

# Using Expert Evidence to Best Effect

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# Working with Experts

## Advanced Practical Tips

## Briefing Experts

- ▶ Two categories – liability and damages (eg medical, OT, accounting)
- ▶ Ensure appropriate expertise
- ▶ Credibility
- ▶ May brief expert before or after proceedings commenced – best before in complex matters eg med neg
- ▶ Where appropriate, seek preliminary view\*
- ▶ Brief should include:
  1. Detailed letter of instructions – outline, background, assumptions, questions (ask the correct questions - with expert assistance);
  2. Relevant documents; SOC, SOP, plans, photographs, business records, medical records, relevant subpoenaed documents; and
  3. Code of Conduct.

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- ▶ Is it necessary for the expert to interview or examine client or can opinion be based on documents? If interview, ensure draft reviewed by client to ensure accuracy
  - ▶ Is it necessary to hold a conference with counsel and/or expert;
    - ▶ to ensure correct expert?
    - ▶ to ensure correct questions are asked in the letter of instruction?
    - ▶ after material reviewed/inspection/preliminary view formed but before report drafted?

## When things go wrong



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- ▶ Code of conduct – Advocate\*
  - ▶ Letter of instructions – request in appropriate circumstances
  - ▶ Included unsigned statement\*
  - ▶ Assumptions – ensure expert basis opinions on the assumptions that can be proven\*

# Disclosure

- ▶ No need to disclose at point of briefing
- ▶ Documents provided to expert will be disclosed to other side in due course
- ▶ Not required to disclose name of expert (privileged)\*
  - May not obtain a favourable report\*
  - Jones v Dunkel

# Privilege

- ▶ Use of a particular expert is privileged prior to service of report
- ▶ Generally, all documents are privileged prior to service of the expert report
- ▶ If expert report is served pursuant to court order – arguable privilege not waived until report is relied upon ie at hearing (s 122(5)(a)(iii) Evidence Act) – but see:
  - Dubbo City Council v Patrick Joseph Barrett* [2003] NSWCA 267;
  - Gillies v Downer EDI Ltd* [2010] NSWSC 1323 at [46]; and
  - Actone Holdings Pty Ltd v Gridtek Pty Ltd* [2012] NSWSC 991, Harrison J at [24].
- ▶ Once privilege is waived the letter of instruction, draft report and experts notes in preparation of report will usually need to be disclosed if requested (ensure expert is aware of this)
- ▶ There is an argument that if the expert is instructed to prepare a draft report for the purpose of the lawyer's comment before finalisation, the draft may remain privileged. However, this may be challenged, therefore, presume privilege will be lost.
- ▶ Communication between lawyer and expert will usually remain privileged

# Communicating with Expert

*"In an effort to avoid any sense of impropriety and influence over the expert, there is a tendency for lawyers to be too cautious when briefing an expert. The Courts have held that **lawyers can, and should, be involved in the preparation of expert reports.**"*

Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 7) [2003] FCA 893 at [19] (Lindgren J).

*"When reviewing expert reports, the role of the lawyer is **limited to assisting** the expert with the **form** of their report, identify any areas of the report that require **clarification** and ensure the **admissibility** of the report."* (Ibid. [27])

*"Lawyers can discuss draft reports with experts and request changes to the report to ensure it is admissible, **however the lawyer should be careful not to influence the substance or opinion of the expert.**"*

Universal Music Australia Pty Ltd v Sharman License Holdings Ltd [2005] FCA 1242 at [231] (Wilcox J).

- ▶ It would be improper to try to influence the opinion of the expert. Any communication to that effect would be inconsistent with the maintenance of privilege.

*"Such an inconsistency will arise if the communications have influenced the expert's report and it would be unfair to allow reliance on it without disclosure of the communications"*

New Cap Reinsurance Corporation Ltd (In Liq) and 1 Or v Renaissance Reinsurance Ltd [2007] NSWSC 258, White J at [53].

# A Word on Privilege

- ▶ Privilege should always be at the forefront of your mind
- ▶ Sometimes your focus is on one thing without considering another eg drafting an affidavit to support an interlocutory application\* and not considering the issue of disclosure of privileged information
- ▶ In some cases, it may be necessary to waive privilege, eg extension of time applications, however, it is the client's privilege and privilege should only be waived after careful consideration, not in error.

# Admissibility

- ▶ Expert Code of Conduct UCPR **Schedule 7**
- ▶ **Rule 31.19** Parties to seek directions before calling expert evidence otherwise need leave (if late, serve and seek leave, at next direction, or if close to hearing, by motion)
- ▶ **Rule 31.23** Expert must comply with Code of Conduct
- ▶ **Rule 31.27** Expert Reports – sets out content of report
  - i. expert's qualifications
  - ii. Facts and assumptions of fact, on which opinions are based
  - iii. Expert's reasons for each opinion etc
- ▶ **Rule 31.28** Disclosure of experts' reports – in accordance with court order, if no such order, in accordance with practice note or not later than 28 days before hearing or need leave but only if exceptional circumstance
- ▶ **Rule 31.29** Admissibility of expert's report if served in accordance with rule 31.28 – no need to call expert (unless expert required for xx by other party)

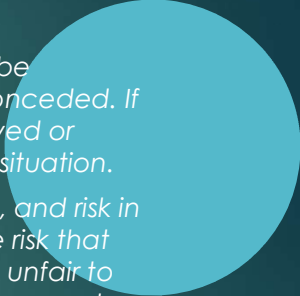
# S 79 Evidence Act Exception: Opinions based on Specialised Knowledge

- ▶ (1) 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.
- ▶ **Rule 31.27** Expert Reports – sets out content of report
  - i. expert's qualifications
  - ii. Facts and assumptions of fact, on which opinions are based
  - iii. Expert's reasons for each opinion etc

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- ▶ *Museth v Windsor Country Golf Club Ltd* [2016] NSWCA 327  
McDougall J, with whom Gleeson JA and Barrett AJA agreed, after having referred to *Dasreef* and *Makita*, stated at 42:


*"In my view, purported expert opinion evidence should not be admitted unless the requirements of s 79(1) are proved or conceded. If evidence is admitted without those requirements being proved or conceded, the opposing party is placed in a most invidious situation.*

*Counsel for that party has two choices: to test the evidence, and risk in effect making good its defects; or not to test it, and take the risk that the trial judge might find it persuasive. In my view, it is grossly unfair to put a party in that situation. If parties and their legal advisers cannot ensure that purported expert opinion evidence meets the basic requirements for admissibility, the consequences should fall on them, not on the other party."*



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- ▶ Further, at 43:

*"Further, in my view, it is not consistent with r 31.28 to permit expert evidence to be given, particularly on a vital topic, unless the requirements of the rule have been met (or the opposing party consents)."*





## Leading Authorities

- ▶ *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; [2001] NSWCA 305, at [85]
- ▶ *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588; [2011] HCA 21

*[133] In short, the utility of receiving expert opinions rests in what the trier of fact can make of them.*

*If the assumed facts are not stated, no reasoning process can be stated and the opinion will lack utility;*

*if there is no evidence, called or to be called, capable of supporting the assumed facts, no reasoning process, even if stated, will have utility;*

*and even if there are facts both assumed and capable of being supported by the evidence, they will lack utility if no reasoning process is stated. In each instance, a lack of utility results in irrelevance and inadmissibility.*

## Examples

- ▶ Case alleging car accident was fraud
- ▶ Defendant expert based his opinion on the plaintiff's vehicle being stationary – report admitted over objection
- ▶ Undisputed evidence it was moving at about 5 kph, no evidence it was stationary
- ▶ 133 *Dasreef* - *if there is no evidence, called or to be called, capable of supporting the assumed facts, no reasoning process, even if stated, will have utility;*

*In each instance, a lack of utility results in irrelevance and inadmissibility.*

Defendant's report – attempt to increase vicissitudes or decrease future economic loss

**3. My diagnosis of any injuries**

He has well controlled diabetes.

He had surgery and chemotherapy for cancer of the lung without any recurrence in the last three years.

He has a very occasional epileptic fit as described above. He has high calcium score implying some coronary artery disease, but this is symptomatic and stress testing did not show any ischaemia. Based on Dr [REDACTED] Memory conventional coronary angiogram showed moderate coronary artery disease without any significant obstructive lesions.

**4. His prognosis**

This is very reasonable.

**5. my opinion as to the workers fitness for work as result of his work Injury**

I cannot comment about the result of back injury as this is outside my specialty.

**6. Assuming the workers work related injury had not occurred would the workers working life have been shortened in any event as a consequence of with other health conditions.**

To comment on this, I am considering his history of lung cancer, diabetes, coronary artery disease as well as epilepsy and his age of 56 years with his working life being 65 years, that is, nine years from now.

This is very difficult to assess and my guesswork would be, say, two years.

133 Dasreef

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*In each instance, a lack of utility results in irrelevance and inadmissibility.*

In this case, the report was not objected to as a whole, only the conclusion, as the report contained parts favourable to the plaintiff.

## Preparing Experts for Court

- ▶ Review relevant practice notes regarding conclaves and joint reports
- ▶ Prepare expert for conclave – conference, moderator, transcription
- ▶ Prepare expert for court – conference re issues and rules of being a good witness
- ▶ Concurrent Evidence (if not concurrent, expert to be present during evidence of other experts – assist counsel, evidence in reply)
- ▶ Expert preparing counsel for court

## Other Tips

- ▶ Work out case theory early – provides direction
- ▶ Once expert report is received consider whether particulars of negligence in SOC need to be updated
- ▶ Hierarchy of objections – report inadmissible, sections of report inadmissible, or admissible but of little weight
- ▶ Consider objections carefully, there may be some aspects of the report that supports your position
- ▶ Important to make objections – for appeal purposes

# Medical Experts

- ▶ Plaintiff – privileged until served – do not disclose name of Dr, only speciality
- ▶ Defendant – no need to serve if unfavourable but PI will make a Jones v Dunkel submission
- ▶ Need to serve updated medical reports if change of position or withdraw reliance on previous reports – raises possible Jones v Dunkel inference
- ▶ Re-serve opponents medical legal reports if favourable to your case
- ▶ If further medical investigation is suggested by a medical legal expert – carefully consider whether and if so by whom such investigation is carried out.
  - If carried out by GP – not protected by privilege
  - If arranged on a medico-legal basis, privileged until served

# Resources

- ▶ The Practitioner's Guide to Briefing Experts – Young Lawyers