Admitting expert evidence

Dasreef Pty Ltd v Hawchar (2011) 277 ALR 611; (2011) 85 ALJR 694; [2011] HCA 21

Mr Hawchar suffers from silicosis. Prior to such diagnosis in 2006, Mr Hawchar was employed by the appellant (*Dasreef*), as a stonemason for which Mr Hawchar spent a considerable amount of time cutting sandstone and inhaling amounts of airborne dust.

Following Mr Hawchar's diagnosis, Mr Hawchar commenced personal injury proceedings in the Dust Diseases Tribunal of New South Wales and relied upon the expert opinion evidence of Dr Basden. As qualified as Dr Basden was as a chartered chemist, chartered professional engineer and retired academic, he had no experience in quantifying the silica dust levels experienced by stonemasons.

In the report produced by Dr Basden, Dr Basden made statements to the effect that the amount of silica in Mr Hawchar's breathing zone would have been 500 or 1000 times greater than the permissible levels (the Estimate). However, as described by Dr Basden, the Estimate was 'only a ballpark [figure]' and was not intended to form the basis of a numerical opinion in respect of Mr Hawchar's exposure to respirable silica. Mr Hawchar's estimation was not supported by any calculations, testing or relevant literature.

Despite this, the primary judge sought to calculate the levels of silica dust to which Mr Harchar was exposed by relying upon the Estimate given by Dr Basden. This led to a finding that Mr Hawchar's exposure to dust while working for Dasreef exceeded the relevant Australian standard.

In the Court of Appeal, Dasreef challenged the admissibility of Dr Basden's evidence. This challenge was rejected.

Decision

The issues before the High Court relating to the admissibility of Dr Basden's 'expert opinion' were:

1. Whether Dr Basden expressed an opinion about the numerical or quantitative level of exposure to respirable silica; and
2. Whether that was an opinion based on specialised knowledge based on Dr Basden's training study or experience.

Such questions necessitated a consideration of s 79(1) of the Evidence Act.

The joint judgment of the majority (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) recognised that Dr Basden did not express an opinion about Mr Hawchar's numerical or quantitative level of exposure to respirable silica. While the Estimate was numerical, it was not, and was not intended to be, an assessment which could form the foundation for a time weighted average level of exposure in respect of Mr Hawchar. This was not, however, how the primary judge or the Court of Appeal took his evidence and instead relied upon Dr Basden's evidence as an opinion about the quantitative level of exposure encountered by Mr Hawchar.

As the majority had held that Dr Basden did not give the relevant opinion, the court, then, considered issue two as a hypothetical question. The court sets out what would have had to be shown in order for Dr Basden to proffer an admissible opinion about the numerical or quantitative level of Mr Hawchar's exposure to silica dust. That is, it would have been necessary for the party tendering his evidence to demonstrate (at [35]):

- [F]irst, that Dr Basden had specialised knowledge based on his training, study or experience that permitted him to measure or estimate the amount of respirable silica to which a worker undertaking the relevant work would be exposed in the conditions in which the worker was undertaking the work.
- Secondly … to demonstrate that the opinion which Dr Basden expressed about Mr Hawchar's exposure was wholly or substantially based on that knowledge. [Bullet points added]

The first step establishes that the witness is an expert in the subject area (that is, such an individual *could* give a relevant expert opinion) and the second step establishes that the expert has utilised this expertise with respect of the opinion evidence in the specific circumstances of the relevant case (that is, the individual *has* given a relevant expert opinion). The majority emphasised that while the admissibility of opinion evidence is to be determined by application of the requirements of the Evidence Act (at [37]):

> … it remains useful to record that it is ordinarily the case, as Heydon JA said in Makita, that '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'. The

> way in which s 79(1) is drafted necessarily makes the description of these requirements very long. But that is not to say that the requirements cannot be met in many, perhaps most, cases very quickly and easily. That a specialist medical practitioner expressing a diagnostic opinion in his or her relevant field of specialisation is applying 'specialised knowledge' based on his or her 'training, study or experience', being an opinion 'wholly or substantially based' on that 'specialised knowledge', will require little explicit articulation or amplification once the witness has described his or her qualifications and experience, and has identified the subject matter about which the opinion is proffered.

As Dr Basden's evidence did not demonstrate how his opinion was based upon his training, study or experience the court held that there was no footing on which the primary judge could conclude that a numerical opinion expressed by Dr Basden was wholly or substantially based on specialised knowledge based on training, study or experience.

It was observed by the majority that a failure to demonstrate that an opinion expressed by a witness is based on the witness's specialised knowledge based on training, study or experience is a matter that goes to the *admissibility* of the evidence, not its weight (at [42]). The general rule with respect to any objections to admissibility of opinion evidence should be dealt with as soon as possible and preferably as soon as the objection is made (at [19]):

> As a general rule, trial judges confronted with an objection to admissibility of evidence should rule upon that objection as soon as possible. Often the ruling can and should be given immediately after the objection has been made and argued. If, for some pressing reason, that cannot be done, the ruling should ordinarily be given before the party who tenders the disputed evidence closes its case. That party will then know whether it must try to mend its hand, and opposite parties will know the evidence they must answer.

Based upon these principles, a party critical of an opposing party's expert would be wise to oppose its tender on the basis of inadmissibility than to allow its tender with the intention of seeking to persuade the court that little weight should be placed upon it (due to a lack of specialised knowledge, for example). A party seeking to rely upon an expert report would be wise to ensure that the evidence illustrating the expert's specialised knowledge, training, study or experience is in evidence prior to the tender of the experts report.

It is noteworthy that Mr Hawchar sought to establish that the above analysis reintroduced 'the basis rule' (a rule by which opinion evidence is to be excluded unless the factual bases upon which the opinion is proffered are established by other evidence). The majority clarified that this analysis does not seek to introduce the basis rule. It is upon this issue (that is, the status of the 'basis rule') where the majority judgment and the judgment of Heydon J may be contrasted. This is discussed below.

Counsel of perfection? Defending *Makita*

In *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 55 IPR 354 the Full Federal Court made some observations concerning expert evidence adduced at the trial. Branson J quoted at [85] of Heydon J's judgment in *Makita* and described his Honour's approach as 'a counsel of perfection' (at 356, [7]). According to her Honour, in the context of an actual trial, the issue of admissibility of expert opinion evidence may not be able to be addressed in the way outlined by Heydon J. Weinberg and Dowsett JJ observed (at 379, [87]) that it would be very rare indeed for a court at first instance to reach a decision as to whether tendered expert evidence satisfied all of Heydon J's requirements before receiving it as evidence in the proceedings, and said that more commonly, once the witness's claim to expertise is made out and the relevance and admissibility of the opinion evidence is demonstrated, such evidence is received.

In *Dasreef*, Heydon JA held that in respect of the admissibility of expert evidence the following three common law requirements must be satisfied in order to bring the evidence within s 79 of the Evidence Act:

1. First, the 'assumption identification' rule: the expert has to identify the 'facts' and 'assumptions' on which the expert's opinion is based;
2. Secondly, the 'proof of assumption' rule: the 'facts' and 'assumptions' must be proved before the evidence is admissible; and
3. Thirdly, the 'statement of reasoning' rule: there must be a statement of reasoning showing how the 'facts' and 'assumptions' are related to the opinion so as to reveal that that opinion was based on the expert's expertise.

The second requirement is, in substance, 'the basis rule' (if one adopts the language of the Law Reform Commission's interim report on evidence[1]) and, as such, Heydon J's judgment may be contrasted with that of the majority. In respect of Heydon J's view that the basis rule subsists under s 79 despite the Law Reform Commission's interim report, he observed (at [109]):

> The Commission's reasoning has misled both itself and some of its readers. A decision to refrain from including what was thought to be a rule which does not exist at common law does not demonstrate abolition of a rule which does in fact exist at common law. The Commission wrongly thought that there is no proof of assumption rule at common law. On that hypothesis, as the Commission correctly saw, the question was whether it should recommend that the legislature should enact one, and it decided not to make that recommendation. In fact there is a proof of assumption rule at common law, and the question for the Commission thus should have been whether to recommend that it be abolished by legislation. To abolish it by legislation would have called for specific language. The Commission's misapprehension of the common law, and hence of its task, has resulted in a failure to have enacted specific language ensuring that s 79 tenders need not comply with a proof of assumption rule.

Heydon J addressed, directly, Branson J's views in *Sydneywide Distributors* (at [100]):

> Branson J's view that s 79 tenders need not comply with an assumption identification rule is not, apart from one passage in this Court, specifically supported by the authorities in any jurisdiction. Almost all courts in which the question has been considered have revealed disagreement with her Honour's view

Ultimately, Heydon J ruled Dr Basden's evidence inadmissible on the same basis as the majority. That is, that Dr Basden had not demonstrated how his opinion was based upon his training, study or experience.

In the end, the inadmissibility of Dr Basden's evidence did not assist Dasreef. The court held that the evidence was sufficient to uphold the finding of liability in Mr Hawchar's favour despite the limitations of Dr Basden's evidence. As with respect to the significance of the decision, Heydon J's judgment raises questions with respect to the status of the 'basis rule', however, the suggestion that the rule subsists appears to have been resolved by the majority. In any case, the majority judgment provides us with the leading authority on the admissibility of expert evidence and the application of the exception to the opinion rule and the correct interpretation of s 79(1).

By Joanne Little

Endnotes

1. The Australian Law Reform Commission, Evidence, Report No 26, vol 1, 1985 p.417 [750].

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