Admissibility of expert evidence

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The laws in relation to the admissibility of expert evidence under the Uniform Evidence Act (**the Act**) are somewhat settled. Yet Courts continue to express opinions on the requirements of the opinion rule in the Act that either clarify or assume to settle outstanding conflicts. And some practitioners and commentators continue to disagree on the importance of common law rules to admissibility requirements or discretionary powers under the Act.

For that reason, the aim of this article is to provide a brief summary of the principles relevant to the admissibility of expert evidence in civil proceedings in those jurisdictions that have adopted the Act, namely the Commonwealth, New South Wales, Victoria, Tasmania (in part), the Australian Capital Territory and the Northern Territory.

In summary, in order to be admissible as expert opinion evidence under the Act:

(i) The opinion must be relevant to a fact in issue in the proceeding;

(ii) The opinion must be on a subject matter of 'specialised knowledge';

(iii) The opinion must be that of a person who has specialised knowledge based on the person's training, study or experience; and

(iv) The opinion must be wholly or substantially based on the person's training, study or experience.

Furthermore, in New South Wales, Part 31 of the *Uniform Civil Procedure Rules 2005* (NSW) (UCPR) imposes additional requirements that must be met for expert evidence to be admissible in civil proceedings (although the Court retains a discretion to admit expert evidence that does not comply with these requirements), which will also be discussed briefly.

The opinion rule: section 76 of the Act

The 'opinion rule' in s 76(1) of the Act provides that evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

Like the hearsay rule, the opinion rule is a purposive rule, in that it only applies where a party seeks to adduce opinion evidence for the *purpose* of proving the existence of a fact about the existence of which the opinion was expressed. Therefore, in considering whether the opinion rule applies at all, there are two threshold questions: first, whether the evidence sought to be adduced is evidence of an 'opinion'; and second, whether the *purpose* for which the expert evidence is sought to be adduced is to prove the existence of a fact about the existence of which the opinion was expressed.

Evidence of an 'opinion'

The Act does not define the term 'opinion'. Therefore, what constitutes evidence of an 'opinion', as opposed to evidence of a fact, is determined by the application of common law principles (s 9 of the Act). In two decisions, the High Court has defined the word 'opinion' as 'an inference drawn from observed and communicable data'.[1] It has been long been acknowledged that the dividing line between evidence of 'fact' and of 'opinion' can be difficult to draw, and is in reality a continuum rather than a bright line. A useful practical test given by Finkelstein J in the Full Federal Court's decision *La Trobe Capital & Mortgage Corporation Pty Ltd v Property Consultants Pty Ltd* [2] is to consider the extent to which the evidence goes beyond the witness' direct observations or perceptions, with the result that 'the more concrete the evidence, in the sense that the more grounded the evidence is in a witness' direct observation or perception of an event, the more likely it is to be factual in nature'.

Relevance of the opinion evidence

As noted above, the opinion rule requires identification of why the evidence is said to be relevant in the proceeding, which (applying the test for relevance in s 55(1) of the Act) 'requires identification of the fact in issue that the party tendering the evidence asserts the opinion proves or assists in proving'.[3]

Ordinarily, the only possible relevance of the expert opinion evidence in the proceeding will be to prove the existence of the fact about which the opinion was expressed. Relevant expert opinion includes the following categories of evidence:[4]

- opinion evidence as to what actually happened in particular circumstances, on the basis of assumptions that the expert is asked to make, as when a pathologist expresses an opinion about cause of death;
- opinion evidence as to what might be likely to happen in the future, on the basis of assumptions that the expert is asked to make, as when an economist might predict the effect of identified phenomena on a market;
- evidence of what is normally done in particular circumstances experienced by the expert, as when a legal practitioner says what is normally done in a conveyancing transaction;
- evidence as to what can be done in particular circumstances that the expert is asked to assume, and which the expert has not experienced, as when an engineer says what could have been done to avoid a failure of a particular structure;
- evidence concerning special usage of language or terms in the field of the expert's expertise, as when a chemist explains special usage of terms that have a different meaning in everyday speech;
- opinion evidence about what should or ought to have been done in particular circumstances that the expert is asked to assume, as when a legal practitioner says what enquiries ought to have been undertaken in a particular transaction, as distinct from what enquiries are ordinarily undertaken;
- opinion evidence as to whether particular conduct that the expert is asked to assume satisfies or falls short of some legal standard, as when a medical practitioner says that a particular procedure was conducted negligently.

Within those general categories of relevant expert evidence, the expert can perform 3 legitimate functions:

- ***Generalising from experience and training:*** 'A person experienced in a particular discipline may, in the course of a lifetime, accumulate a mass of material about the subject of the person's expertise, from his or her own practice, from journals, from newspaper reports and from discussion with fellow practitioners, much of which the person may not be able to recall but which enables him or her to express an opinion more accurately than one who has examined only the facts regarding particular instances. Such a witness may base an opinion on his or her experience, without having to prove by admissible evidence all the facts on which the opinion is based. Such witnesses regularly generalise from experience, calling in aid all their training and professional experience in expressing an opinion upon a matter within their field'.[5]

- ***Acting as librarian:*** 'In many instances, a witness who has experience in a particular discipline may not himself or herself know the answer to a particular problem from his or her own study or experience. However, being trained in the relevant discipline, the witness may be able to refer to works of authority in which the answer is given. In that sense, the witness may be said to be acting as a librarian. In that function, the witness is not giving evidence of his or her own opinion, except to say that, in his or her opinion, the books to which reference is made are of sufficient standing to be accepted by the Court'.[6]

- ***Acting as statistician:*** 'The third function of such a witness can be to apply statistical methods to material available from various sources in order to draw relevant conclusions. The statistical expertise and experience of the witness may be brought to bear on material otherwise in evidence'.[7]

If the expert opinion evidence is relevant for some purpose other than to prove the existence of a fact about the existence of which the opinion was expressed, then the exclusionary opinion rule in s 76 does not apply and it will not be necessary to satisfy the exception in s 79 of the Act. Furthermore, by reason of s 77 of the Act, if the evidence is admitted for some other purpose, it may nevertheless be used to prove the existence of the fact about the existence of which the opinion was expressed, unless an order is made under s 136 of the Act limiting the use that may be made of the evidence.

If the expert opinion evidence is not relevant – that is, even if accepted, the evidence could not rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding (s 55(1)) – it is not admissible in the proceeding, whether as opinion evidence or otherwise (s 56(2)).

"Your Honour, I call Nigel From The Pub… expert witness on whatever you like."

Expert evidence admissible as an exception to the opinion rule: s 79 of the Act

If a party seeks to adduce expert evidence of an 'opinion' to prove the existence of the fact about the existence of which the opinion was expressed, the evidence must satisfy the requirements of s 79 of the Act in order to be admissible.

Section 79 of the Act provides an exception to the opinion rule for the admission of expert evidence. It is noted that other exceptions to the opinion rule are provided in Part 3.3 of the Act for other forms of opinion evidence, such as the exception provided by s 78 for the admission of lay opinion evidence.

Section 79(1) of the Act states: 'If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge'.

In *Honeysett v The Queen*,[8] the High Court noted that s 79(1) of the Act states two conditions of admissibility for expert evidence: first, the witness must have 'specialised knowledge based on the person's training, study or experience'; and second, the opinion must be 'wholly or substantially based on that knowledge'. Subsequent decisions of intermediate courts of appeal have emphasised that these two conditions of admissibility are the *only* conditions of admissibility imposed by s 79, and attempts to impose other conditions of admissibility (such as a test of 'reliability') have been rejected as being inconsistent with the statutory test imposed by s 79.[9]

'Specialised knowledge'

As to the first condition of admissibility, the term 'specialised knowledge' is not defined in the Act. In Honeysett at [23], the High Court said of 'specialised knowledge':

(i) It is to be distinguished from matters of 'common knowledge' (referring to s 80(b) of the Act);

(ii) It is 'knowledge which is outside that of persons who have not by training, study or experience acquired an understanding of the subject matter';

(iii) It may be knowledge of matters that are not of a scientific or technical kind and a person may acquire specialised knowledge by experience;

(iv) However, the person's training, study or experience must result in the acquisition of 'knowledge'. The term 'knowledge' is used in s 79 in the sense of 'an acquaintance with facts, truths or principles, as from study or investigation', and which is 'more than subjective belief or unsupported speculation … [It] applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds'.[10]

One issue that may arise in satisfying this first condition of admissibility is whether

some purported expert opinion constitutes 'specialised knowledge' within the meaning of s 79(1) of the Act. This issue sometimes arises where a purported field of expertise is new or emerging.

At common law, in order for an opinion to be admissible as expert evidence it was necessary to demonstrate that the subject matter of the opinion 'forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or expertise'.[11]

However, in drafting the Act, the Australian Law Reform Commission declined to include any 'field of expertise' test for determining the admissibility of expert evidence, instead preferring to rely on the general power under s 135 of the Act to exclude purported expert evidence that 'has not sufficiently emerged from the experimental to the demonstrable'.[12]

Recently, in *DPP v Tuite*[13] (a decision handed down after the High Court's decision in *Honeysett*), the Victorian Court of Appeal rejected an argument that expert evidence based on a new technique of DNA analysis was not sufficiently 'reliable' to be admissible under s 79(1) of the Act. The Court appeared to decide that (a) so long as the witness has knowledge of the subject matter which is outside that of persons who have not by training, study or experience acquired an understanding of the subject matter, and (b) that knowledge is based on the person's training, study or experience, the evidence is admissible under s 79(1) of the Act notwithstanding it is novel or that the inferences drawn by the witness have not been tested or accepted by others. The Court held that if expert evidence is to be excluded because it is 'unreliable' (that is, because it is untested, unverified or unsupported), it may be excluded on discretionary grounds under s 135 of the Act (or s 137, in criminal proceedings). The reasoning in *Tuite* was approved by the New South Wales Court of Criminal Appeal in *Chen v R*.[14]

Therefore, in light of these matters, if a challenge is made to an expert witness' evidence on the basis that the purported 'field of expertise' is not 'specialised knowledge', it will be necessary for the party seeking to adduce the evidence to satisfy the court that the opinion is 'specialised knowledge' (as explained in *Honeysett* and *Tuite*), otherwise the evidence may either (a) fail to satisfy the test for admissibility under s 79(1) of the Act, or (b) be excluded under s 135 of the Act.

Whether the purported expert has 'specialised knowledge based on the person's training, study or experience'

Another issue that may arise in satisfying the first condition of admissibility under s 79(1) is whether the particular witness *in fact* has the 'specialised knowledge based on … training, study or experience' which the witness professes to have. That is a question of fact which must be satisfied by the party seeking to adduce the expert evidence in respect of each opinion sought to be given by the witness.[15]

Whether the expert's opinion is 'wholly or substantially based' on specialised knowledge based on training, study or experience

The second condition of admissibility of expert evidence under s 79(1) of the Act is that the expert's opinion must be based 'wholly or substantially' on his or her specialised knowledge based on training, study or experience.

This condition of admissibility focuses largely on the *form* in which the expert's opinion is expressed, since it is necessary the expert sufficiently discloses his or her reasoning process so that the Court can be satisfied that the expert's opinion is based wholly or substantially on his or her specialised knowledge.[16] Therefore, it is 'ordinarily the case' 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'.[17] Furthermore, 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'.[18]

To be admissible under s 79(1), it is sufficient that the expert's opinion is 'substantially' based on his or her specialised knowledge. This allows for the fact that 'it will sometimes be difficult to separate from the body of specialised knowledge on which the expert's opinion depends 'observations and knowledge of everyday affairs and events''.[19]

In *Dasreef Pty Ltd v Hawchar*,[20] the plurality noted that in 'many, if not most cases', the requirements of this second condition of admissibility should be able to be met 'very quickly and easily', such as where a specialist medical practitioner expresses a diagnostic opinion in his or her relevant field of specialisation. In such a case, it will require 'little explicit articulation or amplification' to demonstrate that the witness' opinion is wholly or substantially based on his or her specialist knowledge once the witness has 'described his or her qualifications and experience, and has identified the subject matter about which the opinion is proffered'.

For completeness, it should be noted that in *Dasreef Pty Ltd v Hawchar*, Heydon J identified two additional common law rules as to the form in which expert opinion evidence is presented which his Honour held continue to apply to govern the *admissibility* of expert opinion evidence under s 79 of the Act (rather than matters going merely to weight). The first rule is the 'assumption identification rule',[21] which requires an expert to state the facts and assumptions on which the opinion is based. The second rule is the 'statement of reasoning rule',[22] which requires the expert to state the reasoning by which the conclusion arrived at flows from the facts proved or assumed by the expert, so as to reveal that the opinion is based on the expert's expertise. There are three points to make about Heydon J's reasoning. First, in light of the plurality's reasoning in *Dasreef*, which focused upon the two conditions of admissibility based on the statutory language of s 79(1) of the Act (discussed above), it is to be doubted that the 'assumption identification rule' and the 'statement of reasoning rule' continue to apply as standalone rules governing the admissibility of expert opinion evidence under s 79(1) of the Act. Second, however, the 'assumption identification rule' and the 'statement of reasoning rule' do not appear to differ much in substance from the second condition of admissibility identified by the plurality in *Dasreef* (discussed above), which focuses on the form of the expert opinion and requires the expert to sufficiently disclose his or her reasoning process so that the Court can be satisfied that the expert's opinion is based wholly or substantially on his or her specialised knowledge. Third, in practice it would be prudent to continue applying the 'assumption identification rule' and the 'statement of reasoning rule' in *preparing* expert evidence. An expert report certainly will not be open to attack on admissibility grounds if the expert has complied with the 'assumption identification rule' and the 'statement of reasoning rule' in preparing his or her expert report.

An additional issue: Whether the opinion must be based substantially on facts that have been or will be proved by other evidence in the proceeding (the 'basis rule' or 'proof of assumption rule')

In *Dasreef Pty Ltd v Hawchar*, Heydon J also identified a third common law rule which his Honour held continued to apply to govern the admissibility of expert evidence under s 79(1) of the Act. This is the common law 'basis rule' (or what Heydon J called the 'proof of assumption rule'), which provides that expert opinion is not admissible unless evidence has been or will be admitted that is capable of supporting findings of primary facts that are sufficiently like the factual assumptions on which the opinion is based.[23]

In *Dasreef Pty Ltd v Hawchar*,[24] the plurality acknowledged that the Australian Law Reform Commission's interim report on evidence had denied the existence of the common law basis rule and that the ALRC did not intend to include it in the Act.[25] Therefore, in light of the High Court's de-

cisions in *Dasreef* and *Honeysett*, it appears that there is not any 'basis rule' that governs the *admissibility* of expert opinion evidence under s 79 of the Act. This is the view taken in recent decisions of intermediate courts of appeal.[26]

However, expert evidence will likely be given little, if any, weight if the party adducing the evidence fails to prove by other evidence the truth or correctness of the assumptions on which the opinion was based.[27] Furthermore, it has been suggested that an expert opinion 'completely unrelated to proved facts' may be so hypothetical that it does not meet the test of relevance in s 55 of the Act, in which case the evidence cannot be admitted.[28] Furthermore, where an expert relies on unproven assumptions forming a fundamental basis for his or her opinion, the evidence may be excluded under s 135 of the Act.[29]

Part 31 of the Uniform Civil Procedure Rules 2005 (NSW)

Division 2 of Part 31 of the UCPR also includes rules relating to the admissibility of expert evidence in civil proceedings in New South Wales courts. Part 31 provides the Court with significant control over the use of expert evidence. Part 31 should be read in conjunction with relevant practice notes applying in the particular court in which the expert evidence is sought to be adduced.

The main rules imposed by Part 31 are as follows:

(i) Parties must seek directions if they intend to, or it becomes apparent that they may, adduce expert evidence: r 31.19(1).

(ii) Unless the Court orders otherwise, an expert witness's evidence in chief must be given by the tender of one or more expert's reports: r 31.21.

(iii) The expert witness must comply with the code of conduct set out in Schedule 7 of the UCPR: r 31.23(1). Unless the Court orders otherwise, the expert's report may not be admitted in evidence unless the report contains an acknowledgment by the expert that he or she has read the Code of Conduct and agrees to be bound by it: r 31.23(3). Furthermore, the Court may not receive oral evidence from the expert unless it orders otherwise or the expert has acknowledged that he or she has read the Code of Conduct and agrees to be bound by it: r 31.23(4);

(iv) A party must serve an expert report in accordance with a Court order, or any relevant practice note, or if no such order or practice note is in force, at least 28 days before the hearing: r 31.28(1). Except by leave of the Court or with the other parties' consent, the expert's report is not admissible unless it is served in this way: r 31.28(3)(a). Oral evidence from the expert is also not admissible without leave or consent unless the expert's report has been served in accordance with the rules and the report contains the substance of the matters sought to be adduced in the oral evidence: r 31.28(3)(c). The Court will only grant leave if there are exceptional circumstances or the report merely updates an earlier version of the report that was properly served: r 31.28(4).30

(v) Other than in a trial by jury, if served in accordance with r 31.28, an expert's report is admissible as evidence of the expert's opinion and, if the expert's direct oral evidence on a fact on which the opinion was based would be admissible, as evidence of the fact: rr 31.29(1) and 31.30(2). This is subject to the expert report complying with the admissibility requirements of s 79 of the Act, as discussed above.

(vi) If a party requires the expert for cross-examination, the expert's report cannot be tendered under ss 63, 64 or 69 of the Act or otherwise used in the proceeding unless the expert attends for cross-examination, or is dead, or the Court grants leave to use it: rr 31.29(5) and 31.30(6).

(vii) If an expert provides a supplementary report, neither the supplementary report nor any earlier report by the expert may be used in the proceeding unless the supplementary report has been served on all parties affected: r 31.34(1).

The failure to comply with one or more of the requirements of Part 31 of the UCPR does not result in the evidence being automatically inadmissible under s 79 of the Act, nor does it result in the mandatory exclusion of the expert evidence under s 135 of Act. However, the failure to comply with the relevant requirements of UCPR Part 31 may provide grounds for the discretionary exclusion of the evidence under s 135 of the Act.[31] That being the case, on any application to exclude expert evidence under s 135 of the Act, it will be necessary to consider whether the probative value of the evidence is outweighed by any prejudice, confusion or undue waste of time caused by the failure(s) to comply with Part 31 of the UCPR.

Conclusion

As can be seen, the admissibility of expert evidence requires more than a knowledge of s 79 of the Act. That provision must be considered along with the requirements of s 56 of the Act and Part 31 of the UCPR. The discretionary powers of the Court under Part 3.11 of the Act are also important, including where a field of specialised knowledge may still be in its infancy or where assumptions and facts that form the basis for the opinion are not proven by the close of evidence. Further, certain common law requirements such as the assumption identification rule and statement of reasoning rule continue to be important in practice.

END NOTE

1 *Lithgow City Council v Jackson* (2011) 244 CLR 352 at [10]; *Honeysett v The Queen* (2014) 253 CLR 122 at [21]
2 (2011) 190 FCR 299 at [44]-[46]
3 *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [31].
4 P*an Pharmaceuticals Ltd (In Liq) v Selim* [2008] FCA 416, at [35].
5 *Pan Pharmaceuticals* at [26]
6 *Pan Pharmaceuticals* at [27]
7 *Pan Pharmaceuticals* at [28]
8 (2014) 253 CLR 122 at [23]
9 See eg *DPP v Tuite* (2015) 49 VR 196; [2015] VSCA 148
10 Citing *Daubert v Merrell Dow Pharmaceuticals Inc* (1993) 509 US 579 at 590
11 *R v Bonython* (1984) 38 SASR 45 at 47
12 ALRC 26, vol 1, para 743
13 (2015) 49 VR 196; [2015] VSCA 148 at [72]-[73]
14 [2018] NSWCCA 106 at [82]
15 *HG v The Queen* (1999) 197 CLR 414 at [40], [44]; Odgers, *Uniform Evidence Law* (13th ed, 2018) at [79.120]
16 *HG v The Queen* (1999) 197 CLR 414 at [39]
17 *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [37], citing *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85]
18 *HG v The Queen* at [39]
19 *Honeysett* at [24]
20 *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [37]
21 *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [64]-[65]
22 *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [91]-[94]
23 *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [66]-[90]; see also Heydon, *Cross on Evidence* (11th ed, 2017), at [29070];
24 (2011) 243 CLR 588 at [41]
25 ALRC 26, vol 1, paragraph [750]
26 *Langford v Tasmania* [2018] TASCCA 1 at [36]-[42]; *Taub v R* (2017) 95 NSWLR 388; [2017] NSWCCA 198 at [30]-[33]; *Kyluk v Chief Executive, Office of Environment and Heritage* (2013) 298 ALR 532; [2013] NSWCCA 114 at [176]-[179]
27 *Taub* at [33]
28 *Langford* at [40]
29 See eg *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 7)* [2008] FCA 1364 at [332]-[354].
30 A useful discussion of 'exceptional circumstances' under the predecessor rule to r 31.28(4) is set out in *Yacoub v Pilington (Aust) Pty Ltd* [2007] NSWCA 290 at [66]-[67] (and see also *DJ Singh v DH Singh and Others* [2018] NSWCA 30 at [91].
31 *Chen v R* [2018] NSWCCA 106 at [20]-[29]; *Wood v R* (2012) 84 NSWLR 581 at [728]-[729]