to soak it up, then left over a long weekend. The fire started in the spill, spread to discarded packaging, then to other stored materials, and the isolated location meant there was some delay before a fire crew arrived. Damage was extensive, to both the building and stock. Once again the case came to this author from the insurance company.

Several years earlier a fire had occurred in a store building where this author worked at that time. The source of the fire was traced to a wastepaper bin into which rags had been thrown after having been used to wipe up a vegetable oil spill, and company chemists agreed that the combination of *vegetable oil* plus *air* plus *dispersion through material such as cloth* plus *time can possibly* lead to ignition. (Quaint reflection: the person who threw the rags in the bin was never identified.)

In the case of the warehouse fire the absorbent material served the same purpose as the rags, and the memory of the earlier fire led to *the opinion* that leaving the oil-soaked absorbent material on the floor, that is, not collecting it immediately for disposal, led to the fire.

Both of those opinions were reached by the “Sherlock Holmes” method, of using specialised knowledge. Were they correct? No-one knows for sure. Probably, yes. Anyway, they were accepted as evidence. But the inherent hazard was they could have been wrong.

CASES WHEN THE RIGHT QUESTIONS WERE ASKED

In the Case of the Chinese Restaurant a worker sued the owner because he alleged he had been injured by hot cooking oil from a deep fryer being spilled over him when he was sweeping the floor. He claimed the broom had knocked off one of the fryer’s front legs so that a front corner of the fryer had fallen over onto the floor and the oil had overflowed, spilling onto him. He sued his employer, who put the matter in the hands of a city law firm who hired this author to investigate the defence.

This was an annoying case for several reasons, the first of which was that the law firm hiring the author would not pay for a visit to the country town where the incident occurred, over three hundred kilometres from Sydney. Next, some details in reports from the relevant statutory authority and a doctor did not agree with photographs and a video taken in the restaurant. Third, correspondence with the manufacturer (in a neighboring state) and inspection of an identical deep fryer at a Sydney firm which sold them showed the photographs and video were correct, hence we concluded the reports were not correct. Furthermore, the design of the leg fitting was such that knocking it with a broom could not possibly disturb it. Finally, an experiment with the identical deep fryer showed that if a front leg was removed (by undoing bolts with a spanner) the fryer was still stable, and even if the fryer were pushed down so the frame touched the floor the oil would not overflow.

In the report this author pointed out all these discrepancies and discoveries as tactfully as possible, hoping the lawyers would agree to a more thorough investigation. But, no.

Several months later there was opportunity to pass through the country town when returning from a visit to relations further north, so we visited the restaurant which we found had been vacated, was being stripped, and was for sale. The agent handling the sale was almost directly opposite and was prepared to chat (in country town manner) about what he had heard (by country town gossip) of what had happened, and essentially there

seemed to be an understanding the whole affair was some sort of scam involving the owner and the worker. The worker was still living in the country town but in the meantime the original owner of the restaurant (a Chinese woman) had disappeared into Hong Kong.

So, although what was reported to the lawyers was incomplete and rather inconclusive there was considerable personal satisfaction in what was discovered by going to the site and asking the right questions ... answers given to the lawyer concerned, purely for personal satisfaction, but with no payment for them.

The author has been involved in a few LPG cases, and the Case of the 45 kg LPG Cylinder is selected for comment here because one might say it's "process engineering related". Briefly, a family had an LPG-fuelled stove on the back porch of a house in a Sydney suburb, and several were injured in what was poorly described as a fire but appears to have been a vapour cloud explosion, said (by both the Police and the Fire Brigade) to have been caused by gas from a 45 kg cylinder delivered just after midday. The incident occurred in mid-afternoon and the inspecting authorities reported the cylinder must have become hot by being left in the sun for about three hours, the relief valve lifted, and the gas ignited. The family sued the gas supplier, a small local hardware and general materials firm, for damages caused by the gas.

The case came to the author months later from the lawyers acting for the supplier. The first question was: well, where is the cylinder? Ah, it had been picked up late the same afternoon by the supplier and returned to the store. Which one is it? There was shrugging of shoulders, one 45 kg cylinder is the same as the next, by the time it went back into the stock we can't tell one from another, by now it could be anywhere. Why was it returned to stock? Well, it seemed to be full, so it could still be sold. The actual truck driver was questioned: when you picked it up, did it seem to be full? Answer, yes, it seemed to be full weight. Was the paint showing signs of being in a fire? Burned? Discoloured? No, it was clean. Sign of a leak? No. All that seemed to indicate no gas had left the cylinder.

The next set questions related to seeing the location of the incident. No, you can't go there, the people were renting and they have moved, anyway there's nothing to see, and you can't talk to them. Well, what about the LPG stove which was said to have been in use and provided the source of ignition? No-one knows where it is, it seems to have been thrown away. Well, where was it getting its gas? The records showed the 45 kg cylinder wasn't in use that day, only delivered for future use. Oh, yes, the stove had a 9 kg bottle attached to it. Someone had said the family refilled that 9 kg bottle from the 45 kg cylinders they had delivered from time to time. The only conclusion which seemed to fit the facts was that the explosion had been caused by leakage from the 9 kg bottle, maybe from the hose or a connection fitting. Incidentally, even if the whole 9 kg had been released it seemed to be insufficient for a VCE to occur, hence that was argued as being unlikely, even though it appeared, from neighbour's reported remarks and a broken window, that *something* had happened.

After delivering the report the case became even more interesting. At that time the number of injury cases had led to many being settled by arbitration performed by appointed lawyers, not in front of a judge, and this case went that way. The second interesting feature was the injured family also hired an expert, whose opinion was that the cylinder had been

overfilled and expansion of the liquid, caused by the heat of the afternoon sun, had lifted the relief valve. The arguments against that came: first, from the depot where the cylinders were filled; that organisation had procedures and a quality control system which made overfilling virtually impossible, second, if that had been so there had been sun-exposure time for such a leak to have occurred days earlier, and third, by checking the location of the house in a street directory which showed the rear of the house would have been in shade after midday.

Altogether, the claim against the supplier of the gas seemed to collapse, but the arbitration result was a surprise. After the final meeting with the arbitrator the lawyer with whom this author had worked came out and said the family had been awarded some damages; when asked: "How much?" she gave a curious smile and replied: "Not much" without quantifying that. One could only assume the payment was to make the matter "go away".

The Case of the Pumpkin Soup is an example of asking the right questions by performing experiments, and has something of a process engineering flavour. The background was a young woman who had a blender, given to her by her sister as a wedding present, and when using it for the first time to prepare pumpkin soup the lid blew off and splashed her with hot liquid. The provided photographs showed serious scald injuries along her arm and body front. She sued the manufacturer.

This was one occasion when the vital piece of evidence was available: the lawyer had the blender and handed it over for inspection. We (this author and wife) made pumpkin soup, following the same recipe and procedure, poured it into the blender, and the switch was flicked very briefly. The lid was held down firmly, but in the one or two seconds of running the hot liquid spurted out from under the lid. Repeated tests under different conditions, different levels and temperatures, confirmed this was indeed a physically hazardous process!

The manufacturer's instructions were reviewed; they did not warn this could happen. Fourteen other brands of blender were inspected and reviewed, most only fairly tight labyrinth seals, some had loose lids, and some had lock-down lids which might leak but wouldn't spray as the one tested did.

The conclusion suggested that the firm was negligent in not advising users to hold the lid down, not to blend hot liquids, and not to fill above a certain safe level. Sadly, we were not informed what compensation was made by the blender manufacturer.

ANOTHER JUDGEMENT FACTOR – EMOTIONAL IMPACT?

Many injury cases have come to this author, but no fatalities, which might have, by their emotional impact, influenced expert opinion. But there was one injury case which did have an emotional impact, due not only to the nature of the injury but also because of the class of person injured.

A woman, an Asian migrant, employed as a worker in a factory in a Sydney suburb, was allowed by the management to bring her ten-year-old daughter to work during the school holidays, presumably because there was no-one at home to look after her and to save child-mining costs. The woman was operating a strange machine which was, in effect,

a horizontal press, built to insert cloth materials into containers for advertising purposes. Somehow, the child put her hand between the ram and the container and her hand was crushed beyond repair.

After being prosecuted by the government safety authority the employer sued the manufacturer of the press, claiming they were responsible for the injury, and this author was hired to investigate and prepare a defence statement. Briefly, what came out was that the press was designed and built to the *owner's* specification, first a pilot version, then a final one, which actually had a three-position rotating die-holder so with two people working (one on each side of the machine) one could load, rotate the loaded die to in line with the ram and actuate the drive, then rotate the die-holder to the third position for the second person to unload the pressed item. There was a change of ownership, and the rotating die-holder was removed and replaced with a single die, which removed the original safety feature: the rotating system meant hands were never in line with the ram. Now, with the single die, a hand had to pass in line with the ram to load the die.

Even though the damaged hand was not seen, either in the person or in photographs, the description of the injury made objective reasoning rather difficult, but the history of the machine led to suggesting the manufacturer had little responsibility for what happened, the suggested proportion was five percent. This author is left with a niggling feeling that the factory's appearance may have had some effect on him; it was crowded, poorly set out, poorly lit and ventilated (strong chemical odour), with stacks of cardboard packaging (fire hazard), but no fire extinguishers, somewhat disgusting amenities, altogether a very poor quality workplace, what one names as a sweat-shop.

REVIEWING THE HAZARDS OF THE EXPERT WITNESS

The hazards of acting as an expert witness have been stated above, and the above cases illustrate those very well. However, we can now not only review but also add to the earlier statements.

The Cases of Spontaneous Combustion show how knowledge previously obtained can be used to solve the problem of what caused something, in these cases, fires. But there's an inherent hazard simply phrased by these questions. Is what is remembered from the past experiences relevant, truly applicable, to this present situation? Are the circumstances sufficiently alike to make that information applicable? Is an excessive level of speculation needed to apply the information? These questions are only resolved by using judgement, and one person's full-daylight judgement may be another person's blind leap in the dark. Both are hazardous for one's reputation, and one must decide which one is facing when applying judgement.

The Case of the Chinese Restaurant and The Case of the 45 kg LPG Cylinder involved lack of the best evidence, contradictory and irrelevant information, and we believe some disinformation. Not being able to see the actual location was a serious handicap. However, understanding the first was improved by seeing an identical deep fryer and testing it, and giving a satisfying report on the second depended on having been involved

in the LPG industry. At the end both reports only gave opinions, believed to be correct, but of course one doesn't know whether those opinions were in fact correct.

The Case of the 45 kg LPG Cylinder was the only one in which this author was opposed by another expert. The arbitrator did not require the two to confer and agree, indeed, it's doubtful we would have or could have.

The Case of the Pumpkin Soup was a rare example of feeling, when the report was written, that we had the best evidence, there was no contradictions, irrelevancies, or lack of true information. We were able to perform experiments which confirmed the plaintiff's claims and, we hoped, led to compensation payment. The hazard, of course, was the possibility of being injured as the young woman was.

CONCLUSION

Being an expert witness is hard work, though not consistent week by week, sometimes there's been three or four cases in the one month, then a break of several months, and when a case turns up a report is usually needed in a week or two. Of the hundred-plus cases investigated and reported through some twenty years almost all have been frustrating, one way or another, some have been difficult, some have been related to tragedy, some have queried whether human nature is as good as it's supposed to be. But altogether, the experience has been interesting and in fact enjoyable.

Some lessons have been learned. Keep asking questions. Don't accept the first answers received. Don't put in writing to the lawyers anything found out which argues against the lawyer's client, written material can be "discovered" by the other side, talk it over first.

The ultimate hazard is "getting it wrong".

The present state of play has been reduced by our state government's introducing legislation about seven years ago which severely limited injury claims, which, inevitably, led to an equally severe drop in cases for investigation. However, there seems to have been, in the last year or so, a return to near what existed those years ago.

REFERENCES

- Ford, B. J. *The Cult of the Expert*. Corgi Books, Transworld Publishers Ltd, London. 1982.
- Gifis, S. H. *Law Dictionary*. Barron's Educational Series, Inc. Hauppauge, New York. 1996.
- Jones, C. A. G. *Expert Witnesses*. Clarendon Press, Oxford University Press, Oxford. 1994.
- Mowen, J. C. *Judgement Calls. Making Good Decisions in Difficult Circumstances*. Simon and Schuster, New York. 1993.
- Stewart, W. J. *Law (Collins Dictionary)*. Second edition. HarperCollins Publishers, Glasgow. 2001.

APPENDIX A

Expert Witness Code of Conduct (New South Wales)

Uniform Civil Procedure Rules (Amendment No 12) 2006

under the

Civil Procedure Act 2005

The Uniform Rules Committee made the following rules of court under the
Civil Procedure Act 2005 on 4 December 2006.

Jennifer Atkinson

Secretary of the Uniform Rules Committee

Schedule 7 Expert witness code of conduct

(Rule 31.23)

(cf SCR Schedule K)

1 Application of Code

This code of conduct applies to any expert witness engaged or appointed:

- (a) to provide an expert's report for use as evidence in proceedings or proposed proceedings, or
- (b) to give opinion evidence in proceedings or proposed proceedings.

2 General duty to the court

- (1) An expert witness has an overriding duty to assist the court impartially on matters relevant to the expert witness's area of expertise.
- (2) An expert witness's paramount duty is to the court and not to any party to the proceedings (including the person retaining the expert witness).
- (3) An expert witness is not an advocate for a party.

3 Duty to comply with court's directions

An expert witness must abide by any direction of the court.

4 Duty to work co-operatively with other expert witnesses

An expert witness, when complying with any direction of the court to confer with another expert witness or to prepare a parties' expert's report with another expert witness in relation to any issue:

- (a) must exercise his or her independent, professional judgment in relation to that issue, and
- (b) must endeavour to reach agreement with the other expert witness on that issue, and
- (c) must not act on any instruction or request to withhold or avoid agreement with the other expert witness.

5 Experts' reports

- (1) An expert's report must (in the body of the report or in an annexure to it) include the following:
 - (a) the expert's qualifications as an expert on the issue the subject of the report,
 - (b) the facts, and assumptions of fact, on which the opinions in the report are based (a letter of instructions may be annexed),
 - (c) the expert's reasons for each opinion expressed,
 - (d) if applicable, that a particular issue falls outside the expert's field of expertise,
 - (e) any literature or other materials utilised in support of the opinions,
 - (f) any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out,
 - (g) in the case of a report that is lengthy or complex, a brief summary of the report (to be located at the beginning of the report).
- (2) If an expert witness who prepares an expert's report believes that it may be incomplete or inaccurate without some qualification, the qualification must be stated in the report.
- (3) If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.
- (4) If an expert witness changes his or her opinion on a material matter after providing an expert's report to the party engaging him or her (or that party's legal representative), the expert witness must forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect containing such of the information referred to in subclause (1) as is appropriate.

6 Experts' conference

- (1) Without limiting clause 3, an expert witness must abide by any direction of the court:
 - (a) to confer with any other expert witness, or
 - (b) to endeavour to reach agreement on any matters in issue, or
 - (c) to prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement, or
 - (d) to base any joint report on specified facts or assumptions of fact.
- (2) An expert witness must exercise his or her independent, professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement.

The full text of the **Uniform Civil Procedure Rules (Amendment No 12) 2006** can be found at:- <http://www.advertising.nswp.commerce.nsw.gov.au/NR/rdonlyres/er4z6bl6syffgusdj73aowiq2k3ajpqdr1c3bhh4z3ow5ff5a5yth4egnncjbyr762ol6epgeh/Government+Gazette+8+December+2006+-+Part+A.pdf>