

expert update

Uncovering the latest Expert Witness news with Ferrier Hodgson

Exceptional evidence (part I)

State of NSW v Tyszyk [2008] NSWCA 107

Stolfa v Owners Strata Plan 4366 Ors (No 2) [2008] NSWSC 531

Quintano v B W Rose Pty Ltd [2008] NSWSC 956

Background

Division 2 of Part 31 of the NSW Uniform Civil Procedure Rules (2005) (UCPR) deals with expert evidence. A number of the regulations in Part 31 provide the Courts with discretion to restrict the use of expert evidence “unless the Court otherwise orders”¹ or “except by leave of the Court”².

Over the course of the past year there have been a number of judgments which considered the Court’s discretion in relation to expert evidence. This summary is the first of two articles where we consider the outcomes in some of these cases.

State of NSW v Tyszyk [2008] NSWCA 107

Mr Tyszyk parked his truck at a street kerb adjacent to an apartment building. Almost immediately after he stepped out of his truck, he was hit on the shoulder by a piece of downpipe that fell from the building. The downpipe had been dangling from the building for some time. Two police officers were at the scene when the downpipe fell.

Mr Tyszyk sued the State of New South Wales, alleging that the police officers, for whom the State was vicariously liable, had breached a duty of care owed to him. He also sued the owner of the apartment building (“the Building Owner”), alleging that the damaged state of the downpipe was attributable to its negligence.

During the District Court hearing, the trial judge repeatedly refused to allow the tender of two medical reports by Dr P, a rheumatologist to whom Mr Tyszyk had been referred by his GP. In doing so, the trial judge concluded that the reports had not been served in accordance with rule 31.28 and that leave should not be granted to admit the reports as there were no “exceptional circumstances” as required by rule 31.28(4).

Non-compliance with the UCPR will usually result in an expert’s evidence being inadmissible. However, the evidence may be heard in exceptional circumstances

¹ See regulations 31.19(3), 31.21, 31.23(3) and (4), 31.29(2) and (3), 31.30(3), 31.36(1) and (6), 31.41(2) and (3), 31.42(2) and 31.49(2).

² See regulations 31.26(5), 31.28(3), 31.44 and 31.52.

The context in which these tenders were refused included that:

- Although both reports pre-dated the date by which all experts' reports had been ordered to be served, neither report had been served by Mr Tyszyk before the required date.
- Notwithstanding that they had not been served, the State subpoenaed the reports and an order granting the State access to the reports had been made around a year before the start of the trial.
- It was the State that sought to tender the reports at trial.
- During the trial, Mr Tyszyk was cross-examined on a number of statements in the report about what he had told Dr P about his symptoms and history.
- Later in the trial, the Business Owner attempted to tender the reports as "business records".
- During an extended break in the trial, the State served the reports on Mr Tyszyk, and then argued that they had been properly served under the Rules.

The trial judge upheld Mr Tyszyk's claim against the State, but dismissed the claim against the Building Owner. The State appealed against that decision, in the process challenging the refusal of the trial judge to permit the tender of Dr P's reports.

Justice Campbell upheld the State's appeal and found that the police officers were not negligent. In doing so, he commented on the rejection of the tender of Dr P's report, repeating what he had said in an earlier judgment³:

Another question of construction concerned "exceptional circumstances" in rule 31.18(4) ... the conclusions as seem to me applicable in the construction of rule 31.18(4) [are]:

- (a) Exceptional circumstances are out of the ordinary course or unusual, or special, or uncommon. They need not be unique, or unprecedented, or very rare, but they cannot be circumstances that are regularly, routinely or normally encountered...*

³ *Yacoub v Pilkington (Australia) Ltd [2007] NSWCA 290* at [66] to [67], where he discussed what he said in *San v Rumble (No 2) [2007] NSWCA 259* at [59] - [69].

- (b) *Exceptional circumstances can exist not only by reference to quantitative matters concerning relative frequency of occurrence, but also by reference to qualitative factors ...*
- (c) *Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional ...*
- (d) *In deciding whether circumstances are exceptional within the meaning of a particular statutory provision, one must keep in mind the rationale of that particular statutory provision ...*
- (e) *Beyond these general guidelines, whether exceptional circumstances exist depends upon a careful consideration of the facts of the individual case ...*

Justice Campbell concluded:

In my view, the combination of the reports having been cross-examined on, the reports having been in the plaintiff's possession for nearly one year, the defendant having notified an intention to tender the reports, lapse of a reasonable time for the plaintiff to take steps to deal with the tender of the reports (which might or might not be 28 days), and lack of any identifiable prejudice would, in the absence of any other countervailing factors, amount to exceptional circumstances.

Stolfa v Owners Strata Plan 4366 Ors (No 2) [2008] NSWSC 531

These proceedings sought interlocutory and final relief restraining building works by the defendants in the strata title building of which the first defendant was the Owners Corporation, and the plaintiffs, second defendant and third defendant, the unitholders. An injunction and undertaking was given at an interlocutory hearing on 9 October 2007 until further order.

In anticipation of the interlocutory hearing on 9 October 2007, the defendants had obtained a report from Mr R, an engineer, dated 7 September 2007, which was attached to his affidavit sworn 5 October 2007. His affidavit was filed and served at or about that time. Mr R's report included five paragraphs under the heading "Stability of Existing Building", which expressed opinions as to whether the works carried out to that point had maintained the structural integrity of the building and

whether the removal of walls and their replacement with steel beams would reduce its structural integrity.

Justice Brereton observed that, although the UCPR required a party to move for directions in respect of expert evidence at the earliest possible opportunity once it became apparent there may be an issue requiring expert evidence, that did not apply in the context of interlocutory proceedings, and the defendants had not been obliged to move for directions before obtaining Mr R's report.

On 7 December 2007, the Court made a direction for the engagement and instruction of Mr B as a "parties' single expert". Mr B was asked a series of questions including ones relating to the structural integrity of the building. Mr B's report was accepted into evidence. In it, he opined that, in one respect, there was an issue about structural integrity. Mr B's opinion was at odds with Mr R's opinion.

The defendants sought to rely on Mr R's report. The Court noted that rule 31.44 provided that, except by leave of the Court, a party to proceedings may not adduce evidence of any other expert on any other issue arising in proceedings if a parties' single expert has been engaged under Division 2 of Part 31 of the Rules in relation to that issue. Justice Brereton found that that rule had the consequence that, insofar as Mr R addressed issues which Mr B was asked to address, his report was not admissible except by leave.

Justice Brereton went on to observe that, in a number of cases in England under equivalent provisions, it had been said that, on an application to adduce the evidence of another expert, the existence of an objective basis to question the conclusion arrived at by a joint expert and the existence of significant competing expert opinion, or of bias (actual or apprehended), may be a relevant consideration. In this case Justice Brereton summarised the significant considerations as:

... first, that the existence of Mr R's report was, so far as I am aware, not adverted to when a decision was made to appoint a joint expert; secondly, that a fundamental purpose of appointing a single expert is to avoid the need for competing expert reports; thirdly, that Mr R's report does not – obviously enough because it was prepared at an earlier point in time – examine, scrutinise or endeavour to expose errors in Mr B's report; and fourthly, that while I am not convinced that it would be inadmissible on Makita (Australia) Pty Ltd v Sprowles ... considerations, it does not go far beyond merely expressing the author's opinion without extending to the more detailed reasoning that is to be found in Mr B's report.

Given the fundamental purpose of avoiding the cost of competing expert reports, and the circumstance that, as it stands, the lack of detail in Mr R's report means that it does not expose potential error in Mr B's report, I do not consider that it sufficiently manifests the existence of a significant competing expert opinion to warrant its reception, and the consequent defeat of the purpose of avoiding the costs incurred by competing reports.

As a consequence, Justice Brereton rejected the parts of Mr R's report appearing under the heading "Stability of Existing Building", admitting the remainder.

Quintano v B W Rose Pty Ltd [2008] NSWSC 956

On 15 December 2002, Mr Quintano suffered traumatic brain damage when shot in the head at a nightclub operated by the first defendant B W Rose Pty Limited. Mr Quintano instituted these proceedings on 27 April 2004, claiming damages for his personal injuries.

Mr Quintano and his father gave evidence as part of Mr Quintano's case. During their cross-examination, they were each asked whether or not Mr Quintano could, despite his disabilities, have some prospects of obtaining employment as a trainer or entering into partnership with another trainer.

Mr Quintano then called Mr W, a horse trainer, to give evidence. He was asked in examination in chief to express an opinion based on certain assumptions that had been put to him regarding the prospects of the plaintiff obtaining employment in the racing industry as a trainer. The defendants objected to the admissibility of the question.

As Justice Brereton observed:

Uniform Civil Procedure Rules, r 31.28(3), provides that, except by leave of the Court or by consent of the parties, the oral evidence-in-chief of any expert is not admissible unless an expert's report served in accordance with the Rules contains the substance of the matter sought to be adduced in evidence. Sub-rule (4) further provides that leave is not to be given as referred to in sub-rule (3), unless the Court is satisfied that there are exceptional circumstances that warrant the granting of leave, or that the report concerned merely updates of an earlier version of a report...

No report had been served by Mr W at all, let alone one that contains the substance of the matters sought to be adduced.

However, Justice Brereton also observed that, by cross-examining Mr Quintano and his father on the same issue:

That goes beyond testing the claims made in the statement of particulars, which are concerned with how the plaintiff would have progressed in the industry but for his injuries, coupled with an assertion that he is now permanently unfit for employment.

It seems to me that the plaintiff should be permitted to answer the case which has now been put without prior notice to the plaintiff's witnesses, by asking [Mr W] a question along the lines contemplated. The circumstance that the defendant has put to the plaintiff a scenario not so far raised in the evidence is a sufficiently exceptional circumstance to justify the grant of leave in this respect under r 31.28.

As a result, Justice Brereton allowed the questions to be put to Mr W.

Conclusion

The last judgment serves as a warning to barristers. It seems apparent that the only reason why Mr W was allowed to give expert evidence, notwithstanding that the plaintiff was not in compliance with the UCPR, was because Counsel for the defendant created an opportunity for the non-compliance to be overlooked as an exceptional circumstance.

The other cases appear to show that where expert evidence will assist the judge in deciding the case by offering a competing opinion (which is adequately explained) or a combination of other factors (which do not prejudice one side), then exceptional circumstances are likely to prevail over strict procedure. It is likely that this will assist justice being served.



Nick Maiden
Senior Manager, Sydney
phone: 02 9286 9867
email: nick.maiden@fh.com.au

For more information about our forensic services, please contact:

Sydney: Andrew Ross
+61 2 9286 9906
andrew.ross@fh.com.au

George Kompos
+61 3 9604 5150
george.kompos@fh.com.au

Brisbane: Tim Michael
+61 7 3831 4833
tmichael@qld.fh.com.au

John Temple-Cole
+61 2 9286 9919
john.temple-cole@fh.com.au

Adelaide: Peter Holmes
+61 8 8100 7600
p.holmes@sa.fh.com.au

Hong Kong: John Tudorovic
+852 2820 5610
jtudorovic@fh.com.hk

Melbourne: Greg Meredith
+61 3 9604 5118
greg.meredith@fh.com.au

Jean-Pierre du Plessis
+61 8 8100 7600
jduplessis@sa.fh.com.au

Singapore: Tim Reid
+65 6416 1400
tim.reid@fh.com.sg

FORENSIC ACCOUNTING

FINANCIAL INVESTIGATIONS & FRAUD

BUSINESS VALUATION

FORENSIC IT