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"The Limits and Requirements of Expert Evidence with reference to the recent High Court decision of *Dasreef Pty Ltd v. Hawchar*"

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This topic has been chosen for two reasons. The first is that this is a conference at which most of the delegates are either legal practitioners or medical practitioners.

Many of the medical practitioners have in the past, and will in the future give expert evidence in courts of law on matters relating to their professional skill and experience.

Secondly, legislation and rules of court in recent years have dramatically changed the way in which experts are required to give evidence.

Lawyers need to know about these changes so that they can ensure that any expert report complies with the requirements of the court.

If they do not do that then the report obtained will not be admissible in evidence and a great deal of time and money will be wasted. They also will be exposed to an action for damages for professional negligence by a disgruntled client who feels that their case has been lost because their lawyer or lawyers did not do what was required.

Experts need to know about these changes so that they are not preparing reports which are of no use or benefit because they will never be admitted into evidence.

In addition to identifying, by reference to the rules of the Supreme Court of New South Wales, what is now required, I propose to spend a little time on the requirements under the *Evidence Act* for the admissibility of expert evidence. In this connection I will deal with the important High Court decision of *Dasreef Pty Ltd v. Hawchar* [2011] HCA 21.

By way of further introduction it is necessary to identify why rules governing the admissibility of expert evidence have become subject to stringent requirements.

The first reason is that judges have always been very cynical about experts who give evidence in court cases. I would like to give you some examples. In 1843 the House of Lords which was then and has been until recent times, the highest court in the United Kingdom had to decide who was entitled to an hereditary peerage. The determination of that question depended in part upon expert evidence in relation to handwriting. This is what Lord Campbell had to say about the plaintiff's expert in that case:

> *"There was a witness, Sir Frederick Madden, who undertook to say that it was the handwriting of about the middle of the last century. I do not mean to throw any reflection on Sir Frederick Madden. I dare say he is a very respectable gentleman, and did not mean to give any evidence that was untrue; but really this confirms the opinion I have entertained, that hardly any weight is to be given to the evidence of what are called scientific witnesses; they come with a bias on their minds to support the cause in which they are embarked, and it appears to me that Sir Frederick Madden, if he had been a witness in a cause and had been asked on a different occasion what he thought of this handwriting, would have given a totally different account of it."*

Some of you may detect a degree of inconsistency between his Lordship's observations that Sir Frederick was "*a very respectable gentleman*" and "*did not mean to give any evidence that was untrue*" and the observation at the end of this passage that he thought that Sir Frederick, if retained by the opposite party, "*would have given a totally different account of it*".

Thirty years later, Sir George Jessell, then the Master of the Rolls, traditionally, the most senior judge of the Court of Appeal expressed his cynical view about expert witnesses:

> "*Well, we have the witnesses giving evidence for the plaintiff's view of the matter, or the defendant's view, according as they are sought*

> *out and paid by each. It is very natural, and just what one would expect, but it leads one to distrust their evidence. There is also this to be said against them, namely, that their evidence is not the evidence of fair professional opinion. The men are selected according as their opinion is known to incline."*

The quote that I like most in this context, about expert witnesses comes from an American judge, Judge Posner who, in a case called *Chaulk v. Volkswagen of America Incorporated* said: "*There is hardly anything, not palpably absurd on its face, that cannot now be proved by so-called 'experts'.*"

Although, Judges are aware of this bias, they are not allowed to say it. I will digress to give you a reference to the judgment of the High Court in a case called *Vakauta v. Kelly* (1989) 87 ALR 633. In that case the trial judge, having heard who it was that the insurance company proposed to call in a personal injuries case expressed the view that the proposed medical witnesses "*think you can do a full week's work without any arms or legs*".

His Honour then referred specifically to the three medical witnesses proposed to be called on behalf of the insurance company as "*that unholy trinity*".

The resulting judgment in favour of the plaintiff was set aside by the High Court not because they concluded that the trial judge was in fact biased but on a narrower basis, namely that the remarks of the trial judge could lead a lay observer to believe that the judge was biased against these expert witnesses. An apprehension of bias is a sufficient basis upon which to vitiate a decision.

It is not just a matter of a judge being impartial, it is also necessary that he or she appears to be impartial.

So how have courts tried to maintain the integrity of the judicial process with the risk, to put it bluntly, "*that he who pays the piper, calls the tune*", and at the same time ensure that the court has reliable evidence on scientific and technical matters upon which to base a decision.

The first step in achieving those objective is that most courts have now introduced a "Code of Conduct" or equivalent statement in the Rules of Court in relation to the duties of an expert witness. I will use the Code of Conduct from the Supreme Court of New South Wales because it is the one with which I have the greatest familiarity. It provides as follows:

> *"UCPR 31.23* ***Code of conduct***
>
> *(1) An expert witness must comply with the code of conduct set out in Schedule 7.*
>
> *(2) As soon as practicable after an expert witness is engaged or appointed:*
>
> > *(a) in the case of an expert witness engaged by one or more parties, the engaging parties, or one of them as they may agree, or*
> >
> > *(b) in the case of an expert witness appointed by the court, such of the affected parties as the court may direct,*
>
> *must provide the expert witness with a copy of the code of conduct.*
>
> *(3) Unless the court otherwise orders, an expert's report may not be admitted in evidence unless the report contains an acknowledgment by the expert witness by whom it was prepared that he or she has read the code of conduct and agrees to be bound by it.*
>
> *(4) Unless the court otherwise orders, oral evidence may not be received from an expert witness unless the court is satisfied that the expert witness has acknowledged, whether in an expert's report prepared in relation to the proceedings or otherwise in relation to the proceedings, that he or she has read the code of conduct and agrees to be bound by it.*

This must be read, of course, with Schedule 7 itself which I will set out:

> *"SCHEDULE 7 – Expert witness code of conduct*
>
> *(Rule 31.23)*
>
> *(cf SCR Schedule K)*
>
> *1 Application of code*
>
> *This code of conduct applies to any expert witness engaged or appointed:*
>
> > *(a) to provide an expert's report for use as evidence in proceedings or proposed proceedings, or*
> >
> > *(b) to give opinion evidence in proceedings or proposed proceedings.*
>
> *2 General duty to the court*
>
> *(1) An expert witness has an overriding duty to assist the court impartially on matters relevant to the expert witness's area of expertise.*
>
> *(2) An expert witness's paramount duty is to the court and not to any party to the proceedings (including the person retaining the expert witness).*
>
> *(3) An expert witness is not an advocate for a party.*
>
> *3 Duty to comply with court's directions*
>
> *An expert witness must abide by any direction of the court.*
>
> *4 Duty to work co-operatively with other expert witnesses*
>
> *An expert witness, when complying with any direction of the court to confer with another expert witness or to prepare a parties' expert's report with another expert witness in relation to any issue:*
>
> > *(a) must exercise his or her independent, professional judgment in relation to that issue, and*
> >
> > *(b) must endeavour to reach agreement with the other expert witness on that issue, and*
> >
> > *(c) must not act on any instruction or request to withhold or*

avoid agreement with the other expert witness.

5 Experts' reports

(1) An expert's report must (in the body of the report or in an annexure to it) include the following:

(a) the expert's qualifications as an expert on the issue the subject of the report,

(b) the facts, and assumptions of fact, on which the opinions in the report are based (a letter of instructions may be annexed),

(c) the expert's reasons for each opinion expressed,

(d) if applicable, that a particular issue falls outside the expert's field of expertise,

(e) any literature or other materials utilised in support of the opinions,

(f) any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out,

(g) in the case of a report that is lengthy or complex, a brief summary of the report (to be located at the beginning of the report).

(2) If an expert witness who prepares an expert's report believes that it may be incomplete or inaccurate without some qualification, the qualification must be stated in the report.

(3) If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.

(4) If an expert witness changes his or her opinion on a material matter after providing an expert's report to the party engaging him or her (or that party's legal representative), the expert witness must forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect containing such of the information referred to in subclause (1) as is appropriate.

6 Experts' conference

(1) Without limiting clause 3, an expert witness must abide by any direction of the court:

(a) to confer with any other expert witness, or

(b) to endeavour to reach agreement on any matters in issue, or

(c) to prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement, or

(d) to base any joint report on specified facts or assumptions of fact.

(2) An expert witness must exercise his or her independent, professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement."

The power to compel experts to confer is an interesting development.

The main purpose of this is to narrow the areas of dispute between experts but there is an obvious ancillary purpose.

Few professional men or women would wish to appear ignorant in their relevant area of expertise or be embarrassed in front of their peers. Accordingly, directing compulsory conferences facilitates the avoidance of insupportable expert opinions.

Put bluntly, the expert who is not proceeding objectively cannot take advantage of the lack of knowledge of the lawyers in a particular area to advance extreme or scientifically insupportable propositions.

My observations of all of these procedural changes are that they have been of benefit to honest and impartial witnesses. When the party who retains the expert wants him or her to only say things which advance that party's position the honest expert can rely on the code of conduct rules to explain why he or she must politely decline such overtures.

To the Charlatan, codes of conduct or statements of duty have no effect on the opinions they express but judges and experienced lawyers can usually recognise these so-called experts.

Apart from procedural rules the other mechanism adopted to confine expert evidence to matters which are properly the subject of expert evidence is the Evidence Act itself. Again, I would like to demonstrate the need for the precise wording of this legislation by reference to a reported decision.

In ***Clarke v. Ryan*** (1960) 103 CLR 486 the High Court was hearing an appeal in a motor vehicle case involving a collision between a car and a semi-trailer on a bend.

In his judgment Windeyer J observed that only an elementary knowledge of physics was needed to understand why a semi-trailer may "jacknife".

His Honour continued:

> *"But the plaintiff's advisers were not prepared to rely on ordinary witnesses to speak of ordinary things. They called one William Foster Joy, thinking apparently that by describing him as an 'expert' they could enlist him as an advocate. From the time he entered the witness box the proceedings took a strange course, despite the attempts by the learned trial judge to direct them."*

His Honour concluded:

> *"He was put forward as an expert in the investigation of road accidents! He said he had seen the place where this accident had occurred, and he then explained, in general terms, and by reference to photographs, the character and gradient of the road. There could be no objection to that, although the police constable or a surveyor who had made a plan could have done it as well or better. But counsel for the plaintiff apparently regarded a road accident as like a bodily ailment, and thought of the witness as if he were a medical expert skilled in the diagnosis of disease who, although he had not seen the patient, might be invited to assume the existence of symptoms described and then asked to give his opinion as to the nature of the ailment."*

The appeal was allowed because his evidence as to the "cause" of this accident was held to be inadmissible.

What is, however, interesting about this case is his Honour's concluding remarks where he stated:

> *"The acrid remarks in Taylor on Evidence concerning expert witnesses do not lose significance when the expertise is spurious:*
>
> > *'These witnesses are usually required to speak, not to facts but to opinions; and when this is the case, it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond with the wishes or the interests of the parties who call them'."*

It was to stop this kind of evidence that the draftsperson of the Evidence Act used very specific words.

I will use the New South Wales Act, which has near-equivalents in other jurisdictions, to illustrate what is required.

The main provision is s.79(1) which provides:

> *"If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is, wholly or substantially based on that knowledge."*

The "opinion rule" is a rule that states that facts cannot be proven by statements of opinion.

I have underlined the key words in the section to demonstrate the stringency that is imposed on evidence which is sought to be lead as expert evidence.

The reason for that stringency was discussed by Heydon J in ***Dasreef Pty Ltd v. Hawchar*** [2011] HCA 21 which is now the leading case in this area of the law.

At paragraph [58] and [59] his Honour said this:

> *"The tendency of experts to dominate proceedings creates numerous other perils for the integrity of the trial process. One is that experts, who ex hypothesi know much more about their fields of expertise than judges and juries do, and who know of that vast disparity, will take over the conduct of cases and exert excessive influence over their outcomes. Another is that experts, no doubt contemptuous, often justifiably, of the ignorance of lawyers, will appoint themselves as advocates for the party calling them. Another is that experts render their evidence less than useful by giving it in a form conventional in their discipline but not conforming to the rules of evidence. Another is the tendency of experts to drift into giving the court reasons why they should accept or reject the evidence of lay witnesses on matters of primary fact. Finally, and very importantly, there is increasing concern about the risk of injustice that may now flow from unsatisfactory expert evidence."*

The mechanism by which these mischiefs are avoided is by strict adherence to the precise wording of the section.

In ***Dasreef*** Chief Justice French and Justices Gummow, Hayne, Crennan, Kiefel and Bell gave a joint judgment where they said:

> *"The admissibility of opinion evidence is to be determined by application of the requirements of the Evidence Act rather than by any attempt to parse and analyse particular statements in decided cases divorced from the context in which those statements were made. Accepting that to be so, it remains useful to record that it is ordinarily the case, as Heydon JA said in Makita, that '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.' The way in which section 79(1) is drafted necessarily makes the description of these requirements very long, but that is not to say that the requirements cannot be met in many, perhaps most, cases very quickly and easily."*

Conclusion

So what is the result of all of the legislative reform and the rules of court and codes of conduct.

As previously observed the point of the exercise is to attempt, as much as possible, to remove any bias from expert evidence by requiring experts to comply with the Code of Conduct and duties to the court. Secondly, the new regime for expert evidence narrows the content of what may be contained about facts in an expert report to those facts upon which the expert is basing the matters of opinion in the report. It also requires that those factual assumptions be clearly identified.

The expert is then required to identify why it is that the matter about which he or she expresses an opinion is properly a matter of expert evidence, that is, what is the specialised knowledge not available to ordinary members of the community that the expert claims to have. The expert must identify how it is that they acquired that specialised knowledge i.e. their training, study or experience.

The next step is that the expert must then demonstrate how that training, study or experience has been brought to bear upon the facts assumed for the purposes of expressing an opinion about the issue that the judge needs to decide.

As can be seen recent changes in rules of court and legislation in relation to expert evidence have dealt with a problem that has troubled courts for centuries by:

(i) insisting that the expert's role is to assist the court to ascertain the truth rather than assist the case of the party who retained them;

(ii) identifying the content of the factual assumptions upon which the opinion is based so as to determine whether the assumptions correspond to independently proven facts in the case;

(iii) requiring the expert to prove that the expertise professed is genuine and not spurious,

and by

(iv) requiring the expert to demonstrate the means whereby that expertise has been applied to the assumed facts to reach the conclusion set out by way of an opinion.

The effect of this is to reliably inform the judge about a specialised area of knowledge and, more importantly, to provide guidance, when confronted with competing expert opinions about which opinion is to be preferred.

Professionals who provide expert evidence and those who retain them need to be aware that there are the guidelines which must now be followed.

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