Expert Evidence

Law, Practice, Procedure and Advocacy

by

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A series of chapters also deals with issues arising from particular areas of expert evidence – DNA evidence, syndrome evidence, profiling evidence, PTSD evidence, financial evidence, valuation evidence, anthropological evidence, document examination evidence and fingerprinting evidence. These chapters do not purport to set out in detail the learning on the specific areas of expert endeavour but to evaluate how the courts have received and processed such information to facilitate their fact-finding.

As an introduction both to the roles of experts and how those roles are conditioned by various rules, this chapter briefly identifies the major rules that govern expert evidence of fact and opinion, and the stages at which experts may be used in the litigation process.

The five common law exclusionary rules

The best-known feature that distinguishes the evidence of the expert from that of the layperson is that the expert is permitted to offer opinions to the court as to the meaning and implications of other evidence. As it is likely that such opinions may have a significant bearing upon the outcome of the litigation, the courts have long been concerned to ensure that those opinions are offered by reputable people following recognised disciplines of knowledge. The courts have also been sensitive to any trend that could result in "experts" usurping the tribunal of fact's function of deciding what occurred and what inferences should be drawn.

In response to these concerns, five rules of evidence which specifically apply to the reception of expert evidence have evolved under the common law (see below, Chapter 2). These are strictly, though somewhat unpredictably, applied in the criminal courts – especially if there is a jury – but rather more leniently in the civil and family jurisdictions. Each rule is the subject of a following chapter. First, the "expertise rule": does the witness have knowledge and experience sufficient to entitle him or her to be held out as an expert who can assist the court? (See below, Chapter 3.) Secondly, the "common knowledge rule": is the information sought to be elicited from the expert really something upon which the tribunal needs the help of any third party or can the tribunal rely upon its general knowledge and commonsense? (See below, Chapter 6.) Third, the "area of expertise rule": is the claimed knowledge and expertise sufficiently recognised as credible by others capable of evaluating its theoretical and experiential foundations? (See below, Chapter 4.) Fourth, the "ultimate issue rule": is the expert's contribution going to have the effect of supplanting the function of the tribunal to decide the issue before the court? If so, it is likely to be rejected. (See below, Chapter 7.) And, finally, the "basis rule": to what extent can an expert's opinion be based upon matters not directly within the expert's own observations? Such reliance on material that cannot be directly evaluated by the court falls foul of a fundamental principle of evidence. (See below, Chapter 5.) Lying behind the exclusionary rules and carrying a particularly important role under the *Evidence Act 1995* (Cth), the *Evidence Act 1995* (NSW) and the *Evidence Act 2001* (Tas) is the prejudice/probative discretion. This is analysed in Chapter 8.

Not surprisingly in an era of rapid advances in knowledge, these common law rules are frequently being stretched as courts grapple with the problems of how

to apply them to new developments in areas of expertise. An excellent example of the problems of fitting old law to new endeavours is the approach to survey evidence. This is discussed in depth below, in Chapter 5. Another example is the reception of a form of novel psychological evidence, battered woman syndrome, which is discussed in Chapter 11. Still others are evidence about criminal profiling (Chapter 12), parental alienation syndrome (Chapter 11) and post-traumatic stress disorder (Chapter 13).

Importantly, too, the *Evidence Act 1995* (Cth), the *Evidence Act 1995* (NSW) and the *Evidence Act 2001* (Tas) have significantly modified the common law rules – not including the area of expertise rule or the basis rule – substantially abolishing the common knowledge rule and the ultimate issue rule and shifting the emphasis for exclusion onto the discretionary provisions.

Even when a new development offers exciting possibilities, there may be problems which justify the courts being hesitant to accept the opinions of its proponents. Chapter 4 explores these difficulties. A current example of the need to exercise considerable caution is in the use of psychological profiling evidence (see Chapter 12). Another is in relation to DNA evidence in English, American and Australian courts. The notion of DNA profiling providing incontestable proof of the identity of the perpetrator of a crime has been controversial. Although DNA "fingerprinting" is a significant advance for forensic science, its evolution has been marked by many controversies and challenges. (See Chapter 15.)

The courts' sensitivity to being overborne by expert opinion is illustrated by their continued reluctance to accept evidence about the problems of identification or the attributes of "normal" people. In particular, this has inhibited courts' preparedness to receive evidence about processes of memory and about the perils of eyewitness identification evidence (see Chapter 6 and in *Expert Evidence* (subscription service), Chapter 65, "Eyewitness Testimony" by D M Thomson). Throughout the cases, there are references to the dire consequences of letting experts take over the task of the fact-finders (be they a jury or a judge sitting alone). This has particularly been canvassed in the context of certain kinds of evidence put before juries – fingerprinting evidence (see Chapter 16), handwriting and documentary evidence (see Chapter 17) and DNA profiling evidence (see Chapter 15) – where a risk of jurors overreaching their competence by themselves acting as experts has been identified. It is not only a question of subject matter. The discussion of distinctive approaches in jury and non-jury cases (see Chapter 5) shows that courts still believe that juries, but not judges, need protection from the "wiles" and beguiling impressiveness of forensic experts.

An overview of an expert's participation in litigation

Testing the value of proffered expert evidence and opinion is essential not only in cross-examination but also during the preparation for hearing – in anticipation of an attack on the expert evidence during cross-examination. The possible lines of attack upon evidentiary admissibility can be based on any one of, or combination of, the issues raised in the rules of expert evidence mentioned above.

Most commonly, lawyers will watch for attempts by experts to express opinions outside their real expertise. They should also be alert for weak or non-existent connections between the bases advanced for an expert's opinion and the expressed opinions. Following the Commissions of Inquiry into the Splatt, Chamberlain and Thomas convictions, Australasian counsel have become more alert to problems in the chain of custody of exhibits and in poor scientific method.

To forestall falling foul of the rules, a number of pragmatic criteria for selecting experts as well as the distinct stages of a dispute at which experts may be involved can be isolated.

The selection of experts

The selection of experts to assist in gathering and presenting relevant information during a dispute is rather like choosing players for a sports team. Everyone knows the rules but particular players are better in some positions than in others. Further, during the course of the game, it may be advantageous tactically to replace one player with another. Sound case strategy dictates not merely the areas selected for expert involvement; it also highlights the need to draw distinctions among experts within the one area on the basis of their comparative abilities to be up-to-date with the latest developments, their report-writing skills, and their presentation in the witness box.

Thus in a minor criminal matter where a juvenile is pleading guilty to causing wilful damage to property, to reassure the court that it can safely deal leniently with the young offender, a psychologist may be asked to prepare a short written report, after consultation with the juvenile, which explains both why the episode occurred and what risk there is (hopefully none) of it happening again. By having a clinician who is known and respected by magistrates prepare the written report, it is often possible to avoid the expense of the expert having to appear, and the submission that pleads for a light disposition is authoritatively enhanced.

On other occasions, it will be up to the lawyer and an expert to recognise the advantages of dividing the expert's role, and then to select an appropriate person for each stage.

For experts such as psychologists, psychiatrists and social workers, significant problems arise if the assessment and treatment roles are performed by the one person. The consequence of such mixing is always to cloud the person's capacity to make a detached evaluation of both elements. Examples drawn from several fields illustrate the point. In family law disputes about a child's residence, a psychologist requested to prepare an evaluation on the family members should not be involved in the active counselling of any member of that unit. In building disputes, a builder who provides a report on defects in the building finish should not have, or have any prospect of obtaining, the contract to rectify the problems. In medico-legal disputes, the specialist who critiques a procedure should not be the one to perform a corrective procedure. The reason is the same in all cases: it opens up an inference, which will be highlighted in cross-examination, that the expert had the prospect of personal gain from the assessment and that the assessment therefore went beyond a detached evaluation.

Apart from those skills of research, writing and presentation already mentioned, there are other factors to be borne in mind by lawyers who need to select an expert. Foremost, of course, is cost. Just as it can be uneconomical to pursue or defend small claims, so the expense of retaining an expert may be disproportionate to the value of the dispute. (We consider the question of who is responsible for meeting the expert's fees in Chapter 24.) However, the lawyer and client must always consider whether an expert is necessary. If so, then there must be further discussion about the budget for the work to be done by the expert and there is much to be said in favour of clear articulation of the expert's brief in a formal letter from the commissioning solicitor: see Chapter 24.

Previous experience as an expert witness is useful too. Some experts have the added advantage of possessing experience as arbitrators in building disputes or as the medical members of tribunals which make disability and pension determinations. Then there are witnesses with a native brilliance such as the late Bernard Spilsbury (see Browne and Tullett, 1980), the great English pathologist. On the other hand, experienced practitioners are all aware of the tales of the medico-legal hack, the practitioner whose consistent views – always for the plaintiff, or always for the insurance company – are so well known as to be the cause of wry smiles and little, if any, evidential weight: see *Vakauta v Kelly* (1989) 167 CLR 568; 87 ALR 633. No amount of smooth talking will allay impressions of persistent bias. Concern about the lack of neutrality among expert witnesses is among the most prominent of findings in a 1997 survey conducted of Australian judges (Freckelton, Reddy and Selby (1999)) and a 1999 survey conducted of Australian magistrates: Freckelton, Reddy and Selby (2001). This is not a phenomenon confined to Australian courts: see Malsch and Freckelton (2005).

But experts who have not previously appeared in court should have little to fear if they are properly prepared by the lawyers. Such preparation embraces a thorough review of the expert's academic and experiential credentials and ensures that the opinions to be expressed are objectively reasonable and well grounded in knowledge possessed by the expert arising directly from his or her skills, training and experience. It is also helpful for the expert to take the time to sit in on a hearing where another expert is being examined and cross-examined.

From time to time, there are practical workshops which provide experts with guidance on how to become comfortable and persuasive in courtroom settings. Workshops are offered by groups such as the Australian and New Zealand Association of Psychiatry, Psychology and Law (ANZAPPL), the Australian Medical Association (AMA), the International Institute of Forensic Studies (IIFS), the Australian Advocacy Institute (AAI) and the Forensic Accounting Special Interest Group (FASIG) of the Australian Institute of Chartered Accountants.

In sum, the selection of an expert or experts to help the resolution of a dispute should be in response to a case strategy and an assessment of the costs of the exercise. Once experts are involved, it is important that they understand their role, can give a reliable estimate of their cost, and are adequately instructed by the lawyers as to the relevant issues to be addressed in their report and in the courtroom.