What Does a Barrister Expect From an Expert's Report?

- Richard Manly

Introduction

The basic qualifications required of a person engaged to act as an expert are briefly as follows:

(a) relevant professional qualifications and experience in the field of dispute. A lack of professional qualifications will not debar a person from appearing as an expert nor will it render his evidence inadmissible but it may count against him on the score of weight of evidence as compared with that of a witness who has appropriate professional qualifications.

(b) a general knowledge of the principles of evidence, the law of contract, the principles of damages, professional negligence and breach of contractual duty and the practice in relation to the duties of expert witnesses.

(c) the ability to express himself both orally and in writing in clear simple language that can readily be understood by the tribunal, whether it be a court of law or a lay arbitrator;

(d) the ability to weigh facts and to draw logical conclusions from them;

(e) the ability to view a problem impartially;

(f) integrity and honesty;

(see generally Cross on Evidence (4th Australian Edition) by D Byrne & J D Heydon, Chap. 11).

Opinion Evidence

A witness of opinion has special knowledge acquired for example in the course of professional training and experience. This knowledge enables the witness to assist the tribunal in coming to a decision by giving his opinion of the facts before the tribunal. In the case of a motor vehicle accident, an expert witness who was not at the scene of the accident where it occurred can give an opinion based on an examination of the vehicles involved as to whether the accident was caused by mechanical failure or not.

The General Rule

The general rule in the area of expert testimony has been set out by His Honour Mr Justice Dixon in *Clarke v Ryan* (1960) 103 CLR 486 at 491 as follows:

> "A witness may not give his evidence on matters calling for the special skill or knowledge of an expert unless he is an expert in such matters, and he may not give his opinion on other matters if the facts upon which it is based can be stated without reference to it in a manner equally conducive to the ascertainment of the truth, or if it would not assist the Court in coming to a conclusion. The expert will not be permitted to point out to the jury matters which the jury could determine for themselves or to formulate his empirical knowledge as a universal law."

In a work of Lord MacMillan entitled "The Giving of Evidence before a Parliamentary Committee in the High Court and before an Arbitrator" (20 June 1946 London) he said as follows:

> "The expert's evidence, although sometimes of great value, is still only evidence within the basic definition of a method only of proof of the facts in issue. It has been repeatedly said over centuries that the expert witness must not usurp the function of the tribunal and that his duty is to furnish the tribunal with the necessary scientific criteria for testing the accuracy of his own conclusions so as to enable the tribunal to form its own independent judgment by application of this criteria to the facts proved in evidence. As with all matters for resolution of a dispute selection of and reliance upon the experts who may assist in identifying and synthesising the claims, preparation of the technical aspects of pleadings and analysis of the opposition claims or defence is a matter of discretion which must be exercised carefully by the legal practitioner or adviser to ensure he is acting in his client's best interests."

In the law of evidence "opinion" means any inference from observed facts and the law on the subject arises from the general rule that witnesses must speak only to that which was directly observed by them. The treatment of evidence of opinion by English law is based on the assumption that it is possible to draw a sharp distinction between inferences and the facts on which they are based. The drawing of inferences is said to be the function of the Judge or Arbitrator whilst it is the business of the witness to state facts.

Qualification of the Witness as an Expert

The qualification of the expert witness as such is a matter for the trial judge or arbitrator. After investigation, he must determine whether the field of knowledge in

which the witness professes expertise is outside the ordinary experience of men and whether the witness has sufficient expertise in such a field as would enable him to assist the tribunal. Whether a particular field of knowledge is shown to be a sufficiently organized branch of science will depend in each case upon the evidence led in support of such a conclusion and upon the precise question upon which the expert's opinion is to be sought, and also upon the general area of science in question. Thus it may be that a field of knowledge may be not so categorized in one case but accepted at a later date when further research has demonstrated its accuracy.

If the Court comes to the conclusion that the subject of investigation does not require a sufficient degree of specialised knowledge to call for the testimony of an expert, evidence of opinion will generally be excluded. Once the field of expertise of the witness is established the judge or arbitrator must consider the skill of the witness in question. Clearly, the nature and extent of studies pursued by the witness will vary infinitely and will depend upon the area of science in question. In some cases the necessary knowledge may be obtained by experiment and observation, and in others this may not be possible. It is for the judge or arbitrator to determine whether the witness has undergone such a course of special study or is possessed of such experience as will render him expert in a particular subject, and it is not necessary for the expertise to have been acquired professionally. Specialization is a matter of degree. On the other hand, an expert witness is not to be treated as unqualified and his opinion as inadmissible only because he puts forward an unproven theory not accepted by the weight of scientific opinion.

The facts upon which an expert's opinion is based must be proved by admissible evidence. A judge or arbitrator can hardly be expected to act upon an opinion the basis for which is not explained by the witness expressing it. The duty of the expert is to furnish the judge or arbitrator with the necessary scientific criteria for testing the accuracy of his conclusions, so as to enable the judge or arbitrator to form his own independent judgment of the application of these criteria to the facts proved in evidence.

The Problem for the Barrister

One thing upon which the writers agree, and which is self-evident to any experienced advocate, is that there are serious dangers attendant upon the cross-examination of expert witnesses who are specialists in a complex field of science.

In his celebrated text, The Art of Cross-Examination (1904), Francis L Wellman of the New York Bar made the following observation nearly a century ago:

> "As a general thing, it is unwise for the cross-examiner to attempt to cope with a specialist in his own field of inquiry. Lengthy cross-examinations along the lines of the expert's theory are usually disastrous and should rarely be attempted.
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> Many lawyers, for example, undertake to cope with a medical or handwriting expert on his own ground - surgery, correct diagnosis, or the intricacies of penmanship. In some rare instances (more especially with poorly educated physicians) this method of cross-questioning is productive of results. More frequently, however, it only affords an opportunity for the doctor to enlarge upon the testimony he has already given, and to explain what might otherwise have been misunderstood or even entirely overlooked by the jury."

Napley in his text The Technique of Persuasion said much the same thing some eighty years later:

> "Expert witnesses are a much maligned body of men. It is true that some of them may be charlatans, but for the most part they are men who are concerned to give help to the court upon the basis of a life-time's experience and training, and moreover, training within a particular field. Nothing is to be gained by endeavouring to bully them (or, for that matter, any other witness). Although your object may often be to show that the extent of their knowledge and experience is less than the expert whom you propose to call, this needs to be done with a degree of tact and judgment. You occupy a powerful position in court in relation to an expert. To make him look silly (if you are able); to cause him to be the centre of your ridicule (if you are competent to do so), are not only unkind and unnecessary pursuits but may damage him in the pursuit of his own profession by destroying his reputation. Experts for the most part are dealing with matters which can be the subject of differing opinions. If the subject matter of their evidence is something of scientific exactitude, then you are unlikely to get very far with cross-examination in any event."

(See also Cross Examination of Experts by Geoffrey Miller QC in Australian Law Journal October 1987 p.622, and Difficulties of Assessing Expert Evidence by The Hon Justice Von Doussa at p.615).

There is the story perhaps apocryphal, of a famous English silk who had to cross-examine a renowned expert on matters relating to metals science.

After examination in chief that went well for the Plaintiff the silk for the Defendant rose to his feet, straightened his gown, glanced at the expert and casually asked him to tell the Court: "What was the co-effficient of the expansion of brass?". The witness replied that he did not know. The silk immediately sat down having concluded his cross-examination. The Defendant won the case.

The Task of the Expert

The task of being an expert witness is a difficult one. The expert must bring his mind to bear upon particular technical problems which may well have come about by reason of factual situations which are disputed by the relevant parties. The expert is generally provided with documents and instructions from the party engaging him

and it is not uncommon for the expert engaged by the other party to receive different documents and often different instructions. The instructions given to an expert bear upon the task he has to perform and may well shape the result.

Impartiality and Integrity

The expert witness should bring to his task impartiality and integrity of the highest degree. An inquiring mind open to the permutations and combinations of solutions that may well be available for the problem he has to confront is essential. The expert must also have the ability to give his advice without fear or favour irrespective of the interests of the party who has engaged him.

The great dangers that confront those of us involved in the litigation process are experts who are not impartial, who tailor their advice dependent upon who they are engaged by and make unwarranted assumptions preliminary to the conclusions stated in their reports. The other difficulty that I have noticed is that there is a body of experts who appear regularly in the building construction jurisdiction who purport to offer legal advice to their clients. This is not part of the function of the expert and more particularly so where the expert is one not trained in the law.

The Guiding Principles

His Honour Mr Justice Brooking in the case of *Phosphate Co-Operative Co of Australia Pty Ltd v Shears* (1989) VR 665 had cause to comment upon the guiding principles to be adopted by experts in the preparation of their reports.

The facts of the case are not relevant for present purposes. However, His Honour made the following comments:

> "The greatest circumspection is required in relation to ... making representations to an independent expert, not by way of correcting some error of fact, but by way of influencing his judgment on the established facts" (p.681).
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> "The expert's integrity and freedom from baneful influences are essential" (p.683).
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> "The guiding principle must be that care should be taken to avoid any communication which may undermine, or appear to undermine, the independence of the expert" (p.683).

Legal Professional Privilege

The rule in *Grant v Downs* (1976) 136 CLR 674 plays an important part in the litigation process. The facts of the case are as follow:

(a) On 24 August, 1969 Mr Grant was admitted as a patient to a New South Wales Psychiatric Centre. That night he was left on his own in a single room. He escaped through a window. Next morning his dead body was found in the hospital grounds.

(b) Proceedings were issued by Mr Grant's widow and children pursuant to the *Compensation of Relatives Act* 1897 (NSW) against the nominal defendant (for the purpose of this address, the Government of New South Wales) and one Dr Bennett who was at the relevant time the Duty Medical Officer at the Centre.

(c) The nominal defendant filed an amended List of Documents and claimed privilege from production of various reports made to the Department of Health. The basis of the claim was legal professional privilege. The claim was made on the basis that the reports were required to be prepared about injuries suffered by patients in mental hospitals and had as one of the material purposes for their preparation submission to legal advisers of the Health Commission.

Application was then made by the Grant interests for production of the privileged documents and the matter came before the High Court for determination in 1976. The judgment of the majority was:

> "All that we have said so far indicates that unless the law confines legal professional privilege to those documents which are brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings the privilege will travel beyond the underlying rationale to which it is intended to give expression and will confer an advantage and immunity on a corporation which is not enjoyed by the ordinary individual. It is not right that the privilege can attach to documents which, quite apart from the purpose of submission to a solicitor, would have been brought into existence for other purposes in any event, and then without attracting any attendant privilege. It is true that the requirement that documents be brought into existence in anticipation of litigation diminishes to some extent the risk that documents brought into existence for non-privileged purposes will attract the privilege but it certainly does not eliminate that risk. For this and the reasons which we have expressed earlier we consider that the sole purpose test should now be adopted as the criterion of legal professional privilege.
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> It is our opinion that neither the evidence nor the documents themselves sufficiently establish that the purpose of submitting the documents to the respondent's legal advisers was the sole purpose of their being brought into existence."

The rule in *Grant v Downs* is that legal professional privilege from production of documents must be confined to those documents which are brought into existence for

the sole purpose of submission to legal advisers for advice and for use in legal proceedings.

Upon an application of the rule an expert may find that his file of documents can be the subject of a subpoena for production at a hearing and its contents will not necessarily attract legal professional privilege. However, the situations where this may occur will depend heavily on the facts. An enquiry into whether the expert's documents/reports/opinions held on his file were produced for the sole purpose of the litigation will be examined.

Waiver of Privilege

By reason of developments in the law of waiver of privilege (see *Great Atlantic Insurance Co v Home Insurance Co* (1981) 2 All ER 485, *Trade Practices Commission v TNT Management Pty Ltd* (1984) 56 ALR 647 and Law of Privilege by S B McNicol p.31) documents that were protected from production by reason of legal professional privilege may have to be produced.

In the *TNT Management* case Franki, J had to deal with the situation where a witness called by the Defendant had used a document within the preceding month to refresh his memory. Counsel for the Plaintiff called for the document to inspect without penalty. The document was the subject of legal professional privilege. On the question of whether the privilege had been waived by the witness having refreshed his memory from the document His Honour held that the privilege had been so waived and that the document should be made available for counsel for the Plaintiff without penalty.

In the *Home Insurance* case the facts were that the plaintiffs, who were insurers, entered into reinsurance agreements with the defendants who later repudiated the agreements. The plaintiffs brought an action against the defendants claiming a declaration that the defendants were bound by the agreements. When preparing their case the plaintiffs received a memorandum from their American attorneys relating to the action. The first two paragraphs of the memorandum consisted of an account of a discussion between the attorneys and a third party and in the course of discovery before trial the plaintiffs' solicitors disclosed only those two paragraphs of the memorandum. The solicitors intended to claim privilege for the remainder but omitted to do so. At the trial the plaintiffs' counsel read out in open court the first two paragraphs of the memorandum under the impression that it was complete as it stood. When counsel on both sides became aware some days later that the memorandum as read out was incomplete, the defendants' counsel asked for disclosure of the additional matter on the ground that even if the whole document was privileged the disclosure of part of it to the court amounted to a waiver of privilege. The judge upheld that claim and the plaintiffs appealed.

The Court of Appeal held that the introduction by the plaintiffs of part of the memorandum into the trial record waived privilege in regard to the whole document, since a party was not entitled to disclose only those parts of a document that were to his advantage, and both the court and the opposing party were entitled to know whether the material released from privilege represented the whole of the material relevant to the issue in question. The fact that the waiver had been made by the plaintiffs' counsel without the plaintiffs agreeing to it was irrelevant, since counsel had ostensible authority to bind the plaintiffs in any matter arising in, or incidental to, the litigation, and when counsel introduced into the record part of the document he thereby effectively waived any privilege attaching to the document that could be asserted by the plaintiffs. The whole of the memorandum was therefore required to be disclosed.

Conclusion

The expert must constantly strive to keep himself informed of developments in all fields affecting his own professional expertise including legislation, codes of practice, standard forms of contract and codes of conduct.

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