



## Role of Experts in Litigation – An Overview

In litigation, the plaintiff needs to: a) prove liability, b) prove damages, and c) be able to collect on a judgment. Conversely, the defendant rebuts: a) the claims of liability, and b) damages. And some work to make themselves judgment proof. Experts often testify on liability and damages.

In the court system, there are two types of witnesses: fact witnesses, and experts.

Fact witnesses are restricted to speaking to factual matters. This meeting took place, on this date, with these people in attendance, and this person gave this document to this person.

Expert witnesses are allowed to provide opinion evidence. They are granted this privilege in order to assist the court on topics where the court does not have sufficient expertise. As a friend of the court, the expert is expected:

- (a) to provide opinion evidence that is fair, objective and non-partisan;
- (b) to provide opinion evidence that is related only to matters that are within their area of expertise; and
- (c) to provide such additional assistance as the court may reasonably require, to determine a matter in issue.

There is an inherent tension in the role of an expert. On the one hand, they have these obligations to the court, and on the other, they are normally being paid by one side or the other. “Opposing” experts often come to different conclusions. In many cases, the differing opinions are based on differing assumptions. The decision of the judge as to which assumptions are most reasonable, often determines which expert’s testimony the judge chooses to rely upon.

The role of the expert does not include being an advocate for either side. The role of counsel is to be that advocate. If an expert is considered by the court to be an advocate for one side or the other, the court often assigns little or no weight to the testimony of that expert.

Experts can speak to the issue of liability. For example, did the defendant provide negligent or competent advice? These are often called standard of care witnesses.

Experts can speak to the issue of damages. This is my area of expertise.

So, what expertise does the damages expert bring? What is the value proposition?

In the area of damage quantification, there are generally accepted models for quantifying damages. The damages expert will choose the most appropriate model and apply it. However, even if the experts apply the same model, they can still come to different conclusions, based on different inputs into the model.

As an example, if an investor were to be advised to invest in a tax arrangement that would save them \$0.5million, and it ultimately saved them \$nil. If the investor then sues the advisor, the investor's damages are not necessarily \$0.5million. The courts generally ask: a) what financial position the investor would have been in – had they received advice from their advisor that conformed with the prevailing standard, and b) what financial position did the investor end up in, given the negligent advice? The investor's damages are generally found by the court to be the difference between a) and b).

Experts also understand how to work within the court system, that is to say, to work seamlessly with counsel, and provide information in a form that is easily understood by the judge. Judges generally work to understand the model being used by the expert, the key assumptions, and the conclusions. They rarely focus on the detailed calculations, and to some extent rely on the opposing expert to bring any calculations errors to their attention.

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