Dealing with Expert Witnesses

by The Hon. Justice Chesterman, RFD

Opinion evidence may be described as evidence of a conclusion, usually judgmental in nature, debateable as to accuracy and reasoned from facts. The common law was preoccupied with proof of facts and evidentiary rules developed to provide the best means of proving the material facts on which a party relies to establish its case or defence. Opinions were not admitted into evidence. An early exception was the reception of opinions of witnesses who possessed special skills or knowledge.

The conditions to make the opinions admissible were that:

(a) the witness must possess some special skill or knowledge;

(b) the subject matter of the witness's knowledge must be such that the court would not be able to arrive at a correct decision without the assistance of the expert, that is, the subject matter of expert evidence must be beyond the ordinary limits of experience and knowledge possessed by the court.

A corollary to the second condition is that the courts will not regard as "expert" an opinion on a matter which the court could determine for itself having regard to its own knowledge and experience.

The "common knowledge" rule has been abolished for trials in the Federal Court, by s.80 of the Evidence Act 1995 (Cth).

The test remains whether the expert opinion is a necessary aid to the court because it provides relevant technical or scientific knowledge which the court does not itself possess.[1]

If the existence of the subject matter of expert knowledge is contested, the court will normally determine the matter by hearing evidence on a voir dire.

The judge will receive evidence as to whether or not the expert's opinion sought to be led at trial derives from a particular branch of learning known to a group of people who have scientifically or systemically studied the subject or amassed the knowledge. If satisfied there is an appropriate field of study, the court will proceed to receive the evidence. If not, it will rule the proposed evidence inadmissible.

Qualification of expert

This generally poses no problem. Mostly, one is dealing with a witness who has academic and/or professional qualifications in an established faculty. The opinions of doctors, engineers, valuers, and accountants is admissible (subject to relevance) upon proof of their holding the requisite academic qualification or membership of the appropriate professional body.

As with the existence of the field of study, the qualification of an expert is determined by the court on a voir dire. If it appears on such an examination that the proffered expert is not sufficiently familiar by reason of experience or instruction in the designated subject, that evidence will not be received.

Factual foundation of expert opinion

In all but the most exceptional of cases, the retained expert will have no first hand knowledge of the facts of the disputed issues. Expert opinion will be expressed by reference to `facts' which are provided by the client or usually, the solicitors representing one of the parties. For the opinion to be admissible the facts must be proved in the ordinary way by witnesses or documents other than by the experts and their reports.

There are cases where experts have personal knowledge of the facts on which they base their opinion. An example is where an expert conducts experiments to determine a relevant characteristic of an apparatus or piece of material.

This apart, there are exceptions to the requirement that the facts on which an opinion is based must be independently established.

Distinct from cases where the facts must be proved by ordinary means are those cases in which experts are asked to express an opinion based on general factual materials. Such evidence is not entirely opinion but is partly knowledge based on hearsay. This is permitted as an exception to the rule against hearsay. Facts and opinions contained in articles or reports in scientific publications may be adduced in evidence as fact. Expert witnesses may not only base their opinions on such information but may give evidence of fact based upon that data even though it is hearsay in the sense that the data relied on is not the expert's own knowledge but that of someone else. In relying on such data the expert need not have any previous knowledge of it.

The rationale for this latitude is that the scope of scientific knowledge is so vast that no expert can know it all. Hence every expert must rely on the reported data of fellow scientists learned by reading their reports. The law accepts this kind of knowledge from `scientific men' (Wigmore's term).

By contrast: "a mere layman who comes to court and alleges a fact learned only by reading a medical or a mathematical book, cannot be heard. But, on the other hand, to reject professional physicians or mathematicians because the fact or some facts to which they testify are known to them only on the authority of others would be to ignore the accepted methods of professional work and to insist on finical and impossible standards."[2]

To decide whether the opinion is that of the `mere layman' or a `scientific man' the court has regard to:

(a) the professional experience of the witness to know which are reliable authorities and the proper sources of information;

(b) practical experience in the relevant field which enables the expert to estimate the general plausibility of the views expressed;

(c) the impossibility of obtaining information on the particular technical detail other than by reported data.

Another exception is found in the realm of valuation evidence.

The law admits a valuer's opinion even though it is based on hearsay, that is, what the valuer has been told by others. The point is usually expressed in these terms:

"As an expert witness, the valuer is entitled to express an opinion about matters within the valuer's field of competence. In building up those opinions, the valuer will no doubt have learned from engaging in transactions which could provide the basis of first hand evidence. But the valuer will also have learned much from many other sources, including much that could not be based on first hand evidence. Textbooks, journals, reports of auctions and other dealings, and information obtained from professional colleagues and others, some related to particular transactions and some more general and indefinite will all have contributed their share."[3]

This is not to say that a valuer may prove relevant facts by hearsay. Information obtained by a valuer from others forms part of general experience, knowledge and expertise upon which an opinion is formed. If, however, a valuer bases a valuation of property by reference to comparable transactions, those transactions must be proved by admissible evidence, that is, by someone with first hand knowledge of them. To quote

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from English Exporters (London) Ltd v Eldonwall Ltd[4]:

"It therefore seems to me that details of comparable transactions upon which a valuer seeks to rely in his evidence must, if they are to be put before the court, be confined to those details which have been or will be, proved by admissible evidence, given either by the valuer himself or in some other way. I know of no special rule giving expert valuation witnesses the right to give hearsay evidence of facts."

The judge expert

The impermissibility of lay people seeking to instruct themselves in the intricacies of some science applies equally to judges. A judge is to be regarded not as Wigmore's 'man of science' but only as a 'mere layman' who is to take instruction from an appropriately qualified expert. So that if judges, by diligent reading should decide the case by reference to what they have learned and not by reference to expert evidence led in the presence of the parties at the trial, the judgment will be set aside as breaching the rules of procedural fairness.[5]

When negligence is the issue

In many cases, the court must decide whether a defendant was negligent or, as part of the same exercise, whether a risk was foreseeable or whether a defendant exercised reasonable care.

Should the expert be asked, "Was the defendant negligent?" or "Was the risk foreseeable?" the answer would be predictably confused. It has been clarified for actions in the Federal Court by the Commonwealth Evidence Act 1995 but for cases in the Supreme Courts the position is not clear.

The orthodox view that an expert may not be asked to opine on the ultimate issue can be found expressed in R W Miller and Co Pty Ltd v Krupp (Australia) Pty Ltd.[6]

The restriction is that an expert may not give an opinion on an ultimate issue where that issue involves the application of a legal standard or norm to particular facts in order to arrive at the ultimate issue.

The opposing view was expressed by Pincus J when a judge of the Federal Court.[7] Pincus J said:[8]

"It can be seen that difficulties might arise in strict application of the rule where the question is one of negligence in some activity in which a judge or jury might have no knowledge at all ... in such cases are expert witnesses to be prevented from criticising the acts complained of by describing them as mistaken or ill-judged or simply careless? The objection to the use of these expressions may be that they are too close to the notion of negligence - the ultimate issue ... whether or not, where negligence is in issue, there is a ban upon use of the word 'negligence' itself and its synonyms in the framing and answering of questions of those called to give their opinion on what was done, I cannot accept that there is any longer an established practice preventing a suitably qualified expert from saying that what is complained of was not in accordance with good practice, was excessively risky, poorly conceived or other such criticisms."

Section 80 of the Commonwealth Evidence Act 1995 has removed the problem in federal jurisdictions. It provides that evidence of an opinion is admissible even though it is about a fact in issue or an ultimate issue such as negligence or testamentary capacity.

Acceptance of the expert opinion

The only reason for engaging an expert to give evidence is to have the expert's opinion accepted by the court and so aid in obtaining a favourable verdict.

But as the opposing litigant will have engaged experts who will only be called if their opinions controvert the other experts', the court will be confronted with choosing between, usually, eminently qualified experts expressing opinions on a subject about which the court is, ex hypothesi, ignorant.

How is the court to resolve the dilemma?

The function of an expert witness " ... is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusion, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence."[9]

The court is to apply logic and common sense to the best of its ability to decide which expert opinion is to be preferred or which parts of the evidence are to be accepted.[10]

The court is to determine, by the application of its own intelligence, which opinion is better supported by the quality and cogency of the reasoning and exposition which supports it. Other factors are the qualifications and experience of the experts and the extent to which they have, or fail to demonstrate, a correct grasp of the basic objective facts relevant to the problem or the theory of their own field of expertise.[11]

Another factor much relied on by judges intending to reject the views of an expert is that the witness lacked impartiality or appeared an advocate for the litigant in whose case the expert was called. In Clark v Ryan Windeyer J quoted from Taylor on Evidence:[12]

"These witnesses are usually required to speak, not to facts, but to opinions; and when this is the case, it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond with the wishes or the interests of the parties who call them."

Expert evidence does not necessarily carry any more weight than the evidence of lay witnesses of fact. It is for the judge to assess the relative value of the evidence and the judge may reject an expert opinion in preference to the evidence of eye witnesses.[13] A trial judge may resolve a conflict between experts by reference to lay evidence.[14] The court may decline to accept the opinion of the only expert called on a particular topic.[15]

The new rules

Chapter 11 part 6 of the proposed Uniform Civil Procedure Rule contains the new dispensation for experts. The provisions are usefully codified but do not appear to add anything radically new to existing procedures.

The rules provide that if a question for an expert arises the court may appoint an expert and authorise the expert to inquire into the question and report back.

The appointment may be made from a list of experts supplied by the parties. The court may issue directions as to the mode of inquiry.

The court-appointed expert's report is admissible in evidence but is not binding on a party "except to the extent the party agrees to be bound by it".

One can pause to observe that if the parties do not agree to be bound by the report, there seems little point in obtaining it. If they do agree to be bound by such a report, it would have been quicker and cheaper to have their dispute determined by an expert in the first place.

The parties have a right to cross examine the court-appointed expert on the report. With the leave of the court parties may call their own expert evidence on the same question. It would

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seem to me that if a party has not agreed to be bound by the court-appointed expert report and has cross examined that expert with any effect at all, the court would be obliged to give leave to call further expert evidence.

I do not see that, in practice, much will change about calling expert evidence. The reason I say that no radical change is affected is that, since 1876, the Judiciary Act has allowed a court to refer questions involving specialist knowledge to a referee for determination.[16]

The facility has hardly ever been used. It should be recalled that courts themselves have pointed out that a judge (or jury) is not bound to accept the views of an expert, however eminent, even if uncontradicted, because the litigants have invoked the decision of the court and not the "oracular pronouncement by an expert".[17]

To similar effect Turner J said in Blackie v Police:[18]

"I approach the problem with an acute sensibility that there is always danger in allowing an expert witness, or indeed any witness, to answer the very question which the court is called upon to decide. Once this is done and an answer given which is accepted by the court, the chances of success on an appeal on fact are slight indeed."

These considerations are, it seems to me, fundamental to the role of courts in society and the vindication of rights according to law. Litigants go to court for the protection of their rights or just redress for an infringement of them.

When the parties invoke the aid of the courts they should not be relegated to the status of supplicants before an expert who does not have the status, experience, learning or assistance which the judge has at arriving at the right answer.

A serious and wholly unnecessary change to the nature of the judicial process can, if one is not careful, be wrought by excessive or unwise use of procedures allowing experts to determine vital issues in litigation.

Endnotes

1. Eagles v Orth at 319D.
2. Wigmore on Evidence, 3rd ed, vol. 2, para. 665.
3. (1973) 1 Ch 415 at 420 per Megarry J.
4. At 422.
5. Australian and Overseas Telecommunications Corporation Limited v McAuslan 47 FCR 492 at 495.
6. 34 NSWLR 129 at 130-131; see also Grey v Australian Motorists and General Insurance Co Pty Ltd (1976) 1 NSWLR 669 at 675-6 and Glass Expert Evidence (1987) Australian Bar Review 43.
7. Thannhauser v Westpac Banking Corporation (1991) 31 FCR 572.
8. At p.574
9. Davie v Edinburgh Magistrates (1953) SC 34 at 40.
10. Holtman v Sampson (1985) 2 Qd R 472 at 474.
11. Munroe Australia Pty Ltd v Campbell (1965) 65 SASR 16.
12. 103 CLR at 509-10.
13. Hollingsworth v Hopkins (1967) Qld R 168.
14. Munroe Australia Pty Ltd v Campbell (1995) 65 SASR 16 at 27.
15. Minister v Ryan (1963) 9 LGRA 112.
16. Sections 11 and 12.
17. Davie v Edinburgh Magistrates op.cit.
18. (1966) NZLR 910 at 919.

GREEN CLAIMS MEET NEW STANDARDS

A new Standard on environmental-claims labelling is set to provide an international basis for determining the 'fairness' of environmental claims, and free up markets for 'green' goods worldwide.

The new Australian Standard gives comprehensive guidelines about what environmental claims are reasonable and what evidence is required to substantiate these claims.

It provides general guidance on how to formulate claims, specific direction for using twelve common claims, including 'Recycled Content', 'Recyclable', 'Reusable' and 'Refillable', and deals with the correct use of symbols to convey claims.

AS ISO 1402 (Int) - 1998, *Environmental labels and declarations - Self declared environmental claims*, also addresses methodologies that can be used to verify the correctness of a claim.

Standards Australia has just published the document, based on a draft International Standard prepared by an International Organisation for Standardisation (ISO) subcommittee on environmental labelling. Standards Australia holds the secretariat of the ISO subcommittee.

John Henry, Associate Director of Standards Australia's Environment and Consumer Group, said the new Standard addressed a worldwide need for recognized means to assess the validity of environmental claims. Misleading or deceptive claims about the environmental attributes of a product are prohibited under Australian Commonwealth law.

"Because it will be recognized internationally, Australian-made products labelled with claims which comply with the Standard, will be acceptable overseas," Mr Henry said.

Bill Dee, of the Australian Competition and Consumer Commission and Chairman of the International subcommittee responsible for the ISO Standard, said AS ISO 1402I (Int)-1998 drew on guidelines prepared by various governments "in response to spurious green claims".

"The document will be useful for agencies administering fair trading laws to assess whether environmental claims are misleading and are capable of being substantiated." Mr Dee said.

"And because of the detailed nature of the guidance provided in the Standard, and its emphasis on correct and substantiative claims, consumers should be more confident that claims made by companies complying with AS ISO 1402I (Int) -1998 will be truthful."

AS ISO 1402I-1998 has been released as an Interim Standard to give Australian industry and other interested parties a head start, pending the finalization of ISO 1402I at the International level.

The International Standard is expected to be finalized later next year.

In the meantime, copies of AS ISO 1402I -1998 are available from Standards Australia sales offices in all State capitals or over the Internet at www.standards.com.au