

2003 Pensions Convention

1 - 3 June
Grand Hotel, Brighton

Introduction

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Why do we need experts?

- ✓ the expert's role - an overview
- ✓ role in a "construction" case
- ✓ role in a professional negligence case

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The Court's current approach to experts

1. Limiting the use of expert evidence.
 - only that which is reasonably required to resolve the proceedings.
2. Should be impartial
 - duty to help the court on matters within expertise
 - duty to the court - overrides duty to instructing party
 - but can present opinion in way which best advances client's case whilst maintaining objectivity and independence
 - right to request directions from the court

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The Court's current approach to experts (contd.)

3. Encourages co-operation and narrowing of issues.
 - by meetings of experts
 - evidence in written reports
 - right to ask written questions on report (within 28 days)

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The Court's current approach to experts (contd.)

4. Greater use of single experts.
 - of court's own motion
 - unlikely if contested evidence in heavyweight case

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What does a lawyer look for in an expert actuary?

- a person who will convince the court
- expertise in the field vrs an "expert-expert witness"
- honesty and authority
- able to explain concepts in simple terms (presentation skills, written and verbal)
- knowledge of detail

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What does a lawyer look for in an expert actuary? (contd.)

- fair view and maintains it (the value of an impartial view)
- not out on a limb
- is able to see the difference between legal argument, facts and actuarial opinion
- no prior public opinions which might be used against the expert
- value of an 'honest' early assessment for the lawyer

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What should the expert worry about?

- having sufficient information (but only what will be before the court)
- having clear instructions
- not being pressed to adopt another view
- underestimating the opposition
- that the court is not the "real world"
- being alert to potential conflicts of interest

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Use of a 'Devil's Advocate'

- ˆ what is the role of a 'Devil's Advocate'?
- ˆ the advantages of a second view to provide advice

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Drafting the report

1. The basic legal requirements

- details of qualifications
- details of material relied upon
- explain the range of opinion and reasons for the opinion reached
- summary of conclusions
- include a statement that expert understands duty to the court and has complied with it
- set out all material instructions (whether written or oral)
- verified by a "statement of truth"
- consequences for breach

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Drafting the report (contd.)

2. Further practical suggestions

- on time
- well structured (headings, numbering, cross-references)
- authoritative, clear, convincing
- demonstrates independence - deals with points against the "client"
- tightly drafted - avoid sweeping statements - better to understate
- make clear if there is inherent uncertainty in any opinion
- expresses opinion on actuarial matters - not argument about the facts/law

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Drafting the report (contd.)

- only deals with matters within your competence
- make clear where the limitations on your investigations are e.g. not verified data
- make clear who else's work you have relied on (and what they have done)
- everything must be checked and backed up
- C.V.

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Meeting of experts

1. Legal points

- ✓ court will usually order meeting for experts to:
 - identify issues
 - reach agreement on issues
 - following meeting prepare a statement showing issues on which agree and disagree and reasons for disagreement
- ✓ contents of discussion cannot be referred to at trial unless the parties agree
- ✓ any agreement reached does not bind the parties unless they agree to be bound

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Meetings of experts (contd.)

2. Practical points

- ✓ keep lawyers out (observing role only)
- ✓ refuse instructions not to agree anything
- ✓ clarify process of meeting in advance/at outset
- ✓ keep careful notes
- ✓ probe for weakness
- ✓ be professional

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Privilege issues

- ‘ take care over reaching agreement - be sure - take time to reflect
- ‘ the nature of litigation privilege
- ‘ material instructions (whether written or oral) are not privileged but court will not order disclosure/questioning unless reasonable grounds to believe report does not state substance of all instructions on the basis of which it was written
- ‘ distinction between acting in an ‘advisory’ and ‘expert’ capacity

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Privilege issues (contd.)

- ‘ practical problems
 - disclosure to opponents of letter of instruction - care in drafting - include all material instructions
 - unhelpful drafts of reports
 - writing to the expert - avoid it

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In the “box”?

- ‘ be prepared
- ‘ take your time
- ‘ keep it short
- ‘ keep it simple
- ‘ admit what you should admit
- ‘ if the answer needs research - ask for time to do it
- ‘ beware of hypothetical questions
- ‘ no jokes!

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Learning from others' mistakes - common issues

Construction

- ′ contribution rule
- ′ augmentation rule
- ′ winding-up rule
- ′ ill health/early retirement
- ′ bulk transfer
- ′ distribution of 'surplus'

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Learning from others' mistakes - common issues (contd.)

Negligence

- ′ conflict of interests
- ′ not following the rules (see above)
- ′ mistakes
- ′ failure to certify correctly
- ′ failure to comply with professional guidance

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Learning from others' mistakes - common issues (contd.)

- ′ mergers/transfers
- ′ contribution reductions
- ′ investment strategy
- ′ wind-ups

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