

# expert update

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## The weight of it all

### *Flavel v The State of South Australia [2007] SASC 50*

Much has been made of the potential conflicts between the duty of the expert witness to the court and to the person retaining the expert. In practice the duty to the court is seen as a requirement to be “independent” of the party retaining an expert. However, the existence of a relationship between the expert and a litigating party does not necessarily mean the court cannot accept that expert’s evidence, although it could well affect the weight given by the court to that evidence.

This case concerned a windsurfing accident where the plaintiff suffered serious spinal injuries from falling off a windsurfing board in a shallow part of a river. The defendant education body was sued for breach of duty of care for, inter alia, failing to provide proper instruction, causing or permitting the plaintiff and other students to engage in races when not properly trained or skilled to do so.

One issue before the court was whether windsurfing instruction and racing should have been conducted in shallow waters. The defendant engaged as its expert a Mr Y. Mr Y, at the time of trial, was employed by the defendant education body as a senior instructor at an aquatics centre which was not involved in the incident. Counsel for the plaintiff objected to Mr Y’s report, alleging a:

... lack of integrity in Mr Y’s opinion as a result of his commercial relationship with the ... defendant ....

His Honour Justice Bleby overruled the objection.

Counsel for the plaintiff sought to rely on a statement by Lord Wilberforce in *Whitehouse v Jordan* [1981] 1 WLR 246, at 256-257 where he said:

... it is necessary that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation ...

However, as Justice Bleby observed, Lord Wilberforce had not said that evidence which lacked this quality would be inadmissible.

*Can an expert give evidence in a matter involving his or her employer?*

*And even if it is legal, is it sensible?*



Counsel for the plaintiff also referred to a statement of Justice Evans-Lombe in *Liverpool Roman Catholic Archdiocesan Trustees Inc v Goldberg* (No 3) [2001] 1 WLR 2337 that:

...where it is demonstrated that there exists a relationship between the proposed expert and the party calling him which a reasonable observer might think was capable of affecting the views of the expert so as to make them unduly favourable to that party, *his evidence should not be admitted however unbiased the conclusions of the expert might probably be.* (emphasis added)

However, *Goldberg* has not been followed in Australia. Rather, in *FGT Custodians Pty Ltd v Fagenblat* [2003] VSCA, the Victorian Court of Appeal stated that:

... there is no authority requiring this Court to hold that an “interested” expert’s evidence be rejected because of a “perception” that the witness might favour the party seeking to adduce that evidence.

Further, in *ASIC v Rich* [2005] NSWSC 149, Justice Austin stated that:

... the presence of a risk of bias (unconscious or otherwise) is not of itself a reason to exclude evidence of an expert either on grounds of admissibility or in the exercise of discretion ...

Justice Bleby summed up the issue in the present case as follows:

Both authority and commonsense dictate that a relationship such as that complained of in this case does not render the evidence of an expert inadmissible. It will, however, be relevant to the assessment of the weight to be given to that evidence, along with many other factors.

### Significance

In practice, those who retain experts often seek an expert who has no relationship with a party. It is neither in the court’s interest nor a party’s interest to have a lengthy debate about the admissibility of an expert’s report or to have to address a question about a “perception” of a conflict of interest at trial, with the risk that the expert’s evidence is struck out, with consequent cost issues.

In this case the court’s view turned on the facts of the actual relationship with the expert. It should not be taken as encouraging the use of experts who have a relationship with instructing parties.



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