

RISK IN EXPERT EVIDENCE

A F SHIRLEY B.E.(Hons), FIE.Aust, CPEng., M.CIRCEA, R.P.E.Q. [4904]

SYNOPSIS

This paper describes some of the common traps and risks in giving expert advice and subsequent evidence in a court. The paper also suggests a number of ways to minimise the risks, provides some observations on the differences between the legal and technical "cause" of a failure or event, and provides some suggestions on reporting approaches to assist practitioners preparing reports for court use. Examples are also included in the paper of attempts to personally intimidate the author when acting as an expert, some of the traps that an engineer expert can fall into and the embarrassing consequences to an expert who was not objective in his approach to reporting and giving evidence.

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INTRODUCTION & BACKGROUND

I have been asked to speak to you tonight about the "risk in expert evidence", presumably because of the experience that I have had in preparing expert reports on a number of matters, many of which have resulted in me giving evidence before a court. The courts that I have appeared in vary from the Local Court, The District and Supreme Courts and to Coroner's Inquests. I have also acted for WorkCover in industrial relations court actions to assist in the determination of what constitutes a "safe workplace" when a construction accident and resulting death occurred.

In the course of this work, I have discovered that no matter how carefully you discuss the matter with your client and read carefully all the documentation that they provide, it is an absolute trap to believe all that you are told, for there is nearly always two sides to the same story. I have also found that clients rarely like to tell you things that they think will harm their case, whereas the other side is always more ready so to do.

Other matters that experts in legal proceedings need to consider are:

- the current court rules, and
- the political pressures brought to bear on experts and courts, which are often not very subtle, to ensure that a particularly desired "political outcome" is achieved.

Therefore, prior to discussing the risks in expert evidence, and ways of managing the risk, I think we need to get the fundamentals of the legal position clear.

LEGAL ISSUES & COMMON TRAPS

1. Court Rules

The current practice directions, or court rules for expert witnesses quite properly require that reports submitted for consideration by a court include the qualifications of an expert, as well as the assumptions, documents and literature that an expert has relied on.

In addition, the court rules normally require that:

"An expert witness's paramount duty is to assist the court impartially. This duty overrides the expert's obligation to the engaging party. An expert witness is not an advocate for a party".

Thus, it is extremely important for an expert not to become an advocate, despite being enmeshed in often complex and prolonged litigation. In addition, an expert needs to remain "professionally detached", for if they do not, they will become enmeshed in the personal trials and traumas of their client which will ultimately prove to their client's detriment; this is particularly the case if the court perceives the expert as an "advocate".

2. Lying for money

Another fatal trap for an expert is become known as one who is prepared to "lie for money". Whilst usually this "lying for money" is not as overt as actually paying you cash to lie, many experts are more than happy to assist, or technically defend, a client when the reality is the client's position is indefensible.

From what I have seen an expert who finds some abstruse notion to defend the indefensible is inevitably exposed in court. Then, not only is the expert discredited in that matter, but also then finds it hard to be paid as the client lost the case. In addition, the expert will also find it hard to get more work because lawyers talk to each other about experts.

Example – McMahons Point House Collapse – Brian

Describe the circumstances and nature of job.

- Actual mechanism of collapse
- BB's postulated mechanism and irrelevancy
- The result in the court room

3. Causation

Another matter of importance to engineer experts is that the legal concept of "causation" is quite different from the usual technical concept of "causation". In this regard, I refer you to a 1991 high court decision where His Honour, Chief Justice Mason said:

"It is often been said that the legal concept of causation differs from philosophical and scientific notions of causation. That is because questions of cause and consequence are not the same for law, as for philosophy and science.

In philosophy and science, the concept of causation has been developed in the context of explaining phenomenon, by reference to the nexus between conditions and consequences. In law, on the other hand, problems of causation arise in the context of ascertaining, or determining legal responsibility for a given occurrence".

I think therefore that an expert needs to appreciate that when giving evidence, his or her concept of the cause of an event may not equate to that regarded as the cause by a court. As such, when drafting a report, an expert need to bear this in mind.

With these thoughts in mind in mind, I will now turn to the various risks, as I see them, in giving expert evidence.

POTENTIAL RISKS & EXAMPLES

I think there are many risks in writing expert reports and giving evidence, with the risks ranging from a simple "embarrassment", to lawsuits for negligent advice because the plaintiff, that is your client, lost.

I think it also takes a person of very strong character and high integrity to take the continual battering that occurs in the usual court room, and still emerge as a respected expert.

Maybe however some enjoy being battered, but personally I am not that masochistic.

Whilst I am sure that many of you here tonight have your own thoughts on the various risks; for the purposes of our thinking tonight, I have separated the risks into:

- experience risks
- professional risks
- commercial risks, and
- political & personal risks.

1. Experience Risks

Experience risks are those risks that you often unwittingly take on when you agree to provide advice to a client at the perimeter of your knowledge. Initially you consider that you have adequate knowledge to advise your client, but as the matter progresses you realise that you do not have the full depth of knowledge required to advise your client correctly.

Whilst the mature professional will usually recommend the engagement of additional advisers and sub-consultants, all too often an expert will continue to provide advice at the limit of, or outside his sphere of expertise, possibly because of their ego or vanity. As a result the expert acts in a way that is ultimately to the detriment of his client.

The most common example in engineering of this type of problem is that of a structural engineer who provides advice on building foundations and excavations. Whilst in the initial stages most structural engineers are competent to provide such advice, the depth of knowledge required to advise on the more complex issues can rapidly become the province of a geotechnical engineer.

If however the structural engineer decides to "**soldier on**" without the specialist advice, the engineer expert can find himself in a court making assertions and statements of a geotechnical nature. Then, because under cross-examination the engineer is forced to admit he is not an expert in matters geotechnical, the whole of his evidence becomes discredited and not accepted by the court as he is seen a 'jack of all trades' with no real expertise in anything.

The chief experience risks are thus:

- Venturing opinions outside your experience and field of expertise.
- Having too much ego, or vanity, to advise your client of your limited knowledge.

2. Professional Risks

Inevitably, when you write an expert report, or give expert evidence, you are drawn into conflict and disagreement with one's professional peers. And in doing this, there is often a temptation to denigrate the experience and expertise of one's opponent.

And sometimes this process can extend to making quite unjustifiable remarks that are not simply unkind, but can even be considered "defamatory".

Also, as most professional societies, including the Institution of Engineers; the Association of Consulting Engineers, the Australian Geomechanics Society, and so on have strict ethical standards of conduct, you could find yourself involved in disciplinary action by your professional association.

It is therefore very important to be professional and “detached” when writing your reports; I also think that you should adopt a 'clinical' approach to the way in which your report and evidence is structured, so that your conclusions can be seen to be founded in facts, not opinions.

There is also simply no room for personal attacks, belittling comments or remarks in any expert report or evidence. Also, if you do if you do engage in such unprofessional behaviour, you are likely to be drawn into a lawsuit for defamation.

The professional risks in expert evidence can therefore be summarised as:

- ◆ Breaches of the code of ethics, or proper standards of conduct.
- ◆ Making statements that would be considered "defamatory".

3. Commercial Risks

The provision of expert advice, like any consultancy work, is subject to the usual commercial risks relating to the payment of your fees, completion of the work on time, overtaxing of your office staff and so on.

However, in the forensic and expert area, these commercial risks become much greater because of:

- the time pressures imposed on the expert by lawyers, court timetables, etc., and
- a large and rapid escalation of fees near the court hearing, which become beyond a client's capacity to pay.

Thus, whilst the rules of the Law Society require that an engaging solicitor should ensure that expert's fees secured in advance, **the reality is** that very seldom does the lawyer follow these fee rules.

Therefore, when "crunch time" comes for payment of the fees, the lawyers usually discover a way for avoiding paying the expert themselves.

It is therefore very important for an expert to have clear agreement with the lawyer and your client as to the basis on which you charge your fees. There should also be a clear undertaking from the engaging lawyer, or client, as to how and when you will be paid for your fees.

Sometimes however, clients will approach you to work on a “contingency” basis, that is, being paid a substantial fee if the litigation is successful. I think you should be aware that this is a **most dangerous course** because you in effect become an advocate for a party, and so breach the rules of the court. You also lose your most precious asset, your independence.

As such, I think that this suggestion should always be firmly repudiated.

4. Political Risks

Whilst lawyers and courts like to say that politics and external influences never enter the court room, the reality is that politics often enter a court room, be it a coronial inquest or insurance matter.

There are also sometimes political forces at work in the larger matters, because the government of the day can only fund a particular outcome.

Whilst I am not a liberty to describe to you some of the more recent instances, I would like to recount to you two examples, one of which is about an engineer who became unwittingly involved a major tax fraud, the other is about the royal commission into mining on the south coast.

First, the engineer:

Kalgoorlie – Ken

An engineer was commissioned to design a major piece of gold mining plant, worth about \$ 15 mill, and was then offered an additional incentive fee for allowing "repetition" of his original design at a second site. The client also told the engineer that although the plant was for a slightly different process, that is of processing nickel, he was asked if he would agree to the use of his plans for the first plant without alteration.

The engineer accepted the large financial incentive from the client for no extra work by him and ultimately both plants were built.

However, the first plant failed during the course of construction, due we believe to very bad construction, and the remediation of the first plant cost approximately \$ 500,000. Fortunately however the defect was not repeated in the second plant's construction.

The engineer was then sued for negligence and the proceedings extended from 1983 to 1996. During this 13 year trial, the engineer went from a fit able bodied 40 year old, to a grey aging man who had to retire towards the end of the case.

Whilst you may think that this amount of time was excessive, the reason for the whole delay was tax fraud by his client. This is because, in the mining industry a gold plant can be written off in 12 months, but a nickel plant must be written off over 10 years. Thus, because the engineer was associated with the fraud [that is he had allowed his gold plant plans to be reused for a nickel plant] the whole litigation process became very nasty indeed.

Thus, as the expert defending the engineer, who we believe was not at all negligent, we became involved in all sorts of political pressures to say the engineer was negligent, to avoid the client company having to admit the tax fraud.

My second example involves the royal commission in the late 1970's into the proposed mining under stored waters. In this commission of enquiry, all the evidence was prepared by mining companies and the Mines department, so the enquiry had the **politically desired outcome** of allowing the mining, despite the protestations of many groups who suggested that the mining could have a major effect on the stability of land in the Illawarra area.

Subsequent events have also demonstrated that the fears about land instability were completely justified.

5. Personal risks

An expert can also be threatened by some of the litigants, with opposing parties wanting to intimidate you.

Example: Hornsby – Spiteri ats Spooner & Virtue

An example of this is when I was involved in litigation between two neighbours in Berowra. In this case, a local excavation contractor was dumping fill in his yard which kept on slipping onto my client's land.

Clearly the contractor had to be stopped from the illegal dumping, and so various court orders and affidavits were signed to prevent the contractor from the dumping.

As the contractor perceived that I was the cause of his troubles, he tried to intimidate me by making threatening very disturbing phone calls to my home.

The calls included:

- Heavy breathing;
- Alarm clock ticking;
- I know where you live, you will not sleep tonight;
- and so on.

It was a very difficult time for us, particularly as at the time I had a young family and as in those days it took us 6 months to get Telstra to act to trace the calls, or take other action.

As a family we also went through all sorts of traumas as we didn't know who was making the calls and we doubted nearly all our friends and neighbours.

The story had a reasonable end though, the man not only lost the case, but his business because Telstra withdrew his phone service, and it was several years before he could again get a phone.

MITIGATING & MANAGING THE RISK

After identifying the various risks, you can usually ways to mitigating and manage the risks. In this, it is often found helpful to refer to the risk management process flow chart set out in Figure 4.1 of AS 4360 1999 - Risk Management.

Insert overhead 4.1

This risk management process can however only occur once we have identified the risks and how they can happen which I have discussed earlier. But I think that some of the ways to managing the risks can be summarised as:

- ◇ Exercise professional & personal prudence.
- ◇ Have your reports and forensic approaches to a project "peer reviewed".
- ◇ Exercise commercial prudence.

1. Professional & Personal Prudence

Professional & personal prudence is a standard to which I think all experts should aspire, for I think that the death knell of an expert is to be considered imprudent. Thus, in exercising professional prudence and the consequential managing of risk the expert will only:

- Accept work within his or hers expertise
- Ensure that the work does not "over stretch' his practices resources

- Is careful and clinical in reports that are provided, so that no accusations of professional misconduct, or breaches of ethics can be made.

On the personal side, it may also be prudent to keep your home address and phone number private, as you simply never know when some dissatisfied litigant will seek to harass you.

2. Peer review of reports

As your report will be subject to unfriendly criticism from others, I think it is best to have a close professional friend review your report before the report is published; this is often called "peer review".

Whilst most experts pay "**lip service**" to the concept of "peer review", most experts refrain from such review. I think this is because some experts are so infatuated with their own sense of importance, that they rarely encourage other members of their firm to actively criticise their work, let alone seek outside persons to provide informed and constructive criticism.

This is, I think because criticism, even constructive criticism, is always hard for a professional to take. But I firmly believe that peer review is an absolutely essential part of the work of expert.

And so I would strongly commend to you the fostering of a professional relationship with other experts for peer review. Also, whilst this interchange does not have to be a formal process, it is essential to the formulation of a good report which can stand up to the scrutiny of a court.

In addition, my practice as a member of the Investigative and Remedial Works Engineers, which operates a web site "virtual chambers", in which other members of the college regularly review each others professional opinions for consistency and objectivity in reporting. Therefore, if you do not have access to a group such as CIRCEA, then I would strongly commend you consider joining CIRCEA. Thus is because I believe that the peer review process can greatly assist in the acceptance of your work as an expert, as well as enhancing your reputation.

3. Commercial Prudence

As I have mentioned previously, it is extremely important to exercise considerable commercial prudence in both the commissions that your company accepts, as well as ensuring that you're actually paid for your work. This will require proper commercial agreements and the maintaining of the appropriate signed authorities for carrying out the work.

Whilst I appreciate that this is very easy to say in theory [and very hard to follow in practice] I say it because a number of years ago when I was writing off a bad debt in excess of \$ 20,000, my accountant said to me:

"Andrew, why didn't you keep the job authorities & payment schedule up to date?"

to which I answered

"I simply didn't have the time".

Brian then said:

As you would have only had to spend 4 to 6 hours to update these authorities, you could have earned \$3,000 an hour – why didn't you make the time?

Keep your commercial documentation up to date, because if you don't your losses will be very substantial.

CONCLUSION

I hope from what I have said tonight, you might have been inspired to carefully consider the risks in providing expert evidence, both by way in which your reports are written and the commercial practice you adopt when preparing for court work.

I also think that by appreciating the risks to which you are exposed, and then setting in place an appropriate management program, you will be able to:

- effectively manage the risk, and
- maintain a sound professional practice, and
- have your reputation held in high regard by all those that come across you, whether they are opposing you, or working with you.

For it seems to me that there can be no greater compliment paid to a professional than having given evidence in court, and been ruthlessly cross examined by a particular barrister, for that barrister to later recommend you for another matter of major litigation.

I also think that reputations are not built by agreeing with people, but by being able to provide an expert, properly considered opinion based on facts. Courts, and those working in the court system, respect and admire this; it is also a position to which I am sure you would wish to aspire.

Thank you for your attention.