

Expert Evidence

Presentation to the AAAC Professional Development Workshop

Thursday 13 May 2010

Introduction

Although the use of expert opinion evidence is commonplace, the appropriate relationship between the lawyer and the expert they engage is often not well understood by either the lawyer or the expert. In this presentation I will endeavour to provide you with the legal reasoning and framework associated with the engagement of expert witnesses. I hope this will provide you with an understanding of some of the seemingly peculiar behaviours of lawyers when they retain experts in litigation.

What is an expert witness?

An expert witness is a person whose evidence is not confined to facts observed but whose opinion evidence is received by the Court as admissible evidence of the opinion given.

Section 76 of the *Evidence Act 2008* (Vic) states the general rule regarding evidence as follows –

Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

Expert opinion evidence is an exception to this general overriding rule, section 79 states –

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 ultimate purpose of expert evidence is to provide reliable material upon which the Court or Tribunal can rely in the resolution of a dispute. The essential element that grounds the use of such evidence is the need of the Court or Tribunal for assistance in a particular discipline or field.

An expert should not be drawn into emotional or unsubstantiated claims by clients (or their legal representatives) and should only deal with matters of fact that are relevant to a claim, dispute or matter at hand. The expert should only deal with facts that he or she can substantiate as a result

of thorough investigation and must show all documentation that has been used to arrive at a conclusion.

Generally experts have a broad range of knowledge, but must work within the area of their expertise. He or she cannot be an expert on all matters. Where matters are outside of the expert's expertise, they should reference that part to a suitably qualified and experienced expert in that particular area.

Rules governing expert evidence

The admissibility of expert evidence is strictly controlled both by legislation¹ as seen above and by expert witness codes of conduct² (copies for the Supreme Court of Victoria and Victorian Civil and Administrative Tribunal are attached).

The expert witness codes of conduct have been described by Appeal Justice Ormiston (as he was then) as “expressions of the ideal manner in which expert witnesses should go about their tasks”.³ The codes were introduced because existing rules for admissibility were considered inadequate to ensure that only unbiased expert opinions were put before the Court.⁴

The Victorian Supreme Court guidelines incorporate features common to most jurisdictions:

1. *A person engaged as an expert witness has an overriding duty to assist the Court impartially on matters relevant to the area of expertise of the witness.*
2. *An expert witness is not an advocate for a party.*

In the Victorian Supreme Court the expert must declare that he or she has “*made all the enquiries which the expert believes are desirable and appropriate and that no matters of significance which the expert regards as relevant have, to the knowledge of the expert, been withheld from the Court*” (O44 Victorian Supreme (General Civil Procedure) Rules 1996). A similar declaration is required to be made by expert witnesses in VCAT proceedings.

Whilst in Victoria the practice of parties retaining their own “independent expert” is the norm, the witness, once retained, owes an overriding duty to the Court or Tribunal before whom the evidence is given. It is most important that both the expert and the lawyer keep this overriding duty in mind from the outset of the engagement.

¹ See also for example s76 and s79 of the *Evidence Act* 1995 (Cth) from which the Victorian legislation was taken.

² See for example Form 44A to the *Victorian Supreme (General Civil Procedure) Rules* 1996, VCAT Practice Note – PNVCAT 2: Expert Evidence.

³ *FGT Custodians Pty Ltd v Faganblatt* [2003] VSCA 33 at [15] per Ormiston JA.

⁴ *ASIC v Ritz* [2005] NSWSC 149 at [253] per Austin J.

The idea of the expert's overriding duty to the Court is not new. In the "Ikarian Reefer", a 1993 English decision relied upon in the drafting of the various expert codes of conduct adopted by the Courts, Creswell J set out a list of duties and responsibilities of experts in civil cases as follows:

- “1. 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...
2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise... An expert witness in the High Court should never assume the role of an advocate.
3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one... In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report...
6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.
7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.”

Merely because a witness has expert qualifications does not make his or her opinion admissible. Evidence of expert opinion will only be admissible when:

- “(a) it is relevant;
- (b) the witness has specialised knowledge based on his or her training, study or experience; and

- (c) any opinion is wholly or substantially based on that specialised knowledge.”⁵

An authoritative summary in relation to the boundaries set around the giving of expert evidence is found in the reasons for judgment of Appeal Justice Heydon (as he was then) in *Makita (Aust) Pty Ltd v Sprowles*.⁶

“In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of ‘specialised knowledge’; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be ‘wholly or substantially based on the witness’s expert knowledge’; so far as the opinion is based on facts ‘observed’ by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on ‘assumed’ or ‘accepted’ facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the 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. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert’s specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight. And 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 The Queen* (at 428 [41]), 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”.

What sort of expert – Diagnostic or Opinion?

A person who is an expert in a particular field will be engaged to assist a party to a dispute either –

- (a) at the fact finding, investigation or diagnostic stage (“diagnostic expert”); or
- (b) when an anticipated dispute has arisen or there are proceedings on foot (“opinion expert”).

⁵ *Sydneywide Distributors Pty Ltd & Another v Red Bull Australia Pty Ltd & Another* (2002) 55 IPR 354 at 358 per Branson J.

⁶ (2001) 52 NSWLR 705 at 743-744.

If the matter proceeds to Court the expert engaged is likely to be called to give evidence. In this circumstance the rules governing the conduct of the witness and the admissibility of evidence are the same, irrespective of the circumstances of the original engagement, that is, whether the expert was engaged as a diagnostic expert or opinion expert.

An expert called to fact find, investigate and/or diagnose may also be involved as a witness of expert opinion. First, the matters that are observed and recorded by the expert is evidence admissible as evidence of fact. Secondly, the recommendation for remediation and mitigation of damage is expert opinion evidence.

It is obvious that an expert who is engaged to express an opinion will be in a very different position to the expert who was engaged at the diagnostic stage. An expert diagnostic witness will generally express their opinions based upon both primary evidence and secondary evidence (for example: tests performed, photographs taken, statements made by others).

If the expert is engaged at a later stage and the expression of his or her opinion is dependent upon matters that have not been observed first hand, but rather rely on secondary evidence, then the materials relied on by the expert witness must themselves be proved by admissible evidence. If materials are not proved admissible then it is likely the opinion evidence based upon those “facts” will be ruled inadmissible.⁷

Experts and Legal Privilege

Generally, any statement made by a diagnostic witness (a witness of fact) in draft form and provided to a solicitor or communications with the solicitor regarding the statement will not be documents that can be called upon for production in Court or in the Tribunal.

Statements and documents prepared by an opinion expert will be documents that can be called for and likely produced in the Court or Tribunal.

The position is further complicated for the diagnostic expert who reports upon both matters of fact and opinion.

The position of a diagnostic expert presents particular difficulties because part of the expert's evidence will go to matters of fact in the case and part will go to matters of expert opinion.

It is common for the diagnostic expert to be engaged to provide a formal report. In the formal report the expert is likely to set out observations regarding factual matters as well as setting out his or her opinions as to the cause of the problem and its rectification.

⁷ See *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 743.

Case Study: Temwell

An example of the difficulty that can arise is illustrated in the case of Temwell⁸. The witness, Goldstein, was both a diagnostic witness and a witness of expert opinion. Although he was originally engaged in writing to provide factual evidence ultimately Temwell relied upon Goldstein to give expert evidence in relation to particular matters, and Temwell sought to rely upon Goldstein's evidence as an expert opinion.

The evidence disclosed 110 emails passing between the witness and Temwell's legal advisers prior to finalisation of his affidavit. It also later emerged there had been 10 draft versions of his affidavit.

Goldstein's affidavit made no mention of the extensive communications. A claim for legal professional privilege was made in relation to a large number of the emails. The Judge in the case Ryan J made the following relevant observations:

“No formal report has been provided by Mr Goldstein covering the matters which I have just identified as those on which he has given expert evidence. Nor has he set out in his affidavit or elsewhere, except by inference, his instructions or the facts, matters and assumptions upon which his opinions have been based or the documents or other materials which he has been asked to consider. In those circumstances, Counsel for the respondents would normally be entitled to access to all notes, memoranda and successive drafts of Mr Goldstein's affidavit in order to explore what instructions he was given and the extent to which his opinions have been formulated independently of Temwell and its advisers. See *Interchase Corporation Ltd v Grosvenor Hill (Queensland) Pty Ltd (No 1)* [1999] 1 QR 141.

However, it is clear from the necessarily brief summary of his evidence which I have given, that Mr Goldstein has also deposed to matters as to which he is a witness of fact, not an expert. ... If it is possible to segregate from the disputed emails communications directed solely to evidence to be given in that capacity, that should be done so as to preserve the legal professional privilege which Temwell asserts.

I am not persuaded that, merely by requiring Mr Goldstein to give both opinion evidence and evidence of facts based on observation, Temwell has waived that privilege in the sense discussed in *Attorney General (NT) v Maurice* (1986) 161 CLR 475, to which I was referred...

⁸ *Temwell Pty Ltd v DKGR Holdings Pty Ltd* [2003] FCA 930 (2 September 2003)

Here, as I understand it, the disputed emails are said to deal with at least two subject matters; the evidence to be given by Mr Goldstein by way of expressing an expert opinion, and the evidence which it was proposed he should give of primary facts based on his observations in February and March 2000. If those two subject matters can be disentangled from a single email, I consider that fairness requires that to be done so as to preserve the privilege asserted by Temwell in respect of communications directed to the second of those subject matters.

...I propose, as I said, to the extent necessary, to examine the disputed emails and indicate which can be segregated or dismembered in the way I have just indicated.”

To avoid the problems that arose concerning the evidence of Goldstein it is prudent to deal with issues of fact and issues of expert opinion separately in all communications between the lawyer and the expert. Similarly, two statements should be prepared, one being a statement of evidence recording factual observations, the other an expert witness statement.

If the two roles are confused and the communications are not segregated then it is likely that opposing lawyers will have made available to them not only earlier drafts of the expert witness report but also earlier drafts of statements concerning factual matters, as ultimately occurred in the Temwell case. The other matter which emerges from the passage quoted is the need for the lawyers engaging the expert to give clear written instructions and for the witness to prepare a report of his or her own in response to the instructions which confirms with the relevant guidelines.

Instructing an Expert Witness

The law is clear that instructions provided to expert opinion witnesses, being matters upon which the expert bases his or her opinion, are matters which are not only not the subject of legal professional privilege, they are also matters which are required to be disclosed by the expert in his or her report.⁹

Take for example the case of a failed crop. Assume that a diagnostic agricultural expert engaged by the land owner to assist in rectifying the problem told an agricultural expert later engaged to provide expert opinion evidence that in the opinion of the diagnostic expert the failed crop was the result of soil contamination as a result of poor chemical storage by the land owner. If we further assume that the client asked the newly retained opinion expert to say whether he or she agreed with that opinion. That instruction, including the advice as to the opinion of the diagnostic expert is a matter which the opinion expert would be obliged to disclose to the Court or the VCAT.

⁹ See for example paragraph 3.1(5) of Practice Note PNVCAT 2 – Expert Evidence.

Disclosure of instructions is required irrespective of whether the instructions are given orally or in writing. In the example given, no legal professional privilege would attach to those instructions.

Sometimes legal advisers will have prepared documents such as an opinion as to the prospects of success in the case, a statement of evidence from the client or a factual chronology. It is not uncommon for one or more of these documents to be provided for the assistance of the expert. In the hands of the expert the statement of evidence will not be a document to which legal professional privilege attaches. If taken into account by the expert in forming his or her opinions, any legal advice or chronology will similarly cease to be privileged.

The expert, when giving evidence, has an obligation to disclose not simply all instructions that define the scope of the report, whether in written or oral, but also the facts, matters and assumptions upon which the report proceeds. This is what is required by the test of admissibility referred to in the case *Makita* which I quoted from above and by the various witness codes of conduct.

Given the expert's obligations regarding the disclosure of instructions it is imperative that the lawyers instructing the expert to take extreme care with the information which is provided to the expert upon which the expert may form his or her opinions or to which the expert may have regard. Even if the expert does not have regard to the information, if the expert considers that it is a significant matter then the expert must either decline to make the declaration required in the Victorian Supreme Court or in VCAT or, in view of the overriding duty to the Court, disclose the information. If the declaration is not made and if there is non-compliance with the code, the expert evidence may be excluded in the exercise of the Court or VCAT's discretion.¹⁰

In the example above, the diagnostic agricultural expert prepares a statement stating that the land owner's poor chemical storage practices caused the soil contamination and thus the failed crop. If the lawyer provides that statement, whether draft or otherwise, or instructs the independent agricultural opinion expert that such is the opinion of the diagnostic agricultural expert then that is information which the opinion expert is obliged to disclose to the Court irrespective of whether or not the opinion expert agrees with that expression of opinion. It is part of the opinion expert's instructions, it is material and it would be a matter of significance which the expert would be obliged to communicate to the Court or VCAT. The same applies if, when conferring with the diagnostic agricultural expert, the opinion expert is informed orally by the diagnostic agricultural expert of such an opinion. It is a matter that must be disclosed to the Court, particularly having regard to the expert's overriding duty to the Court.

¹⁰ See discussion in *Australian Competition and Consumer Commission v Lux* [2003] FCA 89.

It is also important that when an expert is being instructed by a lawyer to make assumptions, that those assumptions upon which the expert is being asked to proceed are clearly identified¹¹. Further, the assumptions must be capable of being proved either by another witness or by a document which is itself an admissible piece of evidence. If care is not taken in identifying and then proving the assumptions, being assumptions usually outside the particular expert's field of knowledge or expertise, then the whole of the expert witness's evidence will itself be inadmissible.

It is important that expert witnesses carefully consider the views expressed in *Makita* which I quoted from above in order to ensure that whatever reports are produced are in fact able to be relied on as evidence. The lawyer should review reports received from the expert against the criteria identified and determine how the report measures up in terms of admissibility. If it is thought not to do so then steps should be taken to deal with the deficiencies prior to exchange or filing of reports and the commencement of the hearing. In particular, before reports are exchanged or filed they should be reviewed to ensure:

- the opinion is one wholly or substantially based on the witness's expert knowledge;
- if the opinion is based on assumed or accepted facts then those assumed or accepted facts must be identified and are either proved or capable of being proved in some other way; and
- the witness has explained how his or her field of "specialised knowledge" has been brought to bear so as to produce the opinion propounded.

Without these criteria being identified and met in a responsive fashion the whole of the expert's opinion evidence may be ruled to be inadmissible and the reports filed either ruled inadmissible or found to require abandonment in order for the case to proceed.

The Opinion Expert is not part of the team – keeping the expert independent

The expert's task should be clearly identified by the lawyers instructing him or her. There are a number of things experts need to be aware of and/or avoid (lawyers need to avoid these things too)–

- The expert should not be "sounded out" by the lawyers for opinions before the expert has been formally engaged.

¹¹ *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 743

- Excessive communications between the expert and the lawyers should be avoided as this can lead to the whole of the expert evidence being thrown out as it is found not to be the expert's own opinion.¹²
- The scope of matters for the expert's opinion may be defined by the lawyers but the lawyers can have no role in forming the responses which must be those of the expert.
- Tactical discussions should not take place in the presence of the expert who may be writing an independent expert's report – the danger is that by being privy to this sort of discussion the expert may come to be regarded and to regard him or herself as part of a 'team'.¹³
- The expert should not change his or her opinion because requested to do so by legal advisers¹⁴.
- Experts must have first formed their own opinions and committed them to writing before any conference between experts on the same side occurs and the outcome of the conference should be recorded and fully disclosed.
- The views of the experts are neither pressured nor seen to be pressured by the client or its representatives.

There is a need to respect and preserve the independence of expert witnesses in all dealings. First, to ensure the experts' independence, second, to ensure that the opinions are those of the expert, not those of the party or the lawyers by whom the expert is retained.

Case Study: Pivot

The 1989 *Pivot* case¹⁵ is a prime example of that which should not be done. In *Pivot* the expert was engaged to produce an independent expert's report in relation to a company scheme arrangement. An informal approach was made to the witness before his retainer. He was told of the objective of those by whom he was retained, meeting with those persons before writing his report. A report in draft was provided to the company for its "review and comments". The report then delivered was later "amended" as a result of comments made by lawyers.¹⁶ Between the two versions of the report there were telephone discussions and a conference with counsel.

¹² *Pivot: Phosphate Cooperative Co of Australia Pty Ltd v Shears and Another* [1989] VR 662

¹³ *Ibid* at 680

¹⁴ *Temwell Pty Ltd v DKGR* – see for example the ruling on 9 September 2003 [2003] FCA 948

¹⁵ *Phosphate Cooperative Co of Australia Pty Ltd v Shears & Another* [1989] VR 662.

¹⁶ At 678.2.

The case highlights the danger of engagement of an expert before the proposal upon which the expert is to comment is properly formulated.¹⁷ Brooking J (as he was then) found:

“The meeting was such as to give...the impression that the object of the scheme was to dislodge Shears as a takeover suitor. The discussion of the scheme was in [that] context. ...it is undesirable that discussions of this kind should take place in the presence of those who may be writing an independent expert’s report. The danger is that, through his being privy to this kind of thing, he may come to be regarded and to regard himself as part of a “team”.¹⁸

...

“The purpose of this conference seems to have been to improve the report of 9 March and counsel and the solicitor made suggestions to Alfredson about how that report might be improved. As a result of these suggestions, says Alfredson, he substantially rewrote the report...¹⁹

..

“There will often be a danger that the client, who may well, in addition, be engaging experts who are to act in a partisan capacity, will come to regard the independent expert as another member of the team which is being paid very large sums of money to achieve a certain result. The client will often, as here, have at its disposal other advisers who are in a position by reason of qualifications and experience, to influence, either directly, or indirectly through representations made by the client, the judgment or actions of the independent expert. The greatest circumspection is required in relation to this matter of making representations to an independent expert, not by way of correcting some error of fact, but by way of influencing his judgment on the established facts.”²⁰

...

“...It is impossible to lay down specific rules dealing with communications between the expert, on the one hand, and the company and those representing it, on the other: everything depends on the circumstances. The guiding principle must be that case should be taken to avoid any communication which may undermine or appear to undermine the independence of the expert. What happened here was quite

¹⁷ At 680.

¹⁸ At 680.

¹⁹ At 679.

²⁰ At 681.

unsatisfactory. ...I think the present case should serve as a model of what ought not to be done."²¹

The expert not an advocate

In *Arnotts v Trade Practices Commission*²² the Full Federal Court adopted the following passage from an earlier text in relation to the expert's role "as an advocate"²³:

"This is the area in which experts find themselves in the greatest trouble. It is of course not permissible for the expert to take over the role of advocate from counsel in the case – the law does not allow unqualified people to act as barristers, except in special courts like the Industrial Tribunals or the Small Claims Courts. But the expert has a legitimate role of advocacy in that, having expounded to the Tribunal the rules applicable to the case (these may not even be in dispute), his evidence may then consist of argument as to the conclusions that should be drawn from the facts, interpreted in the light of those rules. The difficulty arises because the expert often finds it difficult to distinguish between arguments on the assumption that the 'facts' put forward by his side are the correct ones, and telling the judge or jury which facts they should accept as true. If he makes his assumptions clear, there is no objection to his arguing what the consequences of accepting those assumptions would be; but he is not to do the jury's finding for it, where this depends on accepting one or other of contradictory witnesses."

That the expert has adopted the role of advocate may be apparent from the tenor of their report, from their demeanour or from documents obtained during the preparation process. It may appear from the selective use of materials, tests or techniques relied upon to form the basis of opinions and from the exclusion of other materials or tests which would or may have led to a different and opposing outcome.

If the expert takes on the role of advocate and the Court is persuaded that this is the manner in which they have approached the task, it is unlikely the opinions of the expert will be relied upon. They are more likely to be regarded as tainted, opinions expressed without regard to the expert's over-riding duty to the Court.

²¹ At 683.

²² (1990) 97 ALR 555 at 596

²³ at 596 from Sir Richard Eggeston (1983, p154)

Experts in the Court and VCAT – what can be expected from the opposing party

Production of file

It should be remembered by both experts and the lawyers who retain them that it is not usual for an expert witness to be required by the opposing party to make his or her file available for inspection prior to giving evidence, particularly in cases where the instructions given to the witness are not annexed to expert reports and the materials provided with those instructions are not disclosed.

Cross Examination

Opposing lawyers will not necessarily assume that the witness who provides a long list of apparently authoritative qualifications and perhaps publications is qualified by reason of training and/or experience to express the opinions proffered.

Experts must be careful to list the qualifications and publications which best demonstrate their experience as it relates to the expert evidence they are providing. Opposing barristers will cross examine expert witnesses about their experience as this goes to both the admissibility and weight to be given to their evidence.

The expert witness should expect to be cross examined how the witness has formed his or her opinions. What techniques did the witness rely upon, what tests were conducted, how were they conducted, how were the results analysed? Is the witness's opinion supported by scientific analysis or testing or is it no more than an informed guess by one with expertise in the field?

An expert's opinions must be within the expert's area of expertise. Once one opinion even as to a peripheral matter can be shown to be beyond or arguably beyond the expert's expertise, the reliability or otherwise of the whole of the evidence is called into question.

Conclusion

Irrespective of the fact that the expert has been engaged by a party and is being paid by them to prepare evidence, an expert's overriding duty to the Court or the Tribunal. An expert must maintain their independence be conscious of the nature of their engagement and ensure that the evidence they provide, by report or orally, is within their area of expertise and soundly based on provable facts or principles.