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EXPERT WITNESSES

& their critical role in prosecution & litigation.

National Police Remembrance Day

SEPTEMBER 29, 2023

Cellebrite

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Your unwavering dedication to serving our communities deserve admiration.

Your daily sacrifices do not go unnoticed and are deeply appreciated.

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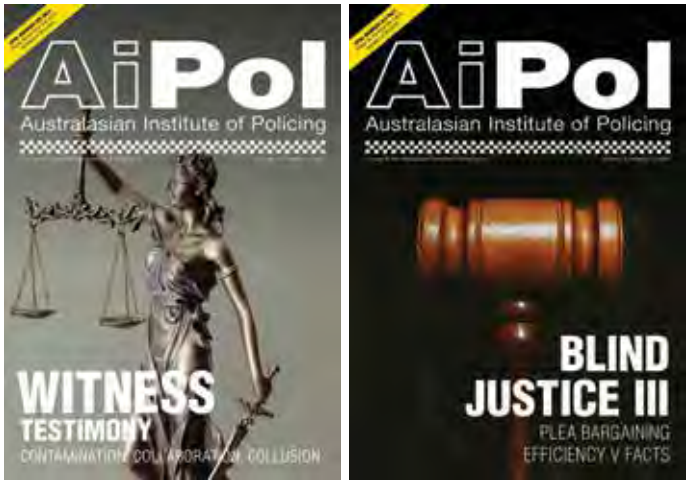

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Federal Labor proudly supports police officers,
who serve our community with courage and compassion.

We remember those police officers who have made the ultimate sacrifice and we convey our greatest sympathies to their fellow officers, families and loved ones.

Thank you for your sacrifice and your service.


The Hon
Anthony Albanese MP


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Richard Marles MP


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Mark Dreyfus KC, MP


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Editorial

DR AMANDA DAVIES

Editor, Senior Researcher at the Charles Sturt University

Expert testimony plays a critical role in litigation and witness preparation plays a critical role in the presentation of expert testimony.

Welcome to the Spring edition of AiPOL, it has been as always, a busy year so far for Australian police locally and with partnership operations internationally. This issue looks at the next step in the judicial process once the hard work on the frontline dedicated to capturing offenders is processed through to the courtroom. In particular, the element of expert witnesses, it lies not only with prosecution personnel to prepare expert witnesses in order to mitigate avenues for potential loss of case credibility, the preparation responsibility is shared with police officers and the witnesses themselves. Interestingly, as discussed in the 'Admissibility of expert evidence' article by David Robertson & Charles Gregory, there are variations across Australian jurisdictions in respect of the legislation associated with expert evidence/witness in court. These circumstances do not change the key advocacy theme emanating from the articles in this issue, suggesting that greater attention needs to be paid to selection and preparation of expert witnesses.

This is particularly relevant to establishing and maintaining integrity and credibility. As referred to in the comprehensive discussion by Hugh Stowe 'Preparing expert witnesses – a (continuing) search for ethical boundaries' preparation of expert witnesses remains a source of ethical angst for lawyers, where 'expert testimony plays a critical role in litigation and witness preparation plays a critical role in the presentation of expert testimony. Stowe further suggested formalizing a process for developing a set of guidelines for expert witness preparation that establishes expert credibility in the courtroom.

The articles have been sequenced to take the reader through discussions of the rules of expert evidence in Australia, to the issue of establishing and maintaining witness integrity and credibility, to the examples of outcomes where preparation of expert witnesses has not been recognized as an important factor in the overall defence and or prosecution which may result in a loss in the courtroom.

Whilst we recognize the relentless demands on all involved in the pursuit of justice, operational police through to the judge in the courtroom, supporting these critical roles with maintaining attention on expert witness preparation offers benefits to individuals, their agencies and the communities they serve.

To help us best serve our readers, we would appreciate your feedback in the short survey:

National Police Remembrance Day is on 29 September. It is a day set aside to honour police who have lost their lives whilst protecting and serving their community. We will remember them. Hasten the dawn.

Jon Hunt-Sharman
President, Australasian Institute of Policing

President's Foreword

JONATHAN HUNT-SHARMAN

President, Committee of management, Australasian Institute of Policing

As President of the Australasian Institute of Policing (AiPol) I very much enjoy the material collated in each of our editions. I often reflect on my law enforcement career and the opportunities and challenges that occurred throughout that time bringing cases to Court, the investigation, the prosecution and the ultimate result of sometimes years of complex investigation. Particularly where 'expert witnesses' have been utilised to support the prosecution case and explain technical matters and provide their professional opinion to the jury.

Of course some police officers are often called upon as 'expert witnesses' for example, in the areas of forensics disciplines of: crime scenes investigation; firearms identification and armoury expertise; biological and chemical criminalistics; identification sciences including fingerprint and facial identification; document sciences; imagery and geomatics; digital forensics; audio and video analysis; victim identification; forensic drug intelligence etc.

However, there are many areas of policing and law enforcement where the expertise of an individual may lead to them being deemed an 'expert witness' by the Courts. For example, a Highway Patrol officer is deemed an expert in assessing the speed of an offending vehicle due to their specific training or expertise, an experienced police officer in a Drug Squad may be deemed an expert witness in relation 'drug lingo and codes' commonly used by various drug syndicates, or an experienced investigator in relation to Outlaw Motor Cycle Gangs (OMCGs) or Organised Crime syndicates may be called upon to provide an expert opinion on international and domestic hierarchical structures, methodology etc.

The bottom line is that in Australian Courts, a police officer or law enforcement officer will engage with potential 'expert witnesses' throughout their career and may indeed be required to be an 'expert witness' in civil or criminal matters as a result of their specific knowledge, training and experience.

Interestingly, in my experience, the standards and processes to be adopted by police officers when engaging expert witnesses was not necessarily clearly articulated or known. Also, although not common, there were times when I was treated as an 'expert witness' in civil proceedings flowing out of criminal investigations. Again an area where the role was not clearly articulated. Fortunately, common sense ensured that the evidence was not tainted, but when reading the articles in this edition, I do realise how easily the evidence could have fallen apart due to the lack of my specific knowledge of the legal parameters involved. Luckily I winged it correctly those years ago. Once again, I reflect on the saying: 'There But For The Grace Of God Go I'.

I certainly believe that with the increased scrutiny of 'expert witness'

evidence and testimony that police officer training should incorporate engagement of 'expert witnesses' and articulate the specific legal parameters surrounding a police officer providing 'expert witness' testimony when called upon to do so.

Police and law enforcement practitioners would definitely benefit from specifically designed courses on the legal parameters that exist when providing professional opinion and testimony in Court as the independence and professionalism of police evidence is clearly going to be scrutinised more and more by the Courts.

I hope this edition, provides some assistance to police and law enforcement practitioners when engaging potential 'expert witnesses' or when they, themselves may be called upon to be an 'expert witness' due to their specific knowledge, training or experience, by providing a clear understanding of the Court requirements of an 'expert witness' and the specific legal parameters when performing that role.

In closing, I would like to remind readers that *National Police Remembrance Day* is on September 29 and is the day set aside to honour police who have lost their lives whilst protecting and serving their community.

It is also an appropriate time to reflect and appreciate our current and former serving police officers who place service above self in the execution of their duties in protecting and serving our communities.

Admissibility of expert evidence

The laws in relation to the admissibility of expert evidence under the Uniform Evidence Act (the Act) are somewhat settled.

BY DAVID ROBERTSON & CHARLES GREGORY

austlii.edu.au

The laws in relation to the admissibility of expert evidence under the Uniform Evidence Act (the Act) are somewhat settled. Yet Courts continue to express opinions on the requirements of the opinion rule in the Act that either clarify or assume to settle outstanding conflicts. And some practitioners and commentators continue to disagree on the importance of common law rules to admissibility requirements or discretionary powers under the Act.

For that reason, the aim of this article is to provide a brief summary of the principles relevant to the admissibility of expert evidence in civil proceedings in those jurisdictions that have adopted the Act, namely the Commonwealth, New South Wales, Victoria, Tasmania (in part), the Australian Capital Territory and the Northern Territory.

In summary, in order to be admissible as expert opinion evidence under the Act:

(i.) The opinion must be relevant to a fact in issue in the proceeding;

(ii.) The opinion must be on a subject matter of 'specialised knowledge';

(iii.) The opinion must be that of a person who has specialised knowledge based on the person's training, study or experience; and

(iv.) The opinion must be wholly or substantially based on the person's training, study or experience.

Furthermore, in New South Wales, Part 31 of the *Uniform Civil Procedure Rules 2005* (NSW) (UCPR) imposes additional requirements that must be met for expert evidence to be admissible in civil proceedings (although the Court retains a discretion to admit expert evidence that does not comply with these requirements), which will also be discussed briefly.

The opinion rule: section 76 of the Act

The 'opinion rule' in s 76(1) of the Act provides that evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

Like the hearsay rule, the opinion rule is a *purposive* rule, in that it only applies where a party seeks to adduce opinion evidence for the purpose of proving the existence of a fact about the existence of which the opinion was expressed. Therefore, in considering whether the opinion rule applies at all, there are two threshold questions: first, whether the evidence sought to be adduced is evidence of an 'opinion'; and second, whether the *purpose* for which the expert evidence is sought to be adduced is to prove the existence of a fact about the existence of which the opinion was expressed.

Evidence of an 'opinion'

The Act does not define the term 'opinion'. Therefore, what constitutes evidence of an 'opinion', as opposed to evidence of a fact, is determined by the application of common law principles (s 9 of the Act). In two decisions, the High Court has defined the word 'opinion' as 'an inference drawn from observed and communicable data'.[1] It has been long been acknowledged that the dividing line between evidence of 'fact' and of 'opinion' can be difficult to draw, and is in reality a continuum rather than a bright line. A useful practical test given by Finkelstein J in the Full Federal Court's decision *La Trobe Capital & Mortgage Corporation Pty Ltd v Property Consultants Pty Ltd*[2] is to consider the extent to which the evidence goes

beyond the witness' direct observations or perceptions, with the result that 'the more concrete the evidence, in the sense that the more grounded the evidence is in a witness' direct observation or perception of an event, the more likely it is to be factual in nature'.

Relevance of the opinion evidence

As noted above, the opinion rule requires identification of why the evidence is said to be relevant in the proceeding, which (applying the test for relevance in s 55(1) of the Act) 'requires identification of the fact in issue that the party tendering the evidence asserts the opinion proves or assists in proving'.[3]

Ordinarily, the only possible relevance of the expert opinion evidence in the proceeding will be to prove the existence of the fact about which the opinion was expressed. Relevant expert opinion includes the following categories of evidence:[4]

- opinion evidence as to what actually happened in particular circumstances, on the basis of assumptions that the expert is asked to make, as when a pathologist expresses an opinion about cause of death;
- opinion evidence as to what might be likely to happen in the future, on the basis of assumptions that the expert is asked to make, as when an economist might predict the effect of identified phenomena on a market;
- evidence of what is normally done in particular circumstances experienced by the expert, as when a legal practitioner says what is normally done in a conveyancing transaction;
- evidence as to what can be done in particular circumstances that the expert is asked to assume, and which the expert has not experienced, as when an engineer says what could have been done to avoid a failure of a particular structure;
- evidence concerning special usage of language or terms in the field of the expert's expertise, as when a chemist explains special usage of terms that have a different meaning in everyday speech;
- opinion evidence about what should or ought to have been done in particular circumstances that the expert is asked to assume, as when a legal practitioner says what enquiries ought to have been undertaken in a particular transaction, as distinct from what enquiries are ordinarily undertaken;
- opinion evidence as to whether particular conduct that the expert is asked to assume satisfies or falls short of some legal standard, as when a medical practitioner says that a particular procedure was conducted negligently.

Within those general categories of relevant expert evidence, the expert can perform 3 legitimate functions:

- ***Generalising from experience and training:*** 'A person experienced in a particular discipline may, in the course of a lifetime, accumulate a mass of material about the subject of the person's expertise, from his or her own practice, from journals, from newspaper reports and from discussion with fellow practitioners, much of which the person may not be able to recall but which enables him or her to express an opinion more accurately than one who has examined only the facts regarding particular instances. Such a witness may base an opinion on his or her experience, without having to prove by admissible evidence all the facts on which the opinion is based. Such witnesses regularly generalise from experience, calling in aid all their training and professional experience in expressing an opinion upon a matter within their field'.[5]
- ***Acting as librarian:*** 'In many instances, a witness who has experience in a particular discipline may not himself or herself know the answer to a particular problem from his or her own study or experience. However, being trained in the relevant discipline, the witness may be able to refer to works of authority in which the answer is given. In that sense, the witness may be said to be acting as a librarian. In that function, the witness is not giving evidence of his or her own opinion, except to say that, in his or her opinion, the books to which reference is made are of sufficient standing to be accepted by the Court'.[6]
- ***Acting as statistician:*** 'The third function of such a witness can be to apply statistical methods to material available from various sources in order to draw relevant conclusions. The statistical expertise and experience of the witness may be

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With honour, they do their duty.

The Wieambilla tragedy last December will cast the darkest of clouds over this year's **National Police Remembrance Day**. We remember Queensland Police officers, Constable Rachel McCrow and Constable Matthew Arnold, who were killed in that premeditated and most depraved attack.

This year, Western Australia's law enforcement community has been rocked by the death of Constable Anthony Woods who succumbed to his injuries days after being run down by a man trying to avoid arrest. Officer Woods is in our memory too.

Our men and women in blue willingly place themselves in danger to contain and quash that danger for the rest of us. They are motivated by a profound commitment to law and order and by the deepest compassion for the communities they serve. Our police act with courage and composure even in the most dire of circumstances.

Not to be forgotten are the partners, children, parents and wider families of our officers whose quiet and commendable fortitude helps them contend with the daily uncertainty that their loved one on the beat may not come home.

On National Police Remembrance Day, we promise to support those families who have suffered the terrible loss of a loved one in the line of duty. And in our remembrance of, and gratitude for all our fallen police officers, may we look to their qualities and deeds to inspire the best in ourselves.

The Hon Peter Dutton MP
Leader of the Opposition
Federal Member for Dickson

Authorised by Peter Dutton, LNP, 3/199 Gympie Road, Strathpine QLD 4500

brought to bear on material otherwise in evidence'.[7] If the expert opinion evidence is relevant for some purpose other than to prove the existence of a fact about the existence of which the opinion was expressed, then the exclusionary opinion rule in s 76 does not apply and it will not be necessary to satisfy the exception in s 79 of the Act. Furthermore, by reason of s 77 of the Act, if the evidence is admitted for some other purpose, it may nevertheless be used to prove the existence of the fact about the existence of which the opinion was expressed, unless an order is made under s 136 of the Act limiting the use that may be made of the evidence.

- If the expert opinion evidence is not relevant – that is, even if accepted, the evidence could not rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding (s 55(1)) – it is not admissible in the proceeding, whether as opinion evidence or otherwise (s 56(2)).

Expert evidence admissible as an exception to the opinion rule: s 79 of the Act

If a party seeks to adduce expert evidence of an 'opinion' to prove the existence of the fact about the existence of which the opinion was expressed, the evidence must satisfy the requirements of s 79 of the Act in order to be admissible.

Section 79 of the Act provides an exception to the opinion rule for the admission of expert evidence. It is noted that other exceptions to the opinion rule are provided in Part 3.3 of the Act for other forms of opinion evidence, such as the exception provided by s 78 for the admission of lay opinion evidence.

Section 79(1) of the Act states: 'If a person has specialised 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'.

In *Honeysett v The Queen*,[8] the High Court noted that s 79(1) of the Act states two conditions of admissibility for expert evidence: first, the witness must have 'specialised knowledge based on the person's training, study or experience'; and second, the opinion must be 'wholly or substantially based on that knowledge'. Subsequent decisions of intermediate courts of appeal have emphasised that these two conditions of admissibility are the *only* conditions of admissibility imposed by s 79, and attempts to impose other conditions of admissibility (such as a test of 'reliability') have been rejected as being inconsistent with the statutory test imposed by s 79.[9]

'Specialised knowledge'

As to the first condition of admissibility, the term 'specialised knowledge' is not defined in the Act. In Honeysett at [23], the High Court said of 'specialised knowledge':

(i.) It is to be distinguished from matters of 'common knowledge' (referring to s 80(b) of the Act);

(ii.) It is 'knowledge which is outside that of persons who have not by training, study or experience acquired an understanding of the subject matter';

(iii.) It may be knowledge of matters that are not of a scientific or technical kind and a person may acquire specialised knowledge by experience;

(iv.) However, the person's training, study or experience must result in the acquisition of 'knowledge'. The term 'knowledge' is used in s 79 in the sense of 'an acquaintance with facts, truths or principles, as from study or investigation', and which is 'more than subjective belief or unsupported speculation … [It] applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds'.[10]

One issue that may arise in satisfying this first condition of admissibility is whether some purported expert opinion constitutes 'specialised knowledge' within the meaning of s 79(1) of the Act. This issue sometimes arises where a purported field of expertise is new or emerging.

At common law, in order for an opinion to be admissible as expert evidence it was necessary to demonstrate that the subject matter of the opinion 'forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or expertise'.[11]

However, in drafting the Act, the Australian Law Reform Commission declined to include any 'field of expertise' test for determining the admissibility of expert evidence, instead preferring to rely on the general power under s 135 of the Act to exclude purported expert evidence that 'has not sufficiently emerged from the experimental to the demonstrable'.[12]

Recently, in *DPP v Tuite*[13] (a decision handed down after the High Court's decision in *Honeysett*), the Victorian Court of Appeal rejected an argument that expert evidence based on a new technique of DNA analysis was not sufficiently 'reliable' to be admissible under s 79(1) of the Act. The Court appeared to decide that (a) so long as the witness has knowledge of the subject matter which is outside that of persons who have not by training, study or experience acquired an understanding of the subject matter, and (b) that knowledge is based on the person's training, study or experience, the evidence is admissible under s 79(1) of the Act notwithstanding it is novel or that the inferences drawn by the witness have not been tested or accepted by others. The Court held that if expert evidence is to be excluded because it is 'unreliable' (that is, because it is untested, unverified or unsupported), it may be excluded on discretionary grounds under s 135 of the Act (or s 137, in criminal proceedings). The reasoning in *Tuite* was approved by the New South Wales Court of Criminal Appeal in *Chen v R*.[14]

Therefore, in light of these matters, if a challenge is made to an expert witness' evidence on the basis that the purported 'field of expertise' is not 'specialised knowledge', it will be necessary for the party seeking to adduce the evidence to satisfy the court that the opinion is 'specialised knowledge' (as explained in *Honeysett and Tuite*), otherwise the evidence may either (a) fail to satisfy the test for admissibility under s 79(1) of the Act, or (b) be excluded under s 135 of the Act.

Whether the purported expert has 'specialised knowledge based on the person's training, study or experience'

Another issue that may arise in satisfying the first condition of admissibility under s 79(1) is whether the particular witness in fact has the 'specialised knowledge based on training, study or experience' which the witness professes to have. That is a question of fact which must be satisfied by the party seeking to adduce the expert evidence in respect of each opinion sought to be given by the witness.[15]

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"Your Honour, I call Nigel From The Pub... expert witness on whatever you like."

continued from page 9

Whether the expert's opinion is 'wholly or substantially based' on specialised knowledge based on training, study or experience

The second condition of admissibility of expert evidence under s 79(1) of the Act is that the expert's opinion must be based 'wholly or substantially' on his or her specialised knowledge based on training, study or experience.

This condition of admissibility focuses largely on the *form* in which the expert's opinion is expressed, since it is necessary the expert sufficiently discloses his or her reasoning process so that the Court can be satisfied that the expert's opinion is based wholly or substantially on his or her specialised knowledge.[16] Therefore, it is 'ordinarily the case' that 'the expert's evidence must explain how the field of 'specialised knowledge' in which the witness is expert by reason of 'training, study or experience', and on which the opinion is 'wholly or substantially based', applies to the facts assumed or observed so as to produce the opinion propounded'.[17] Furthermore, an expert whose opinion is sought to be tendered 'should differentiate between the assumed facts upon which the opinion is based, and the opinion in question'.[18]

To be admissible under s 79(1), it is sufficient that the expert's opinion is 'substantially' based on his or her specialised knowledge. This allows for the fact that 'it will sometimes be difficult to separate from the body of specialised knowledge on which the expert's opinion depends 'observations and knowledge of everyday affairs and events''.[19]

In *Dasreef Pty Ltd v Hawchar*,[20] the plurality noted that in 'many, if not most cases', the requirements of this second condition of admissibility should be able to be met 'very quickly and easily', such as where a specialist medical practitioner expresses a diagnostic opinion in his or her relevant field of specialisation. In such a case, it will require 'little explicit articulation or amplification' to demonstrate that the witness' opinion is wholly or substantially based on his or her specialist knowledge once the witness has 'described his or her qualifications and experience, and has identified the subject matter about which the opinion is proffered'.

For completeness, it should be noted that in *Dasreef Pty Ltd v Hawchar*, Heydon J identified two additional common law rules as to the form in which expert opinion evidence is presented which his Honour held continue to apply to govern the *admissibility* of expert opinion evidence under s 79 of the Act (rather than matters going merely to weight). The first rule is the 'assumption identification rule',[21] which requires an expert to state the facts and assumptions on which the opinion is based. The second rule is the 'statement of reasoning rule',[22] which requires the expert to state the reasoning by which the conclusion arrived at flows from the facts proved or assumed by the expert, so as to reveal that the opinion is based on the expert's expertise. There are three points to make about Heydon J's reasoning. First, in light of the plurality's reasoning in *Dasreef*, which focused upon the two conditions of admissibility based on the statutory language of s 79(1) of the Act (discussed above), it is to be doubted that the 'assumption identification rule' and the 'statement of reasoning rule' continue to apply as standalone rules governing the admissibility of expert opinion evidence under s 79(1) of the Act. Second, however, the 'assumption identification rule' and the 'statement of reasoning rule' do not appear to differ much in substance from the second condition of admissibility identified by the plurality in *Dasreef* (discussed above), which focuses on the form of the expert opinion and requires the expert to sufficiently disclose his or her reasoning process so that the Court can be satisfied that the expert's opinion is based wholly or substantially on his or her specialised knowledge. Third, in practice it would be prudent to continue applying the 'assumption identification rule' and the 'statement of reasoning rule' in *preparing* expert evidence. An expert report certainly will not be open to attack on admissibility grounds if the expert has complied with the 'assumption identification rule' and the 'statement of reasoning rule' in preparing his or her expert report.

An additional issue: Whether the opinion must be based substantially on facts that have been or will be proved by other evidence in the proceeding (the 'basis rule' or 'proof of assumption rule')

In *Dasreef Pty Ltd v Hawchar,* Heydon J also identified a third common law rule which his Honour held continued to apply to govern the admissibility of expert evidence under s 79(1) of the Act. This is the common law 'basis rule' (or what Heydon J called the 'proof of assumption rule'), which provides that expert opinion is not admissible unless evidence has been or will be admitted that is capable of supporting findings of primary facts that are sufficiently like the factual assumptions on which the opinion is based.[23]

In *Dasreef Pty Ltd v Hawchar*,[24] the plurality acknowledged that the Australian Law Reform Commission's interim report on evidence had denied the existence of the common law basis rule and that the ALRC did not intend to include it in the Act.[25] Therefore, in light of the High

Court's decisions in *Dasreef and Honeysett*, it appears that there is not any 'basis rule' that governs the *admissibility* of expert opinion evidence under s 79 of the Act. This is the view taken in recent decisions of intermediate courts of appeal.[26]

However, expert evidence will likely be given little, if any, weight if the party adducing the evidence fails to prove by other evidence the truth or correctness of the assumptions on which the opinion was based.[27] Furthermore, it has been suggested that an expert opinion 'completely unrelated to proved facts' may be so hypothetical that it does not meet the test of relevance in s 55 of the Act, in which case the evidence cannot be admitted.[28] Furthermore, where an expert relies on unproven assumptions forming a fundamental basis for his or her opinion, the evidence may be excluded under s 135 of the Act.[29]

Part 31 of the Uniform Civil Procedure Rules 2005 (NSW)

Division 2 of Part 31 of the UCPR also includes rules relating to the admissibility of expert evidence in civil proceedings in New South Wales courts. Part 31 provides the Court with significant control over the use of expert evidence. Part 31 should be read in conjunction with relevant practice notes applying in the particular court in which the expert evidence is sought to be adduced.

The main rules imposed by Part 31 are as follows:

(i.) Parties must seek directions if they intend to, or it becomes apparent that they may, adduce expert evidence: r 31.19(1).

(ii.) Unless the Court orders otherwise, an expert witness's evidence in chief must be given by the tender of one or more expert's reports: r 31.21.

(iii.) The expert witness must comply with the code of conduct set out in Schedule 7 of the UCPR: r 31.23(1). Unless the Court orders otherwise, the expert's report may not be admitted in evidence unless the report contains an acknowledgment by the expert that he or she has read the Code of Conduct and agrees to be bound by it: r 31.23(3). Furthermore, the Court may not receive oral evidence from the expert unless it orders otherwise or the expert has acknowledged that he or she has read the Code of Conduct and agrees to be bound by it: r 31.23(4);

(iv.) A party must serve an expert report in accordance with a Court order, or any relevant practice note, or if no such order or practice note is in force, at least 28 days before the hearing: r 31.28(1). Except by leave of the Court or with the other parties' consent, the expert's report is not admissible unless it is served in this way: r 31.28(3)(a). Oral evidence from the expert is also not admissible without leave or consent unless the expert's report has been served in accordance with the rules and the report contains the substance of the matters sought to be adduced in the oral evidence: r 31.28(3)(c). The Court will only grant leave if there are exceptional circumstances or the report merely updates an earlier version of the report that was properly served: r 31.28(4).[30]

(v.) Other than in a trial by jury, if served in accordance with r 31.28, an expert's report is admissible as evidence of the expert's opinion and, if the expert's direct oral evidence on a fact on which the opinion was based would be admissible, as evidence of the fact: rr 31.29(1) and 31.30(2). This is subject to the expert report complying with the admissibility requirements of s 79 of the Act, as discussed above.

(vi.) If a party requires the expert for cross-examination, the expert's report cannot be tendered under ss 63, 64 or 69 of the Act or otherwise used in the proceeding unless the expert attends for cross-examination, or is dead, or the Court grants leave to use it: rr 31.29(5) and 31.30(6).

(vii.) If an expert provides a supplementary report, neither the supplementary report nor any earlier report by the expert may be used in the proceeding unless the supplementary report has been served on all parties affected: r 31.34(1).

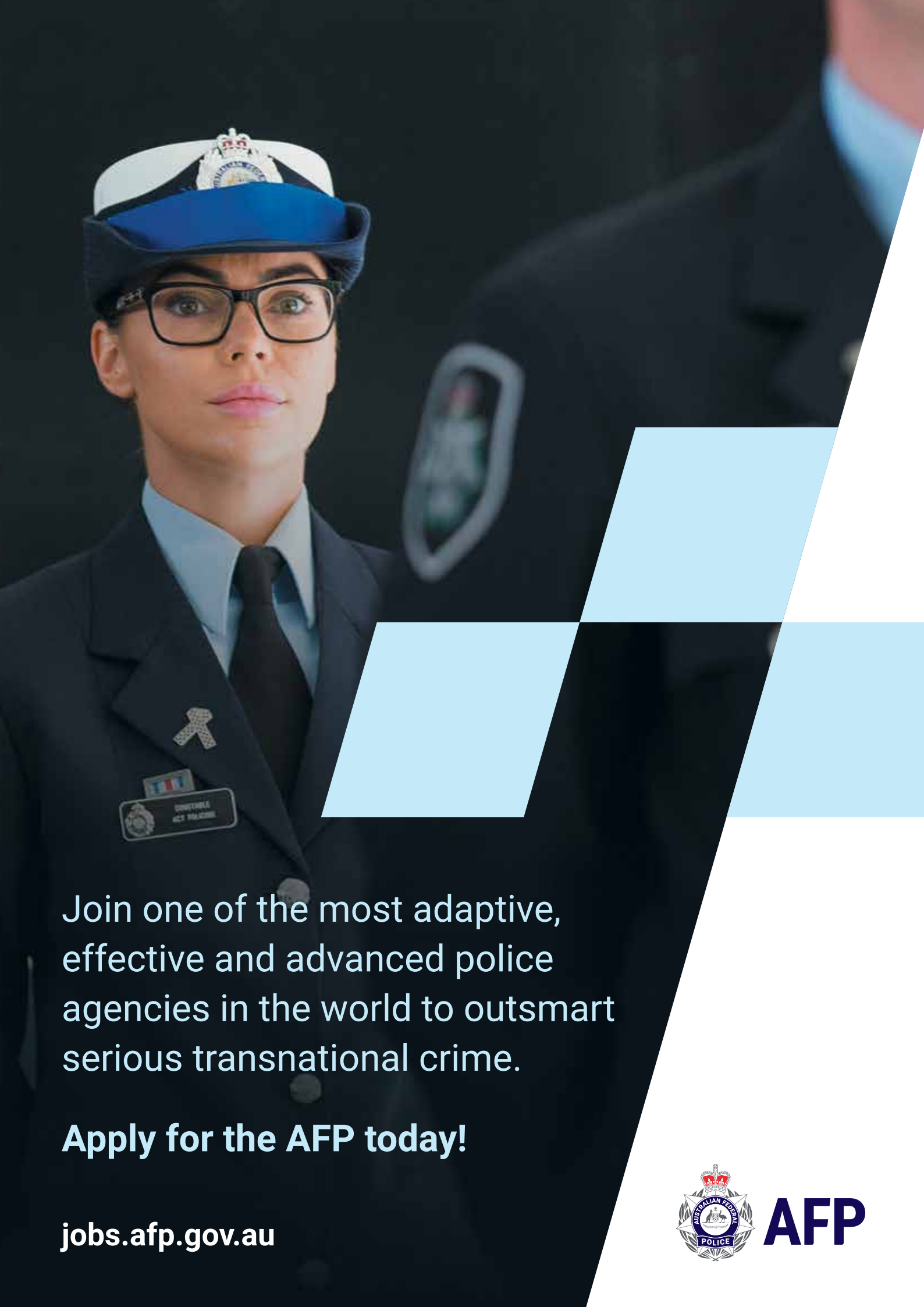
The failure to comply with one or more of the requirements of Part 31 of the UCPR does not result in the evidence being automatically inadmissible under s 79 of the Act, nor does it result in the mandatory exclusion of the expert evidence under s 135 of Act. However, the failure to comply with the relevant requirements of UCPR Part 31 may provide grounds for the discretionary exclusion of the evidence under s 135 of the Act.[31] That being the case, on any application to exclude expert evidence under s 135 of the Act, it will be necessary to consider whether the probative value of the evidence is outweighed by any prejudice, confusion or undue waste of time caused by the failure(s) to comply with Part 31 of the UCPR.

Conclusion

As can be seen, the admissibility of expert evidence requires more than a knowledge of s 79 of the Act. That provision must be considered along with the requirements of s 56 of the Act and Part 31 of the UCPR. The discretionary powers of the Court under Part 3.11 of the Act are also important, including where a field of specialised knowledge may still be in its infancy or where assumptions and facts that form the basis for the opinion are not proven by the close of evidence. Further, certain common law requirements such as the assumption identification rule and statement of reasoning rule continue to be important in practice.

END NOTE

1 Lithgow City Council v Jackson (2011) 244 CLR 352 at [10]; Honeysett v The Queen (2014) 253 CLR 122 at [21]
2 (2011) 190 FCR 299 at [44]-[46]
3 Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588 at [31].
4 Pan Pharmaceuticals Ltd (In Liq) v Selim [2008] FCA 416, at [35].
5 Pan Pharmaceuticals at [26]
6 Pan Pharmaceuticals at [27]
7 Pan Pharmaceuticals at [28]
8 (2014) 253 CLR 122 at [23]
9 See eg DPP v Tuite (2015) 49 VR 196; [2015] VSCA 148
10 Citing Daubert v Merrell Dow Pharmaceuticals Inc (1993) 509 US 579 at 590
11 R v Bonython (1984) 38 SASR 45 at 47
12 ALRC 26, vol 1, para 743
13 (2015) 49 VR 196; [2015] VSCA 148 at [72]-[73]
14 [2018] NSWCCA 106 at [82]
15 HG v The Queen (1999) 197 CLR 414 at [40], [44]; Odgers, Uniform
Evidence Law (13th ed, 2018) at [79.120]
16 HG v The Queen (1999) 197 CLR 414 at [39]
17 Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588 at [37], citing Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705 at [85]
18 HG v The Queen at [39]
19 Honeysett at [24]
20 Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588 at [37]
21 Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588 at [64]-[65]
22 Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588 at [91]-[94]
23 Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588 at [66]-[90]; see also Heydon, Cross on Evidence (11th ed, 2017), at [29070];
24 (2011) 243 CLR 588 at [41]
25 ALRC 26, vol 1, paragraph [750]
26 Langford v Tasmania [2018] TASCCA 1 at [36]-[42]; Taub v 95 NSWLR 388; [2017] NSWCCA 198 at [30]-[33]; Kyluk v Chief Executive, Office of Environment and Heritage (2013) 298 ALR 532; [2013] NSWCCA 114 at [176]-[179]
27 Taub at [33]
28 Langford at [40]
29 See eg Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 7)
[2008] FCA 1364 at [332]-[354].
30 A useful discussion of 'exceptional circumstances' under the p rule to r 31.28(4) is set out in Yacoub v Pilington (Aust) Pty Ltd [2007] NSWCA 290 at [66]-[67] (and see also DJ Singh v DH Singh and Others [2018] NSWCA 30 at [91].
31 Chen v R [2018] NSWCCA 106 at [20]-[29]; Wood v R (2012) 84 NSWLR 581 at [728]-[729]



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Expert witness bias largely unchecked in Australian courts

Transforming procedure is a way to enhance objectivity in our courts, new research shows. Led by Dr Jason Chin, it also explores the failings of the legal system status quo with regard to expert witnesses.

June 22, 2020

BY LOREN SMITH

Assistant Media Adviser (Humanities), sydney.edu.au

Did you know that there is almost no empirical research to guide judges in how they manage potentially biased expert evidence, like forensic science?

A recent paper, 'The New Psychology of Expert Witness Procedure', begins to redress this. Published by Sydney Law Review, the paper looks at the procedures intended to ensure that expert witnesses are impartial, and finds that they are inadequate.

The authors, Dr Jason Chin (University of Sydney Law School), Associate Professor Mehera San Roque (UNSW) and LLB candidate Rory McFadden (University of Queensland) propose that law could harness the psychology of ethical behaviour to help manage experts, and therefore maintain public trust in our court system.

"Many of the concerns about expert witness partisanship merged with fears that 'junk science' was finding its way into courtrooms, presented by unscrupulous experts, willing to tailor their evidence to the needs of their instructing client," lead author, Dr Jason Chin said.

"Despite this, Australian courts have typically refrained from demanding that expert evidence be demonstrably reliable."

Decoding codes of conduct

Focusing on Australian criminal law, the authors note that procedures intended to ensure expert witness impartiality, such as codes of conduct, are not only recent introductions, but are limited in their application.

"Only in Victoria, and only very recently, has a Practice Note (a document detailing procedural guidelines) been developed specifically for criminal trials," Dr Chin said.

Even when procedures are in place, they tend to overlook more subtle forms of bias, such as unconscious contextual bias (when irrelevant details of a case affect an expert's judgment).

How behavioural ethics can reveal bias

Behavioural ethics is a relatively new field of research that studies how people behave when confronted with ethical dilemmas.

"Behavioural ethics illuminates the processes that encourage expert witnesses to overstate their findings and downplay the limits of their expertise. It explains how they can do these things and still see themselves as upstanding actors in their field," Dr Chin explained.

One such process, 'ethical fading', occurs when people operate on autopilot, losing sight of the ethical component of what they are doing. Making the ethical component clear can correct for this. For example, signing an honour code or reciting the Ten Commandments has been found to substantially reduce cheating.

Another process occurs when ethical criteria are flexible or unclear, so that people can stray from them without jeopardising their sense of morality.

Further processes include ethical blind spots (when people tend to see themselves as objective and others as biased) and slippery slopes (where one wrongdoing leads to another, to conceal the initial one).

Using behavioural ethics to change codes, culture

The authors propose that courts should embrace behavioural ethics to counter expert witness bias. One way they can do this is by modifying codes of conduct to engage experts' moral compasses.

The authors argue that codes should:

- remind the expert of his or her duty to the court
- interrupt the typical script and any favourable social comparisons that the expert may make -for example, by comparing him or herself to an unscrupulous expert
- make it clear that the expert is solely responsible for his or her opinion (to avoid diffusion of responsibility).

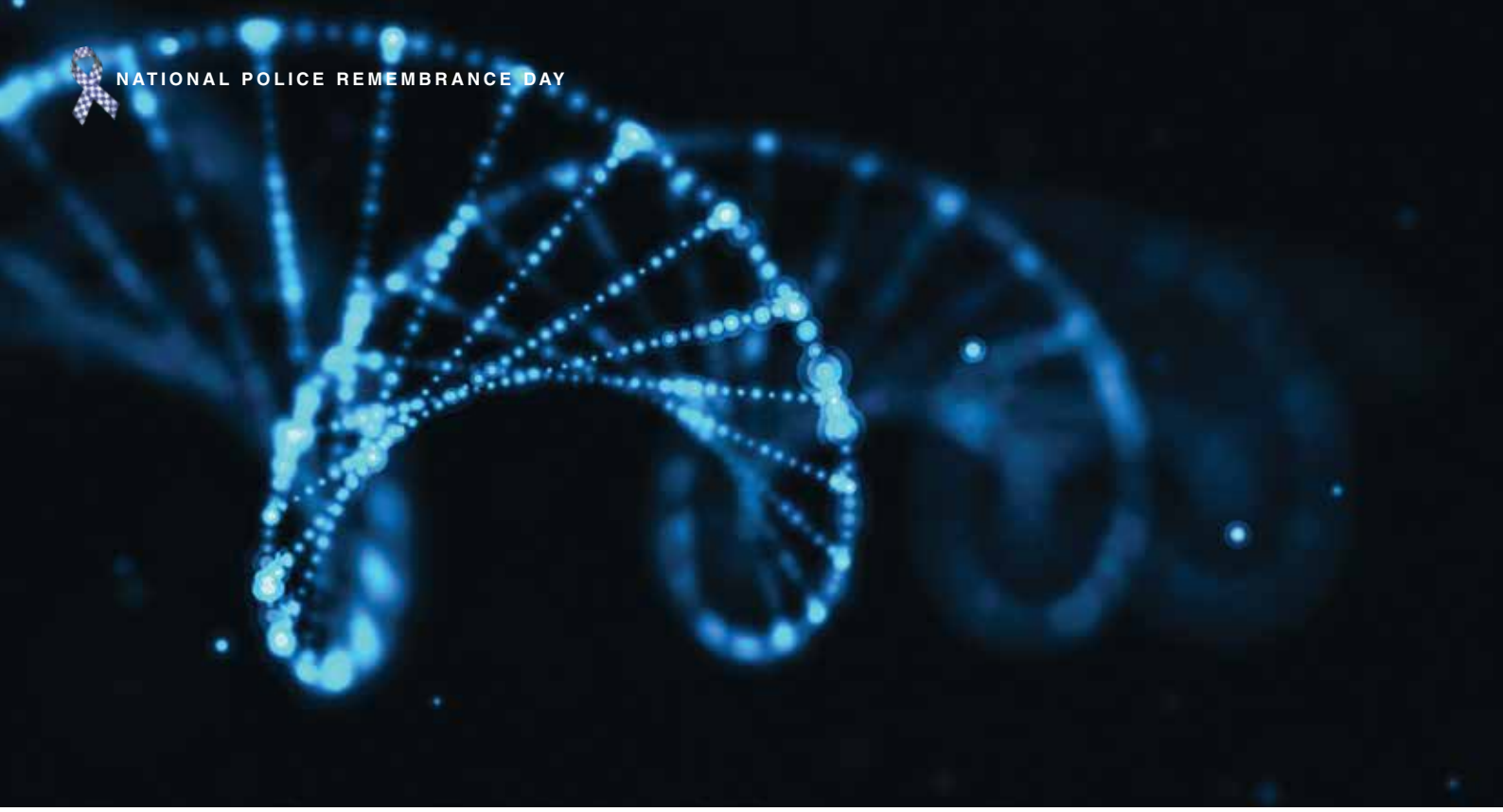
With behavioural ethics concepts in mind, court culture, too, can be reformed to enhance expert witness objectivity.

"There is a pervasive court culture [in common law jurisdictions] that tolerates 'experts' overstating their claims and does not effectively enforce codes of conduct," Dr Chin said.

For example, an inquiry in Ontario, Canada into the wrongful convictions that resulted from the work of forensic pathologist Dr Charles Smith concluded that Dr Smith 'believed that his role was to act as an advocate for the Crown and to "make a case look good".'

In Australia, the trend has been for courts to take codes of conduct increasingly less seriously. To date, the authors are only aware of one Australian court decision that excluded an expert for failing to follow a code of conduct.

The authors conclude that, despite its past failings, expert witness procedure is a key tool for tackling expert witness bias: "When designed with reference to effective scientific procedural safeguards, and enthusiastically enforced by courts, it may provide serious benefits to the trial process."



Forensic Analysis

Delivering expert evidence is becoming harder

January 4, 2023

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Delivering effective Expert Evidence is becoming harder, at least in the UK, Australia and most likely other Commonwealth jurisdictions. Traditionally the role of a Judge was to apply the law to the evidence presented by the parties to a dispute. As well as evidence of factual occurrences, in the case of expert evidence, this could include expert opinion, and where experts disagree, the Judge could choose one expert's views over another, or combine the expert's views. This approach seems to be changing with significant implications for the experts when preparing their reports and evidence.

The situation for Arbitrators and Adjudicators is somewhat different, they are appointed based on their expertise and may choose to use it. However, if the appointed Tribunal decides to use his/her expertise instead of the information contained in an expert report prepared by one (or both) of the parties, this fact has to be made known to the parties and Natural Justice requires they have an opportunity to consider the matter and make submissions that have to be considered by the Tribunal[1].

Most evidence in a hearing is provided by witnesses to fact, these witnesses are restricted to providing evidence about things they personally saw, did, heard, etc., witnesses to fact are precluded from expressing their opinion. Expert opinion is an exception to this usual rule that allows a person who has specialised knowledge based on that person's training, study, or experience to give opinion evidence in Court proceedings that is based wholly or substantially on that person's expert knowledge. However, there are some rules about when and how this will be allowed. The expert, and his/her evidence are required to pass four basic tests:

1. **Relevance or helpfulness test.** This is fundamental – evidence in any court proceedings is only admissible if it is relevant. Unless the expert evidence is relevant and will help the Court make its decision, the evidence will not be allowed.
2. **Specialised knowledge test.** This has two elements:
   The first is that the expert opinion must lie within a field of knowledge that the law recognises as one on which expert evidence can be called; so expert evidence will not be allowed on a topic if an ordinary person is just as capable of forming a view about it without expert assistance. For example, an ordinary person would be able to form an opinion on the colour of a building.

The second is that the subject must form a part of a body of knowledge which is sufficiently organised or recognised to be accepted as a reliable body of knowledge such as scheduling, cost planning, or engineering.

3. **Qualifications test[2].** The witness must be an expert in their field and must have acquired specialised knowledge on the topic based on their training, study, or experience. Academic qualifications and experience usually go together. However, sometimes people are recognised as experts if they have significant practical experience even though they do not have the relevant academic qualifications.
4. **Basis test.** There are two aspects to this test:
   First, the expert opinion must have its basis in the expert's specialised knowledge, evidence by an expert that strays beyond the area of his or her expertise is, self-evidently, no longer expert opinion.

   Second, the facts on which the expert opinion is based must be disclosed in the expert's report, an opinion based on incorrect assumptions will not assist the Court, so it is important to know what facts were found or assumed in arriving at the expert's opinion.

Courts are not required to follow expert opinion

The judgements discussed below and their consequences are directly relevant to court cases in the UK and Australia, but have implications for both arbitrations and adjudications, and are likely to be influential in other jurisdictions.

The analysis should be sound from a common-sense perspective:

The latest indication of change is a decision by the English and Wales High Court in **Thomas Barnes & Sons PLC v Blackburn With Darwen Borough Council [2022] EWHC 2598 (TCC)**, as part of the judgement, His Honour Judge Stephen Davies stated that *'irrespective of which method of delay analysis is deployed, there is an overriding objective of ensuring that the conclusions derived from that analysis are sound from a common-sense perspective'. He also affirmed the decision of Akenhead J in Walter Lilly & Company Ltd v Mckay [2012] EWHC 1773 (TCC) that 'the court is not compelled to choose only between the rival approaches and analyses of the experts. Ultimately it must be for the court to decide as a matter of fact what delayed the works and for how long'. Noting that 'it is not necessarily the last item of work which causes delay'.*

The claim needs to be proved by the expert evidence:

An earlier decision of the England and Wales High Court in **Costain Limited v Charles Haswell & Partners Limited [2009] EWHC B25 (TCC)** the court rejected both experts' findings[3]. While the Court found that Haswell was in breach of its contract and the breach caused delay to the foundations of two buildings that were on the critical path. The Court noted that *'Both experts have agreed that, during this period, those works i.e. foundations to the RGF and IW were delayed, albeit to differing extents. They have also agreed that, at that time, those works were on the critical path of the project so that, all other things being equal, and if no later mitigation measures were taken, those delays would ultimately delay the completion of the project as a whole'. The Court also found 'no evidence has been called to establish that the delaying events in question in fact caused delay to any activities on site apart from the RGF and IW buildings. That being so, it follows, in my judgment, that the prolongation claim advanced by Costain based on recovery of the whole of the site costs of the Lostock site, fails for want of proof'. Both of the expert's used a 'window' analysis to reach their conclusion that a critical delay had occurred, but the Court rejected these opinions because the assumed flow-on of the delay to the overall completion of the works was not demonstrated: 200 (ii) I find that it has not been shown by Costain that the critical delay caused to the project by the late provision of piled foundations to the RGF and IW buildings necessarily pushed out the contract completion date by that period or at all. Nor has Costain established that all activities on the Lostock site were delayed between October 2002-January 2003 by the delaying events. No investigation has been carried out by the experts to establish that one way or the other so, as matters presently stand, it is simply a matter of speculation[4].*

The Court can make up its own mind:

The Australian courts have possibly gone one step further. In **White Constructions Pty Ltd v PBS Holdings Pty Ltd [2019] NSWSC 1166** concerning an alleged delay in the construction of a 100-lot subdivision on the NSW South Coast resulting from delays in approving the sewer design.

Delay experts were engaged by the parties, but the evidence of the experts was mutually contradictory. The presiding Judge, Justice Hammerschlag noted:

[18] *Plainly, both experts [Mr Shahady and Mr Senogles] are adept at their art. But both cannot be right. It is not inevitable that one of them is right.*

[22] *The expert reports are complex. To the unschooled, they are impenetrable. It was apparent to me that I would need significant assistance to be put in a position to critically evaluate their opinions and conclusions.*

As a consequence, the Court used its powers to appoint Mr Ian McIntyre as its expert. Based on his report to the Court the Judgement finds:

[191] *Mr McIntyre's opinion, upon which I propose to act, is that for the purpose of any particular case, the fact that a method appears in the Protocol4 does not give it any standing, and the fact that a method, which is otherwise logical or rational, but does not appear in the Protocol, does not deny it standing.*

[196] *Mr McIntyre's opinion, upon which I propose to act, is that neither method [used by the parties experts] is appropriate to be adopted in this case. This view is consistent with me accepting Shahady's view of Senogles and Senogles' view of Shahady.*

[196] *Mr McIntyre's opinion, upon which I propose to act, is that close consideration and examination of the actual evidence of what was happening on the ground will reveal if the delay in approving the sewerage design actually played a role in delaying the project and, if so, how and by how much. In effect, he advised that the Court should apply the common law common sense*

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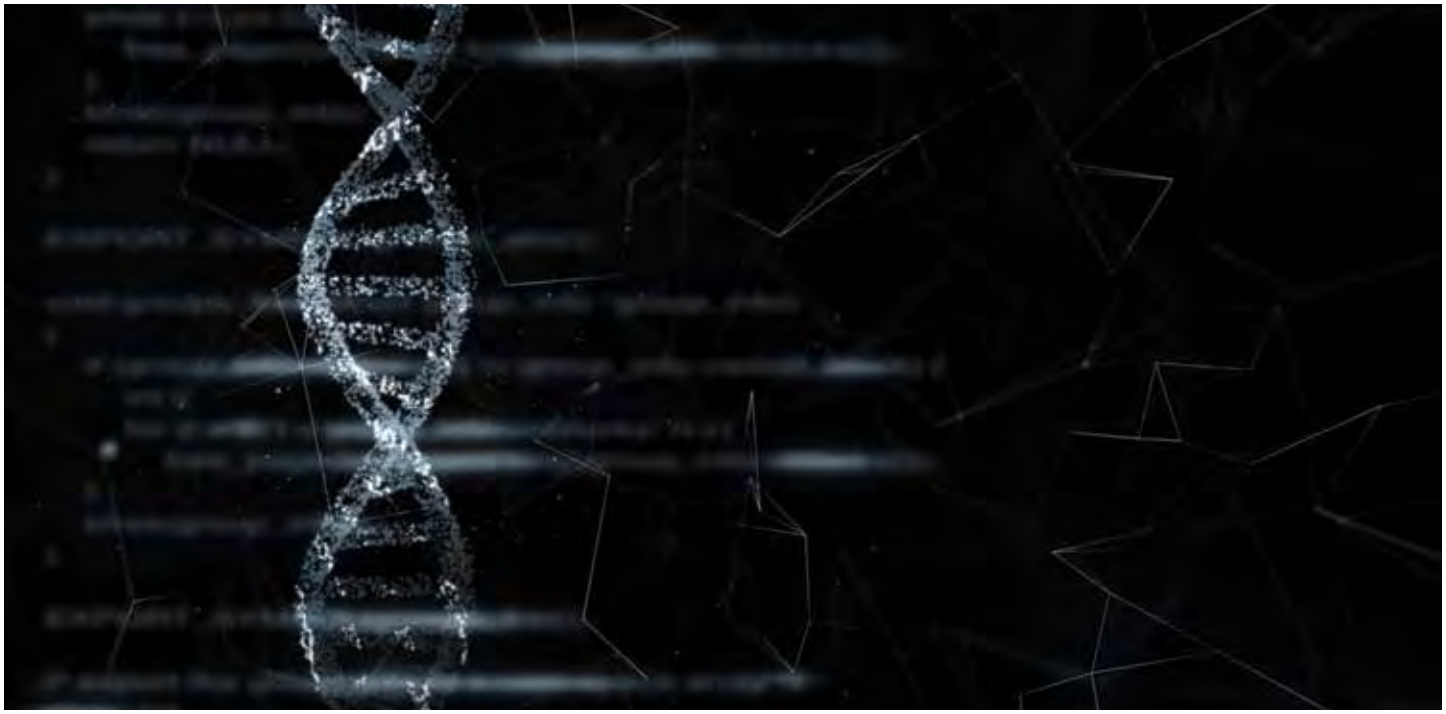

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approach to causation referred to by the High Court in ***March v E & MH Stramare Pty Ltd (1991) 171 CLR 506.***

Ultimately, Justice Hammerschlag held in favour of PBS, finding that White had not been able to prove that delays in other aspects of development could be attributed to the delay in sewer design approval. In arriving at this decision, Justice Hammerschlag considered the construction company's site diary. Noting, this comprehensive record of events 'on the ground' did not reference any 'particular consequences' of the sewer approval delay. Whilst it contained evidence that approval of sewer designs was suspended for a period during construction, it lacked details concerning how this suspension actively affected the progress of other aspects of construction.

Takeaways

1. Expert reports need to be written in a clear and concise way that the tribunal can understand, minimizing jargon and assumed knowledge.
2. The expert report needs to join all of the 'dots' to prove what is claimed, this is particularly important in a 'window' analysis, you cannot assume anything after the 'window'.
3. The report needs to be based on fact, and embed common-sense. An abstract analysis that achieves a 'desirable' answer for one of the parties is unlikely to be accepted. The Courts do not need to accept any of the reports.
4. Methods used to analyse delay need to be appropriate for the situation. The fact that a method appears in the *Society of Construction Law Delay and Disruption Protocol* (2nd edition)[5] and/or the AACE® International Recommended Practice No. 29R-03 Forensic Schedule Analysis[6] does not give it any legal standing. Conversely, the fact that a method, which is otherwise logical or rational, does not appear in the Protocol or R.P. 29R-03, does not deny it standing.

Conclusions

Writing a good expert report is a skilled art. The judgements above are likely to be highly influential in the UK, Australia, and most Commonwealth jurisdictions, and may be persuasive in the USA.

Footnotes

1. Some early cases dealing with this include: Balfour Beatty Construction Limited v The Mayor and Burgess of the London Borough of Lambeth [2002] EWHC 597 (TCC)s, and St Hilliers Contracting Pty Limited v Dualcorp Civil Pty Ltd [2010] NSWSC 1468 6th December 2010. See: https://mosaicprojects.com.au/PDF_Papers/P035_Assessing_Delays.pdf (pages 3 & 4)

2. Expert testimony rules in the USA are based on the Daubert* judgement which requires: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the result of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. *Daubert v Merrell Dow Pharmaceuticals Inc., 549 US 579 (1993)

3. For more analysis of the Costain v Haswell judgement see Costain vs Haswell Revisited: https://mosaicprojects.wordpress com/2023/03/25/costain-vs-haswell revisited/

4. Note: The 'Costain' project involved a number of independent structures distributed across the site. There was no particular requirement to build them in any specific order. For more on the challenges of dealing with this type of distributed project see: https://mosaicprojects.com.au/PMKI-SCH-010.php#Issues-A+D

5. For more on the SCL methods, see Assessing Delay – the SCL Options: https://mosaicprojects.com.au/PDF_Papers/P216_Assessing_Delay_The_SCL_Options.pdf

6. For more on methods to calculate the effect of a delay based on the AACEi® Recommended Practice No. 29R-03 see Assessing Delay and Disruption – Tribunals Beware: https://mosaicprojects.com.au/PDF_Papers/P035_Assessing_Delays.pdf

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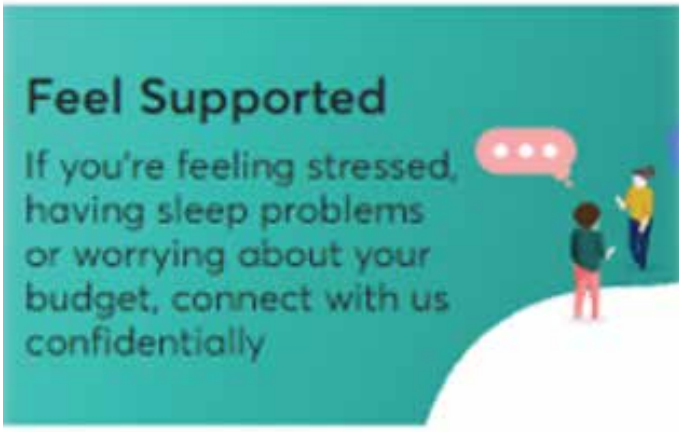

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Expert Activism

How expert evidence derailed a conviction

BY TOM NEVIN

Director, Loquitur Witness Training

Introduction

Wood v R was a criminal case regarding the death of Ms Carolyne Byrne who died of an apparent suicide by jumping off a cliff onto rocks at the Gap at Watsons Bay in Sydney. Gordon Wood was the driver for controversial businessman Rene Rivkin and was Ms Byrne's boyfriend at the time. Mr Wood was subsequently charged with Ms Byrne's murder.

This case contains several important points and lessons for police officers, investigators, prosecutors, legal teams and expert witnesses, and in some respects is a lesson in what to avoid when engaging expert witnesses to help in police investigations and prosecution.

Background

One issue at the trial was whether Ms Byrne had jumped or was thrown from the rocks. Expert witness evidence was called in respect of this. One expert witness for the prosecution was Associate Professor C, an engineer with an expertise in physics. Mr Wood was convicted.

The conviction was appealed. One (of several) grounds of appeal was the expert evidence of A/Prof C. After the conclusion of the trial, but prior to the hearing of the appeal, A/Prof C published a book titled "*Evidence for Murder: How Physics Convicted a Killer*", and other information about his engagement as expert witness on his website. This was a comprehensive account of A/Prof C's opinion of various aspects of the evidence and of his involvement in the investigation. The book acknowledged contemporary concerns about the integrity of expert evidence, but nonetheless revealed serious problems about his own involvement in the police investigations. These publications showed the energy he applied to assisting the police, no doubt a result of worthy intentions.

At the appeal the published material and other involvement of A/Prof C's was considered fresh evidence and considered accordingly.

Book Publication

The court considered the duties of expert witnesses generally, and the role of A/Prof C in particular.

The Judge found that if the published material had been available at trial it would have significantly diminished A/Prof C's credibility as a witness. The information in the book :

- Made plain that A/Prof C approached his task as expert with the preconception that Mr Wood had killed her.
- Suggested A/Prof C saw his task as being to marshal the evidence which may assist the prosecution to eliminate the possibility of suicide and leave only the possibility of murder.
- Was "*replete with recitations of his role in solving the problem presented by the lack of physical evidence and records how he was able to gather the evidence which enabled*

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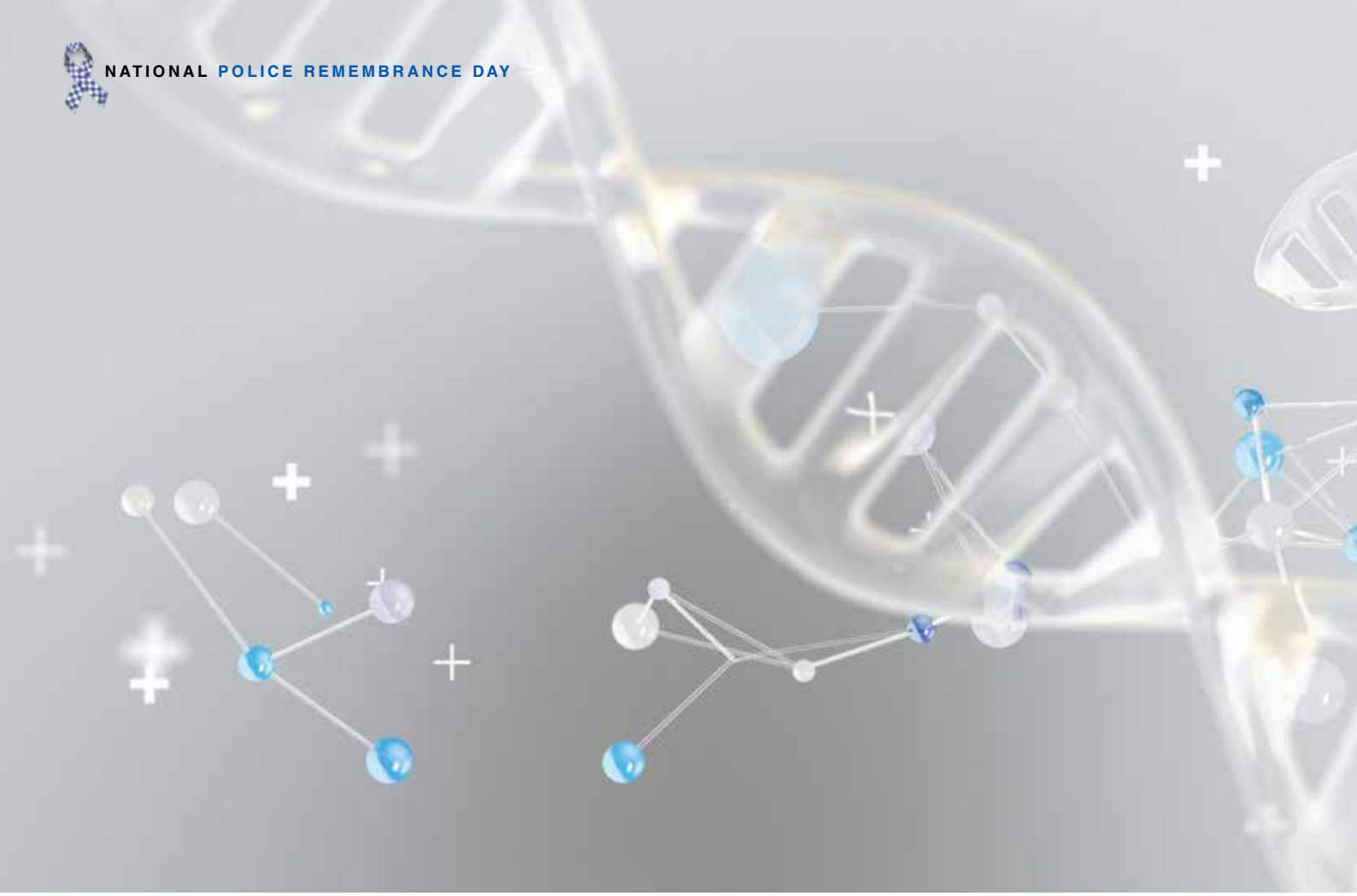

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the prosecutor to bring proceedings against the applicant".

There were also various fundamental issues with the assumptions made by A/Prof C and the tests he conducted.

Role of A/Prof C as Part of the Investigation Team

It was clear from the book, and other evidence adduced on the issue, that A/Prof C was involved in the investigation of the matter to an extraordinary degree. He shared the suspicions of police and coroner. He worked closely with the police and promoted his own case to police. In this way, the "independent" expert was an active part of the police investigation team who worked closely with the police to prove the police hypothesis.

Additionally, A/Prof C worked with the police to support one (lay) witness' version of event and to "convince" the prosecutor to bring the prosecution. There was even a suggestion that A/Prof C had tried to influence police evidence as to the death of Ms Wood.

This created serious doubts as to the apparent impartiality and independence of A/Prof C in his role as an expert witness.

The court found that *once an expert has been engaged to assist in a case, there is a significant risk that he or she becomes part of "the team" which has the single objective of solving the problem or problems facing the party who engaged them to "win" the adversarial contest.*

Additionally, several other factors arose as a result of this particularly close relationship between A/Prof C as "expert" and the investigation team. At one point during the investigation, A/Prof C was asked by police to provide an expert report on forensics. A/Prof C gave the report despite having no experience in forensics, rather being an expert in physics.

Further, documents, including emails between A/Prof C and the police, were not produced until the evening of the 35th day of the trial. This caused disruption to the trial, necessitating its postponement and thus fracturing the cross-examination of the witnesses. The emails also disclosed information for the first time in relation to witnesses who had already given evidence and had been excused from the trial.

Decision

It considered whether an expert's evidence is inadmissible if the expert has breached the Expert Witness Code of Conduct. It found that while this does not necessarily make the evidence inadmissible, it may do so if the breach is sufficiently grave.

Here, A/Prof C had clearly breached the Expert Witness Code of Conduct, and to such an extent that his evidence was inadmissible. The book published by A/Prof C, and his close relationship with, and influence in, the investigation and prosecution had the consequence that his opinion on any controversial matter should have minimal, if any, weight . A/Prof C "*took upon himself the role of investigator and became an active participant in attempting to prove that the applicant had committed murder. Rather than remaining impartial to the outcome and offering his independent expertise to assist the Court he formed the view… that [Mr Wood] was guilty and it was his task to assist in proving his guilt.*"

If the subsequently published information had been "*available to the defence and the extent of A/Prof C' partiality made apparent, his evidence would have been assessed by the jury to be of little if any evidentiary value on any controversial issue.*"

Conviction was quashed, and Mr Wood was acquitted.

Comment and Lessons Learnt

Police officers, investigators, prosecutors, legal teams and expert witnesses can learn a lot from this case.

At the outset we note the interesting point that a failure to comply with the Code of Conduct will not automatically mean the expert witness' evidence is struck out (although it may do if sufficiently serious). However, it will certainly be a factor in the consideration of the weight of evidence and credibility of the expert witness. This is practical consideration by the Courts, and it will be a question of degree as to what the effect of such a failure is.

We are reminded of the expert witness' need for impartiality. Experts must be impartial, and be seen to be impartial. This is particularly important in more recent times when an expert's online media profiles will often be readily and publicly available for others to read. While obviously this includes their professional profiles (LinkedIn, Twitter etc.) it may also include any personal profiles (Instagram, Facebook etc.). It is common for police investigators and legal teams to research and investigate the activities of all opposing witnesses on these forums, and indeed they should also investigate their own witnesses as well to prevent any such issues arising. Any suggestion of an agenda or activism will invite challenges to the witness' evidence, difficult procedural steps, and can lead to very awkward cross-examination and attacks on credibility.

It also serves as a reminder of the need to comply with relevant codes of conduct and a lesson that an expert's primary duty is to the Court, rather than a party instructing them. Nor are witnesses engaged for their own personal aggrandisement. Experts who assist in a police investigation must take special care to preserve their independence, as indeed must the police investigation team who engage them. If there is any suggestion that the independence of the expert has been or could be compromised from their involvement in the investigation their position as a witness should be re-considered.

That is not to say there is no benefit in having a subject matter expert assist in a police investigation. There clearly is, and indeed it can be, essential. However, in circumstances such as this a second expert should later be engaged: with the second expert to provide the expert witness evidence to the Court. The distinct roles of those experts should be respectfully observed, and these experts should be treated differently so as to avoid the "contamination" of the expert witness' evidence.

We also see from this case the dangers of a very close relationship between expert witness and police investigators. The expert should in fact be an expert in the relevant subject matter, a point which the police should independently check. There will also be issues of disclosure between police and expert which may arise, and if these do arise they should be addressed promptly with the issue identified and the action taken to address it, officially recorded.

Finally, we see the catastrophic effect of a failure to comply with these principles. It will reflect poorly not only on the evidence of that expert, but also on the credibility of other police witnesses, and indeed potentially the entire investigation and prosecution. It may severely disrupt or prejudice the trial process itself. This may also have significant cost consequences, as well as reputational damage on the expert and the relevant investigators, prosecutors and their respective organisations.

About the author:

Tom Nevin is a solicitor and director at Loquitur (**www.loquitur.com.au**), Australia's leading witness training and education provider. Specially prepared courses are available for police officers, forensic witnesses, emergency responders, public servants and other professional witnesses. Courses are also available for lay (factual) witnesses and expert witnesses in both criminal and civil matters.

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BY HUGH STOWE, 5 WENTWORTH

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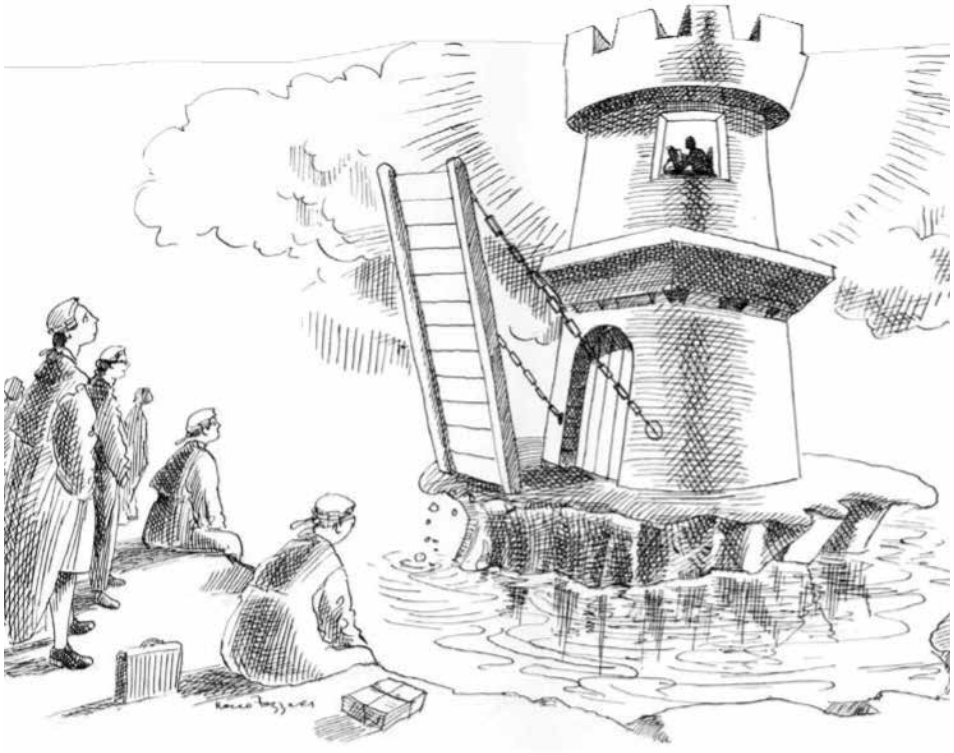
Witness preparation is treated as one of the dark secrets of the legal profession. The resulting lack of rules, guide-lines, and scholarship has created significant uncertainty about the permissible types and methods of witness preparation.[1]’

That was the opening paragraph of my article published in Bar News 10 years ago.[2] This present article reviews the developments since then, with respect to case-law, professional rules, academic writing, and practice.[3] Not much has changed.

Expert witness preparation remains a source of ethical angst for many lawyers. The exhortation to act ethically with respect to witness preparation merely begs the question as to the nature of the ethical duty. This article does not purport to provide an authoritative statement of the ethical boundaries of expert witness preparation. Like its predecessor, the ambitions of this article are limited to highlighting issues, and raising tentative suggestions, most of which remain the same 10 years later. Those suggestions are offered with an acknowledgment that they are unquestionably contestable, and with a (continuing) hope of triggering further debate. That debate is (still) needed. As noted in the original article, there is a stunning divergence in both practice and attitudes with respect to the limits of lawyer involvement in the preparation of expert evidence. This subject matter remains too important to be left in its state of ethical uncertainty.

For the purpose of this article, ‘witness preparation’ is used neutrally



to mean ‘any communication between a lawyer and a prospective witness - … that is intended to improve the substance or presentation of testimony to be offered at a trial or other hearing.[4]’

Inherent importance of witness preparation

Under Regulation 35 of the Uniform Conduct (Barristers) Rules: ‘A barrister must promote and protect fearlessly and by all proper and lawful means the client’s best interests to the best of the barrister’s skill and diligence’.

Consultation with (and preparation of) experts is an important part of the discharge of that ethical duty. It may be necessary to test whether the expert has appropriate expertise; to ensure that any expressed opinion is within the scope of that expertise; to ensure that the assumptions upon which any opinion is based are appropriate; to exclude irrelevant material from a report; to ensure that the opinion is expressed in admissible form; to test

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the soundness of the reasoning process upon which an opinion is based; to test whether any unfavourable expressions of opinion are reasonably grounded; to facilitate the persuasive articulation and presentation of opinion evidence in support of a party's case; to understand fully the expert issues, for the purpose of cross- examination of opponents' experts, re-examination the party's expert, and submission; to limit the likelihood that cross-examination will unfairly diminish the probative force of the expert testimony; to assess the court's likely perception of the strength of the expert evidence, in light of the personal presentation and demeanour of the witness; and to assess the prospects of success in light of the strength of the expert evidence.

The ethical importance of witness preparation is reinforced by a consideration of the adversarial nature of our justice system. In an adversarial system it is presupposed 'that the truth will best be found by the clash of two or more versions of reality before a neutral tribunal'.[5] 'The very foundation of the adversarial process is the belief that the presence of partisan lawyers will sharpen the presentation of the issues for judicial resolution.'[6] Witness preparation is an integral aspect of the partisan case development upon which adversarial justice depends, because at least some degree of witness preparation is 'essential to a coherent and reasonably accurate factual presentation'.[7] The modern embrace of concurrent expert evidence does not change that.

Barristers should not be shy about their potential significance in facilitating the formulation of sound expert opinion, even with respect to the substance of that opinion. While barristers may lack subject matter expertise, they potentially bring to the preparation of expert evidence both analytical rigour and experience in the efficient absorption and application of complex information. In the preparation of a party's expert evidence, barristers potentially have the capacity greatly to assist in the development and testing of lines of expert inquiry, and the identification of error. The question is: should they be ethically permitted to exercise that capacity.

Witness preparation is an integral aspect of the partisan case development upon which adversarial justice depends, because at least some degree of witness preparation is "essential to a coherent and reasonably accurate factual presentation".

Inherent dangers of witness preparation

'For whatever reason, and whether consciously or unconsciously, the fact is that expert witnesses instructed on behalf of parties to litigation often tend … to espouse the cause of those instructing them to a greater or lesser extent'.[8]

That is a reflection of 'adversarial bias': ie, a 'bias that stems from the fact that the expert is giving evidence for one party to the litigation'.[9] That bias may arise from 'selection bias' (being the phenomenon that a party will only present an expert whose opinions are advantageous to the party's case), 'deliberate partisanship' (where an expert deliberately tailors evidence to support the client), or 'unconscious partisanship' (where an expert unintentionally moulds his or her opinion to fit the case). The NSW Law Reform Commission recently observed that: 'Although it is not possible to quantify the extent of the problem, in the Commission's view it is safe to conclude that adversarial bias is a significant problem'.[10]

Aspects of witness preparation unquestionably have the capacity to facilitate 'deliberate partisanship' and exacerbate the insidious process of 'unconscious partisanship'. Signals as to what opinion would assist the case will be communicated by the barrister, will be absorbed by the expert, and may influence the expert's stated opinion. Those processes of communication, absorption and influence may be entirely unintended on both sides. Regardless of intention, the signals may generate 'subtle pressures to join the team – to shade one's views, to conceal doubt, to overstate nuance, to downplay weak aspects of the case that one has been hired to bolster'.[11] The difficulty of detection of adversarial bias exacerbates the insidious nature of the problem.

However, there are a number of considerations which limit the likely extent that witness preparation of experts will contribute to adversarial bias. *Firstly*, pursuant to the Makita rules for the admissibility of expert evidence[12], an expert is required to set out the assumptions and reasoning process upon which the opinion is based. Consequently, an expert cannot be swayed by suggestion beyond a position which can be coherently justified. *Secondly*, the introduction of the expert codes into court rules unquestionably counteracts the process of adversarial bias, by emphasising the expert's duty of neutrality. For example, section 2 of the Supreme Court expert code mandates: 'an expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the court impartially on matters relevant to the area of expertise of the witness'. *Thirdly*, the detachment of experts from the potentially corrupting partisan clutches of their instructing lawyers is reinforced by the exclusion of lawyers from the conclave and joint report process. Fourthly, the inevitability of cross-examination, the possibility of adverse judicial comment, and (perhaps most significantly) collegiate judgment in the context of conclaves and concurrent evidence all further constrain an expert from deviating beyond that which can be reasonably justified. There is a general recognition that the prevalence of partisanship has substantially reduced in the era of conclaves and concurrent evidence.

Tension between conflicting policy objectives

There is a fundamental ethical tension in this area. Witness preparation is both an essential tool for the elucidation of truth in an adversarial system, but also a possible tool of truth's distortion. 'Witness preparation presents lawyers with difficult ethical problems because it straddles the deeper tension within the adversary system between truth seeking and partisan representation'[13]. It is an acute example of the fundamental tension generally underlying professional regulation of barristers: 'barristers owe their paramount duty to the administration of justice';[14] but a barrister must also 'promote and protect fearlessly and by all proper and lawful means the client's best interests'.[15]

Ideally, any framework for defining the ethical boundaries in expert witness preparation should:

- reflect (and balance) the tension between the possibly conflicting objectives of facilitating the presentation of advantageous opinion evidence, and preventing the corruption of opinion evidence through adversarial bias; and
- embody sufficient certainty to provide practical guidance; and
- retain sufficient flexibility to reflect the reality that the 'ethical balance' in this area will be crucially context-sensitive.

Legal Profession Uniform Conduct (Barristers) Rules 2015

Regulation 69 now provides: 'A barrister must not: (a) *advise or suggest* to a witness that *false or misleading evidence* should be given nor condone another person doing so, or (b) *coach* a witness *by advising* what answers the *witness should give* to questions which might be asked'.

Regulation 70 provides: 'A barrister does not breach rule 69 by expressing a general admonition to tell the truth, or by *questioning and testing* in conference the version of evidence to be given by a prospective witness, including drawing the witness's attention to *inconsistencies or other difficulties with the evidence,* but must *not encourage* the witness to give evidence *different from the evidence which the witness believes to be true.*

The regulations appear (on first blush) to create substantial latitude in witness preparation, in that there is a 'safe harbour' for witness preparation in relation to 'questioning and testing' a version of evidence in conference (including drawing witness's attention to 'inconsistencies or other difficulties'), subject only to the proviso that the barrister does not 'encourage the witness to give evidence different from the evidence which the witness believes to be true'.

But the rules are somewhat confusingly structured, providing a general prohibition in Regulation 69, a safe harbour from that prohibition in Regulation 70 ('questioning and testing'), and a qualification to the safe harbour (but 'must not encourage' etc); and the regulations use a series of ambiguous expressions ('suggest', 'coach', 'test', 'encourage') without articulating overarching principles which facilitate the resolution of those ambiguities. Some of uncertainties are:

- What is meant by 'coach a witness by advising what answers the witness should give' under Regulation 70? Is 'advising' limited to explicit communication, or does it extend to the implicit and indirect message that is thereby conveyed?
- What constitutes 'questioning and testing' under Regulation 70. 'Testing' semantically covers a vast spectrum of conduct, from gentle and open-ended queries, to aggressive challenge, to raising and advocating contrary propositions;
- What is meant by 'encourage' the witness 'to give evidence *different from* the evidence the witness believes to be true' under Regulation 70. Is 'encouragement' assessed by reference to the objective meaning of the words, the barrister's subjective intention, or the objective effect on the witness? If the barrister successfully 'encourages' the expert to change their genuine view, does it follow that the barrister's conduct logically falls outside the prohibition of encouraging the witness to give evidence 'different from the evidence which the witness believes to be true?

These uncertainties reflect a failing of the rules effectively to grapple with the insidious risk of unconscious adversarial bias (through which conduct might cause the expert unwittingly to mould the expert's opinion to a party's partisan cause, without intention on either side); and to balance that risk against the

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legitimate interest in witness preparation. Although a large range of meaning is open on the wording of the regulations, it is possibly to construe them in a manner which prohibits conduct which creates an undue risk of adversarial bias.

I suggest that the words in Regulation 69 'coach a witness by advising what answers the witness should give to questions which might be asked', should be construed as conduct which (expressly or by implication) conveys the 'answers the witness should give' in a manner which creates an undue risk that evidence will be corrupted by adversarial bias. The following considerations support that construction. 'Advise' is sufficiently broad to be construed as communications which convey (both expressly but also by implication) the 'answers the witness should give'. 'Coach' is sufficiently broad to be construed as conduct which objectively creates an undue risk that evidence will be corrupted by adversarial bias, regardless of whether there was a deliberate intention to suggest to the expert 'what answers the witness should give'. That construction is supported by the following considerations. *Firstly*, the expression 'coaching' is used to describe conduct which causes the risk of deliberate or unwitting contamination of evidence such that the evidence of the witness 'may no longer be their own';[16] and is assessed by reference to the impact on the witness and not merely by the subjective intention of the 'coach';[17] and is recognised as being 'inevitably a matter of degree, and is dependent on the facts'.[18] *Secondly*, that construction facilitates the explicit articulation and balancing of the competing policy considerations underlying witness preparation, which is inherent in the notion of '*undue risk*'. On that construction, the safe harbour of 'testing' in Regulation 70 should be construed so as not to permit conduct which would constitute 'coaching' under Regulation 69.

The advantage of that construction is that it permits flexibility, and an explicit consideration of policy considerations relevant to the proscription of conduct. The disadvantage is that it reduces the capacity of the rules to provide firm guidance.

I suggest that the assessment of 'undue risk' requires a balance between the conflicting policy objectives referred to above. Factors relevant to that balance might include:

1. The inherent capacity of the conduct to facilitate the formulation and presentation of expert opinion advantageous to the party's case;
2. The inherent capacity of the conduct to corrupt expert opinion through the operation of adversarial bias;
3. The extent to which the legitimate objectives of facilitating the formulation and presentation of advantageous opinion can be achieved through strategies with less inherent capacity to corrupt expert opinion;
4. Specific contextual considerations relevant to the extent of the risk of corruption of opinion through adversarial bias. These may include:
   - The experience and stature of the expert, within the expert's discipline and relative to the barrister;[19]
   - Whether the course of dealing with the expert has demonstrated a willingness or tendency of the expert to be unduly swayed by suggestion;
   - Whether the subject matter of the opinion is one in which there is significant scope for open-textured ' judgment calls', such that modified opinions can be plausibly rationalised;
   - The nature and extent of any incentives for the expert positively to assist the instructing party.[20]

The case law.

A 2013 article in Bar News by Garth Blake SC and Phillippe Doyle Gray provided a comprehensive and valuable summary of case law relating to the

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ethical limits of witness preparation.[21] The learned authors perform a heroic task of seeking to extract a coherent body of principles from the case-law. However, there are starkly inconsistent lines of authority (as the authors identify), there is no Supreme Court of NSW authority providing comprehensive binding guidance,[22] the only High Court authority comprises an obiter dicta by a single justice (Callinan J), and there is no other judicial statement which purports to provide a comprehensive statement of the principles regulating the ethical limits preparation of expert reports.

The authors of that article provide the following summary of what they endorse and justify as the preferred 'Federal line of authority':[23]

(a) Counsel may and should identify and direct the expert witness to the real issues.

(b) Counsel may and should suggest to the expert witness that an opinion does not address the real issues when counsel holds that view.

(c) Counsel may and should, when counsel holds the view, suggest to the expert witness that an opinion does not adequately: (1) illuminate the reasoning leading to the opinion arrived at, or (2) distinguish between the assumed facts on which an opinion is based and the opinion itself, or (3) explain how the opinion proffered is one substantially based on his specialised knowledge.

(d) Counsel may suggest to the witness that his opinion is either wrong or deficient in some way, with a view to the witness changing his opinion, provided that such suggestion stems from counsel's view after an analysis of the facts and law and is in furtherance of counsel's duty to the proper administration of justice, and not merely a desire to change an unfavourable opinion into a favourable opinion.

(e) Counsel may alter the format of an expert report so as to make it comprehensible, legible, and so as to comply with UCPR 4.3 and 4.7.

I respectfully agree with that crisp summary, except for paragraph (d).

As to paragraph (d):

- the first decision cited in support of that principle is the judgment of *Callinan J Boland v Yates Property Corporation*,[24] in which His Honour stated: 'I do not doubt that counsel and solicitors have a proper role to perform in advising or suggesting, not only which legal principles apply, but also that a different form of expression might appropriately or more accurately state the propositions that the expert would advance, and *which particular method of valuation might be more likely to appeal to a tribunal or court*, so long as no attempt is made to invite the expert to distort or misstate facts or give other than honest opinions': [279]. The context of that observation was proceedings in which a barrister was accused of negligence, with respect to the alleged failure to advance a particular valuation methodology on behalf of the party in a resumption compensation case, in circumstances where the party's own valuers had not advanced that methodology. The High Court unanimously upheld the appeal, thereby dismissing the negligence claim. Callinan J held that the Full Federal Court had 'failed to recognise the different roles of the valuers and [counsel] and treated [counsel] as if they were almost exclusively or exclusively the final arbiters of the way in which the property should be valued': [279]. Callinan J noted that 'valuation practice…cannot be an exact science' [277] and 'questions of law, fact and opinion do not always readily and neatly divide themselves into discrete matters in valuation cases and practice': [276]. Notwithstanding His Honour's finding that 'the lawyers are not a valuer's or indeed any experts' keepers' [279], and that counsel were not responsible for the valuation

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methodology adopted in the case, Callinan J nonetheless did observe that counsel has a 'proper role to perform' in suggesting 'which particular method of valuation might be more likely to appeal to a tribunal'.

- His Honour was there dealing with a particular issue (valuation methodology) in respect of which His Honour observed that 'questions of law, fact and opinion' do not neatly divide themselves, implying that the subject matter in question was possibly properly characterised as a matter of law. In those circumstances, it is not clear that Callinan J's statement can be generalised into a broad principle that counsel can make suggestions as to the substance of any expert opinion, subject only to the proviso that 'no attempt is made to invite the expert to….give other than honest opinion'. In any event, this was an obiter judgment by a single judge;
- I respectfully suggest that the other authorities apparently relied upon in support of the broad principle in paragraph (d) authorising 'suggestion' as to the substance of expert opinion, in fact weigh against the principle. In *Harrington-Smith*,[25] Lindgren J held 'Lawyers should be involved in the writing of reports by experts: *not, of course, in relation to the substances of the reports'* [19], and referred to the distinction between 'permissible guidance as to form and as to the requirements of ss 56 and 79 of the Evidence Act on the one hand, and *impermissible influence as to the content of a report* on the other hand': [27]. In *Doogan*,[26] the Full Court of the ACT held that 'the mere fact that some editing' of the expert reports 'does not demonstrate any impropriety' because legal representatives had 'the duty to ensure that the reports conveyed the author's opinions in a comprehensible manner, that the basis for those opinions was properly disclosed and that irrelevant matters were excluded': [119]. However, in finding no impropriety, the Court noted that 'It has not been established that any of the lawyers… *sought to change passages in the reports* conveying relevant opinions or information': [119]. The other cases merely affirmed *Harrington-Smith*.[27]
- since the 2013 article, a Full Court of the Industrial Court of NSW noted with approval the article and its summary of principles,[28] but the ultimate statements of principle endorsed in that case did not expressly endorse a general liberty to make suggestions as to the substance of expert opinion.[29] Justice Davies has also provided obiter support for the article and its summary.[30] Justice Ball has also recognised that 'advisors may test tentative conclusions that the expert has reached and in doing so may cause the expert to reconsider his or her opinion'.[31] However, the limited judicial commentary on expert witness preparation is typically hostile to any influence by counsel in relation to the substance of expert opinion.[32]

In the circumstances, I respectfully submit that the case-law does not support the broad principle that it is ethically permissible for barristers to suggest to the expert that 'his opinion is either wrong or deficient', merely because that view stems from the barrister's genuine view. In the absence of a settled position in the case-law concerning the ethical involvement of counsel in relation to the substance (as opposed to the form and articulation of reasoning) of expert opinion, we are thrown back to the (uncertain) Uniform Conduct (Barristers) Rules, and left to ponder what the rules should be.

The strategic dimension

Strategic considerations may overlay ethical considerations when considering the appropriate limits of expert witness preparation.

Notwithstanding that particular strategies of witness preparation might satisfy a theoretical test for ethical propriety, the strategies may be strategically imprudent if they *appear* to compromise impartiality.

Three considerations provide particular reason to give careful consideration to the prudent strategic limits of witness preparation (in addition to ethical limits). *Firstly*, there is a significant risk of privilege being impliedly waived in relation to all dealings with an expert: ie, a significant risk that the details of witness preparation will be exposed.[33] *Secondly*, cross-examination and submissions by a skilful opponent may cause even ethically legitimate witness preparation strategies to be (unfairly) ethically tainted, and the perceived impartiality and credit of the expert to be (unfairly) compromised. *Thirdly*, there is significant judicial sensitivity about the appearance and substance of expert partisanship, and an expert report may be excluded (or the weight attached to it severely diminished) if witness preparation is deemed to 'cross' the sometimes blurry line.[34]

Consequently, there is a strategic advantage in minimising the role of lawyers in the process of witness preparation (and thereby protecting the appearance of impartiality). This needs to be balanced against the countervailing strategic advantage that may be generated by implementing various witness preparation strategies. That balance will be context-specific. Before implementing any strategy of witness preparation, a barrister should ask: '*Firstly*, is it ethically appropriate? *Secondly*, does the potential strategic advantage of the strategy outweigh any risk of strategic disadvantage that might arise if the conduct is disclosed and becomes the subject of cross examination?'

Practical questions

Set out below is a consideration of some ethical and strategic considerations relevant to some selected aspects of witness preparation.

'Expert assistance' v 'Expert evidence'

'A practice has grown up, certainly in Sydney, perhaps elsewhere, in commercial matters, for each party to arm itself with what might be described as litigation support expert evidence' to provide assistance in 'analysing and preparing the case and in marshalling and formulating arguments'.[35] 'That is the legitimate, accepted and well known role of expert *assistance* for a party preparing and running a case'.[36]

By contrast, 'expert *evidence* in which a relevant opinion is given to the Court drawing on a witness' relevant expertise is quite another thing'.[37]

The better view is that there is no ethical problem in using the same expert to provide both 'assistance' and 'advice', 'as long as that person and the legal advisers understand and recognise the difference between the two tasks, and keep them separate'.[38] However, there are significant strategic considerations which militate against using the same expert for both roles.

Firstly, the nature and extent of involvement by the expert in the partisan process of case formulation and development might be the subject of cross-examination,[39] and may tend to diminish the expert's apparent impartiality. While an inference of partiality should not render the opinion inadmissible on the grounds of bias,[40] the 'bias, actual, potential or perceived, of any witness is undoubtedly a factor which the Court must take into account when deciding issues between the parties'.[41] The degree to which perceptions of partiality affect the weight of an opinion 'must, however, depend on the force of the evidence which the expert has given to the effect that, by applying a certain process of reasoning to certain specific facts, a particular conclusion should be drawn'.[42]

Secondly, there remains a risk that the evidence of the expert will be excluded in the exercise of the court's discretion, if the court considers that the probative force of the opinion has been sufficiently weakened by reason of the expert being exposed to (and unconsciously influenced by) inadmissible evidence in the course of the expert's immersed involvement in case preparation.[43]

Thirdly, 'expert assistance' may lead to an unpleasant operation of waiver of privilege. The process of expert assistance may involve the expert being privy to many sensitive and privileged communications. It is appropriate to assume that there is a very significant risk that waiver may extend to all such communications.

In light of the strategic dangers associated with using an expert for both 'assistance' and 'evidence', a well-funded litigant in a complex case will frequently engage different experts to provide the 'assistance' and the 'evidence', respectively.

Briefing the expert

Assistance in the formulation of instructions. There is no ethical difficulty in consulting with the expert in relation to the formulation of instructions. However, such consultation is in the nature of 'expert assistance', and is subject to the strategic dangers described above.

Preparation without formal instructions. Occasionally experts are not formally instructed until the report is being finalised. This creates no ethical difficulty. However, the deferral of formal instructions will increase the prospect of privilege being waived in relation to communications between the lawyers and the expert. This is because the absence of instructions during the period of preparation of the report raises the question as to the basis upon which the report was prepared, and supports a waiver of privilege in relation to associated materials to facilitate that question being answered.

False or incomplete instructions. It would be unethical to present a case on the basis of an expert report, when the expert was briefed on assumptions which contradict material facts known by the party (or where facts known to be material have been omitted from the instructions).[44]

Preliminary conferences. There is no ethical problem with extensive

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conferring to discuss and test the preliminary opinions of experts, prior to the preparation of a first draft. Some practitioners recommend this, to prevent the generation of a paper trail of draft reports which disclose the meandering evolution of the final opinion. I suggest that any conferring should be consistent with the guidelines suggested below under the heading 'Substance of the expert opinion'.

Minimising the prospects (and prejudice) of waiver

In the article in this edition titled 'Expert reports – waiver of privilege revisited', there are outlined some suggested strategies to minimise the prospects (and prejudice) of a waiver of privilege in relation to materials associated with the preparation of the expert report.

There is no ethical impropriety in such a strategy. The objective of protecting privilege requires no significant justification. Briefly, however, the justification includes promoting 'free exchange of views between lawyers and experts';[45] preventing experts being inhibited from changing their minds by fear of exposure of working papers and drafts; preventing the integrity and strength of an expert's final opinion being attacked through cross-examination on an expert's working notes and drafts (which have potentially been taken out of context); and avoiding the hearing being distracted and lengthened by 'what is usually a marginally relevant issue':[46] ie, the nature of (and reasons for) the evolution of the expert's opinion.

If a barrister proposes to raise matters for consideration by the expert in relation to the substance of the expert opinion, an issue arises as to whether the communications should be made (or recorded) in writing. The creation of a paper trail has both advantages and disadvantages. The ostensible advantage of avoiding a written record is that any waiver of privilege will not generate a paper trail which records the lawyer's role in the evolution of the opinion, which might be manipulated by skilful cross-examination to compromise the credit of the expert and the weight of the expert's opinion. However, I suggest that the following circumstances support the prudence and propriety of maintaining a paper trail:

- if there is a waiver of privilege, the waiver extends to oral communications between the barrister and the expert. A skilful cross-examination of an expert about extensive oral dealings with lawyers is dangerously unpredictable. On the other hand, a paper trail can provide a crisp and clean demonstration of the propriety of the dealings;
- there is a significant risk that a court (consciously or unconsciously) might draw an adverse inference as to the propriety of dealings with an expert, if there were found to be a deliberate strategy of avoiding a paper trail;
- the recording of communications, combined with the ever-present risk of waiver, imposes a valuable chastening discipline on dealings between lawyers and experts. A lawyer will be forced always to ask: 'How will this communication be viewed by the court?'

The form of the expert report

As noted under the heading 'Case law' above, there is strong judicial support in Australia for the ethical propriety (and professional duty) of lawyers being involved in ensuring the clear and admissible expression of expert opinion. 'The court depends heavily on the parties' legal advisors to assist experts to address properly the questions asked

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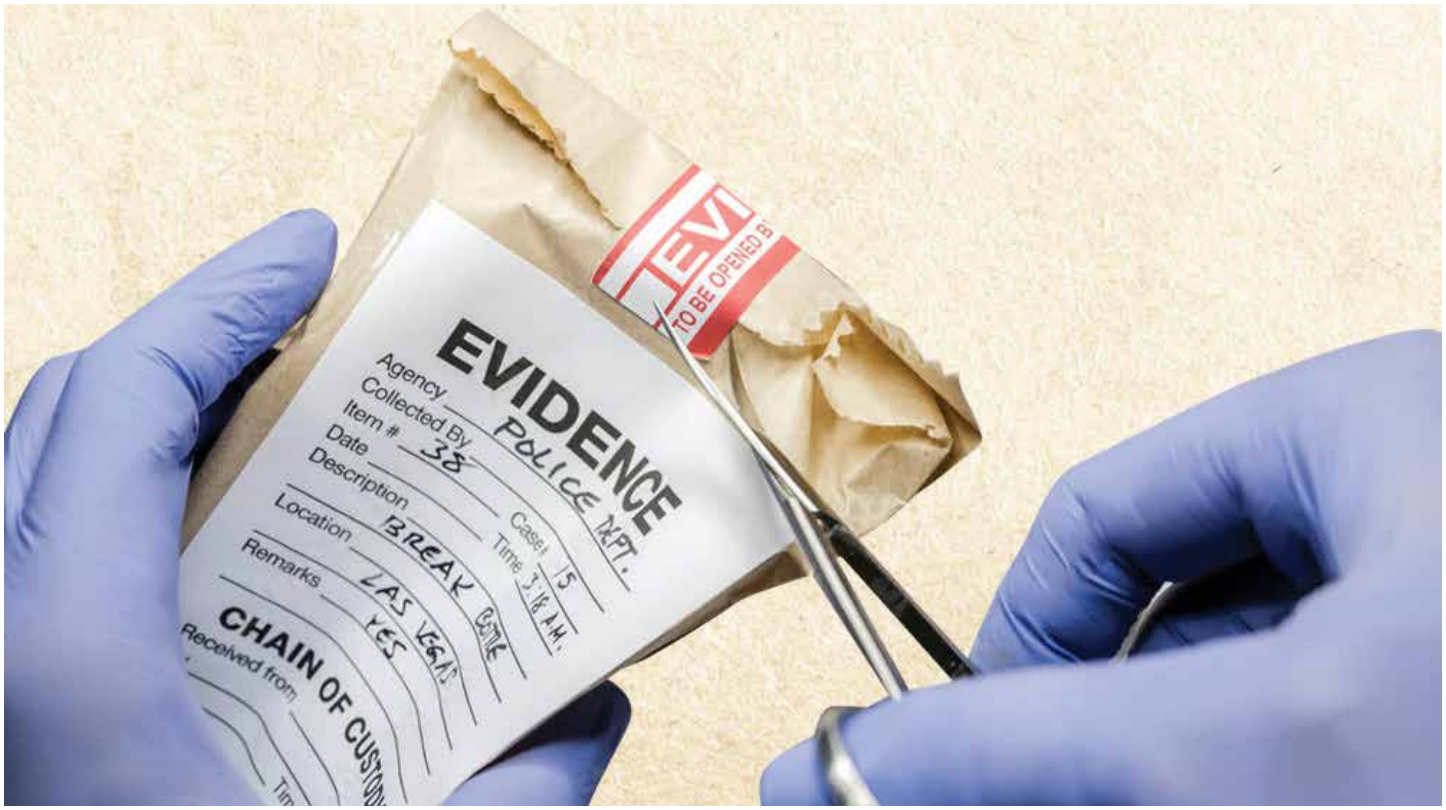

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of them and to present their opinions in an admissible form and in a form which will be readily understood by the court. Equally, the court depends heavily on the parties' legal advisors to ensure that any opinion expressed by an expert is an opinion the expert holds for the reasons that the expert gives and that the expert otherwise complies with the Expert Witness Code of Conduct'.[47]

This is consistent with practice in Sydney. This position is to be contrasted to the position in the United Kingdom. In what remains a leading UK case on the ethical limits of lawyer's involvement in the preparation of expert reports, Lord Wilberforce held: 'Expert evidence presented to court should be, and should be seen to be, the independent product of the expert, *uninfluenced as to form* or content by the exigencies of litigation'.[48] In a subsequent case, Lord Denning relied upon that statement to conclude that lawyers must not 'settle' the evidence of medical reports.[49]

However, as a matter of principle and strategic prudence, the appropriate scope of the role of barristers in drafting expert reports is contestable.

The general considerations in favour of a barrister being involved in the actual drafting are as follows. *Firstly*, compliance with the demanding requirements of form and structure under the *Makita* rules may necessitate a lawyer's substantial involvement in the drafting, as a matter of professional responsibility. *Secondly*, as with any form of communication, the persuasiveness of an expert report will depend not just upon the substantive content of the opinion, but also the method of its presentation. The expertise of many experts may not extend to the skills of persuasive written communication. Lawyers may be able to provide valuable assistance in the persuasive presentation of the expert's substantive opinion, both in relation to structure and verbal expression. *Thirdly*, if the lawyer is participating in the drafting process, the lawyer is able to test any tentative opinions expressed by the expert, before that opinion is incorporated into the draft report. This is likely to prevent the creation of any documentary record of ill-considered opinion, which might damage credit if it is later the subject of waiver.

The ethical considerations weighing against a barrister personally drafting a report on instructions are as follows. *Firstly*, there is significant scope for a draft prepared by a barrister to diverge from instructions provided by the expert. This may be a product of carelessness in the recording or reproduction of instructions, the influence of unconscious adversarial bias on the barrister, or the simple fact that within the framework of an expert's instructions there will remain scope for significant nuance in the final expression of written opinion. *Secondly*, to the extent that the draft diverges from (or embellishes) the expert's instructions, the draft has a substantial capacity to corrupt the substance and expression of the expert's actual opinion. A draft report will have a powerfully suggestive effect on an expert, if it is persuasively expressed, well structured, and crafted by a respected authority figure (such as a barrister). Further, there is a significant risk that a busy expert will simply adopt a draft for expedience, without proper consideration.

There are also weighty strategic considerations against the substantial involvement of the lawyers in the drafting process. *Firstly*, irrespective of the integrity of a barrister's involvement in the preparation of a draft, and the coherence of the finally expressed opinion, the mere fact that a lawyer has crafted the words of the report may stain the credit of the expert in the eyes of a judge. *Secondly*, as Justice McDougall has observed extra judicially: 'it is not desirable to fiddle too much with the actual phraseology of the expert. For better or worse, we all have our own individual modes of expression. Evidence – whether lay or expert –

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speaks most directly when it speaks in the language of the witness and not in the language of the lawyer who has converted it from oral into written form'.[50] *Thirdly*, the possibility of ill-considered adoption by an expert of a lawyer's terminology creates the risk of the expert stumbling over or disowning the wording of a report during cross-examination. *Fourthly*, requiring the expert to prepare the draft will likely increase the expert's engagement with the issues on which the expert is briefed.

Set out below is my personal suggestion as to where the line should be drawn in relation to various aspects and stages of drafting.

Template for report. An effective (and ethically sound) strategy is to provide to the expert a detailed template to assist the preparation of the first draft. The template might set out the structure of the report, the assumptions the expert is instructed to make, and detailed instructions as to what must be addressed in which section of the report. The template should be accompanied by detailed instructions as to the requirements of form and structure of an expert report under the *Makita* rules.

Preparing first draft. The better view is that there is no ethical impropriety under the present rules in the barrister preparing the first draft (in conference or alone), based on instructions received from the expert. However, the considerations of strategic prudence referred to above strongly dictates that the expert should typically prepare the first draft.[51] This may properly occur after extensive conferring with the expert, in which the expert's preliminary opinion is discussed and tested.

Comments on first draft. It is common and acceptable for barristers to submit to experts a 'marked up' version of the first draft, which contains queries of the type described in the section below ('Substance of the expert opinion – Testing an unfavourable opinion'), and requests for the elaboration of reasoning in the draft, and which invites the expert to prepare a further draft in light of those queries and requests.[52]

Preparing subsequent drafts. I suggest that the ethical and strategic balance swings in favour of active participation of the barrister in the drafting process, when the substance of the opinion is effectively settled and recorded in a draft, and the focus is on the refinement of form and expression. As a proposed balance between facilitating the presentation of advantageous opinion, and avoiding the reality and perception of adversarial bias, I suggest the following guidelines:

- If the barrister is to be involved, it is desirable to undertake the drafting in conference with the expert (rather than for the barrister to produce a further draft independently following conference). This allows the expert to take immediate ownership of the formulation of words. If the redrafting is done by the barrister following conference, then enclose the draft under an email saying something to this effect: '…I have endeavoured to ensure that the amendments are consistent with your instructions in conference. However, please check the amendments very carefully, and ensure they accord precisely with the substance of your opinion and your preferred form of expression, and make all necessary amendments to ensure that is the case';
- It is appropriate for the redrafting to address the clarification of ambiguous expression, the comprehensive and coherent articulation of the reasoning process, and the amendment of wording which significantly detracts from the persuasive communication of the

substantive opinion.[53] It is otherwise strategically imprudent to seek to refine or otherwise amend the expert's own words. Maintaining the authenticity of the expert's voice may be more advantageous then crafting perfect expression;

- Unless clearly obvious or inconsequential, any amendment of expression should generally be on the basis of specific and detailed instructions from the expert, and should reflect the expert's own words. The barrister should only suggest a mode of expression when open-ended questioning of the expert has failed to elicit wording which communicates with reasonable clarity the substance of relevant opinion;
- To the extent that the drafting process traverses substantive amendment to a previous draft, it may be strategically prudent for the drafting not to be done in conference with the barrister. Rather, the matter requiring substantive redrafting should be identified (possibly by some notation in the draft being worked on), and the expert should be invited to attend to the redrafting independently in a further draft (to avoid the appearance of undue involvement in the substance of opinion).

Not-withstanding the ethical propriety of involvement by lawyers in the process of preparing subsequent drafts, there will remain significant strategic advantage in avoiding or minimising a barrister's involvement. The appropriate role of a lawyer may depend upon the lawyers' assessment of the capacity of the expert to craft an opinion in admissible and persuasive form without assistance from lawyers.

Substance of the expert opinion

Exclusion of irrelevant opinion. It is ethically permissible for a lawyer to propose substantive amendments to a draft report, which relate to deletion of evidence which is irrelevant, or beyond the expertise of the expert. Beyond that point, the ethical consensus and clarity breaks down.

Testing an unfavourable opinion. Regulation 70 of the Uniform Conduct (Barristers) Rules expressly authorises 'testing in conference the version of evidence to be given by a prospective witness, including drawing the witness's attention to inconsistencies and other difficulties with the evidence'. I suggest that this testing may relate to the appropriateness of assumptions, and the soundness of the reasoning, and the correctness of the conclusion.[54] However, consistent with the prohibition on 'advising [directly or indirectly] what answers the witness should give' in Regulation 69, and the general ethical proviso that witness preparation strategy should minimise the risk of opinion corruption, the process of testing should only proceed by way of open ended questions, which simply direct attention to an issue, and which avoid (as much as possible) suggestion that the opinion is wrong and should be changed: eg, 'What are the assumptions for that proposition'? 'What is the basis for those assumptions?' 'Do you consider those assumptions consistent with A, B, C? How?' 'What reasoning supports the drawing of that conclusion from those assumptions?' 'Does it take account of D, E, F? How?' It should not proceed by way of closed questions which explicitly or implicitly suggest that the expert should change his opinion: 'I suggest that the reasoning is wrong, because of A, B, C. Do you agree?'

The practice of open-ended questions is not only ethically appropriate, but also strategically prudent for the following reasons. *Firstly*, in view of the (proper)

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sensitivity of experts to maintaining an independent and impartial stance, there may be a natural defensiveness to modifying an opinion in response to direct suggestion. *Secondly*, all communications with experts should be conducted on the basis that privilege in the conversation may be waived. The more suggestive and leading is the question which preceded a modification of opinion, the greater the risk that the final opinion will be discounted by reason of perceived adversarial bias (if the question is exposed following the waiver of privilege).

Testing a 'Joint Report'. It is now standard practice for conclaves of experts and joint reports to be ordered in cases involving expert evidence. A question arises as to whether it is permissible for any concession by a party's expert in the joint report to be 'tested' in private conference, and subsequently challenged during concurrent evidence. There is no prohibition on doing so in the court rules, or practice notes. I suggest that a party should be entitled to test in private conference a concession made by an expert in the joint report, in precisely the same manner as set out above. There is significantly less cause for concern about adversarial bias in relation to the testing of concessions in the joint report, because the expert's sense of independence has been sharpened through collegiate cooperation in the lawyer free conclave, and substantial inertia inevitably attaches to a concession recorded in the joint report.

Raising contrary propositions for consideration. This is moving into even murkier ethical waters. I suggest that this practice should be regarded as ethically permissible (and strategically prudent), if the following procedure is followed:

1. The barrister has first undertaken the open-ended 'testing' of the expert's opinion described above, and the expert has not independently expressed an opinion consistent with the contrary proposition;
2. Before engaging in the practice, the barrister exhorts the expert to abide by the spirit of the expert codes: 'Remember your duty is to assist the court impartially, and not to advance my client's case. I want to raise some propositions for your consideration and comment. I don't suggest that they are right or that you should adopt them. You should only do so if you genuinely consider the proposition to be correct';
3. Open style questioning is adopted: eg, 'What is your opinion about [proposition X]? What is the basis for that opinion?', And then 'test' in the manner described above;
4. The barrister does not engage in conduct which has the intention or consequence of pressuring the expert to adopt the proposition;
5. If the expert purports to adopt the proposition, the barrister rigorously tests the basis for it, to ensure that the expert is capable of reasonably justifying the proposition.

The conclusion that this practice should be regarded as ethically permissible is supported by the following considerations. *Firstly*, it may facilitate the articulation by the expert of opinion favourable to the client's case, which supports the legitimacy of the practice unless it gives rise to an undue risk that the expert's opinion will be corrupted through adversarial bias; *Secondly*, the mere fact that a change in an expert's opinion was triggered by a proposition raised by a barrister does not reflect that the modified view is not genuine or not reasonable. Barristers will often acquire substantial expertise in a field relevant to a case. In light of that expertise, the barrister's familiarity with the case, and the analytical capacities barristers will (hopefully) bring to bear on the matter, it is unsurprising that barristers might be able to raise valid propositions for consideration which an expert might reasonably and genuinely adopt. It has been judicially acknowledged that 'testing' may lead to a change in expert opinion.[55] *Thirdly*, the better view is that putting alternative propositions to the expert (in accordance with the guidelines proposed) falls within the safe harbour of 'testing' within Regulation 70. There is a profound ethical distinction between raising a proposition for consideration, and either 'advising what answers the witness should give' (Regulation 69) or 'encouraging the witness to give evidence different from the evidence the witness believes to be true' (Regulation 70).[56]

All that said, it is obvious that the mere fact of a barrister raising a proposition for consideration has inherent suggestive capacity, which generates the possibility of the corruption of opinion through adversarial bias. It is therefore obvious that there is scope for divergent views about the ethical propriety of such a practice.

'Crossing the Line': unethical practices. When then does witness preparation cross the line and become unethical?

Firstly, there are prohibitions on particular categories of conduct in Regulation 69 and 70, which are described above (advising 'what answers the witness should give', and encouraging evidence 'different from the evidence with the witness believes to be true').

Secondly, I suggested above that an appropriate ethical limit on 'raising propositions for consideration by an expert', is the proviso that the barrister must not seek to 'pressure' the expert to adopt the proposition (or engage in conduct which might have that consequence). This is admittedly a frustratingly question-begging limitation, but it is difficult to draw a brighter line. By way of (some) elaboration, factors which may be relevant to determine whether there is 'pressure' include the extent to which any question is expressed in a leading manner; the extent to which the question is repeated; the extent to which the barrister personally advocates the merits of the proposition; the extent to which the barrister highlights the strategic importance of the proposition to the case; the extent to which the barrister seeks to argue with the expert about the proposition (as distinct from testing the expert's opinion by open-ended questioning); and the relative stature of the expert and barrister (which may affect the power dynamic between the two).

General advice about the process of evidence

It is standard practice for barristers to give witnesses general advice as to court room procedure, courtroom demeanour, and methods for the presentation of testimony (in examination in chief, and cross-examination).[57]

There is generally no controversy as to the ethical propriety of such conduct.[58] This is because it relates to procedure and the form of evidence, rather than substance. It is therefore relatively innocuous in terms of distorting testimony.

Rehearsal of cross-examination

Rehearsal relates to the process of practising the presentation of testimony to be given in court. In light of general requirement that expert evidence 'in chief' be provided by way of written report, the issue of the 'rehearsal' of experts only arises in relation to cross-examination.

In the USA, there is no prohibition on rehearsal, and among witness preparation techniques it is described as 'the most strongly advised among trial lawyers' [59]. In the UK, barristers 'must not rehearse practise or coach a witness in relation to his evidence'.[60] In Australia there are some strong authorities against the practice. Justice Young referred to the 'very severe limits, in the interests of justice, in preparing a witness to give evidence…. we do not in Australia do what apparently happens in some parts of the United States, rehearse the witness before a team of lawyers, psychologists and public relations people to maximise the impact of the evidence'.[61] However, the practice is apparently widespread in Sydney.

The question of rehearsal raises particularly difficult ethical issues.

Arguments for rehearsal of cross-examination. A compelling case can be made for the propriety of a rehearsal of the cross-examination of experts. *Firstly*, for a number of reasons, the practice has the capacity to facilitate the presentation of testimony that does justice to the inherit merits of the opinion. The mere experience of formulating and articulating opinion under the pressure of cross-examination will likely improve the general quality of the presentation of testimony during cross examination at trial. More specifically, it will facilitate the development of strategies to combat the following techniques of cross-examination, which might otherwise cause the testimony of an expert to appear weaker than is warranted by the inherent merits of the expert's opinion:

- Techniques of cross-examination might be employed to engender a tendency of acquiescence, which leads to concessions contrary to an expert's genuine considered opinion. These techniques may include: inducing confusion through complex and rapid fire questioning; inducing submission through aggression or overbearing demeanour; provoking the witness to anger, in a way which compromises the expert's rational deliberations; encouraging a cooperative and trusting relationship with the expert through flattery and respect; creating a habit of acquiescence through a pattern of 'Dorothy Dixers'; weakening confidence by embarrassing the expert on collateral matters; trapping the expert in a logical corner which demands a concession, when the trap has been created by extracting the expert's agreement to flawed assumptions (which the expert might carelessly have provided, oblivious to the logical consequences of his concession).
- The cross-examination might damage the credibility of the expert by creating the impression that the expert is unduly defensive and evasive, by a conscious strategy of provocation;
- The cross-examination might probe the expert opinion to expose flaws and inconsistencies (real or imagined). If confronted with those contended flaws for the first time in cross-examination, the expert may

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> be unable properly to address them (and the expert's testimony might be correspondingly weakened). However, the expert might have been able readily to explain them away (on reasonable grounds), had the expert had adequate time to reflect upon them.

The strategy of mock cross-examination has the capacity to alert the witness to the strategies that might be used to attack him or her, to alert the witness to his or her vulnerability to those techniques, and to facilitate the witness developing defences against them. By educating the barrister as to how the witness responds under cross-examination, a rehearsal of cross-examination also produces the advantages of facilitating preparation of re-examination and an informed assessment of the strength of the case.

Secondly, rehearsal of the cross-examination of experts does not have the same inherent distorting tendencies as rehearsal of lay witnesses. The susceptibility of lay evidence to suggestion is exacerbated by the inherent vulnerability of memory to unconscious reconstruction.[62] The extent to which expert opinion can be distorted by the rehearsal of answers in a mock cross-examination is (or can be) limited by a number of considerations. *Firstly*, an opinion is substantially anchored by the necessity to justify the opinion by reference to assumptions and a coherent process of reasoning. This constrains the extent to which the expert's opinion can be swayed by possible suggestion. *Secondly*, the pretrial mock cross-examination will be conducted after the final report and joint report has been served. Any tendency to be swayed by suggestion will be counterbalanced by the fact that the expert is already 'locked in' to a publicly communicated position. *Thirdly*, the scope for distortion through suggestion can be further reduced if the cross-examination rehearsal is conducted on the proposed basis set out below.

Arguments against rehearsal of cross-examination. There are a number of considerations weighing against the ethical propriety of cross-examination rehearsals. *Firstly*, not-withstanding that mock cross-examination is aimed at 'challenging' the expert's evidence, the reality is that discussion and rehearsal of answers to cross-examination are integral aspects of the process. *Secondly*, the inherent vulnerability of witnesses to suggestion during the rehearsal of evidence on the eve of trial: 'rehearsal has a greater potential for suggestiveness than other preparation techniques. A witness naturally feels apprehensive about an upcoming appearance. The inclination to welcome a script is strong. Furthermore, repetition of a story is extremely suggestive.'[63] With respect to lay evidence, 'the danger in discussing with a witness his evidence prior to trial is that the witness's recollection of events will either consciously or unconsciously alter so as to accommodate what the witness perceives as a better, for whatever reason, version of events. Obviously this is a matter of degree'.[64] Different but analogous problems can occur with expert opinion. *Thirdly*, the legitimate objectives of mock cross-examination can be substantially achieved without the risks associated with that process. Testing and probing the expert report can be readily undertaken in conference. General advice as to the techniques and traps of cross-examination can also be provided in conference. The experience of the actual rigours of cross-examination can be created by a mock examination on a subject matter unrelated to the proceedings.[65]

Rehearsal: conclusion. It is a finely balanced and controversial question. As a purely ethical matter, I tentatively suggest that cross-examination rehearsal on the actual case should generally

END NOTES

1. Applegate, 'Witness Preparation' (1989) 277 Texas Law Review 277, at 279
2. Stowe, 'Preparing expert witnesses: A search for ethical boundaries', Bar New, Summer 2006/7, at page 44
3. For convenience and completeness, this article incorporates analysis from the previous article where it continues to be relevant. This article supercedes the earlier article referred to in footnote 1.
4. Applegate, supra fn 1, 278.
5. Applegate, supra fn 1, 327
6. Zacharis and Martin, 'Coaching Witnesses' (1998-98) 87 Kentucky Law Journal 1001, at 1006.
7. Applegate, supra fn 1, 352
8. Abbey National Mortgages Plc v Key Surveyors Nationwide Limited and Others [1996] 3 All ER 184; see also Fox v Percy (2003) 214 CLR 118, per Callinan J at [151]
9. NSW Law Reform Commission, Report 109, 'Expert Witnesses', page 70
10. NSWLRC, Report 109, supra fn 8, page 74
11. Quoted in J Langbein, 'The German Advantage in Civil Procedure' (1985) 52 University of Chicago Law Review 823, at 835; quoted in NSWLRC Report 109, supra fn 8, page 73
12. Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705
13. Applegate, supra fn 1, at 350
14. Regulation 4
15. Regulation 35
16. R v Momodou (Henry) [2005] EWCA Crim 177; [2005] 1 WLR 3442, 587h-j and 588a-c.
17. HKSAR v Tse Tat Fung [2010] HKCA 156, at [79]
18. Majinski v the State of Western Australia [2013] WASCA 10, [30]
19 Suggestibility will be influenced by the 'power dynamic' between expert and the barrister.
20. Eg, contingency fee
21. Garth Blake SC and Phillippe Doyle Gray, 'Can counsel settle expert reports?', Bar News, Summer 2012-2013. The learned authors summary was approved in Hunter Quarries Pty Ltd v Morrison [2013] NSWIRComm 49, at [86]-[97]; and approved in obiter by Davies J to Cassie Masters by her tutor William Masters v Sydney West Area Health Service [2013] NSWSC 228, at [33] where His Honour 'commended' the summary to counsel before him.
22. Although see Cassie Masters, ibid, at [33] for an obiter approval of the summary by Blake SC and Gray.
23. The authorities supporting those principles were identified as Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 7) [2003] FCA 893, per Lindgren J at [19], [27]; which was approved by Sackville J in Jango v Northern Territory of Australia (No 2) [2004] FCA 1004, at [10]-[18]; R v Doogan [2005] ACTSC 74, at [119]; Boland v Yates Property Corporation (1999) 167 ALR 575
24. (1999) 167 ALR 575
25. Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 7) [2003] FCA 893;
26. R v Doogan [2005] ACTSC 74, at [119]
27. Jango v Northern Territory of Australia (No 2) [2004] FCA 1004, at [10]- [18]; Risk v Northern Territory of Australia [2006] FCA 404, at [456]
28. Hunter Quarries Pty Ltd v Morrison [2013] NSWIRComm 49, at [86]- [97]
29. see [94],[95]
30. Cassie Masters by her tutor William Masters v Sydney West Area Health Service [2013] NSWSC 228, at [33]
31. Traderight (NSW) Pty Ltd and ors vBank of Queensland Ltd (No 14) [2013] NSWSC 211, at [23]
32. eg, Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 7) [2003] FCA 893, at [19]; R v Doogan [2005] ACTSC 74, at [119]
33. See my other article in this edition: 'Expert reports and waiver of privilege'
34. eg, R v Doogan [2005] ACTSC 74, at

be ethically permissible, subject to the following parameters:

- The barrister should emphatically exhort the expert to abide by the witness codes;
- On no occasion should the barrister during the session give any direction or suggestion as to the substance of any answer which the expert should provide to any question;
- It is reasonable to discuss answers given in the mock cross-examination, for the purpose of: (i) exploring and testing the basis for any stated answer; (ii) exploring whether any answer (on further reflection) truly accords with the considered opinion of the expert; (iii) if not, exploring why the expert gave the answer in the mock cross-examination; (iv) discussing strategies to facilitate the expert responding to questions in a manner which accords with the expert's considered opinion;
- There should be no more than limited repetition of cross-examination on each subject matter.

However, reasonable minds will differ as to the strategic prudence of the practice of mock cross-examination. Because there does not appear to be universal support for the ethical propriety of the practice, some judges might perceive the rehearsal of cross-examination as tainting the credit of the expert.

Reform in regulation?

I respectfully repeat my suggestion from 10 years ago that it may be useful to consider whether amendments to the Uniform Conduct Rules might provide more practical and clear guidance on witness preparation. Any such consideration might address the following issues:

- the general question of the appropriate nature of ethical regulation in this area. There is often contrasted two types of ethical regulation: 'codes of ethics' (which prescribe high level principles to provide loose general guidance), and 'codes of conduct' (which prescribe specific binding rules consistent with the high level principles). Those different forms reflect the often conflicting goals of regulation: the retention of sufficient flexibility to permit ethical discretion which is sensitive to individual circumstance; and the provision of sufficient certainty to give firm practical guidance (and to facilitate enforcement);
- the relative priority of the conflicting policy objectives in this area;
- whether conduct should be proscribed merely because it creates an appearance of expert partiality.

Conclusion

Expert testimony plays a critical role in litigation. Witness preparation plays a critical role in the presentation of expert testimony. A framework of rules and principles to provide effective ethical guidance in the area is needed. That framework does not presently exist.

To facilitate the development of such a framework, I affirm my suggestion that it might be helpful to undertake the following steps:

- organise a working party through the Bar Council to address the issue. It would be desirable that the Law Society and the judiciary also be represented;
- survey existing practice in relation to expert witness preparation, across the Bar and within law firms;
- survey judicial attitudes as to the impact on expert credibility of various methods of expert witness preparation;
- survey practice in different legal cultures;
- circulate a discussion paper through the working party, setting out proposed guidelines;
- in light of responses to the discussion paper, produce guidelines for practice for approval by Bar Council.

I am interested in exploring this topic further, and welcome comments.[66]

[117]; Phosphate Cooperative Co of Australia Pty Ltd v Shears [1989] VR 665; Secretary to the Department of Business and Innovation v Murdesk Investments Pty Ltd [2011] VSC 581, [101]-[111]; Universal Music Australia Pty Ltd & Ors v Sharman Licence Holdings Pty Ltd & ors (2005) 220 ALR 1, at [227]ff; Hardy v Your Tabs Pty Ltd [2000] NSWCA 150, at [133]

35. Evans Deakin Pty Ltd v Sebel Furniture Ltd [2003] FCA 171, per Allsop J at [676], [678]

36. ibid

37. ibid

38. Ibid, [678]

39. Fagenblat v Feingold Partners Pty Ltd [2001] VSC 454, per Pagone J at [9]; Aitchison v Leichhardt Municipal Council [2002] NSWLEC 226, per Talbot J at [21]; ASIC v Rich [2005] NSWCA 152 (CA) [167]

40. Fagenblat, supra fn 22, [7]

41. Fagenblat, supra fn 22, [7]

42. ASIC v Rich [2005] NSWCA 152 (CA) [167]

43. ASIC v Rich [2005] NSWSC 650, per Austin J at [40]

44. see Bar Rule 36; Bush (1993) 69A Crim R 416 at 431,

45. NSW Bar Association Response to the NSW Law Reform Commission Issues Paper 25 – Expert Witnesses, [33]

46. ibid

47. Traderight (NSW) Pty Ltd (ACN 108 880 968) and Ors v Bank of Queensland Ltd (ACN 009 656 740) (No 14) [2013] NSWSC 211, per Ball J at [23]; see also Harrington-Smith v Western Australia (No 7) [2003] FCA 893, at [19]; quoted with approval in Jango v Norther Territory (No 2) [2004] FCA 1004, per Sackville J at [9], and R v Coroner Maria Doogan [2005] ACTSC 74 (Full Court, ACTSC), at [118]

48. Whitehouse v Jordan [1981] 1 WLR 246, per Lord Wilberforce at 256-257

49. Kelly v London Transport Executive [1982] 1 WLR 1055, per Lord Denning at 1064-1065. However, Callinan J has pointed out Whitehouse v Jordan does not support 'as far reaching a proposition as that propounded by Lord Denning': Boland v Yates Property Corporation Pty Ltd (1999) 167 ALR 575, at [279]

50. Justice McDougall, 'Commercial List Practice: Expert Evidence', College of LAW CPED Seminar, 28 July 2004

51. Urgency might create a necessary exception to this guideline

52. Some practitioners would prefer to organise a conference to discuss the matters raised, before a further draft was prepared

53. Eg, the amendment of wording which is convoluted.

54. This is consistent with the decision of Ball J in Traderight (NSW) Pty Ltd and ors vBank of Queensland Ltd (No 14) [2013] NSWSC 211, at [23] 55 Traderight (NSW) Pty Ltd and ors vBank of Queensland Ltd (No 14) [2013] NSWSC 211, at [23]

56. However, it could be contended that merely raising the proposition is indirectly suggestive of what the witness 'should say' in proceedings

57. For a good example of such guidelines, see Freckleton & Selby, 'Expert Evidence: Law, Practice, Procedure and Advocacy' (2nd Edn, 2002), at 706-713

58. See Re Equiticorp Finance Ltd; ex part Brock [No 2] (1992) 27 NSWLR 391, per Young J at 395; R v Momodou [2005] 2 All ER 571, at 588 (CA); HKSAR v Tse Tat Fung [2010] HKCA 156, [68]-[82]

59. G. Bellow & B. Moulton, 'The Lawyering Process: Preparing and Presenting the Case' (1981), at 357-8; see Applegate, supra fn 1, at 281 fn 13

60. Code of Conduct of the Bar of England and Wales, Rule 705(a); see also R v Momodou [2005] 2 All ER 571, at 588; HKSAR v Tse Tat Fung [2010] HKCA 156, [68]-[82]

61. Re Equiticorp Finance Ltd; ex part Brock [No 2] (1992) 27 NSWLR 391, per Young J at 395.

62. Goodrich Aerospace Pty Limited v Arsic [2006] NSWCA 187, per Ipp JA at [19]

63. Applegate, supra fn 1, 323

64. HKSAR v Tse Tat Fung [2010] HKCA 156, [73]

65. This was endorsed by the Court of Appeal in R v Momodou [2005] 2 All ER 571, at 588

66. hugh.stowe@5wentworth.com

Police Remembrance Day

On Police Remembrance day we pause to reflect on the **courage and compassion** of all our police officers, especially those who have made the ultimate sacrifice in service of their community and of our nation.

To the fellow police officers, family and friends of those we've lost, my heartfelt sympathies go out to you. **They will be remembered.**

Policing calls for the highest standards of **duty, diligence and integrity**. What it also brings out is the extraordinary courage of men and women who step up for all of us. It is not a life without sacrifice - not for them, not for their loved ones.

Australia says **thank you**.

Anthony

Anthony Albanese MP
Prime Minister of Australia
Federal Member for Grayndler

Anthony Albanese MP

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Dos and don'ts for expert witnesses in the witness box

Expert evidence – in both written form in the witness box – is a critical element of any legal proceedings. However, it is an Expert's conduct in the witness box under cross-examination that is often the most commented upon by the Court through the judgments published.

November 29, 2022

BY: THOMAS CALDOW

www.grantthornton.com.au/

The conduct of an expert witness in the witness box is frequently commented on by Judges in their assessment of the evidence presented before them.

Generally, where a Judge comments about an expert's evidence, it's usually accompanied by the inverse, which appears to be a contributing factor to the gap between experts in a particular matter.

Set out below are recent examples whereby an Expert's conduct has been commented upon by the Court.

Landel Pty Ltd v Insurance Australia Ltd [2021] QSC 247

There was a vast gulf in the quality of expert opinion in the case between Dr M on the one hand, and Dr C and Mr C's on the other.

As his reports presaged, Dr M was discursive and non-responsive in the witness box. He showed strong emotional attachment to his ideas.

On the other hand, Dr C and Mr C were responsive witnesses, who gave reasoned and logical explanations for their views both in writing and in the

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A special tribute

Police Remembrance Day is a time for us to reflect on those who have lost their lives in service.

Men and women who served with a determination to protect and care for their fellow Australians.

Their families, friends, colleagues and communities carry a loss beyond measure. But grief draws comfort from pride. Sorrow is a window to remembrance.

We are grateful for their sacrifice in service. We honour lives lived with courage and integrity, and are moved by their example.

I pay tribute to all our law enforcement officers, state and federal. You have our enduring respect and appreciation.

Lest we forget.

The Hon
SCOTT **MORRISON** MP
FEDERAL MEMBER FOR COOK

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witness box. I do not doubt that they presented their honest opinions in their reports and in oral evidence.

Dr C and Mr C received unusual instructions and complied with them. I cannot see how the oddities which resulted are their fault.

I have a strong preference for the opinions of Mr C and Dr C, over those of Dr M. [37]

Central Innovation Pty Ltd v Garner (No 4) [2020] FCA 1796

Ms B is a forensic accountant. Her evidence went to the question of loss and damage. Ms B's evidence was probed and questioned to a limited extent in cross-examination. She was a careful and thorough witness. Her evidence as presented was not extensive, involving narrow questions of accounting for foregone profit based on assumed facts. The only objection to her evidence, properly taken, was the extent to which it relied upon facts or assumptions that were not otherwise established by the evidence.

Gabjet Pty Ltd & Anor V Funk Franchise Pty Ltd & Ors [2021] SADC 88

I have been greatly assisted by the evidence given by Mr O and found Mr O to be a reliable, professional and honest witnesses. He attempted to give me every assistance possible in my consideration of the relevant information before the Court. [761]

I found [Mr O] to be an impressive and thoroughly professional witness. During cross examination, it became clear that Mr O was unable to sustain a number of the opinions that he expressed because he had not been properly instructed or because he had not been given all of the necessary documents, or both. [821]

Mr O was a highly qualified and impressive witness. He gave his evidence thoroughly and well. Notwithstanding, I was unable to accept the opinions expressed by Mr O due to the failure by the respondents to properly instruct him and to properly furnish him with all relevant information. Mr O freely and competently made concessions where they were required and attempted to assist me in my task in every way possible. [826]

The main substantive challenge to her evidence came from the competing expert evidence of Mr S. As detailed further in my observations of Mr S, I generally found Ms B's evidence more satisfactory than his. This was because she explained, or better explained, the basis for the opinions she expressed, while he either did not explain, or did not satisfactorily explain, the basis for several of his key opposing opinions. [80]

Mr S is an accountant. The burden of Mr S's expert accounting evidence for Mr G was summarised and agreed upon in the short cross-examination of him: he formed a different view than the applicants' accounting expert, Ms B, as to the calculation of the costs of goods on the potential losses sustained. In short, his opinion was that there were direct expenses that should have been taken into account by Ms B, but were not.

He based his different opinion on his general experience in the calculation of costs of goods sold. He also took a different view as to the appropriate way to calculate Intercad's gross profit using NCCS pricing because that pricing had a discount applied to it. In the final analysis, the difference between Ms B and Mr S turned not on their credit, or reliability generally, but on which approach was more compelling. As already noted above, I found that Ms B's approach was to be preferred. [86]

Sigma v Shams [2021] VCC 713

I found G [expert accountant] to be a careful witness, willing to admit that if any assumptions underlying the expert report he had given were wrong, his analysis might not be correct, and careful to answer the precise questions put to him. [163]

In his report, G dealt with the instructions he was given, and what he was told to take into account. He carefully compared, for example, what he was told were the costs the defendants could have purchased certain items for had they not been in the relevant franchise arrangements, in contrast to what he was told they actually purchased them for. Using this information, he arrived at sums said to indicate Shams' losses suffered as a result of representations made to her. [164]

The difficulty with G's evidence is that it does not go anywhere, because the defendants did not prove the assumptions underlying his expert report. In other words, they did not call evidence to establish the truth of the assumptions G was asked to take into account, in making his expert report. [165]

Moyes v ENSCO Australia Pty Ltd [2022] WASCA 104

Judges are entitled to take into account the demeanour of party-witnesses, not only in the witness box, but while they enter and leave it, and also while they are sitting in court before and after giving evidence; but observations by the judge of conduct outside the witness box which the representatives of the parties may not have observed, should, if they are influential in the result, be drawn to the attention of the parties so that they may have an opportunity of dealing with the problem.

There is thus no general duty on a judge to advise the representatives of the parties of what they can see for themselves, namely the demeanour of the party-witness in the witness box. Nor, a fortiori, is there a duty on a judge to advise the parties that the party-witness's evidence is not adequate to make out the case of that party-witness. [69]

What is the Court telling us?

- The Court is telling us that as an Expert Witness we should: Give reasoned and logical explanations of our views in both written form and in the witness box. Make reasonable concessions in the witness box when cross-examined about our conclusions and/or the assumptions underpinning our report.
- Be thorough, thoughtful and careful in our responses under cross-examination.
- Do not be 'emotionally' attached to your ideas such that you are not willing to make reasonable concessions.
- Be careful of your conduct when in the courtroom - the Judge is always watching!

Admissibility of police reports

Police reports can often provide a useful contemporaneous account of an incident that later becomes the subject of court proceedings, criminal or civil.

BY BARRISTER NICK HOGAN OF MAURICE BYERS CHAMBERS

thebluebag.com.au

Police reports are *prima facie* a form of hearsay, so unless the party seeking to rely on the document can enliven one of the exceptions to that rule, the report will be inadmissible.

In this regard, it is also uncontroversial that police reports are a form of business record and therefore fall within the ambit of the exception to the hearsay rule contained in section 69 of the *Evidence Act*. If admitted as a business record, the report can then be used as evidence supporting the truth of the matters recorded therein, which is of course the main game when it comes to evidence at trial.

However, section 69 contains a couple of exclusions for the kinds of business records that do not pass the smell test for reliability that a document created in the course of everyday business (eg. an email) would otherwise possess.

One of these exceptions covers a situation where the matters contained in the report are recorded "*in connection with an investigation relating or leading to a criminal proceeding*" (per ss 69(3)(b)). That kind of report would ordinarily be inadmissible, the rationale being that once a criminal investigation is underway, human nature dictates that people, including perhaps even the police themselves, may tend to behave in a self-serving fashion.

In a recent decision that could ultimately prove frustrating for insurers in cases where fraud is alleged, Basten JA in *Averkin v Insurance Australia Ltd* [2016] NSWCA 122 ruled strictly on the question of the admissibility of a police report.

In any argument over the admissibility of a report, the principal question will be whether, objectively speaking, the police report reveals the police to have undertaken "*an investigation which would probably lead to a criminal proceeding.*" (Averkin at [28]).

The police report in Averkin described the incident as a 'stolen vehicle' case, noted a view that there was likely an accelerant used to start the car fire and recorded the nature of inquiries made of the car owner's wife and neighbours.

The trial judge took the view that the test is whether the investigation has reached a particular stage where, in the ordinary course of events, it would have led to a criminal proceeding. In the instant case, where the police inquiries were very much of a preliminary nature, the trial judge found that the test wasn't satisfied and therefore the report was admissible.

However, his Honour Basten JA took the following contrary view (at [28]) and found the report should have been ruled inadmissible:

"*It is patently obvious that on arrival at the scene the police had quickly formed the view that at least two serious property offences had been committed. If the correct approach is an objective assessment [of whether criminal proceedings are probable], this Court should come to the same view on the facts then apparent to the police.*"

There is an argument that the first few interviews and inquiries police make can be valuable in revealing a picture that is untainted by invention, collusion and lawyerly intervention. However, where even the slightest possibility of impartiality is revealed his Honour has deemed the risk of unfairness too great.

It is sometimes costly, inconvenient and even impossible to have in court the witnesses whose representations are recorded in police reports. However, when the report reveals even a preliminary view on the investigating officer's part, parties will now need to find another way to make their case.

New aim and difficulties with the admissibility of expert evidence

The decision of the Full Court of the Federal Court of Australia (comprising a bench of five judges) in New Aim Pty Ltd v Leurng [2023] FCAFC 67 (10 May 2023),[1] focuses on the admissibility of expert evidence, and in particular, the involvement of legal practitioners in the preparation of expert reports.

June 7, 2023

BY HEARSAY

hearsay.org.au

At the first instance an expert report was held to be inadmissible in its entirety as a consequence of the significant level of involvement of the legal practitioners in the drafting of the same. On appeal that decision was overturned and a new trial ordered, with certain parts of the expert found potentially to be admissible.

The Court relevantly said:[2]

… We observe that it is not unusual in a number of contexts not to finalise the formulation of the question asked of the expert without first discussing the issues with the expert. It would be expected, for example, that a solicitor would engage with an expert in a specialised field of scientific knowledge about how to frame a question so as not to give rise to a nonsensical question or one which misses the real issues or one which fails to engage with all of the issues. This is not an inversion of a process which must be necessarily followed of first asking a question and then having its inadequacies pointed out. The laborious following of such a process is likely to result in increased costs and delay for the parties and ultimately a waste of the Court's time.

The importance to not influence witnesses, whether lay or expert is highlighted, the Court said, with reference to the FCA Expert Evidence Practice Note and the Harmonised Expert Witness Code of Conduct:[3]

… There are various ethical requirements on legal practitioners involved in the process of gathering or putting evidence into an appropriate form for hearing. At the core of these is a requirement not to influence a witness's evidence. This applies

both to witnesses of fact and expert witnesses providing opinion evidence. Legal practitioners commonly take proofs of evidence from, or draft affidavits of, witnesses of fact. These are commonly drafted from oral communications which occur in conference or written material provided by the witness or which are otherwise available. It is less common for this to occur in the preparation of expert evidence, but there are reasons why it might occur. Where a legal practitioner takes responsibility for the drafting of evidence, the perception may arise that the drafter may have influenced the content of the evidence, even subconsciously.

The decision of Dalton J (as her Honour then was) in Landel Pty Ltd & Anor v Insurance Australia Ltd [2021] QSC 247 (11 October 2021) is noteworthy on this issue as well, including at [19]:

….. while lawyers must not coach expert witnesses, or influence the substance of an expert report so that it favours their client, it is permissible, and usually desirable, that lawyers do become involved in the editing of expert reports so that they present material in a way which is accessible and comprehensible, and do not contain irrelevant material. Draft expert reports are disclosable so that the effect of any such input will be obvious to the other parties to the litigation – see r 212(2) and Mitchell Contractors Pty Ltd v Townsville-Thuringowa Water Supply Joint Board.

New Aim also involves the issue as to whether certain information held on an employee's mobile phone WeChat application was confidential in nature.

A link to the New Aim decision is at: New Aim Pty Ltd v Leung [2023] FCAFC 67 (fedcourt.gov.au)

References

1. This case at first instance was referred to in the article contained in Hearsay Issue 90 – Expert Evidence in Civil Litigation – Formulation and Management.
2. At [89], after making reference to the comments of Lee J in BrisConnections Finance Pty Limited (Receivers and Managers Appointed) v Arup Pty Limited [2017] FCA 1268; (2017) 252 FCR 450 at [70] – [71].
3. At [119].

THE NATIONALS
for Regional NSW

On behalf of the Coffs Harbour electorate I would like to acknowledge all members of the NSW Police Force who have lost their lives in the line of duty.

GURMESH SINGH MP

Member for Coffs Harbour
Shadow Minister for Tourism, Emergency Services and the North Coast

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Tanya THOMPSON MP

Member for Myall Lakes

Thank You
MYALL LAKES POLICE FORCE

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On this National Police Remembrance Day, we honour and thank you for your efforts and commitment to justice. Thank you for standing in a blue line that inspires pride, respect, and service to our community, especially during challenging times.

I particularly pay tribute to the police officers in my electorate of Bankstown who put themselves in danger to protect and help our community stay safe. I especially acknowledge those who have made the ultimate sacrifice and offer my prayers to their families.

The Hon. Jihad Dib MP
Member for Bankstown
Minister for Customer Service and Digital Government
Minster for Emergency Services
Minister for Youth Justice

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Labor

Police 'Argot' Experts in drug cases: independent?

Drug trials often see the Crown tender telephone intercepts of coded conversations between an accused and their associates to support a submission that the interlocutors were talking about drugs; or at least using language consistent with talk of drugs.

BY BARRISTER NICK HOGAN OF MAURICE BYERS CHAMBERS

thebluebag.com.au

It is a trite subterfuge device within the criminal community to use slang, or 'argot', in an attempt to render ambiguous the true meaning and effect of their conversations. Nevertheless, when evidence of such conversations is put before a jury an expert's guidance is necessary; even though many of the coded terms would be quite familiar to any juror who has taken the time to enjoy a few episodes of *The Wire* in their time.

Therefore, a police officer who has spent considerable amounts of their service dealing with the criminal drug milieu and is thereby purportedly qualified to give evidence of how such people talk, will be called to give evidence.

However, there are considerable dangers in putting such evidence before a jury. The case law illustrates some of the specific forensic dangers, but there are broader perhaps intrinsic issues with a police man or woman giving such evidence which would perhaps warrant an expert being drawn from outside the police force.

A good example of problems that can arise is Keller's case. In *Keller v R* [2006] NSWCCA 204, the accused was charged with the supply of cocaine in a commercial quantity. A conviction was recorded at first instance and an appeal instituted raising an issue with regard to the opinion evidence given by a police officer as to the meanings of various words spoken during intercepted telephone conversations. Some of the more colourful language used included: 'teeth' (a reference to cocaine); 'untickled' (to purity); and 'a farmer' (to quantity, being a quarter of a kilogram).

At the time he gave his evidence, the expert was a member of the Australian Federal Police with extensive training and experience in drug related matters. For his opinion to be admissible under the Evidence Act (section 79) it would need to be wholly or substantially based on his training, study or experience. Yet a passage of cross-examination by the defendant's counsel extracted by the Court of Appeal at [35] revealed that the opinion was not so founded:

"Q- You've said that the reference at page one…saying 'that's when I get the results' is in your opinion a reference to a drug transaction?

A-That's correct.

….

Q- You can't say that simply by reading that, someone saying he's going to meet someone at 9 o'clock in the morning that relates to drugs can you?

A-I placed this telephone conversation in the total context of which it was involved.

Q-What was the total context Mr Smith that' you're talking about, what are the contextual matters that you rely on in reaching that conclusion?

A-The fact that Mr Denholm was arrested with half a kilo of cocaine the following day."

**

The central problem was the admission by the expert that "..in part the opinion of the witness was arrived

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at having regard to the discovery of the cocaine in the possession of the co-accused who had conversed with the appellant." (at [42]); as opposed to an objective assessment based on the expert's experience in other matters of what the words referred to.

If it wasn't for the skilled cross-examination at trial stage and the highly skilled appellate advocacy of Stephen Odgers SC this problem would not have been brought to light.

There was also an issue with respect to the manner in which the expert's evidence was given. He gave evidence to the effect that in his opinion the parties to the intercepted conversations *were actually talking about drugs rather than using language consistent* with that state of affairs. This kind of evidence had previously been ruled inadmissible in other cases on the basis that it strayed far too close to the ultimate or central issue in the trial (ie. was the accused guilty).

The common law rule against evidence being given which strays too close to the ultimate issue has now been abolished by section 80 of the Evidence Act, but judges are still reluctant to allow evidence of this kind and often find other ways to reject it (eg. s135 of the Evidence Act).

On how many other occasions has a police expert given evidence of what the accused or their associates were using was drug 'argot' and did so with a knowledge of the facts and circumstances in which the crime took place?

I suppose as a matter of good defence advocacy, how the witness reached their opinion, including their background knowledge of the case against the accused, should be put to the expert to ensure that any of that information has not coloured their opinion, albeit inadvertently.

Nevertheless, it was somewhat fortunate for the accused that his counsel was able to point to such a particular matter as he did in Keller's case.

Even if the expert did admit to having an expensive knowledge of the facts in the case, it would be an easy submission for the Crown prosecutor to make that this level of background understanding is necessary to enable the expert to properly opine.

However, the problem remains: if you know someone is accused of a drug offence and just how the case is put against them, it is a rare individual indeed who can compartmentalise their thinking to the extent necessary to prevent the same problem as that which occurred in *Keller*. This is not to say that there is any lack of propriety in the way these police witnesses conduct themselves, it is simply a matter of one's independence of thought being coloured by among other things, a combination of what we know, our experience and life's purpose .

This is a matter a judge alone could account for by the weight they accord the evidence, but this level of skill in assessing an expert witness' credit may well be beyond a lay juror.

An embarrassing debacle

April, 2023

BY LOQUITUR

loquitur.com.au

Background

This is a UK case which involved a claim for fraud against various traders at Barclays Bank by the UK Serious Fraud Office ("SFO"). It was alleged the traders rigged the London Inter-Bank Offered Rate ("LIBOR"). They were charged by the SFO and convicted.

Relevant at the trial was the expert evidence from the SFO's expert, a Mr R, regarding the workings of an investment bank.

A retrial was ordered on the basis of various failings by Mr R as an expert witness, and the conviction was unsafe.

Findings

The retrial (and subsequent appeal of the retrial) found that Mr R's failings as an expert were extensive. They included[1]:

1. Signing of documents stating that he had complied with his duties (including reading the relevant procedure rules) when he knew he hadn't in fact done so.
2. Failed to report with any detail or accuracy as to how he reached his opinions.
3. Blatantly disregarding the directions of the trial judge during the course of the trial. In particular, during a break in the giving of evidence, and despite a specific request of the judge not to discuss his evidence with anyone, Mr R contacted a colleague to ask for her input on certain technical points.
4. Knowingly gave evidence about matters outside his area of competence (such as in relation certain bank trading activities).
5. He did not inform the SFO, or the Court, of the limits of his expertise.
6. Secretly consulting with a number of undisclosed advisors in relation to the assignment, primarily on the areas beyond his competence and expertise.

This information was not in fact available at the time of the original trial, and only became evident thereafter. Had this information been available it would have permitted "devastating cross-examination" of Mr R[2], and indeed did so at the retrial.

These were deeply troubling failings that bring the system of justice into disrepute[3] and the court took a very grave view of Mr R's conduct[4].

However, despite these failings, the court was wholly unable to make the causal link between Mr R's failings and the issue of the appellant's dishonesty, which was the key focus of the trial. The issue of the appellant's dishonesty was wholly unaffected by Mr R's evidence, even considering Mr R's presentation in the round. Accordingly, the safety of the appellant's conviction was to stand[5].

Despite the conviction standing in this case, some other traders in related but separate proceedings also sought retrials in those separate proceedings. These were granted on the basis of Mr R's failings as an expert. The traders were acquitted at the retrials[6].

Sanction by Court

Despite the grave view of Mr R's conduct, the court would not be drawn on questions of sanction for Mr R, but did highlight his failings here for the consideration of others[7].

continued on page 59

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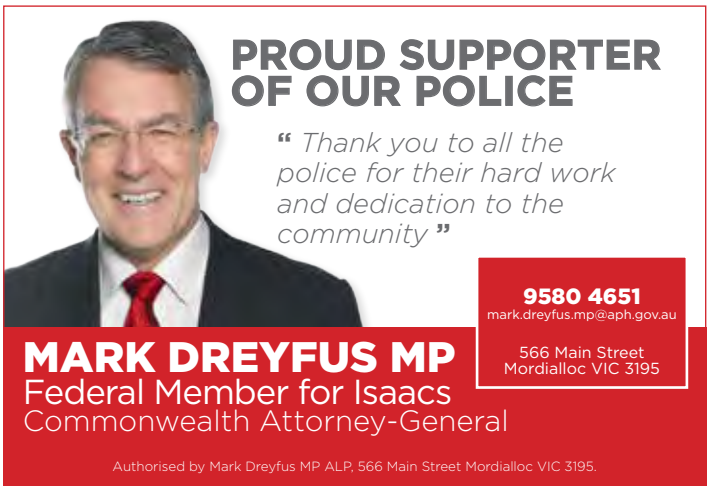


continued from page 59

The court specifically went on to say that the instruction of Mr R "turned into an embarrassing debacle for the SFO, all the more so, given the *high-profile nature of these cases and notwithstanding that, in the event, it has had no impact on the outcome in this case.*"[8]

The court pressed the SFO's counsel for details of any internal reviews on lessons learnt from this, and despite this internal review, the SFO undertook to look again at the matter to see whether there was any way in which it could reinforce expert witnesses' awareness of their obligations.

Surprisingly, it transpired that this was the third time that Mr R had given evidence in LIBOR trials and the first time any questions concerning his expertise had apparently arisen. However, the court found "*there is no room for complacency and this case stands as a stark reminder of the need for those instructing expert witnesses to satisfy themselves as to the witness' expertise and to engage (difficult though it sometimes may be) an expert of a suitable calibre*"[9].

Comment

Most obviously this case stands as a reminder of what expert witnesses should not do. It highlights the many and varied ways in which expert witnesses may fail (and indeed sometimes do fail) in their various duties.

Perhaps more interestingly this case stands as an example of the effects of a failure of an expert witness to reach and maintain the rigorous standards rightly expected of them. Here the expert's failings led to the potentially avoidable time and expense of a re-trial (both in this case, and other related cases) and appeal.

Such failings will inevitably lead to reputational damage to the expert himself, and may also lead to sanction by the relevant regulatory or professional body – a point the court went to some pains to suggest, while of course noting that the details of the sanction was not a matter for the court itself to decide[10].

The reputational damage to the party itself from an expert's failings is also a point which the court went to considerable length to address in the judgement. Parties who engage experts must be sure that the experts themselves are in fact of sufficient competence and expertise, and if the party fails to determine this the party itself may be liable to censure[11].

Implicit within this is also the reflection of such a debacle on the party's legal team. While not specifically addressed by the court, a legal team who relies on a manifestly incompetent expert witness at a trial may also find itself facing difficult questions beyond the issues and matters of the case itself, not to mention the reputational damage in being associated which such a shambles.

To see how we can potentially assist in the training of expert witnesses, including training on expert witness duties, please contact us.

References

1 At paras 29 and 58.
2 At para 29.
3 At para 29.
4 At para 58.
5 At para 73.
6 At para 6 and 29.
7 At para 58.
8 At para 76.
9 At para 77.
10 At para 58.
11 At para 77.

Expert evidence founded on speculation

HG v R [1999] HCA 2

This was a criminal case involving sexual offences against a child. A psychologist named Mr M, gave expert evidence on behalf of appellant (defendant).

February, 2023

BY LOQUITUR

loquitur.com.au

Background

This was a criminal case involving sexual offences against a child. A psychologist named Mr M, gave expert evidence on behalf of appellant (defendant).

Mr M had experience in counselling emotionally disturbed children, and in dealing with, and counselling, victims of child sex abuse. Mr M's report and evidence was that although the complainant had been sexually assaulted, the perpetrator of the assaults had been her natural father and not the appellant. He suggested the complainant had "buried" the assault in response to the trauma of it and the trauma had been "resurrected" at a later date in circumstances which led her to blame the wrong person.

The natural father had in fact died when the complainant was four and a half years old, about 5 years before the complaints to police, and there was no evidence that the natural father had committed these acts, save for the theory of the expert.

The theory that the complainant had, in truth, been a victim of sexual abuse, but that the abuser was her natural father (since deceased) would have been important to the defence case, if there could be found an evidentiary basis for such a theory.

Findings

This hypothesis was not shown to have been based, either wholly or substantially, on Mr M's specialised knowledge as a psychologist. Mr M's opinion was based on "*a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise of a psychologist*"[1].

Mr M approached the complainant's story with scepticism. He did not put the contention that the abuse was committed by the natural father to the complainant, nor did he investigate the possibility of abuse by a third party.

Various competing logical possibilities existed as to how the abuse was perpetrated. It was not demonstrated by Mr M, and it is unlikely, that it is within the field of expertise of a psychologist to form and express an opinion as to which of those alternatives was to be preferred.

The evidence the defence sought to lead from Mr M really amounted to putting from the witness box the inferences an hypotheses on which the defence case wished to rely.

Further, expert evidence should be confined to opinions which are wholly or substantially based on their specialised knowledge. "*Experts who venture "opinions", (sometimes merely their own inference of fact), outside their field of specialised knowledge may invest those opinions with a spurious appearance of authority, and legitimate processes of fact-finding may be subverted. The opinions which Mr [M] was to be invited to express appear to provide a good example of the mischief which is to be avoided.*"[2]

The appeal was dismissed.

Comment

This case re-iterates a common theme found in these case reviews – the need for the expert witnesses to stick to their field of expertise. It was not in the expert's remit to diverge from his role as an assessing psychologist to venture speculative theories about hypothetical occurrences.

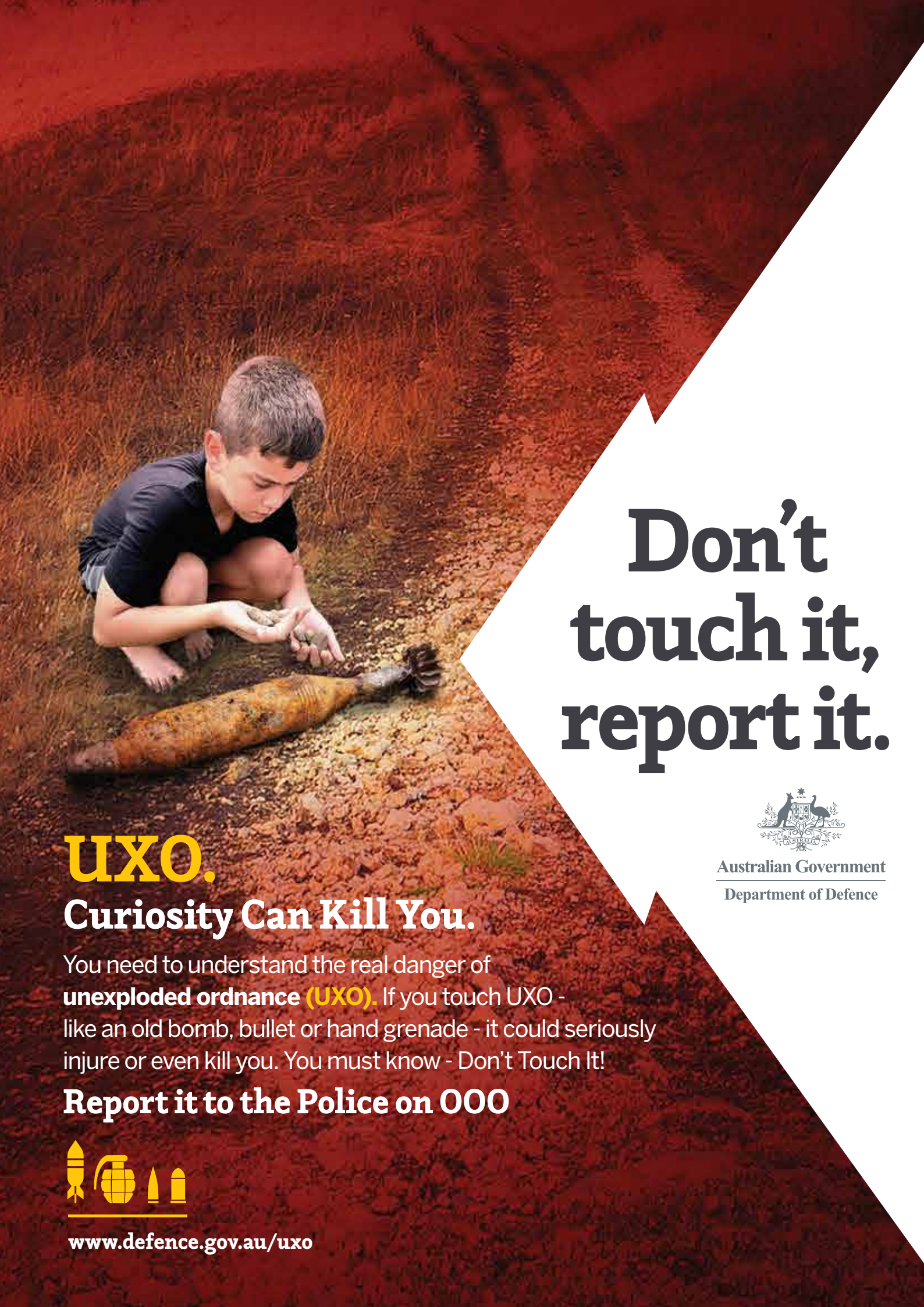
Related to this is the need for all expert opinions to be founded on facts, or such assumptions as reasonable and fair, and which withstand scrutiny by a court. If these facts or assumptions are successfully challenged, then this may in turn materially affect the opinion and the expert evidence provided.

Here, though, the expert went one step further and sought to become a mouthpiece for his client – by proposing an opinion based on speculation and unproven and unfounded facts it severely impacted the expert's credibility, and also the basis of the defence/appeal. Experts must be balanced and objective in their opinion, and to fail in this will have substantial ramifications for the underlying case.

To see how we can potentially assist in the training of expert witnesses, including training on expert witness duties, please contact us.

References

1. At para 41.
2. At para 44.



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