Expert evidence: a judge's perspective

The admissibility of expert evidence under the Uniform Evidence Act

The following paper was delivered by the Hon Justice Catherine Branson, a judge of the Federal Court of Australia, at the inaugural Australian Women Lawyers Conference, Sydney, 29-30 September 2006.

Introduction

In a high proportion of the civil trials conducted in the Federal Court, and in other superior courts, expert evidence of one sort or another is received. This is not surprising. Australia's superior courts are increasingly required to deliver judgments concerning complex or highly technical subject matters including pharmacology, technology, economics, business and medicine. If public confidence in the outcomes of these trials is to be ensured, the public needs to know that judges get the assistance that they need by way of expert evidence to understand, and then to resolve, the disputes that come before them.

The expression 'expert evidence' is commonly used to mean expert opinion evidence. On other occasions it is used in a more limited sense to mean expert opinion evidence given by an independent witness. It was in this sense that Mr Justice Cresswell in *The Ikarian Reefer*[1] observed:

> 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.

However expert evidence is not confined to opinion evidence. For example, an accountant who has inspected the financial records of a company may give a summary of their effect in evidence.[2] An expert with qualifications in a particular field may give evidence of the meaning and denotation of technical terms used in that field[3] and of the construction that a notional person skilled in that field would have placed on a technical publication as at a particular date.[4]

This paper principally gives consideration to the opinion evidence of independent witnesses. This is not intended to imply that the Uniform Evidence Act[5] requires an expert witness to be independent. In *ASIC v Rich* at first instance, Austin J noted that according to the preponderance of Australian authority the fact that an expert is aligned to the party engaging him or her, and biased or not independent, is not a bar to the admissibility of the expert's opinion evidence although it may affect the weight of the evidence.[6] The position may be different in the UK.[7]

The Australian Law Reform Commission, the NSW Law Reform Commission and the Victorian Law Reform Commission have recently conducted a joint inquiry into the Uniform Evidence Act.[8] One of the objectives of their inquiry was to identify and address any defects in the Act. The only amendment which they have proposed to Part 3.3 of the Act, which includes the opinion rule and the exceptions to that rule, is an amendment concerning the evidence of a person who has specialised knowledge of child development and behaviour.[9]

The law reform commissions have additionally recommended that the Act be amended to confirm that s60 (which allows hearsay evidence admitted for a non-hearsay purpose to be used as evidence of fact) applies to both first-hand and more remote hearsay.[10] Their report expresses the view that *Lee v The Queen*,[11] to the extent that it limits the operation of s60 to first-hand hearsay, does not reflect the intention of the ALRC when recommending the enactment of s60. They observe:

> If Lee is read as deciding that s60 has no application to second-hand and more remote hearsay, it follows that evidence of accumulated knowledge, recorded data, and other factual material commonly relied upon by experts will be inadmissible as evidence of the truth of the facts asserted in the material. Yet a central reason for enacting s60 was to continue to allow such evidence to be admissible as evidence of the truth of the facts asserted, even though the evidence is hearsay.[12] (citation omitted)

The limited nature of the above recommendations suggests that the law reform commissions concluded that the Act, generally speaking, provides a satisfactory framework for the provision of assistance to judges by way of expert evidence. This is a conclusion with which I broadly agree.

Nonetheless, it seems that many practitioners are concerned that the Act has added unnecessary complexity to the task of adducing expert evidence. This paper seeks to allay these concerns by identifying, and examining, the basic principles which govern adducing expert opinion evidence under the Act.

Before turning to these basic principles it is necessary to address briefly the broader statutory framework provided by the Act.

The general rule

In proceedings to which the Act applies[13] the admissibility of all evidence is governed by that Act. The central provision of the Act is s56 which provides:

> (1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.
>
> (2 Evidence that is not relevant in the proceeding is not admissible.

It flows from s55,[14] which gives meaning to the phrase 'evidence that is relevant', and s56 of the Act that unless any evidence, including expert evidence, sought to be adduced in a proceeding could rationally affect the assessment of the probability of the existence of a fact in issue in that proceeding it is not admissible. It also flows from these two sections that all evidence that could rationally affect the assessment of the probability of the existence of a fact in issue in the proceeding is admissible unless the Act itself makes it inadmissible or provides a basis upon which the court may refuse to admit it.

The opinion rule

The ordinary rule, which is reflected in s76 of the Act, is that evidence of an opinion is inadmissible to prove the truth of the subject matter of the opinion.[15] This is the opinion rule. An opinion for the purpose of law of evidence is an inference drawn from assumed facts.[16] The ordinary position is that witnesses must state facts (what they saw, heard or otherwise experienced) and it is for the court or other trier

of fact to draw inferences from those facts. The ordinary position reflects an assumption that the judge, or other trier of fact, has the competence to draw all necessary inferences where the subject matter of the inquiry is common-place.

Where the subject matter of the inquiry is not common-place, but rather an area of acquired wisdom, the opinion rule requires modification. In such a case the court, or other trier of fact, may not have the competence to draw all necessary inferences from established or accepted facts; if its judgment is to be sound it will need help from a person who has the relevant acquired wisdom.

The Act recognises three exceptions to the opinion rule. The first is where evidence of the opinion is admitted for a purpose other than for the purpose of establishing the truth of the opinion.[17] The second is a limited exception in respect of lay opinions.[18] The third exception is found in s79 which is relied on in most cases in which expert evidence is adduced. Section 79 provides:

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

It is critically important to note the four requirements which must be satisfied before s79 will take evidence of an opinion outside the opinion rule. The section requires that:

- the evidence in question must evidence a person's opinion;
- the person must have specialised knowledge;
- that knowledge must be based on the person's training, study or experience; and
- the opinion must be wholly or substantially based on that knowledge.

The basis principles which this paper identifies all derive from the general rule governing admissibility and the requirements of s79 of the Act.

Basic Principle No 1

It is important to distinguish between expert evidence and other forms of expert assistance.

The distinction between expert evidence and expert assistance was highlighted by Allsop J in *Evans Deakin Pty Ltd v Sebel Furniture Ltd*[19] in comments concerning a report prepared by an expert accountant. His Honour, after noting that the report was argumentative in style and did not contain clear evidence of an expert opinion, observed:

> There may well have been great value in those preparing *Sebel's Case* obtaining the views of Mr ... . Such views would no doubt have assisted them in analysing and preparing the case and in marshalling and formulating arguments. That is the legitimate, accepted and well known role of expert assistance for a party preparing and running a case. Expert evidence in which a relevant opinion is given to the Court drawing on a witness' relevant expertise is quite another thing.'[20]

Expert assistance in litigation takes many forms. Expert assistance may be provided to a party's legal representatives entirely privately for the purpose of helping them to understand and thus prepare their client's case. For example a marketing expert might provide advice about features of the packaging of two rival products which deserve particular attention in a passing-off suit. At trial, armed with that advice, the party's lawyer may need to do no more than place the two sets of packaging in evidence and invite the court, by reference to those features, itself to draw inferences as to the impression that the challenged packaging would make on the minds of ordinary members of the community when purchasing products of the relevant kind.[21]

Similarly, an accountant might assist a party's legal representatives to analyse a company's financial records for the purpose of identifying its debts, the dates on which those debts were, or will be, due and payable and the resources available to the company to pay those debts as they become due and payable. With that assistance the party's case that the company was insolvent as at a particular date should, in other than a complex case, be able to be made out without expert accounting evidence - and thus without confronting the issue of whether an opinion concerning solvency is admissible.[22]

In other cases legal assistance may be provided directly to the court but not by oral or affidavit evidence. For example, where the court requires expert assistance in understanding technical subject matter, expert assistance in the formulation of an agreed technical primer or an agreed glossary of technical terms can prove very valuable. In some cases of this kind the court might even be persuaded that an expert should be permitted to address the court orally, perhaps as part of a party's opening, to provide a non-contentious explanation of relevant technology or scientific principles.[23]

Expert assistance in the senses discussed above will often not be evidence as such and thus may not be governed by the laws of evidence. Careful attention to the distinction between expert assistance and expert evidence may reduce, and might eliminate entirely, the need for an expert witness in a particular case. Even if it remains necessary or desirable to have an expert witness, the inclusion of expert assistance in an expert report which is required to comply with the laws of evidence is calculated to give rise to problems of admissibility (see Basic Principle No 5).

Basic Principle No 2

The starting point for any expert evidence is the identification of the fact in issue to which the opinion is to relate.

Expert evidence is not admissible merely because it satisfies the requirements of s79 of the Act. Unless the evidence is relevant,[24] s56 of the Act will render it inadmissible. It is therefore necessary to identify, by reference to the substantive law and the pleadings, or other documents which clarify the issues between the parties, what is the fact in issue in the proceeding on which expert evidence is to be adduced. The expression 'a fact in issue in the proceeding' in s55 of the Act is intended to carry a wide rather than a restrictive meaning; it will encompass at least all of those things that one party must prove in order to succeed and that the other must prove to establish its defence.[25] In a proceeding conducted on pleadings the facts in issue will be those material facts pleaded by one party which are not accepted, or deemed to be accepted, by an opposing party. The opinion of an expert will be admissible only to the extent that the opinion, if accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue. An illustration of the way in which identification of the fact in issue can determine the content of admissible expert evidence is found in *EI Dupont de Nemours & Co v Imperial Chemical Industries PLC*.[26]

Both in the area of expert evidence and evidence generally, the requirement that evidence be relevant to be admissible highlights the desirability of parties' cooperating with the court both to clarify and to narrow the issues in dispute in any proceeding. Steps which may usefully be taken include drawing pleadings carefully so as to plead only material facts,[27] amending them as the real issues in dispute are clarified, and the seeking and making of appropriate formal admissions.

Basic Principle No 3

Identify with precision the question or issue on which the expert opinion is to be expressed.

The question or issue on which the expert's opinion is to be expressed may not be the same as the fact in issue to which the opinion relates - although it must be logically related to the fact in issue in the sense that if it were accepted it could rationally affect the assessment of the probability of the existence of that fact.[28] By way of example, the fact in issue might be that the applicant was in good mental health on a particular day. If evidence were available that the applicant had been seen seven days later by a neurologist who had observed severe symptoms of dementia, an issue on which an expert opinion might be sought is whether a person who showed severe symptoms of dementia on a particular day could have been in good mental health seven days earlier.

To satisfy the court that the expert's opinion is admissible under s79 it is necessary to identify the relevant specialised knowledge that the expert has (i.e. what is the precise nature or field of that knowledge) and demonstrate how that knowledge is based on his or her training, study or experience. The identification of the precise question or issue on which the expert's opinion is to be expressed will not only assist in obtaining helpful and admissible expert evidence; it will also assist in identifying what is the specialised knowledge based on training, study or experience that the expert will need to have. In the above example, the specialised knowledge that the expert will need to have is knowledge concerning the speed of progression of dementia; it may be that not every neurologist will have this specialised knowledge.

In *Adler v Australian Securities and Investment Commission Giles* JA noted that the phrase 'specialised knowledge' is deliberately not defined in the Act.[29] He observed that its scope, rather than being restrictive, is informed by the available bases of training, study and experience and in this last regard perhaps extends the common law. The following have been held to be areas of specialised knowledge within the meaning of s79 - investor behaviour,[30] coded language of drug dealers[31] and the propensity of prison escapees to engage in criminal activity.[32]

A critical aspect of 'specialised knowledge' is its reliability; unless the knowledge is reliable an opinion wholly or substantially based on it will not be of assistance to the court in forming a sound judgment on an issue outside the competence of ordinary people.[33] However, the Act has not adopted the United States field of expertise test which asks not only if there is a field of expertise but also whether the scientific procedures used have gained the requisite standing in the scientific community to be regarded as 'generally accepted'.[34]

Not only must an expert witness have the appropriate specialised knowledge, the opinion expressed by the expert must be wholly or substantially based on that specialised knowledge. This means that the expert's competence to draw the inference which constitutes the opinion must be wholly or substantially based on his or her specialised knowledge.[35] An accountant, for example, might be qualified to express an opinion about what accounting standard is applicable in particular circumstances but not qualified to express an opinion on how a competent and experienced company director would act faced with particular circumstances.[36] A general practitioner might be able to express an opinion concerning an every day illness, but not be qualified to express an opinion in an area of specialised medical practice.

The danger of not identifying with precision the exact question or issue on which an expert opinion is required and selecting an expert whose expression of opinion will be wholly or substantially based on

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his or her expert knowledge is illustrated by *HG v The Queen*.[37] In that appeal Gleeson CJ observed of the opinion given by a psychologist:

> That opinion was not shown to have been based, either wholly or substantially, on Mr ... specialised knowledge as a psychologist. On the contrary, a reading of his report, and his evidence at the committal, reveals that it was based 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 of a psychologist.[38]

Basic Principle No 4

Pay attention to the factual basis of the expert's opinion.

Basis rule

The Act does not expressly incorporate what has been called the 'basis rule'. Under the 'basis rule' the expert must disclose the facts or assumptions on which his or her opinion is based; those facts and assumptions must be capable of proof by admissible evidence; and evidence must be admitted to prove the facts and assumptions upon which the opinion is based.[39]

Disclosure

Published judgments of the NSW Court of Appeal and the full court of the Federal Court might be thought to reveal differences of approach, or perhaps of emphasis, so far as the disclosure of the factual basis of the expert's opinion is concerned. The NSW Court of Appeal has identified a requirement for an expert to state the asserted factual basis of his or her opinion as a condition of admissibility.[40] The full court of the Federal Court has tended to address disclosure of the factual basis of an expert opinion in the context of the requirement that the court be satisfied on the balance of probabilities[41] of the relevance of the opinion and of its basis. If satisfied that the opinion is relevant and that it is at least substantially based on the specialised knowledge of the expert, failure fully to disclose and prove the factual basis of the expert opinion is treated as affecting the weight to be given to the evidence.[42]

As Allsop J recognised in *Evans Deakin Pty Ltd v Sebel Furniture Ltd*[43] the differences in approach between the two courts as to the significance of any failure to disclose and prove the factual basis of an expert's opinion is likely to be of only theoretical interest. The requirement of the Act that the court be satisfied that the requirements of s79 are met, together with the discretion vested in the court to exclude evidence if its probative value is substantially outweighed by the danger that it might be unfairly prejudicial, misleading or confusing or result in undue waste of time,[44] will mean that differences in outcome will be rare. Moreover, compliance with the guidelines or rules published by courts for the assistance of expert witnesses should prevent the issue from arising (see, for example, the *Practice Direction on Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia*).

The guidelines or rules published by Australian courts for the assistance of expert witnesses require the expert to state all assumptions of fact made by him or her.[45] An assumption of fact for this purpose is any factual matter to which the expert had regard in forming his or her opinion. All such facts may be characterised as assumptions because it is for the court, not the expert or a party, to determine what are the true facts. It is for this reason that it is impermissible for an expert to read a transcript of a hearing, or sit in court for the purpose of hearing all evidence adduced, and then express an opinion based on what he or she has read or heard.[46] The expert cannot know how much of the evidence that he or she had heard will be accepted by the court.

Assumptions of fact made by an expert may include:

- assumptions of fact which the expert's instructions require the expert to make (eg 'on the assumption that the height of Mount Meru is 4,566 feet above sea level, at what temperature does water boil at its peak?');
- relevant observations made by the expert (e.g. an observation made by a medical practitioner that the applicant had a rash on the abdomen);
- information conveyed to the expert by a solicitor (e.g. 'our client's instructions are that he was driving his motorbike at 60 km/h'); and
- representations made directly to the expert (e.g. 'I was driving my motorbike at 60km/h').

All assumptions of any of the above kinds should be stated by the expert - if he or she has prepared a report, in that report, or otherwise orally or in an affidavit.

However, in some fields of expertise, it is not realistic to expert a witness to identify every assumption which underlies his or her opinion.

This was recognised by Spigelman CJ in the NSW Court of Appeal decision in *ASIC v Rich*, an appeal concerning the evidence of a forensic accountant, where the chief justice noted that:

> An expert frequently draws on an entire body of experience which is not articulated and, is indeed so fundamental to his or her professionalism, that it is not able to be articulated ... There will be occasions in which matters of this character are proper to be explored during the course of cross-examination for the purposes of determining the weight to be given to the opinion. The mere fact that there must have been use of some extraneous material ... does not of itself necessarily lead to a conclusion that the evidence is of low probative value. In many cases the opinion will plainly be capable of being supported by the underlying facts proven or assumed. If so, the fact that a broader range of information may originally have been availed of would not necessarily detract to any significant degree from the probative value of the evidence given. Any such conclusion must depend on the particular circumstances of the matter under consideration.'[47]

In *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 7)*[48] Lindgren J drew attention to the great practical differences in respect to the listing of factual assumptions between, for example, a physicist who specialises in slipping accidents[49] and historians and anthropologists concerned with more complex questions such as whether there are communal, group or individual rights and interests of Aboriginal peoples in relation to land and waters possessed under traditional laws and customs observed by those peoples.

Moreover, the authorities recognise that in the case of some expert economic evidence, such as that traditionally adduced in competition

law cases, it may even be artificial and unhelpful to try to identify all of the factual assumptions on which the relevant opinion is based.[50] In *ACCC v Liquorland (Australia) Pty Ltd*, a case concerning shopping behaviour, Allsop J observed that economics can usefully be understood, in the words of John Maynard Keynes, as 'a method rather than a doctrine, an apparatus of the mind, a technique of thinking, which helps its possessor draw correct conclusions.' [51] His Honour said:

> Because it is a social science and because in one sense and in part it truly is a way of approaching matters and a way of thinking about matters, there is a role, it seems to me, for the economist to assist the court by expressing, in his or her own words, what the human underlying facts reveal to him or her as an economist and what it reflects to him or her about underlying economic theory and its application.[52]

Other disciplines in which it has been acknowledged that an expert cannot be expected to identify every assumption of fact upon which he or she has relied, including history,[53] pharmaceutical chemistry,[54] anthropology[55] and valuation.[56] The same approach may be assumed to be appropriate and permissible under the Act in respect of every discipline in which it is usual practice for a practitioner to draw upon a body of knowledge available generally to all practitioners in the discipline.

Proof

Unless the truth of the factual assumptions (other than those which constitute the body of knowledge available generally to practitioners in the discipline) that underpin an expression of opinion is established, the opinion itself will either be inadmissible, or if admitted, of limited, or perhaps no, weight. For example, if a fact in issue were the temperature at which water boils at Mt Meru's peak, an opinion on this question expressed by a hydrologist who accepted an invitation to assume that the height of Mt Meru is 4,566 feet above sea level would either be irrelevant or of no probative weight if the court were to find that the true height of Mt Meru is 4,566 metres above sea level.

Similarly, if a fact in issue were whether an applicant had contracted measles, an opinion on this question expressed by a medical practitioner whose evidence of having observed a rash on the applicant's abdomen was disbelieved would be likely to be of little, if any, weight. However, if the only discrepancies between the factual assumptions made by an expert and the facts as found by the court were slight, at least in the Federal Court, the failure to prove the truth of all of the factual assumptions that underpinned the expert's opinion would go only to the weight to be attributed to the opinion.

Particular attention needs to be given to hearsay evidence in the context of an expert opinion. Section 60 of the Act provides that the hearsay rule[57] does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation. It is common for evidence of a previous representation to be admitted because it is relevant as the basis of an assumption of fact made by an expert. For example, if a medical practitioner is asked to express an opinion on whether an applicant's injuries are consistent with his claim to have driven his motorbike into a tree, the medical practitioner is likely to ask the applicant about the speed at which he was travelling at the time of impact and base his or her opinion on an assumption that the applicant was travelling at or near the speed indicated by his answer. When the medical practitioner's report is admitted, unless an order is obtained under s136 of the Act[58] limiting the use to be made of the evidence, the hearsay evidence of the applicant's representation as to his speed of travel will also constitute evidence tending to prove the truth of that representation. Of course, the weight to be accorded to the hearsay evidence as proof of the truth of the representation is a matter for the court. Nonetheless, practitioners need to be alert to the need to request an order under s136 of the Act in appropriate cases.

It will not be appropriate to request an order under s136 of the Act in every case in which an expert gives hearsay evidence. The truth of the hearsay may not be contentious. Moreover, it would probably constitute an error for a court to invoke s136 simply because the evidence in question is hearsay.[59] However, if s60 is invoked in circumstances which suggest, for example, an intention to avoid having contentious evidence tested by cross-examination, a court is likely to be readily persuaded to make an order that the hearsay evidence may not be used to prove the truth of any assertion contained in it.[60]

An important limitation on the operation of s60 is that its operation is limited to 'evidence of a previous representation'. This gives importance to the form in which an expert gives evidence of the factual basis of his or her opinion.[61] If given in the form of an assumption s60 will have no operation; if given in the form of a positive representation s60 will have an operation. The ALRC has justified this outcome by noting that it would be perjury for an expert to state as a representation what was only put to him or her as an assumption.[62]

A further important limitation on the operation of s60 derives from *Lee v The Queen*.[63] This case is generally understood to exclude from the operation of s60 second-hand or more remote hearsay. On this basis, a statement in an expert report recording that a solicitor had advised that the client's instructions were that he was driving a motorbike at 60km/h would not constitute evidence as to the speed at which the client was travelling. However, a statement in the report that the client had advised the author of the report that he was travelling at 60/km/h would constitute evidence of the speed at which he was travelling.

In the recently published review of the Act it is stated that the ALRC did not intend to limit s60 to first-hand hearsay, either in relation to prior statements or in relation to the factual basis of expert opinion evidence.[64] As mentioned above, a recommendation has been made that the Act be amended to confirm that s60 does not have a limited operation.[65]

Basic principle No 5

Lawyers should take steps to ensure that expert reports are in the proper form.

The admissibility requirements of the Act, and the strictures of guidelines for the preparation of expert reports, are unlikely to be fully appreciated by an expert whose discipline is not the law. For this reason lawyers should help experts retained by their clients to

formulate their reports in an admissible form and in compliance with the appropriate guidelines. If lawyers do not undertake this role, time and cost on all sides is likely to be wasted and the court deprived of the expert assistance that it needs.[66]

The appropriateness of lawyers helping experts to prepare reports in admissible form was recognised by Lindgren J in *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 7)*. His Honour noted that many of the experts' reports in that case made little or no attempt to address in a systematic way the admissibility requirements of the Act. His Honour said:

> Lawyers should be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed. In the same vein, it is not the law that admissibility is attracted by nothing more than the writing of a report in accordance with the conventions of an expert's particular field of scholarship. So long as the court ... is bound by the rules of evidence ... the requirements of s79 (and of s56 as to relevance) of the Evidence Act are determinative in relation to the admissibility of expert opinion evidence. [67]

Of course, it is important that lawyers understand the boundaries within which their assistance can properly be provided. In *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* the conduct of a solicitor in suggesting changes to a draft opinion expressed by an expert led Wilcox J to conclude that it would be unsafe to rely on that expert in relation to any controversial matter.[68]

The *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia* deal in detail with the appropriate form of a report. The equivalent rules or guidelines of other courts do likewise.[69] If lawyers help experts to ensure that they are followed, the opinion sought to be adduced under s79 will be clearly identified; the specialised knowledge of the expert will be specified and the training, study or experience on which that knowledge is based particularised. Additionally the assumptions of fact made by the expert will be set out as will the reason why those assumptions led to the opinion expressed.

One reason why the courts have sought to control the form of expert reports is that proper form facilitates the determination of admissibility. Only so much of the report as constitutes evidence of the expert's opinion will be admissible under s79 of the Act. The rest of the report will be admissible only to the extent that it satisfies the general admissibility requirements of the Act, and in particular, the criterion of relevance. A report in proper form will include, and only include, evidence which is relevant because, if accepted, it could rationally affect (indirectly) the assessment of the probability of the existence of the fact in issue to which the opinion itself is directed. The evidence will be of this character because it underpins the weight, if any, to be given to the opinion of the expert.

Conclusion

Expert evidence is an important category of evidence. It is likely to become even more important as the subject matter of litigation becomes increasingly removed from ordinary experience.

More than a decade has passed since the Uniform Evidence Act came into operation. Considerable jurisprudence has emerged touching on its operation, including its operation in respect of expert evidence. This paper attempts to identify important features of that jurisprudence and place them in a practical context.

Additionally it attempts to encourage legal practitioners to be thoughtful about whether in any particular case the court will require expert assistance and, assuming that it does, about the type, extent and form of expert assistance most likely to be beneficial and the expertise and experience that an individual will need to have before he or she is able to provide that assistance.

Consideration of court appointed experts and restrictions on the number of expert witnesses, if any, that a party may call are outside the scope of this paper. However, it is appropriate to note that the impetus towards initiatives of this kind are probably rooted in a relatively wide-spread belief that litigation is often unnecessarily protracted, or unnecessarily expensive, or both, because legal practitioners are not displaying sufficient thoughtfulness and discipline with respect to expert evidence.

1 [1993] 20 FSR 563 at 565.

2 *Potts v Miller* (1940) 64 CLR 282 per Dixon J at 302; *Spassked Pty Ltd v Commissioner of Taxation (No 2)* (2002) 49 ATR 642 at [13].

3 *Borowski v Quayle* [1966] VR 382; *R v Patents Appeal Tribunal; Ex parte Baldwin & Francis Ltd* [1959] 1 KB 105.

4 *El Dupont de Nemours & Co v Imperial Chemical Industries PLC* (2002) 54 IPR 304 at [59].

5 '*Uniform Evidence Act*' (or 'the Act') is used in this paper to refer to the *Evidence Act 1995* (Cth), the Evidence Act 1995 (NSW), the *Evidence Act 2001* (Tas) and the *Evidence Act 2004* (NI).

6 (2005) 190 FLR 242 at [334].

7 See the Civil Procedure Rules (UK) Part 35.3 and Toth v Jarman [2006] EWCA Civ 1028.

8 Uniform Evidence Law Report (2005) comprising ALRC Report 102, NSWLRC Report 112 and VLRC Final Report December 2005.

9 Recommendation 9.

10 Recommendation 7-2.

11 (1998) 195 CLR 594.

12 *Uniform Evidence Law Report*, above n 8, at par 7.99.

13 All proceedings in the High Court, the Federal Court, the Family Court, the Federal Magistrates Court or before any person or body (other than a court or magistrate of a state or territory) that is performing a function or exercising a power under a law of the Commonwealth that is required to apply the laws of evidence; all proceedings in any court of the ACT or before any person or body that in performing a function or exercising a power under a law of the ACT is required to apply the laws of evidence; all proceedings in a NSW court; all proceedings in a Tasmanian court; and all proceedings in a Norfolk Island court.

14 Section 55(1) of the Act provides: 'The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.'

15 Section 76(1) of the Act provides: 'Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.'

[16] J D Heydon, *Cross on Evidence*, 7th Australian edn, at [29010].

[17] Section 77 of the Act.

[18] Section 78 of the Act.

[19] [2003] FCA 171.

[20] ibid. at [676].

[21] See *Pacific Publications Pty Ltd v IPC Media Pty Ltd* (2003) 57 IPR 28; Cat Media Pty Limited v Opti-Healthcare Pty Limited [2003] FCA 133 at [55].

[22] *Quick v Stoland Pty Ltd* (1998) 87 FCR 371; *ASIC v Rich* (2005) 190 FLR 242 at [284]-[291]. See also *Potts v Miller* (1940) 64 CLR 282 per Dixon J at 302; *Re Montecatini's Patent* (1973) 47 ALJR 161 at 169; *Spassked Pty Ltd v Commission of Taxation* (No 2) (2002) 49 ATR 642.

[23] I granted such permission in *Brookfield v Davey Products Pty Ltd* (1996) 14 ACLC 303. The explanation was not received in evidence - it constituted part of the party's opening on the facts.

[24] See s 55(1) of the Act, above n 14.

[25] *EI Dupont de Nemours & Co v Imperial Chemical Industries PLC* (2002) 54 IPR 304 at [48].

[26] ibid. at [52]-[60].

[27] See, for example, O 11 r 2 of the Federal Court Rules.

[28] Section 55 of the Act.

[29] (2003) 179 FLR 1 at [629].

[30] *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd* (No 6) (1996) 64 FCR 79.

[31] *R v Lam* [2002] NSWCCA 377.

[32] *Godfrey v New South Wales (No 1)* [2003] NSWSC 160.

[33] *Osland v The Queen* (1998) 197 CLR 316, Gaudron and Gummow JJ at [53].

[34] *Frye v United States* 293 F. 1013 (D.C.Cir. 1923).

[35] See *Quick v Stoland Pty Ltd* (1998) 87 FCR 371 at 375.

[36] *Adler v ASIC* (2003) 179 FLR 1 at [630].

[37] (1999) 197 CLR 414.

[38] ibid. at [41].

[39] Uniform Evidence Law Report, above n 8, at par 9.52. This report at par 9.63 concludes: 'There is no formal "basis rule" at common law. Rather, the label "basis rule" acts as a shorthand for two orthodox proportions: that (1) the lower the correlation between the facts proved and the facts assumed, the less weight can be given to the expert opinion evidence; and (2) where the facts proved and the facts assumed are substantially different, the point might be reached where the opinion evidence carries so little weight that it is not probative, and hence inadmissible.' (references to footnotes omitted).

[40] *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 per Heydon JA at [85]; ASIC v Rich (2005) 218 ALR 764 at [134].

[41] Section 142 of the Act.

[42] *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 55 IPR 354; Quick v Stoland (1998) 87 FCR 371.

[43] [2003] FCA 171 at [670].

[44] Section 135 of the Act.

[45] See, for example, 2.2 of the Federal Court Practice Direction on Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia; the Federal Magistrates Court Rules 2001 (referring to the Federal Court Guidelines); Part 15.5 of the *Family Law Rules 2004*; Part 31, Division 2 and Schedule 7 of the *Uniform Civil Procedure Rules 2005* (NSW); Order 44 of the Supreme Court (General Civil Procedure) Rules 2005 (VIC); Chapter 11, Part 5 of the *Uniform Civil Procedure Rules 1999* (QLD); Order 44 of the Supreme Court Rules (NT); Part 2.12 of the *Court Procedure Rules 2006* (ACT); Part 9, Division 2 of the *Supreme Court Civil Rules 2006* (SA).

[46] *Arnotts Ltd v Trade Practices Commissioner* (1990) 24 FCR 313 at 345-354; *Hillier v Lucas* (2000) 81 SASR 451 at [351]-[353].

[47] (2005) 218 ALR 764 at [170].

[48] (2003) 130 FCR 424 at [26].

[49] *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705.

[50] See *ACCC v Universal Music Australia Pty Limited* (2001) 115 FCR 442; on appeal *Universal Music Australia Pty Limited v ACCC* (2003) 131 FCR 529.

[51] [2005] FCA 630 at [21].

[52] Ibid at [29].

[53] *R v Zundel* (1987) 35 DLR (4th) 338 at 387-390.

[54] *Borowski v Quayle* [1966] VR 382 at 386.

[55] *Daniel v Western Australia* (2000) 178 ALR 542 at [24]-[30].

[56] *Pownall v Conlan Management Pty Ltd* (1995) 12 WAR 370 at 374-5 per Ipp J.

[57] The hearsay rule is set out in s 59(1) of the Act which provides: 'Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.'

[58] Section 136 of the Act provides: 'The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

(a) be unfairly prejudicial to a party; or

(b) be misleading or confusing.'

[59] See *Papakosmas v The Queen* (1999) CLR 297 at [94].

[60] *Quick v Stoland Pty Ltd* (1998) 87 FCR 371 at 378.

[61] ibid. at 377-378.

[62] *Uniform Evidence Law Report*, above n 8, at par 7.118.

[63] (1998) 195 CLR 594.

[64] See *Uniform Evidence Law Report*, above n 8, at par 7.97.

[65] Recommendation 7-2.

[66] *Seven Network Limited v News Limited (No 15)* [2006] FCA 515.

[67] (2003) 130 FCR 424 at [19].

[68] (2005) 220 ALR 1 at [227]-[231].

[69] See, for example, the Federal Magistrates Court Rules 2001 (referring to the Federal Court Guidelines); Part 15.5 of the Family Law Rules 2004; Part 31, Division 2 and Schedule 7 of the *Uniform Civil Procedure Rules 2005* (NSW); Order 44 of the *Supreme Court (General Civil Procedure) Rules 2005* (VIC); Chapter 11, Part 5 of the *Uniform Civil Procedure Rules 1999* (QLD); Order 44 of the Supreme Court Rules (NT); Part 2.12 of the *Court Procedure Rules 2006* (ACT); Part 9, Division 2 of the *Supreme Court Civil Rules 2006* (SA).