Second Study Commission

Civil Law and Procedure

2015 Questionnaire

58th Annual Meeting of IAJ – Barcelona (Spain)

EXPERT EVIDENCE

In Foz do Iguaçu (Brazil), we decided that in 2015, our Second Study Commission will focus on expert evidence. We have limited the questionnaire to five questions and we expect to receive short but concise answers.

1. Is training and accreditation of experts required in your jurisdiction?

In determining the expertise of a witness, formal training and accreditation is a relevant consideration, but is not essential. For evidence to be deemed "expert evidence", it must be demonstrated that the person giving the evidence has *specialised knowledge* in the field of expertise which is accepted to be a reliable body of knowledge.[1] The specialist knowledge must be based on the person's training, study or experience and the expert's opinion must be "wholly or substantially" based on that specialist knowledge to be admissible in evidence.

In *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 (*Dasreef*) at [42], the majority of the High Court held that the failure of an expert to demonstrate "specialised knowledge based on training, study or experience" will not just bear on the weight given to such evidence, but will have the effect of rendering the evidence inadmissible. In that case, their Honours were not satisfied that the numerical or quantitative opinion expressed by the relevant witness was "wholly or substantially based on specialised knowledge based on training, study or experience",[2] and the evidence was ruled inadmissible.

The statements of the majority in *Dasreef* regarding "specialised knowledge" are reflected in r 23.13 of the *Federal Court Rules 2011* (Cth), which sets out the required contents of an expert report. In accordance with this rule, the report is required to contain, amongst other things, particulars of the training, study or experience by which the expert has acquired specialised knowledge; and an acknowledgment by the expert that the expert's opinions are based wholly or substantially on the specialised knowledge.

The ultimate admissibility of expert evidence requires a further step: the identification of *how* the specialised knowledge applies to the facts to found the expert's opinion. In *Makita*

[1] *R v Bonython* (1984) SASR 45
[2] *Dasreef* at [40]-[44].

(Australia) Pty Ltd v Sprowles [2001] NSWCA 305, Heydon JA at [85] stated that if evidence tendered as expert opinion evidence is to be admissible:

> [T]he opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded… an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but, to use Gleeson CJ's characterisation of the evidence in *HG v R* (1999) 197 CLR 414, on "a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise."

2. What powers do you have as a judge to control the use of expert evidence?

The judge has wide powers to control the use of expert evidence, including the power to rule on the admissibility of expert evidence.

In particular, the judge has broad case management powers regarding the manner in which that expert evidence is provided to the Court. Rule 5.04 of the *Federal Court Rules 2011* (Cth) sets out the various directions a judge may make in relation to the conduct of a proceeding, including the manner in which expert evidence is given. Under this rule, directions can be made with respect to:

(a) The appointment of a court expert;
(b) The disclosure and exchange of reports of experts;
(c) The number of expert witnesses to be called;
(d) The parties jointly instructing an expert to provide a report of the expert's opinion in relation to a particular issue in the proceeding;
(e) Requiring experts who are to give or have given reports to meet for the purpose of identifying and addressing the issues in dispute between the experts; and
(f) An expert's opinion to be received by way of submission, and the manner and form of that submission, whether or not the opinion would be admissible as evidence.

Rule 23.15 of the *Federal Court Rules 2011* (Cth) sets out further orders that can be made by the Court where two or more parties to a proceeding intend to call experts to give evidence, including:

(a) that the experts confer, either before or after writing their expert reports;

(b) that the experts produce to the Court a document identifying where the expert opinions agree or differ;

(c) that the expert's evidence in chief be limited to the contents of the expert's expert report;

(d) that all factual evidence relevant to any expert's opinions be adduced before the expert is called to give evidence;

(e) that on the completion of the factual evidence mentioned in paragraph (d), each expert swear an affidavit stating:

(i) whether the expert adheres to the previously expressed opinion; or

(ii) if the expert holds a different opinion;

(A) the opinion; and

(B) the factual evidence on which the opinion is based.

(f) that the experts give evidence one after another;

(g) that each expert be sworn at the same time and that the cross-examination and re-examination be conducted by putting to each expert in turn each question relevant to one subject or issue at a time, until the cross-examination or re-examination is completed;

(h) that each expert gives an opinion about the other expert's opinion;

(i) that the experts be cross-examined and re-examined in any particular manner or sequence.

One approach identified above involves making orders for the giving of concurrent evidence, or, what is more colloquially referred to as "hot-tubbing". Where there is disagreement or uncertainty around expert evidence, the practice of allowing concurrent evidence of a panel of experts is a way of managing the expert evidence efficiently and fairly. After experts have prepared their own individual reports, the process of concurrent evidence will involve three critical stages: (1) early identification of critical questions to be addressed by all experts; (2) a conference (or "conclave") between experts and the preparation of a joint report identifying

areas of agreement and disagreement; and (3) the giving of concurrent oral evidence after all lay evidence has been given.[3]

Justice Pepper of the New South Wales Land and Environment Court has noted that by 2012, concurrent evidence in that court had become:

> the norm rather than the exception. Unless the judge or commissioner orders otherwise, the relevant experts on a particular point are sworn-in together and remain together during the entirety of their evidence, as opposed to the traditional approach where each expert presents their evidence and is separately made available for cross-examination. This approach facilitates a discussion between the experts, the advocates and the judge, and helps to narrow the issues in dispute.'[4]

In *Strong Wise Limited v Esso Australia Resources Pty Ltd* [2010] FCA 240, Rares J said at [96]:

> The great advantage of this process is that all experts are giving evidence on the same assumptions, on the same point and can clarify or diffuse immediately any lack of understanding the judge or counsel may have about a point. The taking of evidence in this way usually greatly reduces the court time spent on cross-examination because the experts quickly get to the critical points of disagreement.

3. How can the tendency towards relying on excessive numbers of experts be prevented or managed?

The overarching purpose of the Australian civil practice and procedure provisions is to facilitate the just resolution of disputes 'as quickly, inexpensively and efficiently as possible.'[5] The Court is required to have regard to this purpose in its management of the conduct of proceedings, particularly in considering the number of expert witnesses to be called by parties.

Where it is necessary to achieve this overarching purpose, the Court can limit the number of experts called by parties.[6] In deciding whether to exercise this power, the Court is required to determine whether it is in the interests of justice to receive evidence from an additional expert. This question was considered by Justice McMeekin in *Stewart v Fehlberg* [2008] QSC 203, his Honour finding:

[3] N J Young QC, "Expert Witnesses: On the Stand or in the Hot Tub – How, When and Why?", Commercial Court Semindar, 27 October 2010.
[4] Ian Freckelton & Hugh Selby, Expert Evidence: Law, Practice, Procedure and Advocacy, Thomson Reuters, Pyrmont NSW, 2013, 393
[5] *Federal Court of Australia Act 1976* (Cth), s 37M;
[6] *Federal Court Rules 2011* (Cth), r 5.04; *Civil Procedure Act 2005* (NSW), s 62(3)(b); *Uniform Civil Procedure Rules* (Qld), r 367(3)(d)

> [T]he rules to which I have referred plainly evince an intention that the Court should receive evidence from only one expert on an issue, that if there are to be multiple experts then the onus lies on the party seeking to call the evidence to demonstrate that it is in the interests of justice that multiple experts be allowed and that onus has not been discharged here.

Another way in which the Court can limit excessive numbers of experts is to appoint one expert as the only expert whose evidence will be admitted and whose evidence will bind the parties. Adopting this course is useful where parties are unable to agree on the appointment of their own experts. A Court appointed expert will have similar overriding duties to the Court to an expert appointed by a party.

4. Are there means of avoiding expert bias, and if so, how?

An expert witness has the duty to provide independent assistance to the court by way of an objective, unbiased opinion.[7] The statement of Lord Wilberforce in *Whitehouse v Jordan* [1981] 1 WLR 246 provides an accurate summary of the court's approach to the independence of experts giving evidence:

> It [is] necessary that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation.

The court has a general discretionary power to exclude or limit evidence, including expert evidence.[8] However, where there is apparent bias affecting an expert's opinion, this will be a question of weight rather than one of admissibility. An interest, or a perceived interest in the outcome of a litigation will not be sufficient to justify the automatic exclusion of the expert evidence. This approach recognises the "natural" or "unconscious bias" that is often characteristic of expert evidence,[9] particularly where a party has retained their own expert. In *FGT Custodians Pty Ltd v Fagenblat* [2003] VSCA 33, the Court of Appeal affirmed the decision of Pagone J at first instance to receive the evidence of a valuer who was also the brother-in-law of a party.

However, the courts are likely to take a more strict approach to the admissibility and or weight given to expert evidence where the expert is paid on a contingency fee basis; that is,

[7] *Re J* [1990] FCR 193.
[8] Evidence Act 1995 (Cth), ss 135, 136
[9] *Miller Steamship Co Pty Ltd v Overseas Tankship (UK) Ltd* (1963) SR (NSW) 958

payment is dependent upon a favourable outcome of the case. Payment of an expert on this basis will not render the evidence inadmissible, but may be taken into account by the court in determining the weight to give such evidence.

The codes of conduct imposed upon expert witnesses engaged to give evidence also seek to preserve the independence and objectivity of the expert evidence giving process. Courts publish guidelines to inform the experts of the standard of conduct that is expected of them, including the duty to remain independent from their clients. The Federal Court Practice Note CM7 entitled 'Expert Witnesses in Proceedings in the Federal Court of Australia', provides that:

> 1.1 An expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise.
>
> 1.2 An expert witness is not an advocate for a party even when giving testimony that is necessarily evaluative rather than inferential.
>
> 1.3 An expert witness's paramount duty is to the Court and not to the person retaining the expert.

The practice note also establishes a duty of disclosure, and requires that, 'if an expert's opinion is not fully researched because the expert considers that insufficient data are available, or for any other reason, this must be stated with an indication that the opinion is no more than a provisional one;' '…where an expert witness who has prepared a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report;' and, '[t]he expert should make it clear if a particular question or issue falls outside the relevant field of expertise.' . If a party intends to retain an expert to give evidence, a copy of this practice note must be given to that expert.[10]

Other courts and Tribunals in Australia have also produced guidelines and codes of conduct which establish a similar framework of duties and obligations imposed upon expert witnesses in a proceeding. The Administrative Appeals Tribunal has published a set of guidelines entitled 'Guidelines for Persons Giving Expert and Opinion Evidence,'[11] and the Supreme Court has a code of conduct for expert witnesses is outlined in r 44 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).

5. How are experts to be prevented from usurping the role of the primary finder of fact in civil matters?

[10] Rule 23.12 of the *Federal Court Rules 2011* (Cth)

[11] http://www.aat.gov.au/LawAndPractice/PracticeDirectionsAndGuides/Guidelines/ExpertAndOpinionEvidence.htm

There is no absolute rule precluding an expert witness from expressing a view as to the ultimate issue. Commonwealth and State Evidence Acts now expressly provide that 'Evidence of an opinion is not inadmissible only because it is about: (a) a fact in issue or an ultimate issue.' However, in civil matters, a court is not bound by the evidence of an expert and will decide the matter for itself.

In practice, experts are prevented from usurping the role of the primary finder of fact in civil matters through the imposition of constraints with regard to: who is qualified to give expert evidence (the expert rule), what evidence may be received via an expert witness (the area of expertise rule), and the requirement to clearly explain the basis for the expert opinion evidence (the basis rule). If expert evidence is given in relation to the central question before the judge or jury, it remains up to the court to guide the manner in which the evidence is provided and the weight given to the evidence, to ensure that the role of the primary finder of fact is not usurped by the expert witness.