Experts Immune from Negligence Claims

Adelina Dal Pra[1]

It would be a rare construction case that did not require expert evidence. Since most construction disputes require technical understanding, expert evidence will often be required from structural, geotechnical or other engineers, quantity surveyors, expert programmers, independent builders, chemists and any number of other fields of specialised knowledge.

Expert Evidence is an Exception to the 'Opinion Rule'

Generally speaking, the Court will not allow a person's opinion about facts to be used as evidence, unless it is used as evidence only of the person's state of mind or perception of the fact. This is the 'opinion rule', which has been enshrined in uniform legislation throughout Australia in the *Evidence Act* 1995 (Cth).

The 'opinion rule' does not apply where an expert gives an opinion based wholly on that specialised knowledge.

The Rationale and Purpose of Expert Evidence

Expert opinion is an exception to the opinion rule to assist the Court to understand matters that a judge, arbitrator or other tribunal member would not otherwise appreciate sufficiently to ascertain the effect or meaning of raw observations. Some simple examples are:

- whether a particular means of construction complies with the Building Code of Australia may be something which requires expert evidence; and
- whether a particular design was capable of being built (whether in a practical sense or in terms of the physics involved) will likely require expert evidence.

Cases such as *Makita (Australia) Pty Limited v Sprowles*[2] have made it clear that the reasoning process of the expert needs to be transparent, so that the Court is able to follow the logic. These principles have been replicated in expert witness Codes of Conduct in most jurisdictions of NSW, such as Schedule K to the *Supreme Court Rules*.

When is an Expert Liable?

An expert witness may, in very limited circumstances, be criminally or civilly liable. Criminal liability is limited only to evidence given which is not genuine or sincere, where an expert has deliberately attempted to mislead the Court by offering false information or views not actually held.

---

1. Adelina Dal Pra is an Associate in the Construction and Engineering Division at Colin Biggers Paisley, Sydney.
2. (2001) 52NSWLR 705.

The principle that all persons participating in judicial proceedings (including judges, witness (both lay and expert), the parties and barristers) are immune from civil liability in respect of their participation in those judicial proceedings is a principle which dates back more than one hundred years.[3] It prevents any person who has given evidence or been an advocate in proceedings from being sued in respect of their behaviour in court.

The principle is founded on the following considerations, which were recently restated by Master Harrison in the Supreme Court case of *Sovereign Motor Inns v Howarth Asia Pacific ('Sovereign')*[4] in respect of expert witnesses:

> *[F]irstly, … to encourage honest and well meaning persons to assist the higher interest of the advancement of public justice, even a dishonest and malicious person may on occasion benefit from the immunity; secondly … to encourage freedom of speech and communication in judicial proceedings by protecting persons who take part in the judicial process from fear of being sued for something they say; thirdly, to ensure that there is finality to litigation, so there is no opportunity to re-litigating the same issues by means of subsequent action.*

Scope of the Immunity

Whilst the Australian High Court has considered this type of immunity in respect of barristers,[5] there has been no such high Australian authority on the scope of the immunity in respect of expert witnesses. In *Giannarelli v Wraith ('Giannarelli')*,[6] the Court decided that a barrister's failure, in criminal proceedings, to argue a particular defence (which would have been available to the defendants), fell within the immunity. Accordingly, the barrister could not be sued in respect of that omission. In that case, the High Court considered that the scope of the immunity should be limited to extend to all work in Court but to other pre-trial work only '*so intimately connected with the conduct with the case in Court that it can be fairly be said to be a preliminary decision affecting the way that case is to be conducted when it comes to a hearing.*'[7]

The other question that arises is whether it applies to all 'judicial proceedings' and whether, for example, it would extend to proceedings which are not, by their nature, judicial, such as expert determination.

---

3. The English case of *Dawkins v Rokeby* (1873) LR 8 QB 255 is an example.
4. [2003] NSW SC 1120 at para 34.
5. *Giannarelli v Wraith* (1988) 165 CLR 543.
6. *Giannarelli v Wraith* (1988) 165 CLR 543.
7. The High Court adopted the limitation on the scope of the immunity expounded by the English House of Lords in the case *Saif Ali v Sydney Mitchell & Co.* [1977] 3 All ER 744.

The Sovereign Case

In *Sovereign*, Master Harrison considered an application to strike out proceedings commenced by *Sovereign* against *Howarth Asia Pacific* ('HAP') for:

- negligence;
- breach of section 52 of the *Trade Practices Act 1974* (Cth); and
- breach of contract.

The question before the Court was whether the principle of witness immunity prevented HAP, the expert, from being sued in relation to the claims brought by Sovereign against HAP.

Background

In earlier proceedings, Sovereign, the lessee of a motel, had sued the lessor of the premises for breaches of the lease, claiming that the motel's business had suffered because the lessor had failed to maintain various aspects of the property. Sovereign engaged HAP to provide three expert reports setting out the financial losses suffered as a result of the falling occupancy level. His Honour Justice Austin, who heard those proceedings, requested that a further report be prepared to give Sovereign the opportunity to present evidence directly concerning the damages related to the air conditioning failure. HAP prepared that report (the fourth report), acknowledging that it would comply with Schedule K of the *Supreme Court Rules*.

At the hearing, most of HAP's fourth report was struck out, only four pages of that report being tendered. In his judgment, Justice Austin did not accept the quantifications in HAP's fourth report. Sovereign lost the case.

Sovereign then sued HAP for damages for:

- negligence associated with the fourth report;
- breach of contract between Sovereign and HAP for expert evidence; and
- breach of Section 52 of the *Trade Practices Act 1974* (Cth).

In that claim, Sovereign sought from HAP the damages which were not recovered from the lessor in the previous proceedings and recovery of costs Sovereign had been ordered to pay for the lessor.

HAP sought to strike out the proceedings on the basis of expert witness immunity principle.

The Arguments

The Court considered the following cases:

- a High Court decision in *Cabassi v Vila* ('*Cabassi*'),[8] that Cabassi, who was an unsuccessful plaintiff in earlier proceedings, sued an eyewitness who had given evidence that Cabassi had not been assaulted, but had injured herself by jumping from a window, was not entitled to maintain the claim because lay witnesses are immune from suit for their evidence (but subject to the laws of perjury);

8. [1940] 64 CLR 130.

- a Court of Criminal Appeal decision in *R v Beydoun* ('*Beydoun*'),[9] which found that it did not offend the Court immunity principle to run a criminal prosecution of Beydoun, who had previously commenced civil proceedings against GIO for an injury claim which was fraudulent (thereby seeking to defraud the government);[10] and
- a High Court decision in *Mann v O'Neill* ('*Mann*'),[11] which decided it was permissible for a magistrate to commence defamation proceedings against an unsuccessful litigant who had previously appeared before that magistrate, where that litigant had a sent a letter of complaint to a minister concerning the magistrate's suitability for office.

Sovereign submitted that the principles in *Cabassi* could not apply because that was a case brought against a witness for evidence in earlier proceedings rather than arising out of a report prepared by an independent corporation pursuant to a contract.

Sovereign also submitted that:

- the immunity could not apply to a witness who was obliged to comply with Schedule K and failed to advise Sovereign that it was unable to do so; and
- witness immunity does not apply to claims under the *Trade Practices Act*.

Section 52 of the *Trade Practices Act 1974* (Cth) and Opinion

The Court in *Sovereign* held that s 52 of the *Trade Practices Act* would not apply to limit the expert witness immunity, and that the claim for breach of contract and in negligence could not be maintained.

Section 52 (1) of the *Trade Practices Act* provides that:

> *[A] corporation shall not, in trade or commerce, engage in conduct which is misleading or deceptive or is likely to mislead or deceive.*

The law about opinions that contravene s 52 of the *Trade Practices Act* is well established. Generally, unless an opinion is 'not reasonably capable of being held' by the speaker, it will not offend the prohibition in s 52.[12] The Court will also imply into an expert report a representation that the expert has produced an opinion based on a reasonable application of the expert's skills.[13]

However, where an expert has not reasoned his conclusions and has not followed Schedule K, although the reports states that Schedule K was complied with, there is a clear possibility that s 52 has been breached. There is nothing specific in the *Trade Practices Act* which indicates that the Act will not apply to evidence given in proceedings.

---

9. *R v Beydoun* (1990) 22 NSWLR 256 (Court of Appeal).
10. *R v Beydoun* (1990) 22 NSWLR 256 (Court of Appeal).
11. *Mann v O'Neill* (1997) 191 CLR 204.
12. *Tobacco Institute of Australia Limited v Australian Federation of Consumer Organisations Incorporated* 111 ALR 61.
13. See, for example, *Kenny & Good Pty Limited v MGICA* (1997) 140 ALR 313; *Amadio Pty Limited v Henderson* [1998] FCA 823 (Full Federal Court).

In *Sovereign*, the Court relied on the High Court decision of *Coco v R*.[14] In that case, the High Court decided that legislation expressly permitting the use of listening devices did not authorise the trespass associated with installing those listening devices, because that constituted an interference with a basic right of property.

In *Giannarelli*, the High Court considered Victorian legislation capable of two possible meanings. One meaning would limit the common law right of a barrister to immunity from suit in relation to proceedings, the other would not. Having regard to the principle that general words in a statute are insufficient to authorise interference with basic privileges and immunities, the Court, by a majority, found that the statute was not intended to limit the Court immunity so as to permit civil claims against barristers for negligence in carrying out their duties in Court.

Interestingly, however, in *Sovereign*, unlike *Giannarelli*, there were not two competing interpretations of the legislation. Nevertheless, the Court found that parliament did not intend to limit the expert witness immunity. It does not appear that the Court in *Sovereign* considered *Giannarelli*.

Having regard to Justice McHugh's recommendation in *Mann*, Master Harrison, in *Sovereign*, proceeded to considered the underlying rationale for the witness immunity, noting:

> *If an expert is to adhere to Schedule K, it can be expected that when confronted with that of another expert in the same field's opinion, he or she may make concessions and even change their view. In these circumstances, the expert should be able to give his evidence freely and not be in fear of being sued. The rationales of not re-litigating the same issues and the higher interest of the advancement of public justice are all applicable.*[15]

In circumstances where courts are increasingly encouraging expert conclaves, it is important that the views of an expert and the underlying rationale used in the preparation of his report are thoroughly tested before the matter is taken to hearing. This case would seem to suggest there is no recourse against an expert for reports (whether for a particular party or a joint report, the product of a conclave) prepared negligently in court proceedings.

Nevertheless, it is worth noting that the High Court has recently been invited to reconsider the principles set out in *Giannarelli* concerning advocates' immunity in the case of *D'Orta-Elenaike v Victoria Legal Aid & Anor*. That case was heard in April 2004 and the High Court has reserved its decision. It may well have some impact on the status of expert witness reports in this regard.

14. (1994) 179 CLR 427.

15. See above, *Coco v R* (1994) 179 CLR 427 at para 39 of the judgment.