

EXPERT EVIDENCE: A YEAR LATER

PRESENTED BY TONY THOMAS,
JULIE WRIGHT & ADELE CARR



GREENWAY CHAMBERS

EXPERT EVIDENCE

AGENDA

1. Evidence Act, Expert Code of Conduct,
overarching purpose

2. Latest cases - Australia

3. Latest cases - UK



Evidence Act 1995 (NSW)

S76 The opinion rule

(1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

S79 Exception: opinions based on specialized knowledge

(1) If a person has specialized 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.

EXPERT EVIDENCE

s79

Evidence Act 1995 (NSW)

Specialized knowledge

An area of recognized expertise; *Hrdavec v State of New South Wales* [2018] NSWSC 1081
Witness must do more than seek to substitute himself for the tribunal of fact

Based on training, study or experience

Opinions outside the area of expertise will be struck out; *Menz v Wagga Wagga Show Society Inc* [2018] NSWSC 1326

Opinion based on that knowledge

Must set out how the conclusions reached are based on the knowledge. A lack of substantive reasoning may not satisfy the court that the conclusions reached are based on the knowledge; *Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority trading as Seqwater (No 15)* [2018] NSWSC 1019



EXPERT EVIDENCE

CODE OF CONDUCT

UCPR, Schedule 7

Content of report

Acknowledgement of code, assumptions and facts, examinations and tests, reliance on others, any limits or qualifications on the opinion and a brief summary

Independence

Not an advocate for a party, overriding duty to assist the court impartially, must act independently during conclaves



EXPERT EVIDENCE

OVERARCHING PURPOSE

Federal Court Expert Evidence Practice Note

Code

Detailed matters for inclusion in report, conduct at joint conferences

Warnings to practitioners

No “hired gun”, no “inappropriate” communications and no dirty experts

Overarching purpose

Federal Court of Australia Act 1976, ss 37M and 37N



Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305 per Heydon JA

[85] In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of “specialised knowledge”; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be “wholly or substantially based on the witness’s expert knowledge”...

Ibrahimi & Ors v Commonwealth of Australia (No 3) [2016] NSWSC 1438 (4 October 2016)

Ibrahimi v Commonwealth of Australia [2018] NSWCA 321 (19 December 2018)

[71] Once again, Mr Pike's assertion amounts to a bare conclusion, unsupported by any analysis or reasoning.

[72] Moreover, and for the reasons I have already expressed, Mr Pike's experience in rescue (such as it is) does not qualify him to express an opinion in these terms.



EXPERT EVIDENCE

LATEST CASES - AUSTRALIA



GREENWAY CHAMBERS

Gordon and Anor v Lever [2018] NSWSC 1888 (14 December 2018)

[150] Experts usually should provide their expert opinions given a set of factual assumptions provided to them, which the calling party is obliged to prove. It is not appropriate, especially if uninvited, for experts to engage in their own sleuthing or investigations...

[153] However, it is imperative that an expert should set out in detail what was observed, read or undertaken to elucidate whether their opinions are based upon their expert knowledge...



Rush v Nationwide News Pty Limited (No 5) [2018] FCA 1622 (29 October 2018)

[46] ... both Mr Schepisi and Mr Specktor have set out their personal knowledge of Mr Rush in their outlines of evidence relating to Mr Rush's reputation. More significantly, in their expert reports, both Mr Schepisi and Mr Specktor have set out exactly how they have used information gleaned from their personal knowledge of Mr Rush in forming their opinions...



Bank of Ireland v Watts Group PLC [2017] EWHC 1667

High Court of Justice, Queen's Bench Division, Technology and Construction Court
Coulston J. (12 July 2017)

Themes directly addressed:

- *When an expert is insufficiently independent*
- *Where the expert does more than is reasonably necessary*
- *When an expert attempts to mislead*
- *When an expert applies the wrong test*
- *When an expert's approach is "thoroughly unreasonable"*
- *When an expert's conduct in superior court litigation is so unsatisfactory that it results in a costs order*

Imperial Chemical Industries v Merit Merrell Technology Limited [2018] EWHC 1577

High Court of Justice, Queen's Bench Division, Technology and Construction Court
Fraser J, 21 June 2018

The quote:

" Any advocate or litigator dealing with an expert will use the internet to see their track record: to see whether they have given evidence before, and if so how they fared."

Themes directly addressed:

- *Unsatisfactory quantum evidence:*
 - *failure to satisfy duty to court*
 - "a preponderance of partisan experts, all called by the same party...if it is a coincidence, it is a remarkable one"



Bruff-Murphy v. Gunawardena 2017 ONCA 502

Ontario Court of Appeal

The quote:

Hourigan J.A.:

A. INTRODUCTION

[1] The law regarding expert witnesses has evolved considerably over the last 20 years. Gone are the days when an expert served as a hired gun or advocate for the party that retained her. Today, expert witnesses are required to be independent, and their function is to provide the trier of fact with expert opinion evidence that is fair, objective and non-partisan.

[2] The role of the trial judge in relation to expert witnesses has also evolved. Appellate courts have repeatedly instructed trial judges that they serve as gatekeepers when it comes to the admissibility of expert opinion evidence. They are required to carefully scrutinize, among other things, an expert witness's training and professional experience, along with the necessity of their testimony in assisting the trier of fact, before the expert is qualified to give evidence in our courts. This gatekeeper role is especially important in cases, such as this one, where there is a jury who may inappropriately defer to the expert's opinion rather than evaluate the expert evidence on their own.





JULIE WRIGHT

JULIE.WRIGHT@GREENWAY.COM.AU



ADELE CARR

ADELE.CARR@GREENWAY.COM.AU



TONY THOMAS

TONY.THOMAS@GREENWAY.COM.AU