Expert Opinion and Legal Considerations

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Abstract

This chapter provides practical assistance to experts who may be required to give evidence in court. It explores the development of law and rules that apply in several jurisdictions. In particular, the legal principles are examined in the context of an Australian jurisdiction which is at the forefront of the relatively new practice in this area – concurrent expert evidence. Important elements are the reliability of expert opinion, the source of knowledge, training and experience, as well as procedural aspects. It is prepared as at October 2016.

Keywords

Opinion evidence • Court rules • Litigation • Concurrent evidence

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Introduction

Expert evidence in courts and tribunals over the last 20 years has undergone a significant transformation. Gone are the days when a report is commissioned by one party from an expert, served on the other party with little or no requirements as to professional conduct or procedural requirements that allow the admissibility of the opinion evidence.

The experience in one of the legal jurisdictions in Australia, namely New South Wales ("NSW"), is used in this chapter as an example of the use of expert evidence in litigation. The reason for this example is that NSW was the origin for one of the most significant recent changes in how experts give evidence in courts and tribunals (Jackson 2016). That change was the process of experts giving evidence concurrently in courts or tribunals having reached agreement and identified areas of disagreement.

The purpose of this chapter is to provide an overview. More detailed consideration of applicable rules of evidence and procedures can be found for the Australian approach in Freckelton and Selby (2009) and Odgers (2014). For the United States, see Conley and Moriarty (2011).

Justice Peter Garling of the Supreme Court of NSW helpfully identified some relevant judicial comment on the role of experts in litigation (Garling 2015):

In *The Queen v Turner* [1975] QB 834 at 841, Lawton LJ expressed the basis upon which expert evidence is received in these words:

> An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury.

A similar description was given by Gaudron and Gummow JJ in *Osland v The Queen* [1998] 197 CLR 316 when Their Honours said:

> Expert evidence is admissible with respect to a relevant matter about which ordinary persons are [not] able to form a sound judgment … without the assistance of [those] possessing special knowledge or experience in the area.

In the Canadian decision of the Supreme Court in *R v Mohan* [1994] 2 SCR 9; (1994) 89 CCC (3d) 402 the admission of expert evidence depended on the application of the following (Freckelton and Selby 2009 p.73):

(1) Relevance;
(2) Necessity in assisting the trier of fact;
(3) The absence of any exclusionary rules; and
(4) A properly qualified expert.

The first two questions are often not difficult to address. The rules change between jurisdictions; however, there are similarities. But what is a "properly qualified expert" in the context of litigation? This depends upon the particular knowledge, training, or experience of the expert against the backdrop of their field of study and compliance with court procedures.

In 1995 the *Evidence Act* was introduced in NSW and also in relation to matters attracting the jurisdiction of the Commonwealth of Australia in an attempt to provide uniform evidence law, including as applied to expert evidence. Combined with the evidentiary requirements are the procedural obligations on experts and the NSW example is Part 31, Division 2 of the *Uniform Civil Procedure Rules 2005*.

In the Australian experience, in order for an expert's opinion to be considered as a reliable source of evidence for a judge or tribunal member to make a decision about an issue or issues in a dispute, a number of criteria must be met (see Freckelton and Selby 2009):

- The evidentiary requirement is that an expert must have specialized knowledge based on training, study, or experience and that the opinion given is founded upon these elements.
- Regardless of who has commissioned the expert, the expert's overriding duty is to the court or tribunal;
- They must exercise their independent professional judgment and if possible, endeavor to reach an agreement with any other expert witness qualified on the matter in issue.
- There must be a transparency of information relied upon by the expert, not only as to the facts and assumptions of facts upon which the opinion is based, but other material, examinations, tests, or other investigations upon which the expert has relied or drawn upon to reach their opinion.
- The duty to the court or tribunal extends to identifying the extent to which the expert may consider that their report is incomplete or inaccurate unless some further information is provided or in the event that insufficient research or data is identified. Also if, after providing an opinion, the expert changes their views, then this new opinion must be given immediately.

The basis for these requirements is to ensure that in order for an expert opinion to be relied upon by a tribunal or court, it is in no way misleading and is reliably based upon knowledge, training, research, experience, or study and, where differing opinions are reached between experts, that their best endeavors are made to reach some agreement and to identify areas of disagreement and reasons for such disagreement. If agreement is not possible, then the court or tribunal can clearly have available the differing assumptions or facts or indeed the different interpretation of scientific principle which lead to a disagreement such that findings may be made about those matters and in turn accept or reject the expert opinion.

State of the Art

Originally developed in NSW in Australia, the innovative procedure of expert witnesses giving "concurrent evidence" in courts and tribunals has gained support in other jurisdictions such as the United Kingdom. This procedure applies before and during the court hearing. Before the hearing, it involves experts meeting in a

"conclave" and identifying in a joint written report areas of agreement and disagreement. Then at the hearing the experts give evidence concurrently rather than the more common procedure of separately. Later in this chapter is a discussion of this recent development of "concurrent evidence."

Evidentiary Requirements

For opinion evidence to be admissible in an Australian court, it is necessary for that evidence to be relevant (s.55 of the *Evidence Act 1995* (NSW and Commonwealth of Australia), have sufficient probative value (s.135 of the *Evidence Act 1995*), and comply with ss.76 and 79 of the *Evidence Act 1995* which relevantly are:

> Section 76 The opinion rule
> (1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.
> (2) . . .

The exception to this is s.79 of the *Evidence Act 1995*.

> Section 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) . . ..
> 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.

> Section 79 of the *Evidence Act 1995* creates a requirement that opinion evidence must meet the following:
>
> - the person giving the opinion evidence must have "specialised knowledge";
> - the specialised knowledge must be "based on training, study or experience";
> - the opinion must be "wholly or substantially based on that [specialised] knowledge".

These elements must be established on the balance of probabilities before a court can accept that the opinion expressed in a report is admissible. The secondary consideration, once admitted into evidence, is the persuasive weight that the court may attach to expert opinion. For example, the opinion may be admissible (and for example fulfil the requirements of s.79 of the *Evidence Act 1995*); however, an assumption upon which the opinion is based may be established by other evidence which is of itself found to be doubtful. This in turn would cause a court to have doubt as to the value or weight of the expert opinion to the extent that it is based upon that questionable assumption. Significantly, in the event that an assumption or factual basis is not made out in the evidence, then it is doubtful that any weight may be

attached to any expert opinion that is based upon an erroneous assumption of fact and indeed the expert opinion may well be rendered inadmissible before the court.

Sometimes a court may seek the assistance of an expert to understand something technical without strict compliance with this section (Branson 2006).

In considering what amounted to "specialized knowledge," Justice Gaudron of the High Court of Australia in *Velevski v R* [2002] 187 ALR 233 at para. 82 observed that "specialized knowledge" was knowledge of matters which are outside the knowledge or experience of ordinary persons and which is sufficiently organized or recognized to be accepted as a reliable body of knowledge.

The phrase, "specialized knowledge" is not defined in Australian legislation. In *Adler v Australian Securities and Investments Commission* [2003] NSWCA 131 at [629]; however, Justice Giles of the NSW Court of Appeal noted that the phrase "is not restrictive; its scope is informed by the available bases of training, study and experience". It has considerable scope and s.80 of the *Evidence Act 1995* also permits that opinion evidence can be admissible even if it is a matter of common knowledge.

Example: Assume that you are asked to provide an opinion on whether a passenger in a motor vehicle was wearing a seat-belt when the vehicle was involved in a frontal collision with another vehicle. This example will be used again throughout this chapter to illustrate the practical application of the principles discussed. The first question is do you have the specialized knowledge based on training, study or experience? A bio-mechanical engineer would as they are trained in both engineering and relevant aspects of medicine. An engineer without medical knowledge may be sufficiently expert if, for example, they had significant experience in motor accident reconstruction over a lengthy period of time. A chemical engineer would not pass the specialized knowledge test as their expertise is not relevant to the issue the subject of the opinion, namely whether a seat-belt was worn.

Reliability

In determining what constitutes specialized knowledge, courts have often considered whether the knowledge is from a "field of expertise." An important question to be considered is the extent of the reliability of the evidence. An example of this would be the reliability of survey results upon which opinion or specialized knowledge is based: see for example, *Interlego AG v Croner Trading Pty Limited* (1991) 102 ALR 379.

The United States helped establish the concept of the general acceptance of a field of study as being a source of consideration of the expertise of an expert. An early decision in the United States of *Frye v United States* 293 F 1013 (1923) relevantly held that when considering the admissibility of expert evidence, "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs" (also called the *Frye* test). With some modification and subject to criticism, this remained largely

the prevailing test until the majority of the United States Supreme Court considered Rule 702 of the *Federal Rules of Evidence* (similar to the Australian s.79 of the *Evidence Act 1995*) in *Daubert v Merrell Dow Pharmaceuticals* 509 US 579 (1993) (The 1975 Federal Rules of Evidence (US) did not refer to the *Frye* test). The court held:

> [T]he word "knowledge" connotes more than subjective belief or unsupported speculation. The term "applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds"...proposed testimony must be supported by appropriate validation – i.e., "good grounds," based on what is known.

The United States Supreme Court in *Daubert* went to considerable lengths to identify whether or not expert evidence was reliable based upon valid scientific reasoning or methodology including testing (Freckelton and Selby 2009 pp.63–64):

> (1) Whether it can be or has been tested . . .;
> (2) whether the theory or technique has been subject to peer review and publication . . .;
> (3) the known or potential rate of error and the existence and maintenance of standards controlling the technique's operation;
> (4) whether a technique has gained general acceptance within the scientific community.

The concept of reliability became a cornerstone and in 2000, Rule 702 was amended in the United States to require reliability. With effect from 1 December 2000, Rule 702 provided:

> If scientific, technical or other specialised knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

It has been the approach in the United States that witnesses will not be permitted to give evidence as experts if their qualifications are not relevant and sufficient (Freckelton and Selby 2009; see also Conley and Moriarty 2011).

The Canadian experience may also assist experts in understanding how best to provide opinion evidence. In the DNA profiling case of *R v Johnston* (1992) 69 CCC 395 at 413, Justice Langdon followed an earlier dissenting judgment of Justice Wilson in *R v Beland* [1987] 36 CCC (3d) 481 and considered that the judgment of Her Honour Justice Wilson was:

> persuasive authority for the proposition that the [*Frye* 293 F 1013 (1923)] test should not be adopted in Canada. It recommends adoption of a more expansive admissibility standard, relevancy and helpfulness. It suggests by reference to cross-examination and opposing experts, that if the evidence meets initial standards of relevancy and helpfulness, further objections are relevant to weight and not to admissibility.

In relation to novel scientific evidence, Justice Langdon was of the view the following should be considered (at 415):

(1) The potential rate of error;
(2) The existence and maintenance of standards;
(3) The care with which the scientific technique has been employed and whether it is susceptible to abuse;
(4) Whether there are analogous relationships with other types of scientific techniques that are routinely admitted into evidence;
(5) The presence of failsafe characteristics;
(6) The expert's qualifications and stature;
(7) The existence of specialised literature;
(8) The novelty of the technique and its relationship to more established areas of scientific analysis;
(9) Whether the technique has been generally accepted by experts in the field . . .;
(10) The nature and breadth of the inference adduced;
(11) The clarity with which the technique may be explained;
(12) The extent to which the basic data may be verified by the court and the jury;
(13) The availability of other experts to evaluate the technique; and
(14) The probative significance of the evidence.

In the United Kingdom, the question of admissibility of evidence was importantly considered in the Court of Appeal decision in *R v Luttrell* [2004] 2 Cr App R 31; [2004] EWCA Crim 1344. The court held that for expert evidence to be admissible, the study or experience of the expert witness provides authority to the opinion and the witness must be qualified to express the opinion. The court adopted the interpretation of Chief Justice King of the Supreme Court of South Australia in *R v Bonython* (1984) 38 SASR 45 at 46, in considering the authority of an expert:

(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 an opinion forms part of a body of knowledge or experience which is sufficiently organised 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.

If the conditions are met, the evidence is admissible and may be considered by the court whereupon the question becomes one of the persuasive "weight" to be attached to the evidence as opposed to the admissibility of the evidence (Freckelton and Selby 2009). At p.34 in *R v Luttrell* (supra) the court considered the issue of reliability regarding the question of admissibility:

> In established fields of science, the court may take the view that expert evidence would fall beyond the recognised limits of the field or that methods are too unconventional to be regarded as subject to the scientific discipline. But a skill or expertise can be recognised and respected, and thus satisfy the conditions for admissible expert evidence, although the discipline is not susceptible to this sort of scientific discipline.

In some cases, reliability of evidence might be relevant to admissibility. For example, if the evidence is "based on a developing new brand of science or medicine: until it is accepted by the scientific community as being able to provide accurate and reliable opinion": *R v Gilfoyle* [2001] 2 Cr App R 57 at para. 25. Even if the field is recognized, an issue may be whether the particular techniques were sufficiently recognized within the expert's profession. See, for example, *R v Robb* (1991) 93 Cr App R 161 regarding the admissibility of voice identification evidence.

In Australia the courts have noted that the focus must be on "specialized knowledge," not to be distracted by questions of reliability that are not specifically referred to in the *Evidence Act 1995*. A leading case of the Australian High Court, in considering opinion evidence, was *HG v The Queen* (1999) 197 CLR 414, in which her Honour Justice Gaudron (in dissent) did raise the question of reliability:

> So far as this case is concerned, the first question that arises with respect to the exception in s.79 of the *Evidence Act* is whether psychology or some relevant field of psychological study amounts to "specialised knowledge." The position at common law is that, if relevant, expert or opinion evidence is admissible with respect to matters about which ordinary persons are unable "to form a sound judgment. . .without the assistance of [those] possessing special knowledge or experience. . .which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience." There is no reason to think that the expression "specialised knowledge" gives rise to a test which is in any respect narrower or more restrictive than the position at common law.

As to admissibility of expert evidence, it may well be that there is a trend away from the test of "general acceptance within the professional community" towards reliability, namely evidence given to the "validity and reliability of the technique or theory" (Freckelton and Selby 2009 p.75) although this will vary from jurisdiction to jurisdiction.

Example: Continuing the example of an opinion as to whether a passenger in a motor vehicle accident was wearing a seat-belt there may be an issue as to causation. If the passenger was not wearing the seat-belt is this irrelevant as the injuries would have been caused regardless? In a frontal impact, there is well-known scientific evidence to say that wearing a seatbelt reduces injury. In this example, however, let us say that there may be a type of injury discovered relating to low impact frontal collisions, similar to the zygapophyseal joint injury which is difficult to detect. Going back to our example, assume a biomechanical engineer gave an opinion that no seat-belt was worn and had it been worn then the injuries alleged to have been caused would not have been caused (Genn 2012). The level of expertise depending upon the medical training may not be reliable or have the necessary specialized knowledge to comment on the type of injury and its causation if the expert did not have the requisite training or experience with that type of injury. In this instance, the engineer may have to work with a sufficiently experienced medical professional.

The Assumptions of Fact

The principles that apply to the admissibility of expert evidence in Australia have been succinctly set out in one of the leading decisions in the area by Justice Heydon (as he then was, before becoming a High Court judge). His Honour paid particular attention to the assumptions of fact that underpinned an expert's opinion. In the New South Wales Court of Appeal in *Makita (Australia) Pty Limited v Sprowles* [2001] 52 NSWLR 705 at para. 85 Justice Heydon observed:

> 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 specialised training, study or experience, the witness has become an expert;
> – the opinion proffered must be "wholly or substantially based on the witness' 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 reach: 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 specialized 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.

Subsequent to this decision, some of the above elements have been qualified. In *Sydney-Wide Distributors Pty Limited v Red Bull Australia Pty Limited* [2002] FCAFC 157 at paras. 16 and 87, the Full Court of the Federal Court of Australia held that many of the elements referred to by Justice Heydon in *Makita* "involve questions of degree, requiring the exercise of judgment" and that where a judge is conducting a trial alone without a jury the matters may go to weight rather than admissibility.

In the *Red Bull* case, Her Honour Justice Branson noted:

The approach of Heydon JA as set out [in para. [85] of the judgment] is, as it seems to me to be understood as counsel of perfection. As a reading of His Honour's reasons for judgment as a whole reveals, His Honour recognised that in the context of an actual trial, the issue of admissibility of evidence tendered as expert opinion evidence may not be always to be addressed in the way outlined in the above paragraph.

There were three reasons given for limiting the "counsel of perfection." The first was where opinion evidence was admitted without objection by the parties and in this context, a court rarely would interfere. Secondly, a ruling on admissibility of evidence is usually required during the course of the trial rather than at the end by which time other evidence may impact on the weight of the opinion evidence. As Her Honour Justice Branson noted further in the *Red Bull* case:

> . . . It may prove to be the case that evidence ruled admissible as expert opinion will later be found by the trial judge to be without weight for reasons that, strictly speaking, might be thought to go to the issue of admissibility (e.g. that the witness's opinion is expressed with respect to a matter outside his or her area of expertise or is not wholly or substantially based on that expertise.

The third reason was identified in the earlier case of *Quick v Stoland Pty Ltd* [1998] 87 FCR 371 at 373-74:

> The common law rule that the admissibility of expert opinion evidence depends on proper disclosure of the factual basis of the opinion is not reflected as such in the *Evidence Act 1995* (Cth.). The Australian Law Reform Commission recommended against such precondition to the admissibility of expert opinion, expressing the view that the general discretion to refuse to admit evidence would be sufficient to deal with problems that might arise in respect of an expert opinion, the basis of which is not disclosed: ALRC Report No. 26, vol. 1 para. 750.

In a further decision in Australia, *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd* [2006] 228 ALR 719, (Federal Court of Australia) Justice Heerey had to determine the admissibility of opinion evidence which had been based on "market research reports" and the like which had not been proved in evidence and were not likely to be "proved": [2006] 228 ALR 719 at 722 para. 6. At para. 7, Heerey J said:

> However, I accept the submission of Senior Counsel for Cadbury that this aspect of *Makita* has not been followed in the Federal Court. The lack of proof of a substantial part of the factual basis of Dr Gibbs' opinions does not of itself render his evidence inadmissible under s.79. Such lack of proof merely goes to the weight which may be given to the opinion [and the court referred to the decision in *Red Bull* and other decisions].

There are other qualifications regarding assumptions of fact.

Opinion evidence is not admissible if it is found that the opinion was based upon different facts from those disclosed, for example, if the expert was influenced by undisclosed facts. The fact of how the expert came to hold an opinion is relevant to weight: *Australian Securities & Investments Commission v Rich* [2005] NSWCA 152 per Chief Justice Spigelman.

As long as the opinion identifies the reasoning process, it is still able to be admitted into evidence even if there were other tests that could have been done to underpin the opinion. An opinion may not be excluded because the reasoning process is not fully disclosed if the area of expertise involves some subjectivity.

An opinion may be admitted into evidence where the expert has made an observation even when all the nonopinion elements of that observation are not set out.

The trend is that it is not necessary to always prove matters which are customarily relied upon by experts in a particular field.

The need to prove a fact upon which a particular opinion is based was clarified by Justice Heydon in *Rhoden v Wingate* [2002] NSWCA 165 at para. 86, namely, that it was not whether the fact is proved to a particular standard but whether "there is evidence which, if accepted, is capable of establishing" the existence of the fact.

If a written opinion sets out facts upon which the opinion has proceeded, and the report is admitted into evidence then those facts are also admitted into evidence, unless the court upholds an objection: s.60 *Evidence Act 1995*. Advocates may make submissions to the court to exclude the admission of the facts upon which the opinion is based until those facts are independently proven (e.g., in NSW and Australian Federal Courts s.136 *Evidence Act 1995*).

Rule 703 of the United States *Federal Rules of Evidence* provides the following:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him [or her] at or before the hearing. If of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Example: The expert is asked to assume that the passenger who did not wear the seat belt was involved in a frontal collision. If in fact the collision was not purely frontal but involved a lateral element, then the opinion may be found to be irrelevant as it did not address the effect on causation, for example, of failure to wear a seat-belt in a lateral collision. It is important when being asked to give an opinion based on assumptions that when objectively considered with known facts whether the assumptions make sense and to question the assumptions if they do not make sense.

Court and Tribunal Rules

Various jurisdictions have procedural requirements as to the admissibility of opinion evidence.

In New South Wales, the procedural requirements on expert opinion are set out in part in Rule 31.23 of the *Uniform Civil Procedure Rules 2005* (NSW). It requires that an expert witness must comply with the "Code of Conduct" which is set out in Schedule 7 to the rules and any report is inadmissible unless it contains an acknowledgement that the expert has read the Code of Conduct and has agreed to be bound by it. The same applies to any oral evidence to be received from an expert. The court has a discretion to exempt compliance but the application of the Code of Conduct is treated very seriously and experts are rarely exempted.

In essence, the Code of Conduct emphasizes the following:

(1) The duty of the expert is to the court rather than any party who has qualified or paid the expert to appear.
(2) That the expert is not an advocate for a party but rather an independent, impartial source of evidence and opinion to assist the court.
(3) The expert must follow any direction by the court.
(4) There is a duty to work co-operatively with other expert witnesses by exercising their judgment and endeavoring to reach agreement.
(5) Requirements as to experts' reports (see discussion above as to evidentiary matters).
(6) Experts' conference – based upon a direction by the court for experts from the parties to proceedings to confer with each other to identify areas of agreement and/or disagreement and if appropriate prepare a joint report.

The last aspect is discussed below under "concurrent evidence."

The requirements under the rules for experts' reports work together with the evidentiary principles and arguably are more specific than the evidentiary requirements for admissibility of the opinion. They extend to an expert identifying if a particular issue falls outside their area of expertise and if they believe that a report is incomplete or inaccurate without some qualification, then the qualification must be stated in the report. Further, if the expert considered that their opinion is not a concluded opinion due to insufficient research or data or any other reason, then this must be stated when the opinion is expressed. If the expert changes their opinion, then the expert must provide a supplementary report detailing the changed opinion.

In Australia under the *Legal Profession Uniform Law Australia Solicitors Conduct Rules 2015*, Rule 24.2.3, a lawyer can draw to the expert's attention inconsistencies or other difficulties with the evidence but not encourage the expert to give evidence different from the opinion they had formed – put simply the opinion in the report must remain that of the expert. Communications between the expert and the instructing lawyer should not only actually achieve this result, they also must not appear to be otherwise.

In most jurisdictions, ethical obligations imposed upon legal practitioners will regulate the extent to which they may engage with the expert in the formulation of an opinion to be relied upon by a court and, while it is usually permissible for legal practitioners to test or challenge opinions in conference prior to the completion of a report, it is not permissible for them to suggest or require a particular opinion to be expressed.

The orders of the court to be complied with can sometimes be onerous. Personal explanations may be required by the court from experts as to why orders of the court have not been complied with. Experts often have professional responsibilities outside of their duty to the court including the pressure of business, but this often is not a satisfactory explanation for failure to comply with the court's directions. Another potential area of tension that may arise are competing interests between obligations to the court and obligations to the expert's own governing bodies or associations, including ethical and disclosure obligations. A clear and typical

example can be found in medical practitioners and the competing obligation of confidentiality to the patient in contrast to the obligation of full candor to the court. Extreme care must be exercised when balancing the competing obligations.

Concurrent Evidence

Concurrent evidence is a relatively new procedural innovation different from the more traditional adversarial approach to testing expert evidence. One of the difficulties with the traditional approach was that there was a separation in the giving of evidence by experts so that evidence was not heard in the context of either other expert evidence or witness evidence received later in the trial. Sometimes experts would have to be recalled to give evidence if new factual evidence had emerged during the course of the trial which changed the assumptions upon which the experts previously gave their opinions. Also during the course of the hearing, one expert would often have to sit in the body of the tribunal and suggest questions to an advocate who was cross-examining another expert. This could be cumbersome. So, not only for reasons of efficiency but also to produce more useful and relevant evidence to a tribunal, in the jurisdiction of New South Wales, Australia, the concept of concurrent evidence began.

In Australia, the practice of concurrent evidence was developed and has since been copied in other jurisdictions, such as the United Kingdom (A pilot program was established in Manchester Specialist courts between 2010 and 2013 with His Honour Judge David Waksman QC, the Manchester Mercantile Judge overseeing the pilot, as he then was. Professor Dame Hazel Genn monitored the pilot and published findings in the Civil Justice Quarterly (Genn 2012, 2013). From 1 April 2013, in the United Kingdom Practice Direction 35 was adopted into the Civil Procedure Rules). The stages involved in concurrent evidence are as follows (Garling 2011):

- Preparation
- The expert conclave – the meeting of experts before the hearing
- The joint written report
- Oral evidence

In the usual course, the experts would be instructed by the parties to the litigation to prepare their separate written opinions and this was no different to the previous approach. Then the new procedure is applied to focus attention on the issues in dispute. Once the written opinions are exchanged, and before any trial, the experts have a meeting (the expert conclave) to identify areas of agreement or disagreement. A joint report is then prepared by the experts setting out those areas of agreement and those areas where differences of opinion remain. Where there is a difference of opinion, the report should also identify the reasons and the basis for the difference of opinion.

Often, prior to the conclave occurring, it is incumbent upon the legal representatives for parties to prepare a joint list of assumptions and questions to be put to the experts for consideration in conclave. The preparation of such a document is often of some significance as it tends to set the agenda for the conclave and focus the attention of the experts upon matters considered by the parties to be relevant considerations.

It is also important to remember that the usual course is that the experts meet and prepare their report in the absence of the legal representatives or parties. This reflects the basic premise that the experts overriding obligation is to the court and not to the parties that have retained them.

Once the hearing commences, the experts of the same discipline, for example, biomechanical engineers, give their evidence concurrently and the judge or presiding officer of the tribunal chairs a discussion between the experts. In essence, the joint report that the experts have created from their prehearing meeting forms the agenda for the discussion. Advocates appearing for the parties also participate in the "discussion" and can put questions or challenge the experts (either individually or jointly). The process is all controlled by the judge or presiding tribunal member.

Advantages of the procedure of concurrent evidence from experts are that it not only saves time and costs, but allows the experts to properly assist the tribunal in reaching a decision about the particular dispute (Jackson 2016). The procedure is also consistent with the well-known process of peer review within academic and professional communities. The peers give their review of each other's opinions in the context of the hearing before the judge or tribunal.

While the process does suffer from some criticism, this is to be expected from any innovation. The key to the process of working effectively is that the experts understand the rules underpinning the process in each jurisdiction.

For example, the Supreme Court of NSW, Common Law Division – General Case Management List Practice Note No. SC CL5, Parts 36 – 40 (see also SC CL7 (Professional Negligence List):

> Concurrent expert evidence
> 36. This part of the Practice Note applies to all proceedings in which a claim is made for damages for personal injury or disability.
> 37. All expert evidence will be given concurrently unless there is a single expert appointed or the Court grants leave for expert evidence to be given in an alternate manner.
> 38. At the first Directions Hearing the parties are to produce a schedule of the issues in respect of which expert evidence may be adduced and identify whether those issues potentially should be dealt with by a single expert witness appointed by the parties or by expert witnesses retained by each party who will give evidence concurrently.
> 39. In the case of concurrent experts, within 14 days of all expert witness statements/reports being filed and served, the parties are to agree on questions to be asked of the expert witnesses. If the parties cannot reach agreement within 14 days, they are to arrange for the proceedings to be re-listed before the Court for directions as to the questions to be answered by the expert witnesses.
> 40. In the case of concurrent experts the experts in each area of expertise are to confer and produce a report on matters agreed and matters not agreed within 35 days of the first Directions Hearing or such other time as the Court may order.

Regarding the joint report, rule 31.26 of the Uniform Civil Procedure Rules (NSW) relevantly provides the following:

(1) . . .
(2) The joint report must specify matters agreed and matters not agreed and the reasons for any disagreement.
(3) The joint report may be tendered at the trial as evidence of any matters agreed.
(4) In relation to any matters not agreed, the joint report may be used or tendered at the trial only in accordance with the Rules of Evidence and the Practices of the court.
(5) Except by leave of the court, a party affected may not adduce evidence from any other expert witness on the issues dealt with in the joint report.

In addition to the above, individual judges may place emphasis on certain aspects of the procedure, for example the material with which the experts ought to be provided (Garling 2011 p.5):

(a) an index of the documents, together with a paginated folder of the documents which is to be put before each expert participating at a joint conference and the giving of concurrent evidence;
(b) a complete list of the factual assumptions which are agreed, or else for which each party contends, as the appropriate basis for the joint expert opinion; and
(c) the questions which each party contends are appropriate for the experts to be asked to answer.

In the prehearing stage of identifying what is agreed or disagreed, the experts when meeting may be assisted by an independent chairperson. The chairperson can then ensure that the pre-hearing conference takes place in a manner allowing each expert's opinion to be heard and also be responsible for the joint report arising from the pre-hearing meeting.

Justice Garling suggested some guidance to experts giving concurrent oral evidence as follows (Garling 2015 pp.16–17):

> It is my practice to briefly outline what is intended to happen, describe the roles and functions of those in the court room, and to describe the ground rules for the session. In particular, I find it necessary to remind the participants that only one person can speak at any one time because often when a discussion takes place, the witnesses can forget that they are in a court room. In giving this outline, I commence with identifying the role of the trial judge and remind them that it is the judge's task to control the proceedings by, in effect, being the chairman of their professional meeting, so as to ensure that the agenda items are all covered in an orderly fashion, to ensure that each of the witnesses has an opportunity to state their opinions and the basis for them and, ultimately, to ensure that the process is conducted fairly to the parties, and each expert and with civility.

His Honour went on to note, consistent with the Code of Conduct referred to above, that the role of the experts is to give their evidence truthfully, not as an advocate for either party and impartially. His Honour also helpfully has identified some of the practicalities that can apply which experts would face if they were in court or a tribunal giving concurrent evidence (Garling 2011 p.18):

> Accordingly, at the conclusion of the first issue (or item on the agenda) and after the judge has finished raising any matters, counsel for each of the parties then, in turn, can question the witnesses ensuring as they do that each expert has the opportunity to answer the question asked. In other words, the examination of the experts by counsel bears little similarity to the typical cross-examination. The purpose of counsel's questions is to ensure that an expert's opinion is fully articulated and tested against a contrary opinion, even an opinion elicited by the judge. As Giles JA said at [107] in *Turjman v Stonewall Hotel Pty Ltd* [2011] NSWCA 392:
>
> "When concurrent evidence is being taken with the degree of direction by the judge, counsel are not passengers. They can and should seek to raise material issues and put material questions to the witnesses …, if necessary submitting that the judge's view of how the evidence should be brought out should be modified."
>
> This process is then repeated for each item until all of the issues have been dealt with.

Some Practical Guidance

In the context of these obligations, experts need to exercise care when they are preparing either written reports or giving oral evidence in proceedings. An expert must ensure that their opinion is their own, not something which has evolved through draft opinions edited by others to something tending towards advocacy. Rather the opinion must be an independent expert opinion.

An expert in a particular field of study may sometimes express opinions outside of that field. The expert must however be cautious when straying into this territory and is likely to be questioned about this in court. Such evidence may not satisfy the test of whether the expert has "specialized knowledge." This may not only undermine that part of the expert's opinion but may call into question the persuasive weight as to the balance of the opinion.

An example of this is that a mechanical engineer would be able to comment about the forces involved in the collision of vehicles and the transfer of energy to the occupants of the vehicle. That expert, however, arguably would not have the expertise sufficient for an opinion to be admissible regarding assessment of medical evidence such as extrapolating from injuries identified as to the physical forces that may have caused them. A mechanical engineer with biomechanical knowledge, training, or experience, however, more likely would be able to express that as an admissible opinion.

Chief Justice Gleeson characterized the evidence in *HG v The Queen* (supra), as "a combination of speculation, inference, personal and second hand views as to the credibility of the complainant, and the process of reasoning which went well beyond the field of expertise". It is important for the expert not to stray.

The expert giving the opinion must be careful not to simply engage in factual analysis where their specialized knowledge is unnecessary. In this instance, a judge receives no benefit from the opinion based upon the specialized knowledge of the expert as the judge can perform the factual analysis. Indeed, such opinion is unlikely to be admissible given that it is not based upon the specialized training, experience, or education.

An example of this might be the opinion as to whether or not a victim in a vehicle collision was wearing a seatbelt. A judge may have the benefit of the observations of witnesses such as any other passengers in the vehicle and other sources of information such as attending ambulance personnel. The expert should combine their understanding of these observations based upon their knowledge, training, or experience, for example as a biomechanical engineer. The ambulance officers' notes and hospital records may show abdominal and shoulder bruising suggestive that a seatbelt was worn. Here the expert combines the available facts derived from the medical records and by using their expertise interprets those records to give an opinion as to the likely forces from a seatbelt to the body that would be sufficient to cause the bruising.

Chief Justice Gleeson, commented further in *HG v The Queen* (supra):

> An expert whose opinion is sought to be tendered should differentiate between the assumed facts upon which the opinion is based, and the opinion in question . . . By directing attention to whether an opinion is wholly or substantially based on specialised knowledge based on training, study or experience, the section [s.79] requires that the opinion is presented in a form which makes it possible to answer that question . . . Experts who venture "opinions" (sometimes merely their own inference of fact), outside their field of specialised knowledge may invest those opinions with a spurious appearance of authority, and legitimate processes of fact finding may be subverted.

The word "substantially" in the context of "substantially based on specialized knowledge" allows the court discretion. This allows an opinion to be admissible if based upon specialized knowledge even if it takes into account matters of "common knowledge": *Velevski v The Queen* [2002] 76 ALJR 402 (High Court of Australia) per Justices Gaudron, Gummow, and Callinan.

Reliability of an opinion has been an important part of considering whether or not expert evidence can be admissible. For example, the issue of body mapping, facial mapping, and fingerprinting. Fingerprint evidence has a scientific basis and database for purposes of comparison to allow experts to formulate an opinion as to whether one fingerprint is similar to another. Facial or body mapping may lack a similar database or mathematical formula as exists in the case of fingerprint comparison. The issue perhaps is not that the opinion lacked reliability but that without the available specialized knowledge the opinion becomes subjective: *Daubert v Merrell Dowell Pharmaceuticals* 509 US 579 [1993].

An expert can and often uses materials provided by others in formulating their opinion. A radiologist who produces a Magnetic Resonant Imaging scan which is then used by a surgeon for forming their opinion about diagnosis does not mean that the ultimate diagnosis is not formed "substantially based" on the specialized knowledge, of the surgeon. Care must be exercised when the expert makes their own investigations. For example, the expert should never to contact directly a party to the litigation or witness. A good guide is to first discuss any such investigations with whoever has requested the written opinion.

A difficulty emerges where there are joint opinions and as can be seen from the procedural approach to expert evidence this is becoming increasingly important. If there is only oral evidence from 1 of the 2 experts who prepared a report, and the

report jointly authored does not identify whose opinion has been formed by which of the two experts, then the requirement that the opinion be wholly or substantially based on the specialized knowledge of the witness may not be fulfilled.

If an expert's opinion has been based upon assumed facts and those facts ultimately have not been separately proven then the expert's opinion is of little, if any, weight. Also important is the reasoning process, which leads to the formation of opinion.

It is important for the experts to have assumptions clearly set out rather than, for example, to be relying on written statements from witnesses that the experts may have been provided. The reason is that then in the process of concurrent evidence, one expert may be interpreting a statement and taking assumptions from it in one way, while other experts may be interpreting the statement differently. By having agreed assumptions or at least clearly formulated contended assumptions, then the basis for their opinion is clear.

Conclusion

One of the judges responsible for encouraging the development of concurrent evidence in NSW, Justice McClellan, made the following comment (McLellan 2007 p.17):

> As far as the decision-maker is concerned, my experience is that because of the opportunity to observe the experts in conversation with each other about the matter, together with the ability to ask and answer each other's questions, the capacity of the judge to decide which expert to accept is greatly enhanced. Rather than have a person's expertise translated or coloured by the skill of the advocate, and as we know the impact of the advocate is sometimes significant, you have the expert's views expressed in his or her own words.

An expert's own words are all the more persuasive if they are given impartially, based upon identified assumptions, with the authority of knowledge, training, or experience and if they are able to respond to peer review.

Cross-References

- ▶ Applications in Forensic Biomechanics
- ▶ Biomechanical Forensics in Pediatric Head Trauma
- ▶ Functional Capacity Evaluation and Preemployment Screening
- ▶ Functional Capacity Evaluation and Quantitative Gait Analysis: Lower Limb Disorders

Glossary

Concurrent evidence A procedure where experts in the same field, each separately qualified by the parties to litigation, give evidence jointly as a panel in court. They identify areas of agreement and disagreement in a joint report before trial. At trial

each expert comments on the opinion of the other experts and advocates for the parties also question them. The judge acts as a chairperson and ultimately decides the issues.

Court rules Rules of procedure applied to court proceedings.

Litigation The process of dispute resolution by the members of courts or tribunals based upon admissible evidence presented by advocates for the parties to the dispute.

Opinion evidence Evidence based upon a person's trainingstudy or experience. It is given initially in writing by an expert and subject to oral or written review by peers, court advocates, and judges based upon applicable court rules.

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