



An Overview of Expert Evidence

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Overview

1. Definition
2. Where are experts used?
3. The role of an expert
4. Professional qualities
5. Relevant Rules
6. The expectations of an expert at the hearing
7. Immunity for experts/ liability for negligence
8. Practical tips

Definition

What is an expert witness?

A witness qualified by knowledge, skill, experience, training or education in a particular area, engaged to provide a scientific, technical or other specialised opinion.

When Required?

Complex matters determined without experts.

A matter of art or science likely to be outside the experience of the Tribunal.



2. Where are experts used?

<p>Corporate:</p> <ul style="list-style-type: none">▪ Share valuations▪ Profit/cash flow forecasts▪ Determine loss of profits	<p>Personal Injury:</p> <ul style="list-style-type: none">▪ Workplace or vehicle injury
<p>Property:</p> <ul style="list-style-type: none">▪ Value/appraise property▪ Determine land premium▪ Environmental	<p>Family:</p> <ul style="list-style-type: none">▪ Determine value of property▪ or assets▪ Physicians: doctors/psychologists

2. Where are experts used?

Building and Construction:

Liability

- Causes of Delay
- Defect Diagnosis
- Workmanship
- Compliance

Quantum

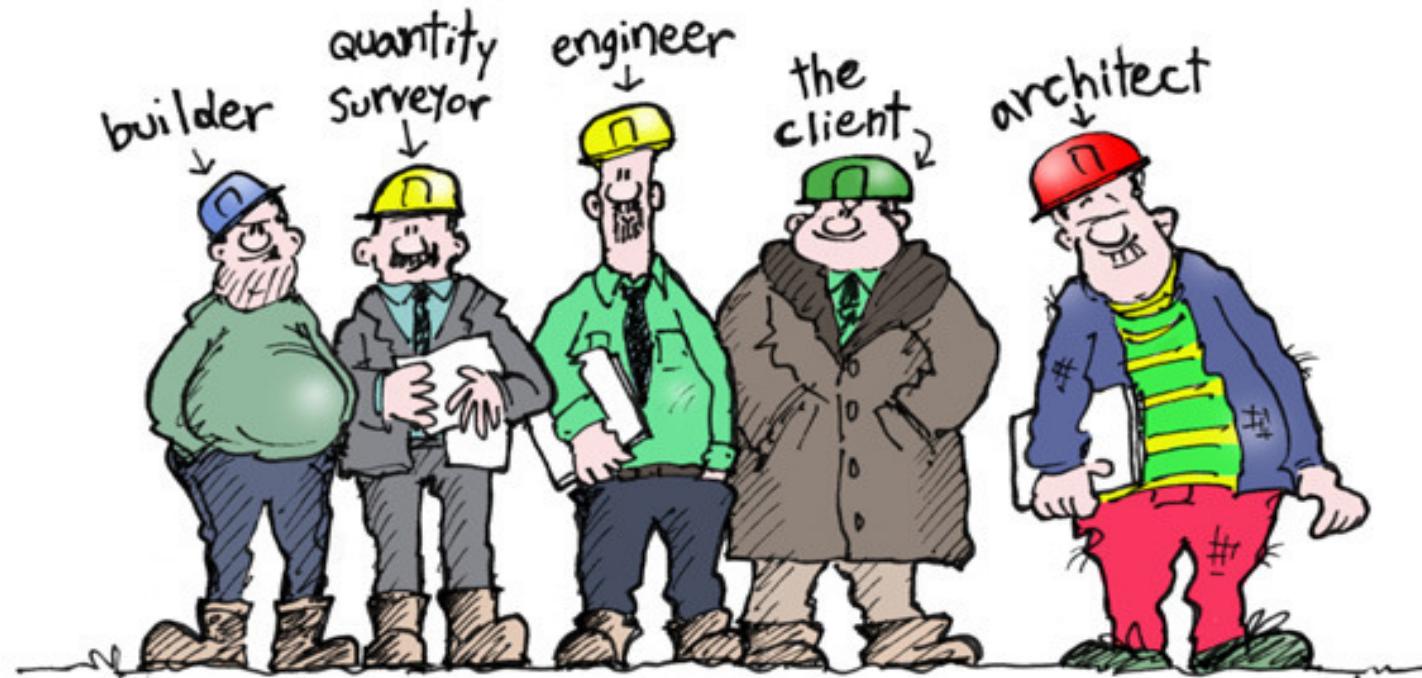
- Certification
- Valuation of extra work/variations
- Determination of compensable delay & L&E
- Remeasurement and reasonable value of works

3. The role of an expert

1. Meet the team
2. Understand the Client's Objectives
3. Obtain instructions
 - a. From Lawyers
 - b. Direct from Client
4. Prepare a Report

3. The role of an expert

Meet the client & project participants and understand the project



3. The role of an expert

Understand the objectives of the client

- Valuation exercise
- Prepare formal claims
- Prepare report and appear in Court

Obtain as detailed instructions as possible

- From lawyers
- Direct from client

3. The role of an expert

Prepare a report

- Understand what the report will be used for
- Appreciate your audience
- Understand joint reports
 - Each party appoints a separate expert
 - Parties jointly appoint an expert
- Must be on time
- Easy to read
 - Cover page
 - Contents page
 - Instructions
 - Documents

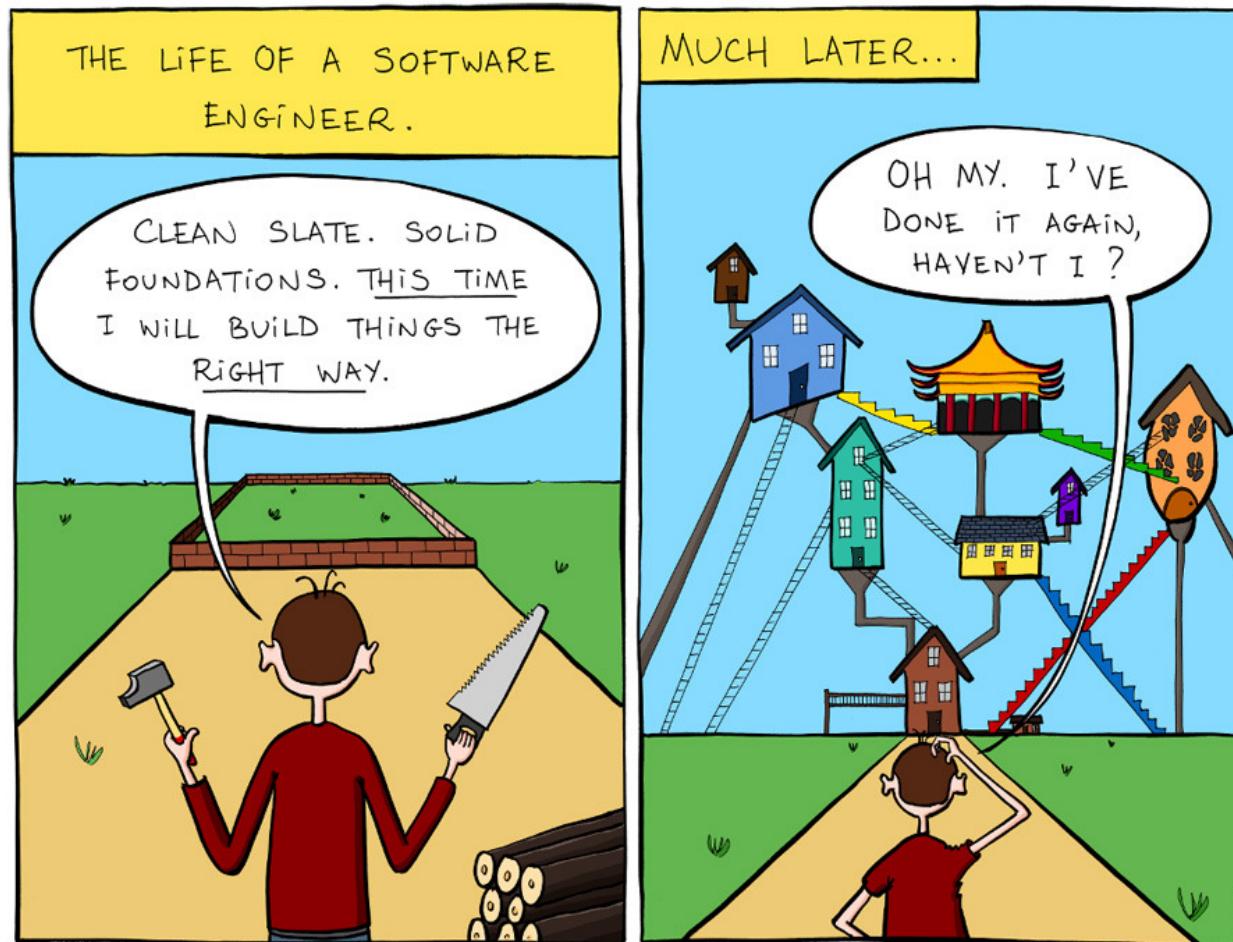
Content of the report

- Code of Conduct – App.D
- Chronology
- Testing undertaken
- Make factual observations
- Express an opinion

Some general pointers

- State opinions based on fact
- Explain reasoning accurately
- Use demonstrative evidence

Pictures



Pictures



Pictures

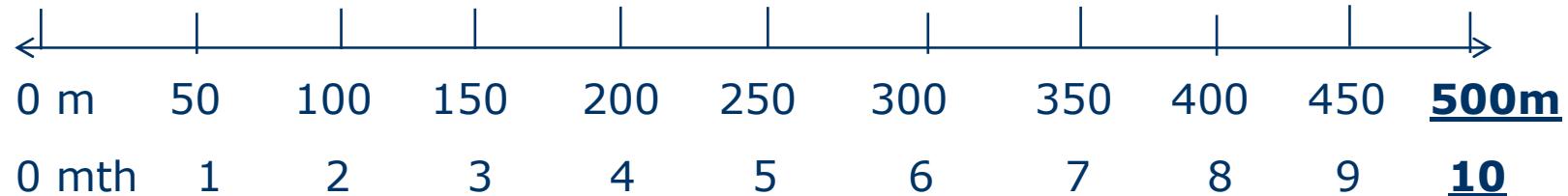
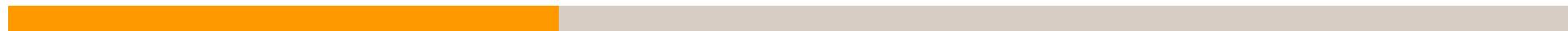


Pictures



Pictures

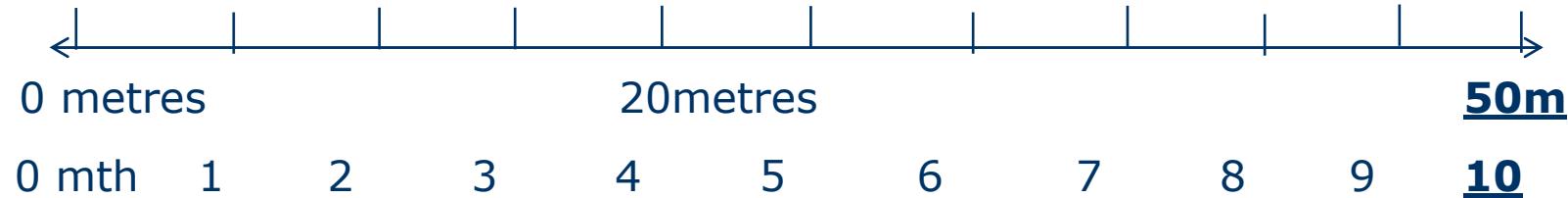
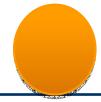




▪ Originally programmed



▪ Actual progress



4. Professional qualities

Ability to act impartially, objectively and professionally

- Avoid conflicts of interest and favouritism, free from preconceived opinions
- As a QS:
 - Sound knowledge of construction technology, project procurement methods, commonly used standard forms of contract, commonly used standard methods of measurement
 - An ability to prepare relevant documentation during the project procurement process, knowledge of cost data relevant to the construction industry, knowledge of common areas encountered during the procurement process such as construction insurance, project financing and some idea of dispute resolution
- As a QS acting as an expert witness:
 - Must understand that expert evidence amounts to more than mere personal views
 - Expected to be reasonable and to have considered everything carefully before answering or agreeing.
 - Expected to be honest and frank in answering questions
 - Are expected to assist the court by giving opinion impartially and independently
 - Leave the legal submissions to the advocates, for they are the experts in law

4. Professional qualities

- Avoid criticism: Hon Reyes J in HK Housing Authority v Hsin Yieh Architects;

“Where the experts have disagreed, I have generally preferred the evidence of [Expert witnesses called by Plaintiff) to that of [Expert witnesses called by Defendant). This is because [the expert witnesses called by Defendant] struck me at times to **be more advocates** for B+B's (Defendant's) cause, **rather than wholly impartial experts.**”

“Mr. [X] has become no more than another advocate of B+B's (Defendant's) cause, **the very thing which an expert is not supposed to be...** I am thus unable to place much reliance or confidence on Mr. [X's] evidence...”

4. Professional qualities

“Another expert witness, Mr. [X], towards the end of cross-examination, was suggested by the counsel that he had **mis-calculated the load** and a principle was put forward to him.

Mr. [X] gave a long, rambling answer which failed to address the question. The counsel repeated his proposition. Mr. [X] continued to digress. The Court interrupted to indicate that it would be more helpful to the Court, if Mr. [X] could just state whether he agreed with the suggestion or not.

The Court was given the impression that Mr. [X] **avoided facing the question**, and that he was **unwilling to admit to a straightforward error**.

Exchanges of this nature accordingly **undermined the confidence** which I might otherwise have had on these experts.”

4. Professional qualities

Kin Shing Engineering (HK) Co Ltd v Vinson Engineering: 2005

- Attempt to re-open issues agreed in joint report.
- In the absence of a supplementary report from the expert for the party stating that he had resiled from what he had agreed and explaining why, it was not open for the party to do so.
- Unfair to allow a party to go back on what the parties had, through their experts, previously agreed.
- The parties must be bound by such agreement in the absence of a truly compelling reason.

Lesson:

- Consider carefully the points in question before agreeing to them in a joint statement.
- Alstom Ltd v Yokogawa Australia: 2012

4. Professional qualities

- **Ensure appropriate experience**

- **Practical examples**

- Financial planner
- Geotechnical engineer
- Quantity surveyor
- Civil engineer
 - "Education:
 - *Civil Engineer: Oxford – Certificate*"

- **Lessons:**

- Think about what cases you take on
- Consistency of views
- Accurate and thorough
- Truthful

5. Relevant Rules

- **"Code of Conduct for Expert Witness" Set out in the Rules of the High Court (Cap 4A) Appendix D**

A party who instructs an expert witness shall provide him/her with a copy of the code of conduct set out in Appendix D; and if the instruction is in writing, it must be accompanied by a copy of the code of conduct: Order 38

- **The General Duty to the Court is stated as follows:**

"An expert witness has an overriding duty to help the Court impartially and independently on matters relevant to the expert's area of expertise

An expert witness's paramount duty is to the Court and not to the person from whom the expert has received instructions or by whom he is paid

An expert witness is not an advocate for a party"

- **Statement of Truth**

"I believe that the facts stated in this [report] are true and the opinion expressed in it is honestly held"

5. Relevant Rules

In relation to any report prepared by an expert witness, the Code states that is not admissible in evidence unless the report contains a declaration by the expert witness that:-

- a) he has read the code of conduct and agrees to be bound by it;
- b) he understands his duty to the Court; and
- c) he has complied with and will continue to comply with that duty.

In relation to oral evidence given by an expert witness, the Code provides that the evidence is not admissible unless an expert witness has declared in writing, whether in a report or otherwise in relation to the proceeding, that:-

- a) he has read this code of conduct and agrees to be bound by it;
- b) he understands his duty to the Court; and
- c) he has complied with and will continue to comply with that duty.

6. The expectations of an expert at the hearing



A) Preparation for Hearing

- Read your own report thoroughly, make sure you know it very well
- Note weak points or possible errors – be prepared to deal with them
- Accept differences or errors, if amendment of your own report is necessary, advise counsel in advance
- Read the other side's report thoroughly and try to anticipate questions likely to be asked

B) Giving evidence at hearing

- Do not communicate with others (such as assistants or other parties)
- Always remember your duty is to assist the Court
- Focus on your expertise instead of making submissions, do not appear to be too involved in either party's case
- The more persuasive you try to be, the less credible you may be perceived by the Court
- Wait for questions; don't anticipate

6. The expectations of an expert at the hearing

C) Preparing for cross examination

- Discuss possible areas that you might be cross examined on with the lawyer
- Advise the lawyers of possible cross-examination points in respect of the other side's expert report
- Always be prepared to correct errors under cross examination



7. Immunity for experts/liability for negligence

▪ Traditional View – Immunity

- It encouraged experts to testify in Court
- It encouraged experts to give honest and frank opinions without fear
- But not absolute



▪ Current View – Abolition of Immunity

- Arises from the case of *Jones v Kaney*, a decision of the Supreme Court in the UK.
- Immunity for expert witnesses was not necessary because:
 - removal of the immunity would not discourage experts giving evidence in court;
 - experts would be more careful in giving evidence without such immunity;

7. Immunity for experts/liability for negligence



- The abolition of advocate immunity did not deter advocates from acting, nor did it result in a flood of claims by disappointed litigants
- The Court emphasised that:
 - Every wrong should have a remedy; and
 - That any exception to this rule must be justified as being necessary in the public interest.

Accordingly, expert witnesses no longer enjoy immunity from claims for negligence arising from evidence given in Court.

The Position in Hong Kong:

- Undecided
- Strictly speaking, expert immunity still exists
- Review professional indemnity insurance

8. Practical Tips

1. Don't take on too much

2. Stay within your expertise
 - Ineffectual, incompetent, inept

3. Assist the parties and the Tribunal

And Finally....

A QS was crossing a road one day when a frog called out to him and said, "If you kiss me, I'll turn into a beautiful princess." He bent over, picked up the frog and put it in his pocket. The frog spoke up again and said, "If you kiss me and turn me back into a beautiful princess, I will stay with you for one week." The QS took the frog out of his pocket, smiled at it and returned it to the pocket.

The frog then cried out, "If you kiss me and turn me back into a princess, I'll stay with you and do ANYTHING you want." Again the QS took the frog out, smiled at it and put it back into his pocket.

Finally, the frog asked, "What is the matter? I've told you I'm a beautiful princess, that I'll stay with you for a week and do anything you want. Why won't you kiss me?"

The QS said, "Look I'm a QS. I don't have time for a girlfriend, but a talking frog, now that's cool."

Encore....

Three contractors were visiting a tourist attraction. One was from Shanghai, another from Beijing, and the third from Hong Kong. At the end of the tour, the guard asked them what they did for a living. When they all replied that they were contractors, the guard said, "Hey, we need one of the rear fences redone. Why don't you guys take a look at it and give me a bid?" So, to the back fence they all went to check it out.

First to step up was the Shanghai contractor. He took out his tape measure and pencil, did some measuring and said, "Well I figure the job will run about \$900. \$400 for materials, \$400 for my crew, and \$100 profit for me."

Next was the Beijing contractor. He also took out his tape measure and pencil, did some quick figuring and said, "Looks like I can do this job for \$700. \$300 for materials, \$300 for my crew, and \$100 profit for me."

Without so much as moving, the Hong Kong contractor said, "\$2,700."

The guard, incredulous, looked at him and said, "You didn't even measure like the other guys! How did you come up with such a high figure?"

"Easy," he said \$1,000 for me, \$1,000 for you and we hire the guy from Beijing."