

## **EXPERT EVIDENCE**

**BY**

**A W STREET SC**

### **Statutory provisions**

1. Part 3.3 of the *Evidence Act* 1995 contains the general provisions dealing with the admissibility of opinion evidence. The scheme of Part 3.3 is similar to that of Part 3.2 dealing with hearsay. Both parts must still be read with Part 3.1 which governs relevance and this is the first consideration to be taken into account prior to any evaluation as to whether the proposed opinion evidence falls within a relevant exception to the prohibition found in s. 76(1).
2. Equally, even if relevant and otherwise admissible in accordance with Part 3.3, the opinion evidence may be excluded because of considerations involved under Parts 3.5 to 3.11.
3. The other general relevant statutory exceptions to the opinion rule as found in s. 76(1) are:
  - opinions contained in certificates or documents made under relevant regulations which provide for the certificate or document to have evidentiary effect under s. 76(2);
  - a direction for the adducing of evidence in summary form because of volume or complexity under s. 50(3);
  - admissible for purpose other than proof of existence of fact about which opinion expressed – s. 77;
  - lay observation necessary to obtain understanding of perception – s. 78;
  - evidence admissible as an admission under s. 81 (confined by s. 83);
  - evidence as to a death or execution of a testamentary instrument or evidence as to a conviction within the exceptions found in s. 92;
  - evidence as to character within s. 110 and s. 111.

4. The critical specific expertise exception which is intended to be the main subject of focus is s. 79.
5. Section 79 requires a person to have “specialised knowledge”. The section requires that that specialised knowledge is “based on” training, study or experience.
6. Finally, the opinion must be:
  - (i) wholly or substantially;
  - (ii) based on;
  - (iii) that specialised knowledge.
7. The old grounds of objection as to the opinion being inadmissible because it concerns the ultimate issue or a fact in issue or as a matter of common knowledge has been abolished by s. 80.
8. The provisions are usefully discussed in ALRC Issues Paper 28 Review of the *Evidence Act 1995*.
9. Opinion inference drawn from observed and communicable data
10. Identified as opinion not statement of fact
11. Orderly presentation
12. Presented in form possible to answer each of statutory criteria
13. Reliable body of knowledge or experience
14. Assess whether reasoning or methodology scientifically valid

### **Standard objections**

15. Not relevant want of qualifications – training, study, experience.
16. Not based on specialised knowledge.
17. Conjecture / speculation / argumentative.
18. Objectionable material can’t be trimmed- too intertwined.
19. Bare “ipse dixit” (oracular pronouncement)

20. Danger outweighs probative value – s. 135.
21. Not independent expert / failure to comply with Expert Witness Code of Conduct; see Schedule K *Supreme Court Rules*; *Supreme Court Rules* see Part 36 rules 13C and 13CA (as well as for personal injuries rules 13A and 13B); Federal Court of Australia Guideline for Expert Witnesses in Proceedings – Practice Direction. See also Order 33 rule 20 as to the form of an expert report and as to conferring of experts and adducing evidence, see Order 34K rule 3. *Ikarian Reefer* (1993) 2 LLLR 68 at 81 Cresswell J
22. Provisional admission – subject to foundation – s. 57.
23. Limit use of facts in report – s. 136.

### **Importance of opinion evidence**

24. In practically every case there are facts in issue upon which expert evidence is material and likely to be decisive, either as to the case as a whole or as to a substantial limb. The spheres of admissible opinion are as diverse as the fields of human activity and enterprise provided there is specialised learning (study), training or experience.
25. The following are some examples:
  - (a) fact in issue – cause of medical condition;
  - (b) fact in issue – whether testatrix's signature / spurious / forgery;
  - (c) fact in issue – ability of company to pay its debts;
  - (d) fact in issue – life expectancy;
  - (e) fact in issue – future profits / expenses;
  - (f) fact in issue – dictates of good seamanship;
  - (g) fact in issue – proper practice lawyer / accountant / broker / banker;
  - (h) fact in issue – value of real / personal property;
  - (i) fact in issue – cause of damage to property;
  - (j) fact in issue – principles of foreign law;

- (k) fact in issue – match of DNA / fingerprint / pollutant;
- (l) fact in issue – whether nature of substance – medicine / cosmetic / narcotic;
- (m) fact in issue – biological relationship;
- (n) fact in issue – cause of occurrence – fire / explosion / collapse / sinking;
- (o) fact in issue – risk of occurrence;
- (p) fact in issue – state of mind / testamentary capacity / intoxication;
- (q) fact in issue – nature, quality, strength of material;
- (r) fact in issue – identification of market / market power.
- (s) fact in issue – practicability of alternative measure / system / action.

### **Adducing expert evidence**

- 26. Identification of facts in issue upon which opinion evidence admissible.
- 27. Ascertaining qualifications and expertise.
- 28. Provision of expert code / guideline; identified material; identified assumptions; questions based wholly or substantially on expertise
- 29. Consider whether basis for factual foundation able to be independently established and whether can be redressed if flawed.
- 30. Process of reasoning by which alternative hypothesis excluded.

### **Loss of privilege**

- 31. Communications with expert.
- 32. Earlier drafts.
- 33. Privileged material provided to expert.

### **Oral presentation**

- 34. Settle the witness.
- 35. Lead the material relevant qualifications / past retainers / publications.
- 36. Leading questions – s. 37.

37. Identify and adopt report.
38. Deal with reasons for rejecting competing opinions.
39. Confirm opinion on alternative assumptions if specific foundations fail and reasons why maintain opinion.
40. I want you to make the following assumptions – summarise clear and simple ultimate factual conclusions likely to be established, and enquire whether based on those assumptions, able to express an opinion based on relevant field of expertise pertaining to the relevant fact in issue. If so –what is that opinion and what are the underlying reasons.

### **Destroying expert opinion evidence**

41. Competing opinion evidence – reasons for greater credibility / defer to greater experience.
42. Consider extent to which no competing expert evidence blunts intended attack.
43. Attack qualifications / experience.
44. Attack independence / compliance with code / guideline.
45. Departure from instructions
46. Attack tests not performed / deficiencies of data / records.
47. Attack critical foundations / flaws / improper unsubstantiated inferences.
48. Nothing more than inferences and hypothesis upon which party wishes to rely.
49. Drifts into legal standard or merits of case.
50. Unacceptable field of expertise / not sufficiently organised or recognised.
51. Lacks requisite scientific rigour.
52. Undetectable or unstated assumptions
53. Assumes advocates role
54. Attack provenance of foundation / samples / custody.
55. Attack abstruse reasoning / speculative / conjecture / outside field / baseless.
56. Most effective cross examination fatal wound / blood drawn within first ten minutes.

57. Recant from opinion – seek to withdraw report – ask for exhibit to be returned.

### **Re-examination**

58. Focus on issues under s. 39.
59. Matters arising out of evidence / question requiring leave (with consequences if refused or if allowed).
60. Explaining qualifications / limit of concession made / intended meaning.
61. Lucid and vigorous exposition of sincere and objective view

### **Disregarding expert testimony**

62. Notwithstanding the forensic victory in the concession extracted from the opposing expert or indeed the unanimity of expert view the Court is not bound and will still evaluate the evidence, credibility and whether the relevant onus to prove the fact in issue has been discharged (Ancher, Mortlock, Murray & Woolley Pty Ltd v Hooker Homes Pty Ltd [1971] 2 NSWLR 278 at 286).

### **Material judicial observations**

63. The need for legitimate area of expertise was explained by Dixon CJ in Clark v Ryan (1960) 103 CLR 486.
64. The assistance provided by expert evidence must still be evaluated as to whether on the whole of the evidence the relevant onus is discharged in respect of the fact in issue - Ramsay v Watson (1961) 108 CLR 642 at 645.
65. Temporary expertise – ad hoc qualifications. See Butera v Director of Public Prosecutions (Vic) (1987) 164 CLR 180 at 187-188.
66. The need to identify the area of expertise sought to be brought to bear was emphasised in Murphy v The Queen (1989) 167 CLR 94 at 111-112.
67. The need to differentiate between the assumed facts upon which the opinion is based and the opinion in question, as well as the need to identify the expertise

which the witness can bring to bear and that the opinions are related to that expertise – HG v The Queen (1999) 197 CLR 414 at 427, 428.

68. Duties and responsibilities of experts – Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705 at 729-746; see also Rhoden v Wingate [2002] NSWCA 165.
69. Inadmissible forensic accounting report on financial position – ASIC v Rich [2005] NSWCA 152; and see (2005) NSWSC 149 (Austin J) para 249-377.
70. Admissibility - Velevski v The Queen (2002) 187 ALR 233 at 252-253, 267-268.
71. Incapable of rational affect - Quick v Stoland Pty Ltd (1998) 87 FCR 371.
72. Expose reasoning process – Ocean Marine Mutual Insurance Association (Europe) OV v Jetopay Pty Ltd [2000] FCA 1463; Evans Deakin Pty Ltd v Sebel Furniture Ltd [2003] FCA 171 at 688-690.
73. Absolute certainty as to based on specialised knowledge not required – question of degree, Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd [2002] FCAFC 157.
74. Particular scrutiny of ultimate issue R v GK (2001) 53 NSWLR 317 at 326-327.
75. Bias or want of independence not fatal to admissibility-FGT Custodians v Fagenblat (2003) VSCA 33
76. Not necessary assumed facts correspond with complete precision- Paric v John Holland Constructions (1985) 59 ALJR 844 at 846

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