By Ian Freckelton SC

The **evolving obligations** of **expert report-writers** and **expert witnesses**

Recent years have seen increasing attempts to regulate the conduct of expert report-writers and witnesses so as to render them more accountable for the opinions that they express. An aspect of this has been reforms governing the admissibility of expert evidence. Other initiatives have been changes to court procedures, the making of costs orders against experts and solicitors relying upon poor quality expert reports, erosion of witness immunity in the United Kingdom to allow some civil actions against experts for forensic work, and the introduction of disciplinary proceedings in relation to forensic work by experts.

THE NEW ACCOUNTABILITY FOR FORENSIC EXPERTS

Both bias and defective methodology in expert evidence and reports have generated continuing controversies and an impetus towards reform of admissibility criteria for expert evidence over recent years.[1] They have also generated concern to reduce the potential for consequential miscarriages of civil and criminal justice. This article reviews recent case law in the United Kingdom and Australia regarding the consequences of non-compliance by experts with court rules in relation to forensic reports. It also scrutinises the trends towards exposing experts (and solicitors) to various forms of redress when experts' discharge of their forensic functions is negligent, incompetent or unethical.

ADMISSIBILITY OF REPORTS IN THE FACE OF EXPERT NON-COMPLIANCE WITH COURT RULES

The development of court rules in relation to the content and style of expert reports since the late 1990s, starting in the Federal Court in Australia, has encouraged greater independence, transparency, rigour of reasoning, and accountability in respect of expert reports. However, partial or substantive failures to adhere to both the letter and spirit of the court rules and codes of expert conduct still occur.

An extensive jurisprudence has evolved to address non-compliance by experts with such requirements. One issue has been the status of reports written without the requisite acknowledgment by the author that they have read the expert code of conduct and have agreed to be bound by it. On occasions, courts have given leave for experts to be cross-examined on the issue.[2] The broad approach was summed up by Einstein J in *Commonwealth Development Bank of Australia Pty Ltd v Cassegrain*:[3]

> 'To my mind, considerable significance attaches to enforcing strict compliance in the expert witness provisions now found in Pt36 r13C [of the Uniform Civil Procedure Rules]. Questions of the significance of the opinions of experts have been mooted over a very extended period of time and the schedule K and Pt 36 r13C(1) *Expert Witness Code Of Conduct* was promulgated with the clear intent that only reports by experts who have proceeded in accordance with the stated norms of conduct, should be relied upon and may be admitted into evidence. The significance of the Code of Conduct emerges clearly from the whole of the Code, as well as from the "general duty to the court" section of schedule K, as well as from the stipulations as to the form of experts' report.'[4]

McDougall J in *Investmentsource v Knox Street Apartments*[5] emphasised that when an expert does not prepare a report in accordance with a court code of conduct there is a real risk that they will form an opinion from which it is difficult for them to retreat and thus that prejudice may ensue. However, the most authoritative decision on the issue, by the New South Wales Court of Appeal in *Hodder Rock Associates Pty Ltd v Genworth Financial Mortgage Insurance Pty Ltd*,[6] has extended some latitude. The court declined to impose a *prima facie* rule of inadmissibility for non-compliant reports, holding that each case needs to be looked at on its merits and observing[7] that if a report has been written without the code in mind but the author is later shown it and swears that in fact they did abide by it, the report should be admitted into evidence.

Another issue that has been litigated is the extent to which evidence should be admitted during proceedings when it goes beyond the stated remit of a filed expert report. This has the potential to be the product of poor commissioning of a report by solicitors, or of an expert's failure to address issues that they have been asked to consider. The outcome is the same, however: the other side is prejudiced in its capacity to prepare properly for the litigation. It has been held that there is a need to strike a balance between case management considerations and ensuring a fair trial, the latter being a particularly important consideration.[8] The later in a proceeding that such extra evidence is sought to be adduced in the aftermath of a deficient report, the more problematic it is. But it is a case-by-case issue as to whether a court should preclude the reception of such extra evidence, or permit it and allow necessary remedial measures such as the recall of other witnesses and the adducing of extra evidence.[9]

WASTED COSTS ORDERS

An option that has been adopted in a number of cases has been the ordering of costs against expert witnesses personally when their forensic conduct has been problematic and has engendered wastage of time and additional expenses being incurred by parties. It is also possible for a wasted costs order to be made against solicitors on the basis of gross deficiencies in expert reports[10] or arising from their service or content.

In *Phillips v Syme (No. 2)*,[11] Smith J of the England and Wales High Court reviewed in detail the authorities on whether a third party costs order could be made against an expert witness, taking into account that wasted costs >>

Costs have been ordered against both expert witnesses and solicitors because gross deficiencies in expert reports have wasted time and incurred additional expenses.

orders against advocates had been decoupled from barristers' immunity. He concluded that in light of experts' obligations to the court, as set out in the court rules, 'it would be quite wrong of the court to remove from itself the power to make a costs order in appropriate [cases] against an expert who, by his evidence, causes significant expense to be incurred, and does so in flagrant disregard of his duties to the court'.[12] He did not regard other potential sanctions against an expert as 'being either effective or anything other than blunt instruments. The proper sanction is the ability to compensate a person who has suffered loss by reason of that evidence.'[13]

It was argued before Smith J that should there be costs orders against experts, report-writers and witnesses would be inhibited from fulfilling their duties. He rejected this assertion, stating that he could 'not believe that an expert would be deterred because a costs order might be made against him in the event that his evidence is given recklessly in flagrant disregard for his duties. The high level of proof required to establish the breach cannot be ignored. The floodgates argument failed as regards lawyers and is often the court of last resort … The idea that the witness should be immune from the most significant sanction that the court could apply for that witness breaching his duties owed to the court seems to me to be an affront to the sense of justice.'[14]

In *Macquarie International Health Clinic Pty Ltd v Sydney Local Health District; Sydney Local Health District v Macquarie Health Corporation Ltd*,[15] Kunc J dealt with a related issue in civil proceedings that had become characterised by continued slippage in compliance with the timetable for the filing of expert reports by the plaintiff. He accepted that experts are dependent upon the timely provision of instructions and information from the party commissioning them, but pointedly commented: 'the court wishes to make it clear that experts must understand that they themselves bear a direct responsibility to the court for compliance with the court's directions in relation to when their report is to be ready for filing and service and the form of the report itself'.[16] He emphasised that by accepting a retainer to provide a report to a court, an expert becomes personally subject to a court's directions and that this extends to 'explaining why there has been non-compliance with any order of the court in relation to the expert's report insofar as that non-compliance is the fault of the expert'.[17]

Kunc J indicated the inclination of the Supreme Court of New South Wales to require personal explanations from experts (rather than through a solicitor's affidavit) but also stated that 'experts could themselves be subject to costs orders insofar as any party to proceedings suffers additional costs by reason of the non-compliance with a direction as to the timely preparation of an expert's report where the reason for that non-compliance can be visited upon the expert'.[18] He observed that the court would not in general terms regard it as acceptable for experts to assert that they are unable to comply with court timetables because of the pressure of other business. It appears, therefore, that the law in the United Kingdom and the law in Australia are converging on the issue and that costs orders against experts may become part of the court landscape, or at least a spectre that may be invoked to encourage compliance with directions and orders.

In addition, in the 2013 decision of *Mengiste v Endowment Fund for the Rehabilitation of Tigray & Ors*,[19] Smith J of the High Court of England and Wales sounded another warning by ordering costs against solicitors on the basis of arguments by the defendant that the solicitors should not have associated themselves with litigation based upon reports by an expert that were particularly poor. It was apparent from the reports that the expert did not understand his duty to the court, and the reports were manifestly marked by inaccuracies, mischaracterisations, exaggerations and inappropriate assertions of fact.

DISCIPLINARY LIABILITY OF EXPERTS

The doctrine of witness immunity has traditionally provided substantial protection to expert witnesses against civil suit for their forensic work.[20] In *Meadow v General Medical Council*,[21] the Court of Appeal (of England and Wales) dealt definitively with the related issue of whether the principle of witness immunity protected expert witnesses and report-writers against disciplinary action, brought by their regulatory body. The case giving rise to the decision arose from evidence given by a well-known paediatrician, Professor Sir Roy Meadow, in the trial of a London solicitor, Sally Clark, for the murder of her two sons. He had given expert evidence about the relative unlikelihood of two children in the same household dying of sudden infant death syndrome (SIDS). The evidence was statistically misconceived.

A complaint was made to the General Medical Council about the negligence of his evidence. A Fitness to Practise (FTP) Panel removed Professor Sir Roy Meadow's name from the Medical Register. He appealed to the High Court, where Collins J reversed the decision of the Panel on the basis of the protection he found was afforded by the witness immunity rule. However, the Court of Appeal overturned Collins J's decision, Clarke MR concluding that the witness immunity rule did not preclude disciplinary proceedings arising out of forensic work, and observing that it is:

> 'of the utmost importance that an expert should only give evidence of opinion which is within his particular expertise and that, where a statement, whether made in writing or orally, is outside his expertise, he should expressly say so. If, for example, it depends upon work done or opinions expressed by others, that work or those opinions should be identified in the statement, so that their validity can be

ascertained by the parties to the proceedings or by the court. All reasonable attempts should be made to check the validity of an opinion which is not within the expert's expertise.'[22]

Auld LJ concurred with Clarke MR but noted that it is 'important that that body should fully understand, and assess [an expert's] conduct in the forensic context in which it arose. Of great importance are the circumstances in which he came to give the evidence, the way in which he gave it, and the potential effect, if any, it had on the proceedings and their outcome.'[23] Auld LJ emphasised the importance of experts recognising their limits and adhering to the principle that they should confine their evidence within such parameters. This did not mean that in the cut and thrust of litigation every mistake made or ill-considered assertion volunteered or analogy drawn constitutes professional misconduct. The question is very much to be decided in respect of individual instances of alleged misconduct.

The Court of Appeal rejected the proposition that immunity from disciplinary proceedings is necessary to promote fearlessness on the part of experts playing a forensic role and to avoid collateral litigation – 'those public policy benefits do not and cannot (or at least should not) override the public interest in the protection of the public's health and safety enshrined in the GMC's statutory duty to bring FTP proceedings where a registered medical practitioner's fitness to practise is impaired. A similar point can be made in the case of other professions and occupations, with more or less force depending upon the particular circumstances.'[24]

A consequence of the *Meadow* decision is that, in a series of decisions, forensic pathologists and medical examiners have been found to have engaged in misconduct in their forensic role by incompetence, negligence or bad faith in their work.[25] However, significant restraint has been exercised by the General Medical Council in the cases that have been sent to hearing in relation to the discharge of the forensic role.

A similar situation has prevailed in Australia, with very few cases making their way to disciplinary tribunals for breach of forensic responsibilities. Exceptions that have gone to the courts on appeal have been the related matters of *James v Medical Board (SA)*[26] and *James v Keogh*,[27] which arose from forensic work undertaken by a pathologist. In the latter decision, Debelle J applied the *Meadow* Court of Appeal decision and commented that: 'if a medical practitioner gives expert evidence incompetently or dishonestly but, in the result, the evidence does not affect the outcome, he will not necessarily be absolved from a charge of unprofessional conduct'.[28]

Thus the position in both the United Kingdom and Australia is that egregiously poor quality conduct by an expert in discharge of forensic responsibilities will be dealt with by disciplinary tribunals. However, this is seldom likely to occur.

CIVIL LIABILITY OF EXPERTS

As set out above, the witness immunity doctrine has traditionally provided experts in many countries, including the United Kingdom and Australia, with immunity from actions for defamation and negligence. However, in a controversial decision in 2011, the United Kingdom Supreme Court in *Jones v Kaney*[29] partially overturned this position.

The case involved a transport accident and a joint court report given by a psychologist when she backed down from a previous report that she had written that had been supportive to a plaintiff.

In her first report, the psychologist stated that the plaintiff had PTSD arising from the accident, while a psychiatrist's report for the defendant maintained the view that the plaintiff was exaggerating his symptoms. The trial judge ordered the experts to hold discussions and prepare a joint statement. They did, with the outcome being that the psychiatrist prepared a draft joint statement which the psychologist signed without amendment or comment. The report stated that by that stage all that the plaintiff had was an adjustment reaction and that he had been deceptive and deceitful with them. The plaintiff's behaviour was stated to be suggestive of 'conscious mechanisms' that raised doubts about whether his subjective reporting was genuine.

When the psychologist was confronted with the apparent changes, she said:

- she had not seen the psychiatrist's report at the time of the conversation;
- the joint statement did not reflect what she had agreed to on the telephone;

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- she felt under some pressure to agree to the report; and
- she thought the plaintiff had been evasive rather than deceptive and that he had suffered from PTSD which had since resolved.

The plaintiff's claim had to be settled on relatively disadvantageous terms because of the joint report when the trial judge did not allow the plaintiff to commission a new expert. The plaintiff sued the psychologist for what he had lost by reason of the negligent joint report, but was met by the defence of witness immunity. The case went to the Supreme Court on the issue of principle of whether such a defence should still exist. Ultimately, five Law Lords determined that the plaintiff could bring the action against the psychologist, while two dissented, expressing the view that so significant a change to the law should only be made by Parliament.

The leading decision in *Jones v Kaney* was delivered by Lord Phillips, the President of the Supreme Court. He observed that since *Hall v Simons,*[30] barristers in the United Kingdom no longer had immunity from negligence actions in the United Kingdom, and that since *Meadow v General Medical Council,*[31] experts could be the subject of disciplinary proceedings. He observed, too, that wasted costs orders had been made against experts in decisions such as *Phillips v Symes.*[32]

The majority noted that the abolition of barristers' immunity had not resulted in a large flow of litigation or in a diminution in advocates' readiness to perform their duty. Lord Phillips commented that the rational expert witness who has performed his or her duty is unlikely to fear being sued by a client and doubted the likelihood of a proliferation of vexatious claims against experts.[33] Lord Collins concurred with the partial removal of immunity for experts, stating that:

- The danger of undesirable multiplicity of proceedings has been belied by the practical experience of removal of the immunity from barristers;
- A conscientious expert would not be deterred by the danger of civil action by a disappointed client; and
- The main effect of the removal of immunity would be to cause a greater degree of care in the preparation of the initial report or joint report.[34]

The Supreme Court permitted the action by the plaintiff against the psychologist. The *Jones v Kaney* decision in the United Kingdom has been controversial.[35] However, it only permits parties to sue their own expert – not an expert on the other side in litigation. In addition, it relates only to actions for negligence, not for defamation.

The decision is unlikely to be applied for the foreseeable future in Australia. The High Court has twice determined to retain advocates' immunity – in *Giannarelli v Wraith*[36] and in *D'Orta-Ekanaike v Victoria Legal Aid.*[37] It would be anomalous and conceptually indefensible to retain this immunity but to erode that applying to expert witnesses. Two civil decisions have made clear Australia's current position. In *Commonwealth v Griffiths,*[38] an attempt was made to sue a government laboratory for the forensic work done by a scientist. The New South Wales Court of Appeal expressed no reservation about the existence of the immunity that precluded the individual scientist being sued and found that his employer was similarly (vicariously) protected because the same principles applied. Again, in *Young v Hones,*[39] Garling J observed that an expert witness retained for the purpose of giving evidence in legal proceedings and providing advice in respect of the proceedings was entitled to immunity.

THE FUTURE FOR EXPERT ACCOUNTABILITY IN AUSTRALIA

The pressures for compliance with court rules and codes of conduct in respect of expert reports are growing. The winds of change in respect of expert witness liability are blowing increasingly strongly in the United Kingdom – in respect of both experts' and solicitors' exposure to wasted costs orders arising from unsatisfactory forensic reports; and disciplinary liability for experts and civil liability, at least at the suit of the party commissioning an expert. In Australia, we have only gone part of the way down the same track. The decision of Kunc J in *Macquarie International Health Clinic Pty Ltd v Sydney Local Health District; Sydney Local Health District v Macquarie Health Corporation Ltd* highlights the fact that on some (rare) occasions, experts may be the subject of costs orders if they

are particularly dilatory (without reasonable excuse) or non-compliant in the discharge of their forensic responsibilities. Whether solicitors in Australia will similarly be held to account and when costs orders will be made against experts remains to be seen, but the precedent for this occurring in the United Kingdom does exist. In some, comparatively unusual situations, too, experts may be referred to their disciplinary tribunals if their discharge of forensic functions has been negligent, incompetent or unethical. However, there is no likelihood in the short to medium term that they will be vulnerable to civil litigation in negligence or defamation for their forensic work in Australia. ■

Notes: **1** See I Freckelton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy*, 5th edn, Thomson Reuters, 2013. **2** See, for example, *Barak v WTH Pty Ltd* [2002] 649. **3** *Commonwealth Development Bank of Australia Pty Ltd v Cassegrain* [2000] NSWSC 980. **4** See also *Langbourne v State Rail Authority* [2003] NSWSC 537; *Jermen v Shell Co of Australia Ltd* [2003] NSWSC 1106; *Portal Software v Bodsworth* [2005] NSWSC 1179. **5** *Investmentsource v Knox Street Apartments* [2007] NSWSC 1128 at [50]. **6** *Hodder Rock Associates Pty Ltd v Genworth Financial Mortgage Insurance Pty Ltd* [2011] NSWCA 279. **7** *Ibid*, at [63]. **8** *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* [2011] VSC 477 at [29]; see also *Alucraft Pty Ltd (in liq) v Grocon (No. 1)* [1996] 2 VR 377; *Consolidated Credit Network Pty Ltd v Illawarra Retirement Trust Ltd* [2005] NSWSC 1004. **9** *Chiropractic Board of Australia v Hooper* [2013] VCAT 417 per Garde J. **10** *Mengiste v Endowment Fund for the Rehabilitation of Tigray & Ors* [2013] EWHC 1087 (Ch). **11** *Phillips v Syme (No. 2)* [2004] EWHC 2330 (Ch); [2005] 1 WLR 2043. **12** *Ibid*, at [95]. **13** *Ibid*, at [96]. **14** *Ibid*, at [96], [98]. **15** *Macquarie International Health Clinic Pty Ltd v Sydney Local Health District; Sydney Local Health District v Macquarie Health Corporation Ltd* [2013] NSWSC 970. **16** *Ibid*, at [4]. **17** *Ibid*, at [6]. **18** *Ibid*, at [7]. **19** [2013] EWHC 1087 (Ch). **20** See I Freckelton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy*, 5th edn, Thomson Reuters, 2013. **21** *Meadow v General Medical Council* [2007] 1 QB 462. **22** *Ibid*, at [71]-[72]. **23** *Ibid*, at [205]. **24** *Ibid*, Clarke MR at [34]. **25** See I Freckelton, 'Expert Evidence Accountability: New Developments and Challenges', (2011) 19 *Journal of Law and Medicine* 209 at 211-12. **26** *James v Medical Board (SA)* (2006) 95 SASR 445. **27** *James v Keogh* [2008] SASC 156. **28** *Ibid*, at [73]. **29** *Jones v Kaney* [2011] 2 All ER 671; [2011] UKSC 13. **30** *Hall v Simons* [2002] 1 AC 615. **31** *Meadow v General Medical Council*, see note 21 above. **32** *Phillips v Syme (No. 2)* [2004] EWHC 2330; (Ch); [2005] 1 WLR 2043. **33** *Jones v Kaney*, see note 28 above, at [59]. **34** *Ibid*, at [85]. **35** See D Mendelson, 'From Expert Witness to Defendant: Abolition of Expert Witness Protection and its Implications', (2012) 20(2) *Journal of Law and Medicine* 250; I Freckelton, 'Civil Liability of Health Practitioners for their Forensic Work: Further Erosion of the Witness Immunity Rule', (2012) 20(1) *Psychiatry, Psychology and Law* 451; K Hughes, 'The Abolition of Expert Witness Immunity' (2011) *Cambridge Law Review* 511. **36** *Giannarelli v Wraith* (1988) 165 CLR 543. **37** *D'Orta-Ekanaike v Victoria Legal Aid* (2005) 223 CLR 1. See also *Donnellan v Woodland* [2012] NSWCA 433 at [161]-[178]. **38** *Commonwealth v Griffiths* [2007] NSWCA 370. **39** *Young v Hones* [2013] NSWSC 580 at [75].

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