

Has the High Court re-written the rules on expert evidence?

by Sue Gatford

The rules about what is and is not admissible evidence changed in Victoria last year with the adoption of the *Evidence Act 2008 (Vic)*. The Act is substantially based on model legislation developed by the Australian Law Reform Commission, which has been operating in Commonwealth and New South Wales Courts since the 1990's.

The Commonwealth and State Acts, referred to as the Uniform Evidence Acts, are not considered to constitute a complete Code (other relevant legislation still exists) and after their enactment it was generally thought that common law principles relating to expert evidence continued to apply. Until, that is, the High Court's decision in *Dasreef v Hawchar* [2011] 277 ALR 61; [2011] HCA 21.

In *Dasreef* the High Court said that the relevant section of the New South Wales *Evidence Act* relating to expert evidence is a complete guide to admissibility.

Expert evidence is...

Expert evidence is a form of opinion evidence. When it comes to opinion evidence the common law and the *Evidence Acts* are clear - opinions are not admissible (the opinion rule). The Court's task is to make findings of fact and law, and an opinion is neither. However, Courts have long recognised that in areas of special expertise a particularly qualified person's opinion can help, and should be available to the Court. Expert opinions may therefore be accepted by a Court as an exception to the general prohibition.

In order to guard against irrelevant opinions, the following common law principles have developed:-

1. the opinion has to be on an area that the Court accepts is an area of specialised knowledge;
2. the witness must demonstrate that by reason of specified training, study or experience they are an expert in that area;
3. the opinion must be on matters within that area of expertise;
4. the expert must state, and the party calling the expert must prove, the facts on which the expert opinion is based;
5. if any facts relevant to the opinion are assumed they must be identified and proved in some other way; and
6. the expert must explain how the opinion expressed was reached.

Under the *Evidence Act* the general prohibition, that is, the opinion rule, is in section 76, which provides that:-

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

The exception for experts is in section 79, which 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."

Now, the *Evidence Act* doesn't expressly say anything about points 4, 5 and 6 above: proof of underlying facts, assumptions and reasoning. So the issue is whether those rules still apply or whether the Evidence Act has relaxed these common law requirements. And so we come to the High Court and *Dasreef*.

Farewell Leigh Jackson

The List held a wonderful dinner in August to farewell Leigh Jackson upon his retirement as clerk and to celebrate his 15 years service to the List and to our solicitor supporters. I'm sure you will join with me in wishing Leigh a very happy retirement.

We also farewelled and recognized Richard Smith SC, our previous List Chairman, on his appointment as a Judge of the County Court; Rod Randall on his appointment as an Associate Justice of the Supreme Court; Bill Lally QC; Bill Martin QC and John Bell on their retirement after many years service to the List and the Bar.

The business name Gordon & Jackson will continue with Ross Gordon remaining as clerk to the List. Gordon & Jackson will continue to provide an expert level of representation and advice from our barristers; and you can expect the same high level of service from our office staff.

Booking enquiries should be directed to the clerks you are familiar with, Ross Gordon and Michael Rowan and our new clerk, Susan Wilkes.



Leigh Jackson and Judge Richard Smith



Ross Gordon, Leigh Jackson, Michael Rowan & Susan Wilkes

The facts in *Dasreef*

Mr Hawchar worked as stonemason for *Dasreef* between 1999 and 2005. In 2004 he was diagnosed with scleroderma and in 2006 with silicosis. The issue was whether his silicosis was as a result of his exposure to silica dust whilst working for *Dasreef*. Mr Hawchar was successful in the New South Wales Dust Diseases Tribunal and was awarded damages of \$131,130.43. At trial there was evidence from an expert pathologist that, based on the period of latency of his disease, Mr Hawchar's exposure to silica had been intense and was attributable to a history of exposure to silica dust over a period of six years beginning in 1999.

In addition, Mr Hawchar led evidence from Dr Basden, a chemical engineer and founding member and fellow of the Clean Air Society of Australia. Dr Basden had conducted many field and laboratory investigations into air pollution and workplace atmospheric contamination. It was accepted that he was experienced in the measurement of respirable dust concentrations, but no such measurements in respect of *Dasreef*'s workplace were either provided to him or undertaken by him. He also admitted that he had never measured the respirable fraction of dry ground sandstone, which was the stone worked by Mr Hawchar at *Dasreef*. Despite this he speculated in his report about the likely concentration levels to which Mr Hawchar had been exposed, and those speculative comments were used by the judge to undertake some calculations of his own which formed the basis of the following finding.

“Findings on expert evidence

89. Mr Hawchar, when using an angle grinder in the employment of *Dasreef*, was frequently exposed to high concentrations of dust, which exceeded the maximum time weighted average of 0.2 mg/m³ for one week mandated by the WorkSafe Australia standard.”

Both the majority judgment of French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ and the dissenting judgment of Heydon J found that Dr Basden's speculative opinions as to exposure levels (or “guesstimates”, as Dr Basden called them) ought not have been admitted, and thus that the judge's finding above was unsupported by any admissible evidence. They were also critical of the trial judge for not making a ruling as to the admissibility or otherwise of the evidence during the trial. The trial judge had allowed Dr Basden to be cross-examined as on a *voir dire* (that is, in order to determine whether his evidence ought be admitted) but had not then made any ruling on admissibility, instead reserving the issue and publishing his decision as to admissibility in his final reasons.

Appellate courts have warned in the past of the need for timely evidentiary rulings by their trial judge counterparts so this aspect of the decision is not really new, although when a unified High Court speaks in strong terms it behoves trial judges (and those who appear before them) to sit up and take notice.

But the more interesting part of the decision as a precedent in future cases is the application by the majority of section 79, and the reason that the majority gave for the evidence being inadmissible. They said that because Dr Basden had no training, study or experience of the actual level of sandstone particles to which Mr Hawchar was exposed his “guesstimate” of the exposure levels was inadmissible. They expressly stated that this finding was not an application of the common law rules 4, 5 and 6 above (proof of underlying facts, underlying assumptions and explanation of reasoning, collectively the so-called “basis rule”), but simply an application of the words of section 79 itself.

This approach refines the concept of the scope of an expert's “specialised knowledge” in an interesting way. Applying the High Court test, to make Dr Basden's “guesstimates” admissible he would have had to have had “specialised knowledge” of the concentration levels at *Dasreef*'s premises. How could he have obtained such knowledge? Presumably either by conducting measurements at *Dasreef* or by conducting measurements in environments established as being sufficiently comparable to it. Thus his “specialised knowledge” becomes, in effect, the performance of tests to determine the underlying facts supporting his opinion.

Understandably, Mr Hawchar's lawyers submitted that this approach seeks to introduce the “basis rule” into section 79. They pointed to the deliberate non-inclusion of that rule by the Law Reform Commission, and said that the Court ought not to do now what the legislature had deliberately not done when drafting and enacting the legislation. The Court's riposte was that it was doing no such thing, that it was not concerned with what the common law had been, and that it was simply interpreting the words of the section. By contrast, Heydon J (dissenting) said that the Law Reform Commission had simply got it wrong - that it had assumed (incorrectly) that the basis rule was not part of the common law and that because the *Evidence Act*, which is not Code, had not abolished that rule it continued to apply along side section 79 to govern admissibility.

So what does it all mean?

The High Court's approach in *Dasreef* is unlikely to lead to radical changes in the preparation of expert evidence. It has not changed what you should be considering in briefing experts or the practical steps to take to ensure that the Court has before it the best evidence possible.

The codes of conduct/guidelines for experts issued by various Courts still apply. For example, under the *Federal Court Rules 2011*, which came into operation on 1 August 2011, all expert reports must separately set out:-

- the opinions within the report;
- the factual findings or assumptions on which each opinion is based; and
- the reasoning for each opinion [see FCR 23.11(2)].

In Victoria, the *Civil Procedure Act 2010* also has its own separate consequences for experts, particularly any who fail to make complete disclosure to the Court. *Dasreef* does not change any of this. It does, however, provide a process by which each opinion of your chosen expert can be assessed. First, you need to identify the area on which an opinion is required - is it an area of specialised knowledge, and how broadly or narrowly should the relevant area of expertise be defined? Secondly, you need to ask whether your expert is sufficiently experienced/qualified in that area to express an opinion.

The breadth or otherwise of the answer to the first question may determine the answer to the second. For example, Dr Basden was accepted as an expert in the measurement of respirable dust concentrations but had never measured the respirable fraction of dry ground sandstone, which was the stone worked by Mr Hawchar at *Dasreef*. So you need to be very careful and, according to the High Court, very specific, in identifying the area of expertise.

By the way, for those interested in the result, Mr Hawchar nevertheless held his judgment for \$131,130.43. This was because the High Court (Heydon J again dissenting) said that the impugned findings of the trial judge were immaterial to the result, and that the evidence of the pathologist was sufficient to establish *Dasreef*'s liability. So perhaps the final message from *Dasreef* is only to lead expert evidence if you really need to.

Susan Gatford is a barrister who specialises in commercial and intellectual property law. She is presenting a half-day Continuing Professional Development Seminar on expert evidence later this year, further details of which can be found at www.cpbs.com.au.



Summary dismissal of Testator's Family Maintenance claims

by Thomas Mah

Introduction

In *Jackson v Newns* [2011] VSC 32 a family maintenance claim was summarily dismissed on the basis that the claim was "hopeless". Since then a considerable number of applications for summary judgment have been made, although none have succeeded. Written judgments were delivered in three such cases (coincidentally, all by Zammit AsJ).

Story v Semmens [2011] VSC 305

The deceased passed away in 2010 leaving an estate worth approximately \$2.35 million. The deceased had three children, John, Janet and Barbara. Barbara predeceased the deceased in 2000 leaving four children, including the plaintiff. In her will, which was drafted after Barbara's death, the estate was distributed to John and Janet.

The plaintiff was 40 years old. She worked as an engineer with an annual income of approximately \$150,000. She owns her own home which was valued at approximately \$750,000 which was subject to a mortgage of approximately \$235,000. She also had superannuation entitlement of approximately \$100,000. The plaintiff was in a relationship but was not married and did not have children.

The plaintiff had a fairly typical caring grandchild to grandparent relationship. The plaintiff did not appear to contend that the deceased was *in loco parentis* for her, or that she had provided substantial support or care to the deceased.

The Court found that the deceased arguably had a moral obligation to make adequate provision for the plaintiff and that the plaintiff had lost the possibility of immediate and continuing support that she would have received from her mother Barbara. Further, the Court found that the fact that the plaintiff was financially comfortable did not preclude a finding in her favour.

Wollensack v Leone [2011] VSC 324

The deceased passed away in 2010 leaving an estate worth approximately \$1.25 million. The beneficiaries under the deceased's will were his siblings and a niece and a nephew. The plaintiff, who was the deceased's older sister, received \$10,000.

The plaintiff was 66 years old and had no significant assets. She received a pension and lived in rented Housing Commission accommodation.

The plaintiff had a close relationship with the deceased. After the plaintiff's first divorce the deceased helped the plaintiff to look after her children, and to some extent performed the role of father to her children. The deceased provided financial and emotional assistance to the plaintiff throughout her life however the extent of the assistance was not clear.

The fact the deceased had provided such assistance to the plaintiff was sufficient for the Court to find that the prospect of the plaintiff's claim succeeding was realistic and not fanciful. Accordingly the extent and the nature of the assistance provided by the deceased, and the extent of the plaintiff's reliance upon the assistance would need to be properly investigated at trial.

Importantly, the Court indicated that, had there been no evidence of financial or emotional assistance, then it would have been appropriate for the claim to be summarily dismissed.

Further, the Court specifically rejected *Athour v McElhone* [2010] QSC 177 in which the Queensland Supreme Court refused to summarily dismiss a maintenance claim even though the claim was practically hopeless. Such an approach, her Honour opined, would undermine the intention of the Civil Procedure Act and would be in contravention of the overarching obligations.

Webb v Ryan [2011] VSC 461

This claim was unusual and was described as sitting at the "very margin" of maintenance claims. The plaintiffs were a married couple and their four adult children. The plaintiffs were not related to the deceased, but had a longstanding personal and business relationship with the deceased such that they regarded the deceased as a part of their family.

The deceased was a widower without any children. He left an estate worth approximately \$900,000 to his nieces and nephews.

The application for summary judgment was dismissed notwithstanding the Court's adverse comments regarding the merits of the claims. The Court noted that the application was made after interlocutory steps and mediation had been completed, and that the matter was ready for trial. In that case, it was an unfair use of summary judgment procedure to deprive the plaintiffs of a trial.

The Court further observed that the application should have been made at the close of the plaintiff's evidence.

Conclusion

While the test for summary judgment under the Civil Procedure Act 2010 may be less stringent, the above cases demonstrate the continued reluctance to dismiss a proceeding without a full trial. Equally, however, the outcome in *Jackson v Newns* and the comments in *Webb* and *Wollensack* make plain that, where appropriate, proceedings that are hopeless would be dismissed.

For a legal practitioner acting for a claimant, the claim must be carefully analysed before any proceeding is commenced. Once commenced, the practitioner must ensure that all relevant facts which would support the claim must be included in the supporting affidavits.

Likewise, when acting for a defendant, great care should be taken before an application for summary dismissal is made. If such an application is to be made, then the appropriate time to make the application is after the plaintiff has filed his or her supporting affidavits.

Thomas Mah has a strong Probate and Succession Law practice.



We warmly welcome Paul Glass who has commenced taking briefs:



Paul Glass

BSc (Psysc), LLB (ANU), MAppLaw (Family Law)

Paul attended Melbourne Grammar School and the Australian National University before recently completing his Masters at the College of Law.

Paul has a strong background in family law, practising almost exclusively in that jurisdiction both in Melbourne and Canberra. Prior to joining the Bar, Paul was employed with Victoria Legal Aid as a Senior Family Lawyer. He is well versed in all aspects of family law practice and has extensive advocacy experience in the Federal Magistrates Court and the Family Court of Australia. In late 2010, Paul appeared in a successful nullity application founded on the pressure exerted on a bride by her parents to marry the groom of their choosing in India (Kreet & Sampir [2011] FamCA 22). Paul has a passion for advocacy and in addition to family law he is keen to appear in mediations, criminal matters, intervention orders and in the Children's Court.

Paul is a keen kite surfer and is reading with Patrick O'Shannessy.

Introducing Susan...



Susan Wilkes is our new employee clerk and is settling into her role well, having been with Gordon & Jackson since July.

Susan graduated Bachelor of Laws, University of Adelaide in 1988. She has a legal background primarily in Criminal Law handling indictable crime. Susan achieved Specialist Accreditation in criminal law with the Law Institute of Victoria in 1996. Susan was Associate to the Honourable Justice Olsson, Supreme Court of South Australia. She has worked with the Criminal Law Section of the Legal Services Commission of South Australia, the Criminal Law Division of Victoria Legal Aid, with David Tonkin & Associates and with Leanne Warren & Associates. Before relocating to Melbourne recently to join us, Susan was employed for a community based organisation in the mental health sector in Adelaide in Communications / Business Services. Susan is a keen Carlton supporter.

Susan is looking forward to hearing from you!

It's 3rd for the Vics as the Cats reign supreme



Ross Gordon missed watching his beloved Cats snare victory in this year's AFL Grand Final as he was playing hockey for the honour of Victoria in the veterans' hockey championships held in Canberra. His team finished third in the Over 55 Div 2 competition.

GORDON & JACKSON
BARRISTERS' CLERKS

Owen Dixon Chambers T 03 9225 7333
205 William Street F 03 9225 7907
Melbourne Vic 3000 E clerks@gordonandjackson.com.au
DX 94 Melbourne W www.gordonandjackson.com.au