Current debates on expert evidence

By Miiko Kumar

Preparing and using expert evidence raises many questions. Is the expert witness providing an opinion on matters that require specialised knowledge? Is the expert witness qualified in the specialised knowledge? Is the opinion based on the expert's specialised knowledge? These questions are the criteria for the admissibility of expert opinion at common law and under s79 of the *Evidence Act*. Of course, expert opinion must also be relevant, not misleading and not unfairly prejudicial. Admissibility is not discretionary but is determined by a rule-based approach to ensure that the court receives helpful and reliable opinion enabling it to achieve its fundamental aim: that is, rectitude of decision-making. In recent times, courts have enacted procedural rules that govern the form of an expert report and regulate the duties of experts who provide opinions. While a tub full of experts may not be such a great image, the taking of concurrent expert evidence is an Australian invention that has been exported to overseas jurisdictions. Courts have also made further reforms affecting the use of a single joint expert witness and court-appointed experts, and have introduced the requirement that opposing expert witnesses gather together in a conclave to identify points of agreement/ disagreement.

This edition covers a plethora of contemporary issues in and views on expert evidence. Some issues are long-standing; others are the result of recent innovation. The articles offer practical advice to lawyers on the running of litigation and also demonstrate the important scholarship in this field. Ian Freckelton SC's article on the evolving obligations of expert authors and witnesses cites an interesting development in the UK: the erosion of witness immunity and the introduction of disciplinary proceedings in relation to forensic work by experts. George Hampel AM QC provides a strong dissent to the use of single experts in adversarial litigation and raises the possibility of improvement through accreditation of experts. Dermot Ryan SC critiques the 'hot tub' method and provides a practical account of its impact on cross-examination. His article offers an astute observation about the lawyer's reduced role.

Garth Blake SC and Philippe Doyle Gray ask the vexed question of whether counsel can settle expert reports; they canvass the divergence of views in the Australian authorities but thankfully arrive at a definitive conclusion on the answer to this question. My own contribution examines litigation following the High Court decision in *Dasreef v Hawchar* (a case in which I was led by the wonderful Barry Toomey QC) about whether satisfaction of the basis rule is a requirement for the admissibility of expert opinion. Christopher T Barry QC provides an insightful article on the practical effect of the NSW changes (that is, conclaves, joint reports, pre-trial rulings and concurrent evidence). His contention that the changes have dramatically changed litigation sounds a warning to other jurisdictions, which are likely to follow NSW. Bruce Smith provides practical tips for dealing with expert witnesses. As both a barrister and the operator of a business that identifies expert witnesses for litigation, he is well-qualified to offer advice on engaging experts, and highlights the importance of briefing the expert with accurate information and a clear aim. His tips in respect of oral opinions, fee agreements and conclaves are also valuable.

Expert witnesses also have a say in this edition. Andrew Ross provides an expert's perspective on conclaves and concurrent evidence. He advocates the benefits of decreased costs and delays generated by these methods. Glenn Porter provides an excellent critique of identification through CCTV surveillance and other images, and draws on his experience of giving evidence on the unreliability of identification from photographs in criminal trials. Dr Drew Dixon writes on the differences between the 4th, 5th and 6th editions of the AMA guides. His clear and informative piece is a must for any personal injury lawyer.

Finally, Phillipa Alexander discusses the topic that usually signifies the end of litigation, costs. She presents a summary of the position in respect of the costs that a practitioner can recover from a client, and the expert's fees which a victor in litigation may recover from another party.

I commend this edition to you. ■

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