REJECTION OF EXPERT EVIDENCE

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Expert witnesses are allowed a rare exception to the rule which prevents evidence being given in the form of opinion or inferences. The role of the expert is to assist the court by providing specialised knowledge which is beyond the experience of the trier of fact. For this reason, expert evidence is an extremely important part of litigation, and an expert's report has the potential to make or break a case.

A number of recent cases have shown that the rules about the admissibility of expert evidence are being more and more strictly applied. Expert reports have frequently been held to be inadmissible or have had their usefulness questioned. For example:

- In *HG v The Queen* (1999) expert evidence was rejected by the High Court as being evidence of 'speculation', given under cover of being expert opinion evidence.
- In *Evans Deakin Pty Ltd v Sebel Furniture Ltd* [2003], a report prepared by an accountant was rejected by the Federal Court on the basis that it went beyond providing accounting opinions, and dealt with legal, evidential and common sense points. It was described by Justice Allsop as 'litigation support evidence' in the nature of 'expert assistance', and as a report by someone experienced enough in litigation to be able to put forward an argument as to how the proceedings should be defended.
- In *Dean-Willcocks v Commonwealth Bank of Australia* [2003], an expert's report was rejected by Justice Austin of the Supreme Court NSW on the basis that it read more like submissions such as would be presented by counsel, than like an expert's report. His Honour criticised the expert for purporting to usurp the function of the trier of facts by drawing inferences from the text of the documents and the circumstances of the documents in

Expert evidence is being frequently rejected by the courts for not meeting the legal requirements for admissibility. This can have damaging consequences on the outcome of a case for the party relying on the evidence.

The Federal Court Guidelines and NSW Supreme Court Rules on Expert Evidence provide some guidance on admissibility. Lawyers and experts should give careful consideration to these guidelines and to the rules of evidence concerning admissibility in the preparation of expert reports.

the same way that the court does in resolving disputed questions of fact.

- An expert's report was also criticised by the Federal Court in *Dowdell v Knispel Fruit Juices* [2003] as being 'submissions dressed up as evidence' and the practice of modelling what the profits of a business would have been based on various assumptions was criticised.

- In *McNeil v Commissioner of Taxation* [2003], an expert's report was rejected by the Federal Court on the basis that the expert did not possess any specialised knowledge on the point on which he was asked to provide an opinion. The expert had concluded that a benefit was realised from the sale of certain 'sell-back rights', by analysing ASX statistics and summarising the entitlements of the sell-back rights. Justice Conti held that there was no problem with the expert summarising the ASX statistics, although he questioned the utility of doing so in the context of the case, but held that by adopting the expression 'benefit' where in the context of a tax objection the word was capable of carrying a fiscal conclusion, he went beyond his area of specialised knowledge and provided an opinion that he was not expertly qualified to provide.

- In *Harrington-Smith on behalf of the Wongatha People v State of Western Australia* [2003], Justice Lindgren criticised the form of expert reports, describing parts of them as 'undifferentiated combinations of speculation, summary description of facts, opinion (including opinion beyond the witness' field of specialised knowledge), hearsay, unsourced assertion and sweeping generalisation'. His Honour said that:

... it is difficult to avoid the impression that no attempt at all has been made to address the criteria of admissibility of expert opinion evidence.

It is therefore increasingly important that expert witnesses, lawyers and parties to litigation give careful thought and consideration to the way in which expert evidence is prepared.

SO, WHAT ARE THE CRITERIA OF ADMISSIBILITY OF EXPERT OPINION EVIDENCE?

The Federal Court Guidelines for Expert Witnesses (which have been recently updated) and the NSW Supreme Court Rules (Schedule K) usefully set out what is expected of expert witnesses giving opinion evidence and tips on how to ensure admissibility. The Federal Court Guidelines are not rules of law. Failure to comply with the Guidelines will not result in the expert report being excluded from evidence, but compliance or non-compliance may influence the court's assessment of the report (*ACCC v Lux Pty Ltd* [2003]).

The Guidelines are based on a set of basic principles or criteria for admissibility.

Specialised Knowledge

First, the expert must have sufficient knowledge and experience to be held out as an expert. This is a question of fact, and the point at which a person becomes an expert is not always easy to determine. In some circumstances a witness must be a member of a profession in order to be qualified to give an expert opinion, but in general, the manner in which the witness obtained their specialised knowledge (for example, through schooling, or by private reading and study, or in the course of a business) affects only the weight the court will give to his or her opinion, and not whether or not the evidence is admissible.

A rule that the area of expertise must be sufficiently recognised has not been expressly incorporated into the *Evidence Act*. However, there is a rule in section 135 of the *Evidence Act* that requires that evidence not be admitted if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial, or misleading or confusing, or result in a waste of time. This rule would prevent the leading of expert evidence based on 'mad science', or opinions based on theories that are not widely accepted.

The evidence that the expert gives must be 'wholly or substantially based on that knowledge' (section 79, *Evidence Act 1995*). In *Evans Deakin and Dean-Willcocks*, the expert reports were held to be inadmissible because they proffered opinions on matters about which the witnesses were not expertly qualified to give an opinion. In *McNeil*, Justice Conti said that though the witness was very well qualified, with experience in tax, accounting, valuation and audit principles, the particular question on which he was asked to give an opinion was not something within his specialised knowledge, and his opinion was held to be inadmissible.

Common Knowledge

Second, the witness' evidence must concern something with which the tribunal of fact needs assistance. Expert evidence will be inadmissible if the matter on which the evidence is given is a matter of common knowledge or common sense.

Ultimate Issue Rule

Third, the expert must not give evidence which has the effect of supplanting the function of the tribunal of fact to decide the issue before the court. This is generally known as the 'ultimate issue' rule. The role of the expert is to assist the tribunal of fact in drawing inferences, but it is not the role of the expert to draw those inferences for the tribunal of fact.

Basis Rule

Finally, the expert's opinion must be based upon matters within the expert's own observations. This is known as the 'basis rule'. Experts are subject to the same rules of evidence as apply to lay witnesses, and therefore may not give evidence which is in the form of hearsay. This can be problematic, because all experts employ hearsay to some degree in forming their views, by relying on books, articles, papers and statistics through which they gain their specialised knowledge. In practice, the basis rule means that witnesses should disclose any version of the facts upon which their opinion is based, and explain the way in which the application of their specialised knowledge has lead them to draw a particular conclusion. Expert opinions are preferably presented as hypothetical constructs upon assumed facts. The evidence will be of no value, even if it is admissible, if the facts assumed in arriving at it are rejected by the tribunal of fact or cannot be proved through admissible evidence.

CONCLUSION

In *Harrington-Smith*, Justice Lindgren commented that experts should be given assistance and guidance by their lawyers in order that the requirements for admissibility be systematically addressed. Justice Lindgren commented that, in that case, his impression was that, beyond an initial letter of instructions, lawyers had left the task of writing the reports entirely to the expert, even though the expert could not 'reasonably [have been] expected to understand the applicable evidentiary requirements'. He said that, despite a commendable desire to avoid suggestions of improper influence, lawyers should be involved in the writing of reports. They should not be involved in writing the substance of reports (in particular, in arriving at the opinions to be expressed), but should generally be involved in ensuring that expert reports meet the legal tests of admissibility.

This is a developing area of law, and, if the examples given above are any indication, the admissibility of expert evidence will continue to be a 'hot topic' with the courts. It is important that lawyers, experts and clients keep abreast of the changes and continuing case law.

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