# Expert Evidence in Commercial Litigation

***Presenter: Suzanne Kirton, Barrister***

***Television Education Network Webinar***

***24 February 2017***

---

## Table of Contents

# 1. Introduction

*An expert witness is a person who has specialised knowledge based on that person's training, study or experience. Unlike other witnesses, a witness with such specialised knowledge may express an opinion on matters within his or her particular area of expertise. Other witnesses may speak only as to facts, that is, what they saw or heard, and are not permitted to express their opinions.*
*Of course, the value of any expert opinion is very much dependent on the reliability and accuracy of the material which the expert used to reach his or her opinion. It is also dependent upon the degree to which the expert analysed the material… Expert evidence is admitted to provide [a jury] with information and an opinion on a particular topic which is within the witness's expertise, but which is likely to be outside the experience and knowledge of the average lay person.*
*The expert evidence is before you as part of all the evidence to assist you in determining [the issues] in this case…*[1]

## 1.1 Why the special rules and procedures?

Generally speaking, a person is only permitted to give evidence of facts, not their opinions. It is the task of the judge or jury to draw any inferences or findings from the facts presented to them. However in certain cases, special knowledge may be needed to properly interpret those facts, and this is knowledge that a judge or jury does not possess. An expert is permitted to offer opinions to the court as to the meaning and implications of other evidence.

The purpose of expert evidence is "to assist the trier of fact by providing special knowledge that the ordinary person would not know. Its purpose is not to substitute the expert for the trier of fact. What is asked of the trier of fact is an informed judgement, not an act of faith"[2].

"An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience of a judge or jury"[3].

"The function of the expert is to provide the trier of fact, judge or jury, with an inference which the judge or jury, due to the technical nature of the facts, is unable to formulate"[4].

Accordingly, if a person has specialised knowledge based on the person's training, study or experience, the court will allow evidence from that person of his/her opinion, provided that the opinion is wholly or substantially based on that knowledge[5].

## 1.2 Defining the terms 'expert' and 'expert witness'

- An expert can be anyone with knowledge of or experience in a particular field or discipline beyond that to be expected of a layman.
- An expert witness is an expert who makes this knowledge and experience available to a court, tribunal, etc. to help it understand the issues in a case and thereby reach a sound and just decision
- He/she assists the trier of fact but does not decide the case

---

[1] Suggested jury direction on expert evidence published by Judicial Commission of New South Wales: https://www.judcom.nsw.gov.au/publications/benchbks/criminal/expert_evidence.html
[2] per Binnie J in *R v J-LJ* [2000] SCC 51 at [56]
[3] per Laughton LJ in *R v Turner* (1974) 60 Cr App R 80 at 83
[4] per Finkelstein J in *Quick v Stoland* (1998) 157 ALR 615 at 625
[5] s.79 *Uniform Evidence Act*

- Moreover, an expert witness is paid for the time it takes to:
  - form an opinion and, where necessary,
  - support that opinion during the course of litigation.
- An expert witness is not paid for the opinion given, and still less for the assistance that opinion affords the client's case.

# 2. Who is an expert? – Finding the right person for your matter

## 2.1 Identifying the facts in issue and finding your expert

Similarly to lay witnesses, the first step in the process is to identify what it is that you need the expert to provide expert evidence on. Next you need to check whether the facts you seek to establish can be proved by lay witness evidence, that is, question whether or not you really need the expert's evidence. If you decide that expert evidence is needed then identify the area of expertise required. Of course, even within a recognised area of expertise there may be areas of particular specialised knowledge. You will need to decide whether a broad view or a more restricted view of the area will best assist your case. That decision may in turn determine the type of expert you seek.

## 2.2 Expert assistance is not expert evidence

A word of warning. Don't confuse expert evidence with expert assistance. Expert assistance in litigation might mean you or your counsel engaging and meeting with experts who are never going to be witnesses but who have an important contribution to make in assisting the lawyers understand the questions that they need to ask or the flaws in the other side's case. They might include, for example, your client's accountant or someone from their factory or laboratory who is not going to be giving evidence. They might even include an expert similar in qualifications and experience to the expert that you engage to give evidence, who can help educate you and maybe even help you prepare a technical primer or agreed list of technical terms. In some cases expert assistance can avoid the need for expert evidence altogether, or focus it on the disputed facts in issue so that the expert who is called is not left to carry the complete burden of educating the Court and explaining his opinion.

If the issues in the case are so technically complex that you cannot brief an expert without first understanding more about the field of endeavour in which the dispute exists then make sure you educate yourself first, either through discussions with your client or with someone else who is unlikely to be called as a witness.

## 2.3 Finding your expert - where to look

The next step is often the most frustrating and difficult, because now you have to find a person with expertise in the area that you have identified. Depending on how broadly or narrowly you have delineated your field of expertise you may have very few experts to choose from. On the other hand you may have a great many – but you still have to pick one or two. Remember also that experts who regularly appear in certain jurisdictions will be known to the Court, and that the Court may already have a view (accurate or otherwise) of your chosen expert's credibility.

There are a number of sources of possible experts, and where to look will obviously vary depending on what sort of expert you need. If you need accounting expertise or a valuer, for example, there are a variety of firms to choose from. In technology cases there are generally leading research institutes, universities or government or quasi-government bodies

which can be approached. Both the University of Melbourne and the University of New South Wales have services to help you identify possible specialists.

Another good place to consider is trade associations, of which your client may or may not be a member. When questioned in detail, clients themselves often know who the authorities in their field are (but make sure they don't approach them - ask them to let you speak to them). Others find experts from reviewing past cases in similar subject areas and by talking to other solicitors and barristers who work in specialist areas.

During this process it is useful for the different roles of the barrister and the solicitor to be clearly defined. It is the responsibility of the solicitor to identify and retain potential experts. It is the responsibility of the barrister to assess the potential expert's expertise and usefulness in the light of the matters that need to be proved. It is not uncommon for a solicitor to identify an entirely credible and experienced witness (perhaps one that they have worked with in a different case) whose area of expertise does not quite match the area of expertise that you have identified as the most relevant. If no other expert appears to be available then compromises may be required, but any such compromises need to be made by the client and in the knowledge that the case itself is being compromised. It is often the client who, in these circumstances, identifies a possible expert that no-one else was aware of.

## 3. Expert evidence - the rules relating to experts

A summary of the various rules applicable in the Victorian courts and tribunals is in the table below:

| Jurisdiction | Evidence Act | Civil Procedure Rules relating to expert evidence | Expert Witness Code of Conduct |
|---|---|---|---|
| Federal Court of Australia [FCA] | Uniform Evidence Act *Evidence Act 1995* (Cth) | Federal Court Rules 2011 (Cth) Rule 5.04 and Part 23 Experts RR 23.01—23.15 | Practice Note CM7 Expert Witnesses in proceedings in the Federal Court of Australia |
| Supreme Court of Victoria [VSC] | Uniform Evidence Act *Evidence Act 2008* (Vic) | Supreme Court Rules 2005 (Vic) Order 44 Expert Evidence Rules 44.01—44.06 | Form 44A Expert Witness Code of Conduct |
| County Court of Victoria [VCC] | Uniform Evidence Act *Evidence Act 2008* (Vic) | County Court Rules 2008 (Vic) Order 44 Expert Evidence Rules 44.01—44.06 | Form 44A Expert Witness Code of Conduct |
| Magistrates Court of Victoria [VMC] | Uniform Evidence Act *Evidence Act 2008* (Vic) | Magistrates Court Rules 2010 (Vic) Order 44 Expert Evidence Rules 44.01—44.06 | Form 44A Expert Witness Code of Conduct |
| Victorian Civil & Administrative Tribunal [VCAT] | N/A | Victorian Civil & Administrative Tribunal Act 1998 s.94 and Schedule 3 | Practice Note – PNVCAT2 Expert Evidence |

### 3.1 At Common Law

Courts have always been sensitive to any trend that could result in an expert usurping or being seen to usurp the tribunal of fact's function of deciding what occurred and what inferences should be drawn. Accordingly, the common law developed a series of rules as to what is expert opinion -

- **The field of expertise rule**: The claimed knowledge or expertise should be recognised as credible by others who are capable of evaluating its theoretical and experiential foundations;
- **The expertise rule:** The witness should have sufficient knowledge and experience to entitle him or her to be held out as an expert who can assist the court;

- **The common knowledge rule:** The information sought to be elicited from the expert should be something upon which the court needs the help of a third party, as opposed to relying upon its general knowledge and common sense;
- **The ultimate issue rule:** The expert's contribution should not have the effect of supplanting the function of the court in deciding the issue before it; and
- **The basis rule:** The admissibility of expert opinion evidence depends on proof of the factual basis of the opinion.

## 3.2 Statutory Laws - the Uniform Evidence Act

The common law rules have been codified in legislation, following recommendations by the Australian Law Reform Commission and others[6].

Until recently Victorian practitioners had two sets of evidence rules to worry about - the *Evidence Act* 1958 (Vic), which applied in state courts, and the *Evidence Act* 1995 (Cth), which applied in federal courts. Since 2010, however, this has not been a problem, as Victoria has adopted the uniform evidence law by the enactment of the *Evidence Act* 2008 (Vic), which mirrors the Commonwealth legislation.

New South Wales adopted the uniform evidence law in 1995, and Tasmania did so in 2001, but the other states are still operating under various older state-specific legislation. This paper covers only the uniform evidence law (which is referred to in this paper generically as the *Evidence Act*), so if you have case where this doesn't apply check the rules of operation in your particular tribunal.

There is a general exclusion on opinion evidence in section 76 of the *Evidence Act*, known as the "opinion rule". Section 76 reads as follows:

> ***The opinion rule***
>
> *Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.*

There are a number of exceptions to the opinion rule, contained in sections 77 - 79. Section 79 relates to expert evidence and reads as follows.

> *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.*

The exception for experts is thus confined to opinions that he or she is able to express because of their particular expertise. The minute an opinion strays outside that area of expertise it is inadmissible under section 76 because it is not caught by the exception in section 79.

## 3.3 The Rules of Courts and Tribunals

Each of the courts and the major tribunal in Victoria (VCAT) also has their own Rules and Practice Notes relating to the use of expert evidence. There are minor differences between them but the purpose of all is to:

- require the early disclosure of expert evidence in written form between the parties;

[6] for example, Evidence (Interim) (ALRC Report 26) published on 21 August 1985, Evidence (ALRC Report 38) published on 5 June 1987, Uniform Evidence Law (ALRC Report 102) published on 8 February 2006.

- require disclosure to be made in such a way that clearly reveals the admissibility of otherwise of the evidence; and
- impress upon the expert and the parties that the principal role of an expert is to assist the court in reaching a more reliable decision rather than to advance in a partisan way the interests of a particular party, and that experts should provide independent reports.

In summary, the Rules and Practice Notes cover the following matters:

- General issues in relation to the rules for expert evidence
- Overarching obligations of an expert witness
- Procedural requirements for expert reports
- Required content of an expert report
- Procedural rules for expert conferences
- Procedural rules for giving evidence in court
- Procedures for court appointed expert or jointly appointed single expert
- Shadow experts (SA only)

## 3.4 The Victorian Supreme Court, the County Court and the Magistrates Court

Order 44 of the Supreme Court Rules regulates the adducing at trial of the evidence of a person as an expert. The County Court Rules adopt Order 44. The Magistrates Court Rules have their own Rule 44, which is in largely the same form[7] as Order 44.

An expert is defined as a person who has specialised knowledge based on the person's training, study or experience (Order 44.01).

Order 44 applies to expert evidence in any proceedings, however commenced, except:-

- any expert retained before 1 November 2003 (in which case the former regime applies);
- the evidence of a party who would, if called as a witness at the trial, be qualified to give evidence as an expert in respect of any question in the proceeding; and
- medical reports governed by Order 33 (other than medical reports in medical negligence proceedings which express opinions on the liability of the defendant, to which Order 44 does apply).

Order 44.03 provides as follows:-

> *(1) Unless otherwise ordered, a party who intends at trial to adduce the evidence of a person as an expert shall-*
>
> *(a) as soon as practicable after the engagement of the expert and before the expert makes a report under this Rule, provide the expert with a copy of the code; and*

[7] It exempts any itemised quotation or assessment attached to a complaint under Rule 5.05(2) (costs of repairs to the vehicle arising out of a motor vehicle collision) and an arbitration of a compliant, where the complaint has been referred to arbitration by the Court under section 102 of the *Magistrates Court Act 1989 (Vic)*.

*(b) not later than 30 days before the day fixed for trial, serve on each other party, a report by the expert in accordance with paragraph (2) and deliver a copy for the use of the Court.*

*(2) The report shall state the opinion of the expert and shall state, specify or provide-*

*(a) the name and address of the expert;*

*(b) an acknowledgement that the expert has read the code and agrees to be bound by it;*

*(c) the qualifications of the expert to prepare the report;*

*(d) the facts, matters and assumptions on which the opinion is based (a letter of instructions may be annexed);*

*(e) (i) the reasons for;*

*(ii) any literature or other materials utilised in support of;*

*(iii) a summary of- the opinion;*

*(f) if applicable, that a particular question, issue or matter falls outside the expert's field of expertise;*

*(g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications;*

*(h) a declaration-*

*(i) that the expert has made all the enquiries which the expert believes are desirable and appropriate; and*

*(ii) that no matters of significance which the expert regards as relevant have, to the knowledge of the expert, been withheld from the Court;*

*(i) any qualification of an opinion expressed in the report without which the report is or may be incomplete or inaccurate;*

*(j) whether an opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason.*

*(3) If the expert provides to a party a supplementary report, including a report indicating that the expert has changed his or her opinion on a material matter expressed in an earlier report-*

*(a) that party shall forthwith serve the supplementary report on all other parties; and*

*(b) in default of such service, the party and any other party having a like interest shall not use the earlier report or the supplementary report at trial without the leave of the Court.*

*(4) Any report provided by the expert pursuant to this Rule-*

*(a) shall be signed by the expert; and*

*(b) shall be accompanied by clear copies of any photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter to which the report refers.*

The code referred to is in Form 44A. A copy of it is below:

**Form 44A Expert Witness Code of Conduct**

1. A person engaged as an expert witness has an overriding duty to assist the Court impartially on matters relevant to the area of expertise of the witness.

2. An expert witness is not an advocate for a party.

3. Every report prepared by an expert witness for the use of the Court shall state the opinion or opinions of the expert and shall state, specify or provide—
   (a) the name and address of the expert;
   (b) an acknowledgement that the expert has read this code and agrees to be bound by it;
   (c) the qualifications of the expert to prepare the report;
   (d) the facts, matters and assumptions on which each opinion expressed in the report is based (a letter of instructions may be annexed);
   (e) (i) the reasons for,
   (ii) any literature or other materials utilised in support of,
   (iii) a summary of - each such opinion;
   (f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise;
   (g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications;
   (h) a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate, and that no matters of significance which the expert regards as relevant have, to the knowledge of the expert, been withheld from the Court;
   (i) any qualification of an opinion expressed in the report without which the report is or may be incomplete or inaccurate; and
   (j) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason.

4. Where an expert witness has provided to a party (or that party's legal representative) a report for the use of the Court, and the expert thereafter changes his or her opinion on a material matter, the expert shall forthwith provide to the party (or that party's legal representative) a supplementary report which shall state, specify or provide the information referred to in paragraphs (a), (d), (e), (g), (h), (i) and (j) of clause 3 of this code and, if applicable, paragraph (f) of that clause.

5. If directed to do so by the Court, an expert witness shall—
   (a) confer with any other expert witness; and
   (b) provide the Court with a joint report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing.

6. Each expert witness shall exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the Court and in relation to each report thereafter provided, and shall not act on any instruction or request to withhold or avoid agreement.

Further, the Commercial Court Practice Note 1 of 2017 provides as follows:-

**Commercial Court Practice Note PN CC 1 of 2017**
**[15] Expert Evidence**

15.27 The List Judge may give directions to the effect that:
15.27.1 expert evidence at trial will follow factual evidence upon which the expert evidence is predicated;
15.27.2 two or more experts engaged by the respective parties be sworn and present their evidence concurrently, and may, if permitted by the List Judge, question each other in relation to their evidence; and
15.27.3 the parties consult and propose matters upon which the experts are to confer.

15.28 Where contentious expert evidence is to be adduced, the Commercial Court will almost invariably direct that experts confer before trial pursuant to r 44.06 of the Rules. Typical directions appear in **Schedule 9**.

15.29 Where a conference of experts is directed, legal practitioners and the experts must ensure the expert code of conduct is strictly adhered to. In particular, legal practitioners are not to participate in the conference. In appropriate cases, the List Judge may order that the conference of experts be facilitated by an Associate Judge, Judicial Registrar or other suitably qualified person.

15.30 Following any conference, the experts must prepare a joint report for the Court stating:
15.30.1 the matters upon which they were directed to confer;
15.30.2 that they have met and discussed each matter upon which they have been directed to confer;
15.30.3 the matters on which they agree;
15.30.4 the matters on which they disagree; and
15.30.5 a brief summary of the reasons for any disagreement.

There are also several relevant schedules to the Practice Note, including Schedule 9 which sets out the standard orders for joint expert evidence and Schedule 2 which contains a standard valuation order which applies in shareholder oppression proceedings, partnership disputes and any other proceeding where the value of a business is likely to be in issue.

## 3.5 The Federal Court

The Federal Court adopted new rules on 1 August 2011. Part 23 of the Federal Court Rules deals with experts reports and experts. Division 23.1 deals with Court-appointed experts and Division 23.2 deals with parties' expert witnesses and expert reports. Various expressions use in that division are defined in Schedule 1 to the Rules as follows:-

- an expert means a person who has specialised knowledge based on the person's training, study or experience;
- expert evidence means the evidence of an expert that is based wholly or substantially on the expert's specialised knowledge; and
- expert report means a written report that contains the opinion if any expert on any question in issue in the proceeding based wholly or substantially on that expert's specialised knowledge, including any report in which an expert comments on the report of any other expert.

Division 23.2 contains Rules 23.11 - 23.15, which provide as follows:-

***23.11 Calling expert evidence at trial***

*A party may call an expert to give expert evidence at a trial only if the party has:*

*(a) delivered an expert report that complies with rule 23.13 to all other parties; and*

*(b) otherwise complied with this Division.*

Note **Expert** and **expert report** are defined in the Dictionary.

***23.12 Provision of guidelines to an expert***

*If a party intends to retain an expert to give an expert report or to give expert evidence, the party must first give the expert any practice note dealing with guidelines for expert witnesses in proceedings in the Court (the Practice Note).*

***23.13 Contents of an expert report***

*(1) An expert report must:*

*(a) be signed by the expert who prepared the report; and*

*(b) contain an acknowledgement at the beginning of the report that the expert has read, understood and complied with the Practice Note; and*

*(c) contain particulars of the training, study or experience by which the expert has acquired specialised knowledge; and*

*(d) identify the questions that the expert was asked to address; and*

*(e) set out separately each of the factual findings or assumptions on which the expert's opinion is based; and*

*(f) set out separately from the factual findings or assumptions each of the expert's opinions; and*

*(g) set out the reasons for each of the expert's opinions; and*

*(h) comply with the Practice Note.*

*(2) Any subsequent expert report of the same expert on the same question need not contain the information in paragraphs (1) (b) and (c).*

***23.14 Application for expert report***

*A party may apply to the Court for an order that another party provide copies of that other party's expert report.*

***23.15 Evidence of experts***

*If 2 or more parties to a proceeding intend to call experts to give opinion evidence about a similar question, any of those parties may apply to the Court for one or more of the following orders:*

*(a) that the experts confer, either before or after writing their expert reports;*

*(b) that the experts produce to the Court a document identifying where the expert opinions agree or differ;*

*(c) that the expert's evidence in chief be limited to the contents of the expert's expert report;*

*(d) that all factual evidence relevant to any expert's opinions be adduced before the expert is called to give evidence;*

*(e) that on the completion of the factual evidence mentioned in paragraph (d), each expert swear an affidavit stating:*

*(i) whether the expert adheres to the previously expressed opinion; or*

*(ii) if the expert holds a different opinion;*

*(A) the opinion; and*

*(B) the factual evidence on which the opinion is based.*

*(f) that the experts give evidence one after another;*

*(g) that each expert be sworn at the same time and that the cross-examination and re-examination be conducted by putting to each expert in turn each question relevant to one subject or issue at a time, until the cross-examination or re-examination is completed;*

*(h) that each expert gives an opinion about the other expert's opinion;*

*(i) that the experts be cross-examined and re-examined in any particular manner or sequence.*

A new Expert Evidence Practice Note (GPN-EXPT) was issued on 25 October 2016. A copy of it may be found on the Federal Court website (it runs to 13 pages so I have not included it in this paper). The Practice Note also includes the annexures *Harmonised Expert Witness*

*Code of Conduct* and the *Concurrent Expert Evidence Guidelines*. Much is unchanged from the previous Practice Note; for example, most of the required contents of an Expert's Report. However the new Practice Note includes extensive provisions on joint expert conferences and reports and on concurrent evidence.

## 3.6 The Federal Circuit Court

The Federal Circuit Court Rules 2001 deal with expert evidence in Division 15.2, which includes Rules 15.06A - 15.08. These provide as follows.

***15.06A Definition***

*In this Division:*

***expert**, in relation to a question, means a person (other than a family and child counsellor or a welfare officer) who has specialised knowledge about matters relevant to the question based on that person's training, study or experience.*

***15.07 Duty to Court and form of expert evidence***

*For an expert's duty to the Court and for the form of expert evidence, an expert witness should be guided by the Federal Court practice direction guidelines for expert witnesses.*

*Note While not intended to address all aspects of an expert's duties, the key points in the guidelines are:*

- *an expert witness has a duty to assist the Court on matters relevant to the expert's area of expertise*
- *an expert witness is not an advocate for a party*
- *the overriding duty of an expert witness is to the Court and not to the person retaining the expert*
- *if expert witnesses confer at the direction of the Court it would be improper for an expert to be given or to accept instructions not to reach agreement.*

***15.08 Expert evidence for 2 or more parties***

*(1) This rule applies if 2 or more parties to a proceeding call expert witnesses to give opinion evidence about the same, or a similar, question.*

*(2) The Court may give any direction that it thinks fit in relation to:*

*(a) the preparation by the expert witnesses (in conference or otherwise) of a joint statement of how their opinions on the question agree and differ; or*

*(b) the giving by an expert witness of an oral or written statement of:*

*(i) his or her opinion on the question; or*

*(ii) his or her opinion on the opinion of another expert on the question; or*

*(iii) whether in the light of factual evidence led at trial, he or she adheres to, or wishes to modify, any opinion earlier given; or*

*(c) the order in which the expert witnesses are to be sworn, are to give evidence, are to be cross-examined or are to be re-examined; or*

*(d) the position of witnesses in the courtroom (not necessarily in the witness box).*

## 3.7 The Victorian Civil and Administrative Tribunal (VCAT)

The Evidence Act does not apply in VCAT, and VCAT is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it

adopts those rules, practices or procedures (section 98(1)(b) of the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic)).

However, it has, in effect adopted those rules in relation to experts by the publication of Practice note PNVCAT 2 - Expert evidence, which applies to any evidence given to VCAT by an expert witness. PNVCAT 2 is in largely the same form as Order 44 discussed above. A copy is available on the VCAT website.

## 4. Can you coach your expert? – Ethics and the expert

The short answer to this question is - yes and no. There are many examples where cases have failed because the independence of the expert is called into question. However of course lawyers should and do have some involvement on the preparation of an expert report and the content of their evidence - the answer is a question of degree. Some examples include:

- ***Moore v Getahun*** 2014 ONSC 237:

  In this medical malpractice suit heard in the Ontario Superior Court of Justice, the trial judge was highly critical of the way a medical expert [Dr T] discussed a draft copy of his report with counsel and made changes based on their suggestions. Discovery of the expert's notes revealed that his draft report was discussed during a 90-minute phone call. Upon cross-examination, Dr T said that although he was happy with his report, counsel made 'suggestions' and he 'made the corrections over the phone'. Counsel for the Plaintiff submitted that it was 'inappropriate for defence counsel to make suggestions to shape Dr T's report'. In her decision, Wilson J emphasised the requirement for expert witnesses to be independent, stating:

  *Discussions or meetings between counsel and an expert to review and shape a draft expert report are no longer acceptable ...*

  *I do not accept the suggestion… that discussions with counsel of a draft report go to merely weight. The practice of discussing draft reports with counsel is improper and undermines both the purpose of [the Canadian Rules of Civil Procedure] as well as the expert's credibility and neutrality…*

  *There should be full disclosure in writing of any changes to an expert's final report as a result of counsel's corrections, suggestions, or clarifications, to ensure transparency in the process and to ensure that the expert witness is neutral.*

- ***Moore v Getahun*** 2015 ONCA 55:

  The legal profession and community of expert witnesses in Canada were so perturbed by this decision that various representative groups were given leave to intervene in the appeal that followed. The Court of Appeal overturned the decision below, but reinforced the notion that such communications are likely to be disclosed, holding:

  *[62] I agree with the submissions of the appellant and the interveners that it would be bad policy to disturb the well-established practice of counsel meeting with expert witnesses to review draft reports. Just as lawyers and judges need the input of experts, so too do expert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive to the pertinent legal issues in a case…*

  *[63] Consultation and collaboration between counsel and expert witnesses is essential to ensure that the expert witness understands the duties reflected by [the rules] … Counsel play a crucial mediating role by explaining the legal issues to the expert*

*witness and then by presenting complex expert evidence to the court. It is difficult to see how counsel could perform this role without engaging in communication with the expert as the report is being prepared…*

*[67] I now turn to the issue of the extent to which consultations between counsel and expert witnesses need to be documented and disclosed to an opposing party… [77] In my view, the ends of justice do not permit litigation privilege to be used to shield improper conduct. As I have already mentioned, it is common ground on this appeal that it is wrong for counsel to interfere with an expert's duties of independence and objectivity. Where the party seeking production of draft reports or notes of discussions between counsel and an expert can show reasonable grounds to suspect that counsel communicated with an expert witness in a manner likely to interfere with the expert witness's duties of independence and objectivity, the court can order disclosure of such discussions.*

- ***Australian Competition and Consumer Commission v Snowdale Holdings Pty Ltd*** [2016] FCA 541

  This case involved allegations of misleading and deceptive conduct brought by ASIC in respect of eggs labelled "free range". Mr G, an operations-livestock manager, was the respondent's expert witness. He was required, during cross-examination, to produce drafts of his report. The first two drafts, sent to Snowdale's solicitors for discussion, were three and a half pages long. A draft document, described as Mr G's report, was generated by Snowdale's solicitors and sent to Mr G the following day. That document totalled almost nine pages. There were a further seven iterations of the document, based on the draft report produced by Snowdale's solicitors, until the final report was filed.

  ACCC contended that this progression of the draft reports showed that Mr G was amendable to adopting changes whose primary purpose was to assist Snowdale's case, and Mr G was unable, in cross-examination, to provide persuasive explanations for the amendments to his draft reports. In some instances, he was not able to say why changes had been made, or who had made them. The trial judge found:

  *Mr [G] did not act as an independent expert… Mr [G] did not approach his role as an expert witness from the position of a person who owed a paramount duty to the Court to express an independent opinion. Rather, I find that Mr [G] was prepared to participate in a cooperative venture with Snowdale and its solicitors whereby he was prepared to mould his views, or acquiesce in the moulding of his views, into a form which would, to the best extent possible, assist the case of the party that had retained him.*

- ***Harrington-Smith on behalf of the Wongatha People v Western Australia*** (No 7) [2003] FCA 893 per Justice Lindgren:

  *Unfortunately, in the case of many of the experts' reports, little or no attempt seems to have been made to address in a systematic way the requirements for the admissibility of evidence of expert opinion. Counsel protested that, in order to ensure that the requirements of admissibility are met, lawyers would have to become involved in the writing of the reports of expert witnesses. In the same vein, counsel said, in supporting the admission of certain parts of a report, that they were written in the way in which those qualified in the particular discipline are accustomed to write.*

  *Lawyers should be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed. In the same vein, it is not the law that admissibility is attracted by nothing more than the writing of a report in accordance with the*

*conventions of an expert's particular field of scholarship. So long as the Court, in hearing and determining applications such as the present one, is bound by the rules of evidence, as the Parliament has stipulated in subs 82(1) of the NT Act, the requirements of s 79 (and of s 56 as to relevance) of the Evidence Act are determinative in relation to the admissibility of expert opinion evidence.*

# 5. Use of expert evidence in the conduct of proceedings

## 5.1 The retainer

Once a possible expert has been identified it is important to be able to talk to them confident that what you say will not reach the ears of the other side or their representatives. Be very careful in initial approaches to experts and think about what you tell them. In a patent case the mere identity of the patentee can sometimes tell an expert more than you want them to know, particularly if they are being asked for an opinion of whether an invention is obvious. In my experience dealing with experts is one area in which email communications can be a hindrance, not a help. Telephone calls and meetings tell you so much more - about whether someone is interested in assisting, about how they present themselves, about how well they can explain things and communicate.

If, after an initial contact, you think you have found someone who is likely to be willing and able to assist, you should send a letter retaining their services, even if you have not yet made a final decision. The retainer should deal with the following issues:

- confidentiality - of communications and documents and of the retainer itself;
- preservation of client legal privilege;
- fees and charges (do not allow your experts to charge on a success fee basis or to charge a higher fee if your client is successful);
- what happens if the opinion is provided and you decide not to use it; and
- the retention of documents provided to and generated by the expert during and at the end of the retainer.

Remember that there is no property in a witness, and that your expert witnesses are at liberty to talk to your opponent as well. Also, experts who you decide not to call can still be subpoenaed by other parties. You should send retainers to anyone you engage for expert assistance as well.

## 5.2 The instructions to the expert

The instructions to the expert should be written with the knowledge that they will be provided to the Court and the other parties. They should

- identify the parties and the dispute
- attach copies of all relevant documents (checking that no privileged material is disclosed)
- state any assumptions you want the expert to make (and ensure sure you can prove those assumptions)
- ask the expert to set out their relevant experience

- ask for an opinion - either generally or as a series of questions
- ask the expert to identify the documents on which the opinion is based
- give guidelines as to the form of the report you want
- attach the relevant code of conduct or Court/Tribunal Rules

The instruction can be folders of material duly tabbed, paginated and organised like a good brief to counsel or they can be by way of a solicitor's letter which either describes the dispute or attaches the relevant pleadings, states the relevant assumptions, and asked for the expert to provide their curriculum vitae and a summary of their relevant expertise and then their written opinion on listed issues or questions. Either way, the instructions are an opportunity to define the playing field and their significance cannot be overstated. The best experts are of little assistance if they are not asked the right questions.

A word of warning - don't delay in engaging an expert or in getting documents to them. Many well known experts are very busy and will require a long lead time to produce a report. In ***Martincic -v- Marusco*** [2016] WASCA 133, a failure to adhere to court deadlines lead to refusal of an adjournment where a party had not made reasonable attempts to mount its defence, including timely engagement of an expert. The defendants in the primary proceedings had applied for leave to appeal against a decision by the trial judge not to vacate the hearing dates. The application argued that the defendants had been unreasonably denied 'unfettered' access to books and records, including computers, to provide to their expert accountant. Leave was denied, partially due to the defendants *"failing to brief their accountants about information in their possession earlier, not being sufficiently proactive in securing the report and in failing to utilise the formal and informal means available to them to obtain copies of relevant documents".*

# 6. Presenting expert evidence to the Court

## 6.1 Cross examining the other side's expert witness

Most expert evidence is given, at least initially, by the production of written reports by the expert. However, other methods are also acceptable. In ***Gambro Pty Ltd v Fresenius Medical Care South East Asia Pty Ltd*** (2004) 61 IPR 442 evidence was given by way of a tape recording of a discussion between the solicitor and the expert, which the judge considered very helpful.

Traditionally the report would be tendered and stand as the witness' evidence in chief. The other party would then cross examine the expert. The most effective cross examination requires counsel to have an understanding of the subject matter in dispute, which is why, for example, many building lawyers have a background in engineering, and many patent lawyers have chemistry degrees. Having said that, there are many excellent lawyers who have learnt from experience and/or are able to pick up and understand scientific concepts when explained to them (for example by expert assistance - see paragraph 2.2 above).

There are many techniques for challenging an expert's evidence in cross examination, including:

- challenging their qualifications or experience
- questioning the basis for their opinions (i.e. if the instructions they were given are found to be incorrect, does their opinion change)

- their independence - how much of their report was written or settled by lawyers, what do they stand to gain from their evidence, their connection to the parties
- whether their knowledge is up to date
- contamination of exhibits
- flaws in testing used
- prior inconsistent statements
- whether they would agree with alternative explanations or hypotheses.

### 6.2 Joint reports and concurrent evidence

More recent developments in the use of experts see the production of joint reports, the requirement that both sides experts answer a series of Court-generated questions, and the widely discussed "hot tub" process. Courts are more likely than not now to order one or more of these processes, as can be seen from the rules and practice notes set out above.

The rules in most jurisdictions are very flexible, and the bench is showing an increasing desire to control how evidence is presented to it rather than letting the parties present their evidence in the way that they consider most appropriate. Such judicial activism may be a response to perceived shortcomings, deliberate or accidental, in the presentation of expert evidence by the parties. Presenting your expert evidence clearly and innovatively may avoid the need for Court intervention and allow your chosen experts to inform and educate the Court in the manner that you or your counsel consider to be the most appropriate.

These processes remove much of the traditional cross examination opportunities, as:

- Judges often ask the relevant questions themselves,
- the experts have met and conferred in a conclave prior to the hearing,
- they have often produced a joint report which considers alternatives,
- you can rely on your own expert to question the other side.

Many traditionalists are not happy with these processes as the lawyers tend to lose control of the evidence. However most courts now find they save time and increase understanding of the issues, often leading to a more just outcome.

## 7. Common issues in dealing with experts and expert evidence

### 7.1 are communications with experts legally privileged?

**Under the *Evidence Act* -**

Draft expert reports and communications passing between an expert and the client's lawyers will attract client legal privilege if, inter alia, they satisfy the conditions of s 119 of the *Evidence Act*, in that they are:

- confidential, and

- were prepared or made for the dominant purpose of the client being provided with professional legal services in relation to an actual, anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

The privilege may be waived under s 122(2) e.g. if the client or party concerned has already disclosed the relevant documents or communications.

**At common law -**

Ordinarily, the confidential briefing or instructing by a prospective litigant's lawyers of an expert to provide a report of his or her opinion to be used in anticipated litigation attracts client legal privilege:

- Copies of documents, whether the originals are privileged or not, where the copies were made for the purpose of forming part of confidential communications between the client's lawyers and the expert witness, ordinarily attract the privilege

- Documents generated unilaterally by the expert witness, such as working notes, field notes, and the witness's own drafts of his or her report, do not attract privilege because they are not in the nature of communications

- Ordinarily, disclosure of the expert's report in order to rely on it in the litigation will result in an implied waiver of the privilege in respect of the brief or instructions or documents referred to in (1) and (2) above,

- Similarly, privilege cannot be maintained in respect of documents used by an expert to form an opinion or write a report, regardless of how the expert came by the documents.

In ***Sprayworx Pty Ltd v Homag Pty Ltd*** *[2014] NSWSC 833,* the NSW Supreme Court looked at whether communication of suggested changes to an expert is an implied waiver of client legal privilege over both the communication and the expert's draft report.

Sprayworx entered into a contract to purchase a belt sanding machine with Homag. Sprayworx alleged that Homag supplied it with a defective sanding machine, engaged in misleading or deceptive conduct, and was negligent. To establish Homag's liability, Sprayworx relied on the reports of two experts; Professor S, with an engineering background, and Mr K, a forensic accountant.

Homag served notices to produce the draft reports prepared by Professor S, and the communications between both Professor S and Mr K and Sprayworx or its solicitors. Homag alleged that some of the communications influenced the expert opinions "in a way that requires disclosure." Sprayworx claimed privilege over the documents.

Homag agreed that the documents of which they sought production were protected by client legal privilege, but contended that the privilege had been waived because the documents had been used in a way that influenced the expert opinions, which is inconsistent with privilege. Therefore, they argued, it would be 'unfair' for Sprayworx to rely on the final expert reports without disclosing the draft reports and communications, and disclosure was "reasonably necessary to understand the experts' reports".

Section 126 of the *Evidence Act* 1995 (NSW) allows for disclosure where it is "reasonably necessary to enable a proper understanding of the communication or document".

Both Sprayworx and Homag agreed that the Court could inspect the documents claimed to

be privileged to consider whether Sprayworx and its solicitors influenced the expert opinions "in a way that requires disclosure."

Associate Judge Harrison inspected a letter written by Sprayworx's solicitors to Professor S, found that its purpose was to request him to make changes where he deemed them necessary in light of new documents and instructions, and with respect to the barrister's mark-ups, accept the changes where appropriate, and therefore her Honour could not *"draw the inference that those comments by the solicitor could be said to influence the substance of Professor [S]'s final report."*

In relation to the letter written by Sprayworx's previous solicitors to Mr K, providing him with further instructions, Her Honour found that there was *"nothing contained in that letter that is in any way suggestive of an intention to influence the substance"* of Mr K's report. Her Honour could also not find that the solicitor's comments influenced the report's content in a way that its use would be inconsistent with maintaining the privilege in the documents, including it being unfair for Sprayworx to rely on the final report without disclosing the draft report and communications.

In addition, her Honour examined Professor S's final report and held that it could be thoroughly understood without requiring the disclosure of the draft reports and communications between the Professor and Sprayworx or its solicitors.

The judgment reinforces that communicating with an expert to update instructions, provide further information, or suggest changes of form and admissibility, do not in themselves constitute an automatic waiver of privilege once the report is adduced. This judgment, however, shows that there are actions for lawyers and experts in order to help reduce the risk of accidental waiver of legally privileged documents, such as:

- explicitly identifying the purpose of any draft report (when requesting one, or when delivering one)
- ensuring that the expert refers in his or her report to any information and instructions relied upon that were included in communications other than the instruction letter
- ensuring that suggested changes for an expert report are just that: suggestions. Remind the expert to adopt them only where appropriate, and to maintain independence
- identify explicitly changes that are required for admissibility. This will add clarity later if correspondence is to be produced.

## 8. Case study - Understanding the Code of Conduct for Expert Witnesses

*James Maxwell Holdsworth and Heather Munro Ellison v RSCPA (Vic) Incorporated [2015] VCC 653*

In this case, the evidence of two of the experts (one called by each party) was criticized in the judgment. All of the issues that impacted the acceptance of the evidence could likely have been identified before the experts were engaged or issued their reports. Had more regard been given to the Code of Conduct, the defects with the expert evidence should have been apparent to the parties' lawyers before the trial commenced.

There was a drought in the Warrnambool region of Victoria which led to the RSCPA putting down a number of the plaintiffs' cattle in late May 2003. As a result, the plaintiffs were left with too few breeding cattle, and they were required to sell calves to meet financial

obligations. In late 2003, the drought broke which led to the recovery of the condition of the remaining cattle of the herd. The Court found that the defendant was liable for wrongly putting down 131 cattle and the losses that resulted.

Four financial experts were engaged to quantify the loss suffered. Two of them were criticised in the judgment for a number of reasons, outlined below.

**Mr D's expert evidence**

Mr D was engaged by the defendant. He provided multiple reports estimating the loss. The Court commented on three main issues with Mr D's evidence:

- The appropriateness of his expertise - he relied on the expertise of another partner in his firm who had more experience in cattle enterprises and he did not know relevant data such as the quality of the herd, the age of the cattle, the effect of the drought on breeding rates, the ability of the plaintiffs to manage the farm;

- The number of errors in the reports, which resulted in three revised reports, and the calculation of loss more than doubling - Justice Bowman stated that *"any remaining confidence which [he] had in the report of [Mr D] was further eroded by the number of errors that plagued the reports and the calculations"*. Additionally, he said *"The complexity resulting from his errors is such that the whole of his evidence should be rejected"*; and

- The appropriateness of his instructions - Mr D's report proceeded from instructions *"to deal with the animals as being commercial and not stud animals, or stock that could become stud animals"*. Justice Bowman held that Mr D's *"assumption that this was going to be a commercial herd and not a stud one seems to … be misplaced"*;

**Mr T's expert evidence**

Mr T was engaged by the plaintiffs to provide a loss estimate. The Court considered his independence to be compromised because:

- When a university student, Mr T had worked on a farm owned by one of the plaintiffs. At that time, Mr T met the other plaintiff, and became friends with them and their accountant;
- Mr T was the accountant for the plaintiffs' partnership;
- Mr T was owed fees for accounting work;
- Mr T's brother had advanced to the plaintiff a loan for payment of water rates; repayment had not yet occurred;
- Mr T originally took instructions from the plaintiffs, rather than their solicitors;
- Additionally, Mr T had had contact with the brother of one of the witnesses prior to contact with solicitors;
- Mr T initially omitted from his initial calculations the plaintiffs' artificial insemination operations, as he was not able to determine that they had been at a commercial stage. In subsequent reports, after receiving an email from the plaintiffs' solicitors, he included an 'extremely sizeable' amount regarding artificial insemination;
- Mr T's calculations included estimates of the worth of each artificial insemination straw without having obtained expert evidence of their value; and
- The plaintiffs' solicitors had advised the solicitors for the defendant that Mr T's report would not be put forward because he was the accountant for the plaintiffs, and was not independent.

Mr T's loss calculation produced an amount that far exceeded that in the other experts' reports (including the plaintiffs' other experts). After considering all this, Justice Bowman

said that Mr T *"cannot be viewed as an independent expert witness. That does not mean that his evidence is to be totally ignored. However, … the weight to be attached to his evidence seems to me to be greatly reduced"*.

The three shortcomings of Mr D's expert evidence highlight the need for solicitors to mitigate the risk of their expert being criticised and the evidence being undermined. This can be achieved by ensuring that experts:

- have the appropriate level of expertise in the subject matter;
- either prepare all of their report themselves; or are able to explain portions prepared by others under their supervision;
- report all sources of information;
- conduct quality assurance checks on the report to avoid the need for later revision ; and
- are provided with appropriate instructions.

Mr T's lack of independence is a reminder that where an expert is perceived to have, or has an actual, conflict of interest, the weight given to his or her evidence will be significantly reduced.

## 9. Case update – Scholastic Cleaning Supply v Hudspeth

***Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd & Ors***
[2013] VSCA 14 (4 February 2013)
[2014] VSCA 3 (6 February 2014)
[2014] VSCA 78 (16 April 2014)
[2014] VSC 542 (20 November 2014)
[2014] VSC 567 (20 November 2014)
[2014] VSC 622 (16 December 2014)

The first defendant employed the plaintiff as a cleaner. Her cleaning duties included a boys' toilet at the second defendant's school. On 27 April 2005, the plaintiff was confronted with a mess of liquid soap that had emanated from the soap dispensers in the toilet, which appeared to her to have been vandalised. When cleaning up the spill, the plaintiff slipped, which she contended was a cause of her injuries.

At the trial, the plaintiff called evidence from Mr D, a professional consulting engineer, with qualifications in mechanical engineering who had a forensic practice in the field of occupational health and safety. During the trial it became apparent that three different versions of the plaintiff's expert report were floating around:

**First Report:** A report dated 9 April 2010, which the expert had signed and sent to the plaintiff's solicitors, before the trial. The First Report was served on the defendant.

**Second Report:** A report dated 9 April 2010, which was an amended version of the First Report. The Second Report included changes made by the expert's assistant at the request of the plaintiff's solicitors, without the expert's knowledge or approval of those changes or of the existence of the Second Report. The prime difference was in the use of the word 'not' in relation to whether Ms H had seen previous incidents of vandalism in the toilets.

Several issues with the first and second reports were identified during the appeal process:

1. The second version of the report (prior vandalism), was not in fact a report that Mr D had prepared and authorised.

2. The second version did not comply with Order 44 of the Rules6 as it failed to identify an important source of factual information, being instructions from Ms H's solicitors.7

3. The relationship between Ms H's solicitor and Mr D, which led to alterations without approval to the second version, was "inconsistent with the proper independence to be expert witness".

4. Confusingly, at trial Mr D identified that the correct version was the first, no prior vandalism, version, but on appeal changed that view to identify that the correct version was the second, prior vandalism, version.

Tate JA summed up:
*"[38] Whatever the motivations may have been, and whatever misunderstanding there were, the effect of what occurred is that [Ms H's] solicitors altered the account of what the appellant has told [Mr D] in the course of his interview with her."* … "[41] *His position now that the version 'with the not' (no prior vandalism) is the incorrect one is a remarkable departure from his evidence in trial."*

**Third Report:** A report dated 12 November 2010, which was a further amended version of the First Report. The Third Report included changes made by the expert's assistant at the request of the plaintiff's barrister, when it became apparent that the assumed facts in the First Report were inconsistent with the evidence given by the plaintiff during the trial. The expert signed the Third Report and provided it to the plaintiff's barrister, but it was not provided to the plaintiff's solicitors, nor was it served (a contravention by Ms H's senior counsel of Order 44 the Rules). It was uncovered during cross examination at trial. Again, like the prior vandalism version of the 9 April 2010 report, the instructions or dealings with Ms H's senior counsel were **not** disclosed in the 'Documents and materials' section.

Whelan JA stated: *"Thus, if the report were read in isolation it was open to be interpreted, in relevant respects, as an account of what [Mr D] had been told by [Ms H]... In that respect the report, on its face, was misleading."*

The trial at first instance was before Dixon J and a jury of six. She lost and appealed, because of comments made by the second respondent's senior counsel in his closing address at trial. Those comments related to the conduct of Ms H's legal team regarding expert evidence during the trial. The appeal was upheld as it was ruled that the comments had prejudiced Ms H in the eyes of the jury. The case was ordered to be re-tried by the trial judge and Ms H's senior counsel and solicitors ordered to each indemnify the second respondent for 40% of its liability to pay Ms H's costs of the appeal, as their conduct had provoked the comments made by the second respondent's senior counsel and thus the miscarriage of the first trial.

On the remitted hearing, Dixon J allowed the claim against the school, awarded Ms H damages of $610,400 plus costs, and made the following findings about the conduct of the plaintiff's solicitors, barrister and expert:

- The plaintiff's barrister breached his paramount duty to the Court

- The plaintiff's solicitors breached the overarching obligation to disclose the existence of the Third Report

- The plaintiff's expert:

- breached his overarching obligation not to engage in misleading or deceptive conduct by failing to disclose the Third Report and therefore leading the Court to the wrong assumption that it had not been prepared or adopted, and

- failed to adhere to the Expert Code of Conduct when giving his evidence in chief by not mentioning the existence of the Third Report.

Dixon J ordered:

- the expert to indemnify each of the plaintiff's solicitors and barrister for 13.333% respectively, in respect of their liability to pay the costs of the appeal, and

- the plaintiff's expert, solicitors and barrister each pay one-ninth of the school's costs.

---

**Suzanne Kirton**

**24.2.17**