PRESENTED BY
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EXPERT EVIDENCE – THE DECISION MAKER'S PERSPECTIVE AND HOW TO IMPRESS THE JUDGE

Abstract

The provision of medical expert evidence before any court or tribunal is often occasioned by frustration and mystery on the part of both the expert witnesses and decision makers. From the judge's perspective much of this frustration and mystery is seen to arise from suspicion or insecurity on the part of medical experts giving evidence.

This difficulty can largely be overcome by the medical expert understanding the legal framework governing the provision of expert evidence. The legal framework includes the rules of evidence governing the provision of expert evidence, the role of the expert in the trial proceeding and the expert having an appreciation of the difficulties courts and tribunals commonly encounter. Particular pitfalls include bias or the perception of bias especially because of partisan conduct; failure to properly found expert opinions in fact; fear of cross examination; and poor report writing. This chapter provides some insight into these issues.

Introduction

The provision of medical expert evidence before any Court or Tribunal is often occasioned by frustration and mystery on the part of both the expert witnesses and the decision makers. Frequently this occurs because of an absence of appreciation by the relevant expert of his/her role in the process and an expectation by the decision maker that the relevant expert understands that role and the responsibilities associated with it. The purpose of this chapter is to explain, for the prospective medical and allied health expert witness, his/her role and the framework in which the evidence is proffered. In so doing every attempt will be made to avoid unnecessary technicality but yet include sufficient statutory and judicial reference to provide guidance and foundation for addressing what is a

practical guideline on what the task requires and how in doing it one can deliver the best results as an expert witness.

Principles of Expert Evidence

It is important that experts appreciate that the exclusionary rule regime for expert opinion evidence, under the common law, extends to them a privilege that is generally not permitted to lay witnesses. That privilege is the giving of evidence in the form of opinions and inferences. That privilege is subject to limitations. In *Davie v Magistrates of Edinburgh* [1953] SC 34 at 40 Lord President Cooper in addressing the limitations stated:

> *"Expert witnesses, however skilled or imminent, can give no more than evidence. They cannot usurp the functions of the jury or judge sitting as a jury, any more than a technical assessor can substitute his advice for the judgment of the court … Their duty is to furnish he judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincingly and tested, becomes a factor (and often an important factor) for consideration along with the whole of the evidence in the case."*

Until recent times the courts had regularly expressed their anxiety about the risks of expert evidence. The principal grounds for judicial concern have been that :

1. Jurors may not comprehend complex, conflicting expert evidence sufficiently well to evaluate it effectively;
2. Jurors may be overborne by the articulateness and impressiveness of expert witnesses;
3. Courts may be deceived by the undisclosed partisanship unrepresentedness and even dishonesty of expert witnesses;
4. Expert evidence may unduly prolong litigation without significantly assisting the trier of fact, be it judge or jury;

5. The relevant juries may be usurped by evidence which trespasses into their domain; and
6. Cross examination may not act as an effective check and balance to these risks.[1]

It is with the above concerns in mind that rules in relation to experts have developed.

Legal Framework

The body of law governing expert evidence falls within the body of law referred to as Evidence. Principles governing evidence have largely evolved from the common law. In recent times an attempt at codification has been made in Australia with the introduction of a uniform evidence code. It has been adopted by the Commonwealth, and the Australian states of New South Wales (NSW), Victoria, Australian Capital Territory (ACT) and the Northern Territory (NT). Adoption is under consideration in other states. It is modelled on the common law. For convenience it will be adopted as the basic framework for this chapter.

Section 79 of the *Evidence Act* provides:

"79 Exception: opinions based on specialised knowledge

(1) 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.

(2) To avoid doubt, and without limiting subsection (1):

(a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual

abuse on children and their development and behaviour during and following the abuse); and

(b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of the kind referred to in paragraph (a), a reference to an opinion relating to either or both of the following:

(i) the development and behaviour of children generally;

(ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences."

The Role of the Expert

It is important to understand the role of the expert. In *Arnotts Ltd v TPC* (1990) 24 FCR 313 at 350 the Full Court (FCA), in considering the question of the role and function of the expert witness, gave particular consideration to the observations of Sir Richard Eggleston, a respected author in the field. The court observed:

"Before dealing with that submission, it is desirable to refer to the accepted general rules as to the functions of expert witnesses. Sir Richard Eggleston's work, Evidence, Proof and Probability (2nd ed, 1983), contains an illuminating discussion of the role of expert witnesses: see, in the second edition, pp145-158. Sir Richard there identifies four separate functions which are from time to time performed by expert witnesses: "generalising from experience, acting as librarian, acting as statistician and acting as advocate." Sir Richard pointed out that not only experts were allowed to generalise; where it was not reasonable to expect a non-expert witness to recount the primary facts underlying an opinion – for example, about the approximate age of a person – the witness is allowed to give evidence in this form of an opinion. But experts constantly generalise from experience, calling in aid all their training

and professional experience in expressing an opinion upon a matter within their field. Sir Richard discussed aspects of that function (at pp 147-148):

> *'Assuming that the matter is one on which only an expert can express an opinion, what sort of opinion may he give, and on what material can it be based? It is often said that an expert cannot give an opinion as to the ultimate fact that the court has to decide. This is inaccurate, as experts, especially valuers, often given evidence as to the ultimate fact, and in many cases the question whether that fact exits can be answered only by experts … What the rule really means is that an expert must not express an opinion if to do so would involve unstated assumptions as to either disputed facts or propositions of law. Thus an expert who says 'In my opinion this accident was caused by …' in a case where the facts are disputed is assuming the right to make a decision as to which of the parties is telling the truth, and is therefore usurping the function of the tribunal. Similarly, if a valuer is called in a case where the unimproved value' of a property is in issue, and there is uncertainty as to the meaning of the term as a matter of law, the expert should not say 'In my opinion the unimproved value is …' without stating on what interpretation of the term his opinion is based. In general, where there is uncertainty of either description, the opinion should be based on hypothetical facts, clearly stated.'*
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> *As to the material on which the expert opinion can be based, just as the non-expert who is allowed to express an opinion does so on the basis of experience, so can the expert base his opinion on his experience, without having to prove by admissible evidence all the facts on which the opinion is based. Accordingly, a valuer can base his opinion on comparable sales of property, without having to call witnesses to prove the facts relating to the sales. An experienced valuer will in the course of a lifetime accumulate a mass of material about sales, from his own practice, from journals, from newspaper reports, and from discussion with his fellow practitioners, much of which he will be unable to recall,*

but which enables him to express an opinion more accurately than one who has examined only the facts regarding the sales in the area. But if he wishes to cite a particular instance to the court, for example, where there is an adjoining property that has recently been sold, evidence must be given by someone who can swear to the facts relating to the sale."

Who is an expert?'

The term, expert, is defined in the dictionary to the Federal Court Rules (Schedule 1) as "*a person who has specialised knowledge based on the person's training, study or experience*". Expert evidence is also defined to mean *"the evidence of an expert that is based wholly or substantially on the expert's specialised knowledge*".

The dictionary defines expert report to mean "*a written report that contains the opinion of every expert on any question in issue in the proceeding based wholly or substantially on that expert's specialised knowledge, including any report in which an expert comments on the report of any other expert*". The definitions refer to the question of inadmissibility provided for in s.79 of the *Evidence Act*.

There are essentially 5 rules that apply to the provision of expert evidence. It is essential to broadly understand these rules to ensure the provision of an expert opinion is not rendered inutile by exclusion for inadmissibility. The rules are:

- the expertise rule;
- the area of expertise rule;
- the common knowledge rule;
- the basis rule; and
- the ultimate issue rule.

The Expertise Rule

Section 79 permits an exemption to the opinion rule to “persons” who have specialised knowledge based on a person’s training study or experience.

This invites an analysis of whether or not the person providing the opinion, the subject matter of the evidence, is providing evidence of fact or opinion warranting the exemption. To illustrate: in *R v Perry (No.4)* (1981) 28 SAWSR 119 scientific opinion evidence was being considered. Cox J. noted that opinion evidence from a psychiatrist, in relation to the diagnosis of a mental condition, and a pathologist, as to the cause of death, depended upon expert judgments and that the views of people informed in those matters might reasonably differ. For that purpose they were experts within context. That was to be contrasted with evidence from an expert analytical chemist. In that case, where a reliable method requiring little if any independent judgment was required to measure the level of arsenic in a person’s blood, any statement to that effect was merely a statement of fact. The witness, in that instance, was not acting as an expert and would not be a “person” in the context of s.79.

Care must be taken in accepting any retainer. The expert must ask him/herself: does this matter truly require the application of personal expert judgment or is the ‘expert’ merely a conduit through whom other facts are being relayed? If the latter, there is a distinct possibility that the person is not an ”expert”, for the purpose of expert evidence in that instance.

Given that most readers of this text will have formal qualifications, the chapter will not address some of the more fundamental issues arising as to whether, or not, a person is an “expert”. The illustration provided in *R v Parry* should serve to highlight the most significant risk area for this topic.

<u>The Common Knowledge Rule</u>

Section 79 requires there be “specialised knowledge”. Courts have refused to receive expert evidence proffered on matters that they have classified as areas of common knowledge, asserting they do not, in such circumstances, require

assistance from specialist witnesses. This rule goes to the heart of the way in which courts inform themselves of matters of fact and the criteria which they apply to draw upon expert opinion to interpret, evaluate and draw inferences from those matters of fact.[2]

The rule is described as one whereby experts' evidence is not "*admissible on a question within the capacity of lay witnesses*": *R v DAR* (Unrpt NSWCA 8 Nov 95). The policy concern is that evidence by an expert of matters within common knowledge may prejudicially enjoy enhanced status: *Transport Publishing Co Pty Ltd v Literature Board of Review*)1956) 99 CLR 111 at 119.

This can be a common problem particularly in the area of psychiatry.

In *Weightman v The Queen* [1991] Crim LR 204 it was held psychiatric evidence was not admissible to tell a jury how a person, not suffering from a mental illness, is likely to react to the stresses and strains of life.

The field of psychiatry and psychology has always been problematic. The requirement that expert testimony be outside the experience and knowledge of the ordinary jury has generally been translated to mean that experts can only testify on the "abnormal".

The leading Australian authority is *Murphy v The Queen* (1989) 167 CLR 94.[3] It is accepted if the evidence is within the ordinary understanding and expertise of the jury expert evidence will be inadmissible.

Expert evidence is not admissible to prove those matters that are acceptable under current community standards.

The rule was succinctly stated by Pincus J in *E v Australian Red Cross Society* (1991) 105 ALR 53 at 87-88 where he adopted the view of Doyle Q.C. in his article, Admissibility of Opinion Evidence (1987) 61 ALJ 688 at 692, stating:

"If the subject matter is one on which the average man is capable of forming an opinion unaided by expert evidence, then the expert evidence is inadmissible. In the area of common knowledge there are no degrees of expertise. The test seems to be not whether the opinion of the expert would assist, but whether the judge or jury is capable of forming an opinion."

The Area of Expertise Rule

Section 79 permits the exemption to the opinion rule only if the person has specialised knowledge "*based on a person's training, study or experience*".

For many medical and allied health practitioners this matter should not be in issue. Formal qualifications and training will adequately equip them to satisfy this criterion. This is a live issue in expansive new frontier areas of medical science. The established approach of courts was stated by King CJ in *R v Bonython* (1984) 38 SASR 45 at 46 – 47:

"Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of opinion falls within the class of subjects upon which expert testimony is permissible. The first question may be divided into two parts:

(a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and

(b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court.

The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court."

It follows that if those conditions can be satisfied then the question becomes one of weight.

If an expert is engaged to provide evidence in a frontier area it is important that any report clearly addresses the expertise matters.

The Basis Rule

Once the preconditions of s.79 are addressed the next issue concerns the factual context upon which an expert is called to express an opinion. The basis rule is formulated in Phipson on Evidence (1990) para 32.14 as follows:

"An expert may give his opinion upon facts which are either admitted, or proved by himself, or other witnesses in his hearing, at the trial, or are matters of common knowledge; as well as upon an hypothesis based thereon. An expert's opinion is therefore inadmissible as to material which is not before the court, or which may have merely been reported to him by hearsay."

The difficulty that commonly arises concerns how strictly this rule ought to be applied. Doctors regularly form and express views which have their genesis in tests done by other doctors or technicians or following discussions with colleagues and information provided by relatives and friends of patients. If every fact so considered had to be strictly proven, to render an opinion admissible, considerable practical difficulties would be presented to both parties and the courts.[4]

As a rule of convenience, courts have not tended to insist upon the proof of extrinsic materials, customarily employed by experts, to perform their work. That includes an understanding obtained from the use of professional libraries,

knowledge acquired in the discharge of professional duties and the use of data in authoritative publications.[5]

There has also been some latitude afforded based upon the nature of proceedings. A stricter approach will be taken if the evidence is to be provided in a matter before a jury rather than in a matter before a judge alone hearing.

Despite greater latitude being afforded to the strictness of rules in a civil proceeding, if the hearsay or secondary evidence has greater forensic value, the failure to prove such basis evidence could be fatal. In *Sych v Hunter* (1974) 89 SASR 118 at 119 Brazey J excluded evidence based on what a psychiatrist had learned from the plaintiff's mother who was not called. In ruling he said:

> *"I can understand how desirable it may be in a scientific sense for the psychiatrist to acquaint himself with the opinions, the attitudes, and the personalities of the patient's close relatives and friends, but it cannot be too clearly emphasised that from the point of view of the law, or this, if it takes place in the parties' absence, is hearsay or opinion founded on hearsay and has to be excluded in justice to those who have no opportunity of testing it."*

The position is as was stated by Miles CJ in *Forrester v Harris Farm Pty Ltd* (1996) 129 FLR 431 at 438 where his Honour noted:

> "*It is a trite principle of evidence law that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a substratum of facts, which facts are proved by the evidence in the case, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof. Whether or not the expert believes in the substratum of facts or knows them to be true or is satisfied that they are true, is completely beside the point. The expert's function is to express an opinion based on assumed facts, not to express a view on whether the assumptions are justified."*

It is accepted that the proved facts need not correspond with complete precision to those which are relied upon by the experts. See *John Holland (Constructions) Pty Ltd v Paric* (1985) 59 ALJR 844 at 846.

Some matters cannot realistically be the subject of direct evidence. From a practical perspective, courts generally do not require any significant account of a expert witness's knowledge acquired in the course of professional training or experience to be proved. It is important to note that where an expert refers to articles and other learned writings, to explain or justify his/her opinion, such should then be referred to in such a way "*that the cogency and probative value of their conclusions can be tested and evaluated by reference to it*"; *R v Abadom* [1983] 1 WLR 126 at 131.

It needs to be understood that, even if opinion evidence without a basis is initially admitted, then without such foundation it ultimately will be inutile. If the basis evidence is introduced then strength, reliability or otherwise of that basis evidence merely goes to weight which might be afforded the expert evidence dependant upon it.

As an expert, there is a role to be played in advising on what secondary matters, referred to by such expert, ought be strictly proved or addressed. Consideration must be given to whether the material referred to is of the kind that might reasonably require testing or critical review from the perspective of the other party.

<u>The Ultimate Issue Rule</u>

A common law exclusionary rule, of expert evidence, provides that an expert witness may not give evidence about a matter which is the "ultimate issue".[6]

This rule is becoming clouded with the expansion of scientific knowledge, particularly in the field of social sciences. As Parker CJ noted in *DPP v A & BC Chewing Gum Ltd* [1968] 1 QB 150 at 164:

> *"[W]ith the advance of science more and more inroads have been made into the old common law principles. Those who practice in the criminal courts see every day cases of experts being called on the question of diminished responsibility, and although technically the final question "Do you think he was suffering from diminished responsibility:" is strictly inadmissible, it is allowed time and time again without objection".*

That is to be distinguished from the situation where, a psychiatrist may not be asked to or express an opinion about the guilt or innocence of the accused. The question of whether, at the relevant time, the accused acted voluntarily and with the necessary intent is properly a question for the jury.

The position postulated by Parker CJ doesn't inhibit permissible expert opinion as to status of insanity, diminished responsibility, capacity to form intent and fitness to plead: see *R v Tonkin* [1975] Qd R 1 at 18.

The policy object of the rule is to ensure the jury is not overwhelmed by an expert's expression of opinion which assumes a certain set of facts which is in contention or does not, of itself, clearly enough disclose its basis.

<u>Common Issues for Expert Witnesses</u>

Accepting that the expert addresses the essential matters required by the legal framework to qualify as an expert and report an expert opinion to a court or tribunal there are some matters warrant comment from a practical perspective.

In my view there are five critical factors to be addressed in this context:

1. identification of recognised problem areas;
2. an appreciation of how decision makers make decisions;
3. an appreciation of the expert's need to be objective;
4. the significance of the report format; and
5. the importance of presentation before a Court or Tribunal.

Problem Areas

Five common problem areas exist in the delivery of expert evidence:

1. Bias among forensic experts;
2. difficulties of comprehension of expert evidence;
3. experts exceeding the parameters of their expertise;
4. unresponsive answering of questions by experts; and
5. failure to prove the basis of expert opinions.

Bias

The problem of bias, among forensic experts, was summarised by Sperling J in his article, "Expert Evidence: The Problem of Bias and Other Things"[7] where his Honour stated:

> *"The actual role of the expert witness, particularly in major litigation, is that the expert is part of the team. He – it is usually a "he" – contributes to the way the case is framed and indirectly to decisions as to what evidence is to be got in to provide a basis for his opinion. His report is honed in consultation with counsel. Then, when it comes to the trial he is a front line soldier, carrying his side's argument on the technical issues under the fire of cross-examination.*
>
> *Natural selection ensures that the expert witnesses will serve the interests of their clients in this way. If the expert measures up he will be kept on and he will be used again by the same client, the same solicitors and others. If he does not measure up, he will be dropped from the case or never used again by anyone. He then disappears from the forensic scene.*
>
> *An appearance of objectivity is a marketable attribute. Cross-examination or contrary evidence may unmask dissemblance or may not. A judge is ill-equipped to diagnose bias in an expert witness. It is likely, therefore, that the*

incidence of bias as assessed by surveyed judges in the Freckelton report is an under-estimate.

Judges are interested in valid fact-finding. So long as the adversarial system continues unremittingly, however, the interests of the litigants in presenting expert evidence that may win the case will prevail over the interests of judges in obtaining objective assistance on technical issues as a basis for valid fact-finding."[8]

His Honour's observations commence by acknowledging the risk associated with experts becoming "too close" to their clients. This can occur both consciously and unconsciously. Consciously it may occur because of the commercial interests of an expert witness in securing an ongoing source of referrals. That is risk of permitting his/her professional judgment to be clouded by the prospect of commercial advantage. The risk of this is heightened in cases where an expert's subjective views can reasonably colour an objective opinion. Subjective cultural or social views concerning the robustness of a subject, although honestly and reasonably held by an expert, might interfere with an assessment, as commonly arises when addressing of an individual's reasonable pain threshold. It is not uncommon for differences in respect of such subjective matters to impact an expert opinion notwithstanding a common diagnosis of the underlying organic injury. Care must be taken to ensure that such subjective biases are identified and reflected upon by an expert. The most valuable characteristic an expert possesses is an unqualified acceptance of his/her impartiality. Courts recognise that opinions are often influenced by subjective factors. An unreasonable perseverance with an unreasonable view will quickly lead a judge to be concerned of bias by the expert.

The risk of becoming too close to the client is particularly difficult in fields where experts are routinely called upon to provide expert evidence. It is this very mischief which is addressed by the Federal Court of Australia Practice Note CM7 Expert Witnesses and Proceedings in the Federal Court of Australia which is appended to this chapter. As guideline 1 provides:

"Guidelines

1. *General duty to Court.*

1.1 An expert witness has a 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 of value to rather than inferential.
1.3 An expert witness's paramount duty is to the Court and not to the person retaining the expert".

The expert's role is that he/she be an advocate for his/her opinion but not for the client or even the expert himself or herself. This is a subtle but real distinction.

The question of independence often arises in the medical context because a treating practitioner may frequently be a principal expert in litigation concerning his/her patient. The fact that a prospective expert has that connection should not ordinarily preclude the reception and weight of the expert testimony. That fact may bear upon the evaluation of such evidence by the decision maker. Partisanship alone is not a basis for rejecting expert evidence: *Smithkline Beecham (Australia) Pty Ltd v Chipman* (2003) 131 FCR 500.

<u>Comprehension</u>

A common failing of experts is the use of jargon and acronyms which import an assumption of peer review. It is important for experts to remember the audience to which their evidence is directed. The audience includes not only other experts who, it is assumed, will have the same level of knowledge and to whom jargon and acronyms will not present any challenge but more importantly the other parties relevant to the issues in dispute. Those parties include the decision maker, the engaging lawyers, the opposition lawyers and their respective clients. Each of those parties will bring to bear a differing level of appreciation and understanding of technical jargon and acronyms incorporated in the expert's report. An expert

should give consideration to this issue at the outset so that a consistent approach is applied, not only through the written report but also through the giving of oral evidence. If a technical term is apposite it ought be engaged. Otherwise it is better to adopt generic and lay terms to facilitate clear expression and understanding. This rule ought apply to both spoken and written expression. Frequently an expert's testimony is confused by the use of complicated language. Although expert testimony has to withstand peer scrutiny, the ultimate objective is to clearly communicate in plain terms the expert's message to the lay person who would generally constitute the Court or Tribunal and the parties and their representatives. This should be the ultimate aim of an expert giving expert evidence.

When using jargon, one should attempt to use it in a manner that readily can be comprehended. Terms employed should have a common and readily assessable meaning by reference to a technical publication. If a term enjoys a nuanced meaning or has a colloquial meaning, the term should be defined when first used, either in a footnote or the report.

Exceeding expert parameters

A common difficulty with expert evidence is that the professional expert seeks to exceed the bounds of his or her specialised knowledge.

In the field of medicine there are many specialties. Although there are many specialist fields in medicine that does not disqualify an appropriately qualified medical practitioner, by reason of his training, study or experience, and assuming he/she is able to, from expressing a view, upon a subject relevant to medicine. It would not be necessary to adduce evidence from a haematologist concerning the interpretation of a pathology report commonly ordered and reported to a general practitioner. Were a dispute to arise, concerning the interpretation of such a report, it is more likely than not that the opinion of the more highly specialised expert would be preferred to that of the more generalised expert. The days of "all purpose" expert are now largely behind us. The question of whether the expert witness is to be permitted to testify, in the form of opinions, is largely one of

sufficiency and relevance of the expert's specialised skills rather than a mater governed by strict definition. As Ormiston JA held in *R v Noll* [1999] VSCA 164 at [3]:

> *"Professional people in guise of experts can no longer be polymaths: they must, in this modern era, rely on others to provide much of their acquired expertise. Their particular talent is that they know where to go to acquire that knowledge in a reliable form".*

That, of itself, does not permit the so called expert to simply act merely as a "librarian", thereby being a conduit for the work and opinion of others whose works and opinions cannot be tested in cross examination and subject to proper evaluation by decision makers.[9] Often times, the point of demarcation is difficult to identify. Once the expert ceases to apply his/her expert skill, knowledge and experience and becomes a mere "librarian", the effect is the expert ceases to be.

When experts trespass beyond their field of expertise, that can detract from the discipline of confining evidence only to relevant matters. If this occurs, the opposing party may seek to address such a trespass by calling contrary evidence or, if necessary, by objecting to that part of the report. In either event, the effect is to distract the Court from the substance of the report and possibly undermine the credibility of the expert.

The point of demarcation is often difficult to identify. Often there is no clear line in the sand, between what is within the ambit of the expert's specialised knowledge and related matters which of themselves require some specialised knowledge but are not necessarily within the specialised knowledge of the expert. It will always be a matter of judgment but it is important for an expert to be conscious of these matters when giving evidence.

<u>Non-responsive answering by experts</u>

Experts need to avoid jargon, acronyms and difficult language. Whilst the use of such language, by an expert, might well be justified that language can often also be symptomatic by attempts at obfuscation by experts. The non-responsiveness to questions by experts is usually sourced in a lack of objectivity; suspicion of the intent of the cross examiner; ego; or fear of the adversarial system, being a concern that the expert may not be permitted an opportunity to explain his or herself.

An expert must understand that the purpose of cross examination is to test the evidence. Testing often requires an expert to consider alternative hypothesis or hypotheses. Such an alternative is generally based upon a differing or slightly varied factual scenario advanced by the other party. Cross examination is generally particularly directed to ascertaining whether those variations would impact upon the overall opinion or any part of it. Sometimes, an alternative hypothesis is based upon a differing technical assessment. Effective cross examination will quickly reveal an expert who seeks to obfuscate. The basis for obfuscation may be somewhat more difficult to discern. In the eyes of a decision maker, obfuscation is a telling sign against a witness. If an expert witness lacks objectivity that will be a relevant matter for the decision maker. If the ego of an expert is such that appropriate concessions cannot be made or a dismissive approach is taken to the evidence of another expert, without a reasonable and grounded explanation, that too may raise doubt in the mind of the decision maker as to the objectivity of the expert.

Suspicion of the intent of a cross examiner or fear of the adversarial system should not, of themselves, occasion concern. At best a cross examiner may introduce to an expert a consideration or perspective which had not been previously considered by the expert. Remembering that the expert is not an advocate for the party by which he or she has been engaged, the only real challenge of such cross examination is to require an expert to extemporise an opinion on a matter which may not have been previously the subject of due consideration. If an expert has been properly briefed, and has appropriately

considered the subject matter under consideration, it is unlikely that any hypothesis contended for in cross examination will come as a surprise.

In the course of any proceedings, and long after an expert has been briefed, different or varying factual scenarios may come into evidence. More often than not, the unusual and surprising twists, which may appear at the point of cross examination, are the product of the evidence that has fallen from the witnesses during the course of the trial, rather than being based in the sanitised instructions presented to an expert in the brief in the course of preparation. The expert's role is not to justify his or her earlier opinion on the basis that it is immutable but rather, and if necessary, to tailor the opinion to any other alternative hypothesis that might be proffered. It is a question for the Court to determine what primary facts it finds and the consequences of those facts, based upon the expert testimony. There is no proper justification for suspicion of the intent of the cross examiner. If the cross examiner steps out of line, that is a matter for the Court and for opposing Counsel but not one for the expert.

The next fear of an expert is that of the adversarial system. Experts express concern that they will not be permitted to explain themselves. It needs to be recognised that experts, in particular medical experts, are treated with deference by Courts and Tribunals. Although decision makers are reluctant to descend into the arena and engage in the adversarial process, they are also anxious to ensure they understand the nature and import of the evidence being adduced. They are conscious of the need to obtain the assistance of the expert, in dealing with an assessment of the various hypotheses that may be evident, based upon the competing evidence of the primary witnesses. Decision makers are conscious of the need to have experts assist them in understanding the points of difference and the basis for the points of difference between competing experts. Some decision makers are more assertive and intrusive than are others in their engagement with experts. Even if the relevant decision maker does not actively intervene in the process, at the conclusion of cross examination the relevant expert's Counsel has an opportunity of re-examination. If an expert feels, at any time, that he or she is being shut down in cross examination all that expert need do is note that he or she

would like to add to his answer. If the cross examiner does not permit that to occur, and the relevant decision maker does not invite the expert to address that matter immediately, then such a remark will alert opposing Counsel to the need for re-examination. If Counsel fails in that regard that is a matter for Counsel, not the expert.

Failure to prove basis of expert opinion

Difficulties with expert evidence often arises because of a failure, by an expert, to establish the basis for his or her opinion in the manner as may be demonstrated in the “basis” rule. It is not uncommon for an expert to be inadequately briefed at first instance. If that occurs, it is essential that an expert request the provision of such further factual, or other, material as is necessary to establish the factual foundation for an expert opinion. Factual deficiencies should never be skated over.

The circumstances of the case may be such that an essential fact will not be founded in any evidence but based upon an assumption. In a case, where there has been pre and post traumatic amnesia, a witness may be unable to provide express instructions on the manner in which an accident occurred. That may lead to the need for assumptions to be made about such things as whether or not a witness was wearing a seatbelt, the position of a witness at the time of the accident, such as leaning forward. Such assumptions might be critical to an assessment of the nature of an injury or of its cause. Where assumptions are made, it is important the expert clearly express those assumptions. Assumptions bear particular importance because they might require the consideration of other experts with a view to either providing a stronger foundation for the adoption of the assumption or its dismissal. In that sense, these matters are as important for the experts as they are for the lawyers who brief them.

The decision makers

The relevant decision makers will be the judicial officers, arbitrators and/or Tribunal members and adjudicators. In the context of this chapter the position of

experts appointed to do expert determinations, such as occur before various Workers Compensation Tribunals, will not be examined.

It is important to understand what type of decision maker will be presiding, when addressing the provision of expert evidence. It is helpful to appreciate that the higher up the judicial chain the more likely the base knowledge and/or appreciation of technical issues diminishes. Most judges by training and professional experience have only ever been lawyers Tribunals, arbitrators and adjudicators may include people with a technical background. Sometimes they sit together, as with the Health Practitioners Board or the Veterans Review Tribunal which comprise a judicial or legally trained officer and medical assessors.

Decision makers will generally have expertise in determining conflicts of fact but may have only limited experience in resolving conflicts of a technical nature. It is for this reason that there is the need to carefully consider the tone and language of expert evidence, to ensure that the message is clearly communicated.

It is safe to work upon the presumption that a decision maker will not have an expert's knowledge or experience on the subject matter. It is this very matter which invites the exception in s.79 of the *Evidence Act*. Decision makers will look to an expert to assist him/her in understanding and appreciating the relevant underlying facts and their requirement within the framework of the expert's opinion. It is for this reason that cross examination of an expert commonly focuses upon the bearing that differing facts might have upon an opinion. Such cross examination is not intended as an attack on the opinion of the expert but rather to tease out of the expert the effect such a variation of facts would have upon the expert's opinion. Judges are attuned to the object of cross examination and generally pay close attention to it for that reason.

It follows that because decision makers have no subject matter expertise they are generally reluctant to take experts on in their field of expertise. Decision makers will look for the assistance of experts in addressing the conflicting hypotheses that are put forward in the course of any proceeding. That will be irrespective of

whether the conflicting hypotheses have a basis in the fact or theory. Experts need to be attuned to a decision maker's interest in such matters as the ultimate role of an expert is to assist the Court or tribunal in determining those issues and not to act as an advocate for his or her retainer.

An expert should be prepared for the decision maker to seek multiple expressions of opinion, based on prospective factual outcomes, in the event that such matters are not addressed by parties in the course of the proceeding. The nature of inquiry, coming from the bench, can assist in informing an expert in whether the expert's message is being conveyed. Many judges are active listeners and will seek to rephrase a complex concept in layman's terms to ensure they have correctly observed and understood the evidence. Such intrusions are intended to be helpful to the expert. They are designed to elicit feedback from the expert to assure the decision maker that he/she has a fair comprehension of the expert evidence being proffered. Comments from the bench might alert an expert to the prospect that the message is not being received. If so, another attempt at explanation might be warranted.

It is also necessary for the expert to understand that his or her evidence is but one part of the puzzle. Each of the parties, to a proceeding, will be seeking to establish underlying facts. The factual scenario presented by one party, or the other, will ultimately represent the best case scenario for that particular party. That is a factual scenario which it will urge upon the decision maker. The decision maker is not bound by either party's preferred version of evidence. It is not uncommon for a decision maker to accept some, but not all, of one party's version and reject some, but not all, of another party's version. The trial becomes something of a matrix with the decision maker intervening to dissemble the findings advanced by each particular party, following its own assessment of the evidence. It is most important that the expert witness be prepared to address his evidence, allowing for any number of possible scenarios, and particularly those which may follow upon the inquiries by the decision maker.

It is helpful to understand how decision makers process the information produced by way of evidence. In addressing expert evidence, the decision maker first makes findings of fact. It is against those findings that it then seeks to apply the expert knowledge. Frequently it is relatively straightforward, simply involving the wholesale acceptance of the version of one party or the other. The expert must appreciate that the core business of a decision maker is the underlying fact finding process. Experts need to be flexible because the basis, upon which the expert opinion was initially sought, may not prove to be correct. An expert must be prepared to express multiple views, based on differing facts or, if appropriate, to express the view that some facts may be implausible.

Once the facts have been ascertained, the next step requires their assessment, against the expert's field of expertise. It is important for the expert to appreciate that, unless he/she is alive to this process of analysis, his or her opinion may be rendered nugatory by reason of a failure to sensibly address prospective hypothesis which are put in cross examination or by the expert simply failing to address a fact which is material to the outcome.

The Report

The report format is an essential part of the delivery of the expert's evidence to the Court. It should be appreciated that the experts report, if well done, provides more effective advocacy of an expert's opinion than any later oral testimony. It will probably be seen by the decision maker long before the expert provides oral testimony. It will set an agenda for the provision of oral testimony, it will highlight other facts in the case which may be in issue and which require consideration and it will be before the decision maker, in the same form, at a later time when he/she is deliberating the issues.

Before proceeding to examine stylistic matters, relevant to a report's presentation, there are some formal requirements. The Federal Court practice direction[10] requires an expert report must comply with Federal Court Rule 23.13 and therefore must:

(a) be signed by the expert who prepared the report;
(b) contain an acknowledgement at the beginning of the report that the expert has read, understand and complied with the practice note;
(c) contain particulars of the training study or experience which the expert has acquired specialised knowledge;
(d) identify the questions that the expert was asked to address;
(e) set out separately each of the factual findings or assumptions on which an expert's opinion is based;
(f) set out separately from the factual findings or assumptions each of the expert's opinions;
(g) set out reasons for each of the expert's opinions; and
(h) comply with the practice notes.

The practice note also requires that the experts state that the matters of opinion are wholly or substantially based upon the expert's specialised knowledge and it requires the expert to declare that he has made all reasonable enquiries that he believes are desirable and appropriate and that no matters of significance that are relevant to the expert's knowledge have been withheld from the Court. The report should also contain, as an attachment, all that material which has been referred to or at a minimum a bibliography of references if that material is voluminous.

If an expert's report appropriately addresses the matters required by the practice direction, then many of the difficulties which confront experts, in the provision of their reports, should be avoided. The most common cause for difficulty are the facts and/or assumptions made by experts in the provision of the report. Common experience establishes that it is most infrequent that experts of equal quality, informed of the same basic facts, come to different conclusions. Sometimes that may occur, in an area of controversy where subjective factors relevant to an expert opinion have their foundation in cultural or social factors. Those matters aside, it follows that where experts of common experience are provided common information, they produce opinions that are generally in agreement.

The general cause of disagreement between the views of two competing experts falls to be resolved by reference to the question the expert is asked or the questions of fact and/or assumptions that are imported into the opinion making process. It is for this reason that an expert clearly and faithfully should relate both his/her primary instructions and the essential facts relevant to the expression of the opinion. It is also essential that an expert identify the assumptions which he/she regards as material to the expression of the opinion and, if possible, the basis for such assumptions. If the instructions are considered in adequate or ambiguous then the expert should consult his/her retainer and seek clarification. Commonly instructions to experts are the subject of discovery and they can provide an effective weapon for use in cross examination if they reveal a flaw in thinking related to the retention of an expert or the instructions upon which the expert is expected to report.

The Letter of Instruction

The letter of instruction is an important document. It articulates what the expert is required to do. The letter may include not only statements of fact but also documents. Care must be taken to fully appreciate the nature and ambit of the letter of instruction and any supporting documents provided. These documents are discoverable and are closely scrutinised when a contest arises in respect or expert evidence.

The Basis for Dispute

Some experts become quite defensive when presented with a contrary opinion. A contrary opinion can be founded in the contrary instructions, provided to the opposing expert. The fact that an opposing expert may be presented, with a contrary set of instructions, should not occasion any difficulty to an expert truly acting within that capacity. That is the role of the expert, namely to assist the Court by providing an opinion or series of opinions based upon the facts as presented. Experts, when presented with opposing facts, may be keen to draw conclusions as to the truthfulness or accuracy of an opposing set of instructions. That is not the

expert's role. That is a role for the Court and, for an expert to engage in the task of commenting upon the reliability, truthfulness or otherwise of an alternative set of instructions, is beyond the scope of the expert. An expert may, by reason of the alternative hypothesis put, be able to suggest a basis for its implausibility. Such a matter must be handled carefully, in order to avoid creating the impression in the mind of the Court or Tribunal, that the expert is engaging in an adversarial manner rather than merely as a witness.

The same applies for assumptions or presumptions. Sometimes facts will simply not be available and experts will be called upon to rely upon assumptions and presumptions. Except in those unusual cases, where an expert can demonstrate there is no basis for such an assumption or presumption, an expert should be cautious not to fail to address the alternative hypothesis, otherwise it may leave it to the other party to successfully argue before the Court that the relevant assumption or presumption ought be accepted.

The expert must appreciate in this context that if a fact, assumption or presumption is not accepted by a Court then in the absence of those matters the expert's opinion is likely to be afforded no weight.

Content of Report

In preparing a report, it is helpful to draft the report using neutral language which would permit the expert to express an alternative view, based upon an alternative hypothesis. Such an approach avoids the risk of an expert presenting as an entrenched witness, intransigent in his/her views and not willing to concede an alternative hypothesis, even in circumstances where he/she is justified in that stance. It is for that reason that the cited approach is adopted by most decision makers, in assessing expert evidence. They will carefully examine the facts and make findings of fact and then look to the expert opinion which addresses those factors. Even with the most complex matrix of facts, a dispute generally comes down to one or two points of difference. A good expert will be one who is seen to

be able to express alternative views, based upon the alternative hypothesis that presents on the points of difference between the litigating parties.

Where possible, it is desirable that a report address all hypotheses which are advanced. In that case, the expert addresses the view which would follow on the acceptance of one parties case and the view which would follow on the other parties case.

If this is done in the report, it enables the court/tribunal and the parties to equally focus on the points of difference and enhances a closer examination, at an earlier time, of the issues. Such an approach also demonstrates that element of flexibility decision makers look for in an expert and thereby serves to enhance the general credibility of an expert as not just an “opinion for hire”.

If the point of difference, between the experts, resolves into a genuine difference of opinion, notwithstanding an agreement of fact, then that part of the expert’s report which addresses his or her specific training and experience becomes critical. On a point of difference, between two experts examining an injury to a hand, an orthopaedic surgeon specialising in that particular limb is more likely to be preferred to a general orthopaedic surgeon on the points of any difference.

It is worth making some observations about engaging the assistance of counsel or solicitors in settling reports. In *Whitehouse v Jordan* [1981] 1 All ER 267 at 276 Lord Wilberforce warned:

> *“While some degree of consultation between experts and legal advisors is entirely proper, 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. To the extent that it is not, the evidence is likely to be not only incorrect, but self defeating.”*

Some assistance can be obtained by engaging the assistance of lawyers in settling a report. Upon review, inadmissible material may be excluded. Care must be taken to ensure the opinions remain those of the expert. Drafts, of reports, are discoverable in some jurisdictions and material changes, in expression or opinion, may expose an expert to attack, particularly if they reveal evolutions of a report, including changes in thinking and perhaps the basis for that change.

The Curriculum Vitae

It is important to ensure that, as an expert, the curriculum vitae attached to the expert's report not only addresses the basic qualifications from the relevant universities and medical colleges but also additional courses and programs of study which were undertaken; papers and presentations to peer review professional bodies; training with reference to specific medical establishments, if those establishments and the personnel administering them have some particular standing. This document should be constantly updated and, at trial, the updated version should be available, particularly if there is going to be a contest based upon differences of professional judgment.

Draft Reports

In many jurisdictions, for instance Queensland, draft reports are no longer privileged. Care must be taken in the preparation of any report, particularly if there is concern about the adequacy of instructions, including relevant material facts required to express a tentative or final opinion. If instructions are inadequate, or if for some reason issues arise following a presentation of a person for assessment, it is better not to express any view but rather require the provision of further material or the making of further enquiries. The proper and formal documentation of those matters may further enhance the opinion expressed by an expert because it demonstrates the care taken to identify and consider relevant factors or where assumptions are made those assumptions.

The material facts are usually a distillation of all the material presented. Only those facts, essential for the expression of the expert opinion in the report, need be related prior to the analysis stage. At this point, the report should explain why the conclusions are derived. This part of the report involves the synthesis of fact and opinion, highlighting the reasoning process concluding with the opinions provided. It also flags the relevant facts, matters which the expert considers may, or may not, be in issue and the relevant expert material which may, or may not, be in issue, which when combined provides the result.

Although this chapter presents that process in a somewhat more simplified fashion than occurs in practice, the fact remains that if a contest between two experts has to be resolved by reference to a Court or Tribunal, that, of itself, is not expert, it will seek to resolve the conflict by ascertaining and addressing the points of difference. Factual differences present an easier basis for distinction than do technical differences. If technical differences provide a basis for distinction, and there is no reasonable professional basis presented to differentiate between the views of two experts, then the clarity of reasoning will often determine the point.

In the process of writing a report, it is important to remember the audience. It applies with equal force to both oral and written testimony. Sentences should be kept short and succinct and written in plain language Where possible, the expert should seek to use common terms. If appropriate, there should be a “glossary”, if there are a large number of technical terms or acronyms employed. If there is any concern about misinterpretation of a common term, the expert should provide some discussion, perhaps in a footnote, so that the reader of the report is not unnecessarily distracted by arcane technical discussion, in respect of a point of language used in the course of discussion of a substantive topic. The expert is advised to use paragraphs to break down common subjects. If common subjects themselves are convoluted, it may be beneficial to use subparagraphs. Wherever possible use of headings assists in reading of reports. Even the comprehension of a short report is enhanced by the use of common headings such as “Introduction”; “History”; “Clinical Examination”; “Discussion”; and “Conclusion”.

The use of headings is particularly important if the expert is providing the first report. The use of headings enables the expert to establish the agenda for the later evidence of the relevant parties. If the expert uses headings, it is likely that the subsequent report writers, in reply, will adopt the same heading format. Not only do headings then enhance the general comprehension ability, for those reading conflicting reports, by bringing order to diverse issues, but it assists in responding to the reports that are produced in response to the first report. If the first report addresses matters under a certain heading, and those headings are adopted, then matters in reply are more readily confined.

An Executive Summary, at the commencement of the report, may also assist. Use of an appropriate type face (sans serif) and font (point 12 – 1 ½ line spacing) makes the report readily readable, as does numbering of the paragraphs. This makes it much easier for all to follow, particularly when being cross examined about a lengthy report.

Medical/Confidence & Immunity

The matter of duty of confidence requires some comment. The evidence of an expert is not privileged and it is not protected from scrutiny by the other party. There is no strict right to refuse disclosure of matters, before a court, on the basis of a confidential relationship: *Hunter v Mann* [1974] QB 767. No advice or litigation privilege will generally arise in the context of the retention and provision of expert medical advice for litigation purposes.

There is no property in a witness and, despite being an expert, the expert is simply a witness. Usually matters, addressed in an expert report, will include matters which may ordinarily be the subject of medical professional confidence. That confidence is impliedly waived by the engagement of the expert to report on such matters for the purpose of litigation. No legal professional privilege will apply to any document obtained or created by an expert in the course of preparing an expert report for a party to a proceeding: *Interchase Corporation Ltd (In liq) v Grosvenor Hill (Queensland) Pty Ltd (No.1)* [1999] 1 Qd R 141.[11]

As an expert witness, the expert is free to speak to people representing either side of the record. Upon being approached by the “other side”, a failure to reasonably engage may have the expert open to attack, on the basis of demonstrated partiality. There is no compulsion to speak or deal with the other parties’ lawyers but it is a risky strategy to adopt an exclusive approach and keep access solely for one party.

Evidence, as an expert witness, is exempt from action for professional negligence and, to that extent, the expert witness enjoys privilege: *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [19]. Initially, the immunity existed only in respect of oral evidence but it is now accepted that immunity also extends to reports, affidavits and other statements made preliminary to giving evidence in court. See for instance UCPR (Qld) at 4292.

Conclusion

The duty and responsibilities of giving professional expert evidence are taxing. The outcome of proceedings can fall to be resolved by the favourable reception and consideration of an expert report. Prospective expert witnesses should understand the basic technical framework governing the proffering of their expert opinion. An appreciation of those basic principles will better inform the report produced. That outcome will also be a by product of a more deliberately considered and clearly expressed report. A report, technically well founded, structured and considered, as well as clearly expressed, will serve the additional advantage of preparing the expert witness for the ultimate trial for an expert, cross examination.

Michael Burnett[12]
August 2012

End Notes

[1] Expert Evidence Law, Practice, Procedure and Advocacy, 4th Edition, Freckelton & Selby, Thompson Reuters 2009.
[2] Freckelton & Selby at pg 76.
[3] The case concerned the trial of one of the Anita Cobby murderers. Murphy was a man of limited intellectual capacity and issues arose concerning the bearing of that fact upon voluntaries of confessions.
[4] Freckelton & Selby at pg 111.
[5] Freckelton & Selby at pg 112.
[6] Freckelton & Selby at pg 132.
[7] (2000) 4 The Judicial Review 429 at 432.
[8] While his Honour's remarks are addressed generally they apply with equal force in the area of expert medical evidence.
[9] Freckelton & Selby at pg 18.
[10] Most courts and tribunals now have Practice Directions governing the report format. Guidance should be sought by reference to the appropriate forum's practice guidelines.
[11] See also discussion *Australian Medical Law,* J.A. Devereux 3rd Ed Routledge – Cavendish 2007 at p 969 – 976 and *Expert Evidence: Law and Practice*, Hodgkinson and James, 2nd Ed, Sweet – Maxwell, London 2007.
[12] B.Econ LLB LLM MBA. A former barrister, he practised in Queensland particularly in the construction field for 22 years before appointment to the Federal Magistrates Court of Australia. He also held appointments to various tribunals, was a graded arbitrator and adjudicator and holds the office of Deputy Judge Advocate General, Air Force, (ADF).

Further reading

Expert Evidence, Advocacy Law & Practice, 4th Edition, Freckelton & Selby, Thompson Reuters 2009

Australian Medical Law, J.A. Devereux 3rd Ed Routledge – Cavendish 2007

Expert Evidence: Law & Practice Hodgkinson and James, 2nd Ed, Sweet – Maxwell, London 2007

Key Words

Medical expert witness
Report writing
Expert opinion evidence
Judge
Cross examination
Bias