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Prior inconsistent statements in the world of expert evidence

Quintano v B W Rose Pty Ltd & Anor [2009] NSWSC 446

On 15 December 2002, the plaintiff Luke Quintano suffered traumatic brain damage when shot in the head during a brawl in a nightclub operated by the first defendant BW Rose Pty Ltd (“BWR”). He claimed damages for his personal injuries from BWR and the second defendant, AWS Security Services Pty Ltd (“AWS”), a company contracted by BWR to provide security services, alleging that BWR and AWS were negligent in the provision of security at the nightclub.

Mr Q was awarded substantial damages when Justice Brereton found BWR breached its duty to use reasonable care for the safety of its patrons by failing to provide a sufficient level of security. Justice Brereton found no breach of duty by AWS.

Mr Q had engaged Mr J as an expert security consultant. Mr J’s report was reviewed in detail in *Quintano v Rose [2008] NSWSC 957* (and the subject of *Expert Update Issue 17*), where it was claimed that his opinions were mere *ipse dixit*. In that decision, Justice Brereton rejected some of Mr J’s opinions, accepting those which were supported by Mr J’s reasoning. Justice Brereton summarised one opinion that survived as:

...[the nightclub] required eight qualified and licensed security officers, and even more when the maximum 400 patronage figure was reached; that two security guards could not possibly provide an appropriate level of security and safety; and that it was not appropriate to have officers at high risk positions such as pool tables and the dance floor leaving their positions unattended...¹ [emphasis added]

It is not clear whether Mr J’s evidence was modified by a supplementary report or the evidence given at trial, however the earlier judgment summarised Mr J’s answer to one of the questions posed to him:

¹By December 2002, the security arrangements at the nightclub involved the owner’s wife and two security guards, one employed by BWR and one employed by AWS.

Those instructing experts need to know their experts well. This includes reviewing previous evidence for inconsistent opinions and understanding whether the expert’s experience is relevant and current. If you don’t do it, you can be sure the other side will!

*As detailed in my report it is my belief that taking all of the known risk factors into consideration that this nightclub required **up to** eight qualified and trained security officers ... [emphasis added]*

Nonetheless, following Mr J's oral evidence, Justice Brereton stated:

I was generally unimpressed with Mr [J]'s evidence. Under cross-examination, he tended to resile from the absolute opinions expressed in his report to much less firm positions. His expertise is, at best, dated. His evidence as to the current state of his qualifications, memberships and currency in providing advice to licensed premises was inconsistent with evidence he had given in other proceedings. It emerged that he had not formally provided security advice to licensed premises since 1997. His assertion that there had been little development in the field of provision of security for licensed premises over the years since 1997 was implausible, and inconsistent with evidence he had given in other proceedings (to the effect that he would make significantly different recommendations if designing a system for the same club today as ten or fifteen years ago). His attempts to explain his non-production of documents in other proceedings were querulous. But it suffices for present purposes to say that his cross-examination demonstrated his recommendation of eight security guards for [the nightclub] to be little more than a guess, in that he acknowledged that he could not give a reliable opinion on that matter without a security analysis of the premises, which he had not undertaken. Even when it was put to him that three would have been manifestly inadequate, his answer was that three would have been insufficient "upon the data that I was given". Nonetheless, ultimately he said that he could not think of circumstances in respect of a nightclub with 200 plus patrons between the ages of 18 and 40 drinking alcoholic liquor, dancing to disco music, playing pool and socialising until 6:30 am on Saturday or Sunday mornings that could adequately be covered by only three guards.

Significance

This judgment provides yet another example of the need for those instructing experts to gain a clear understanding of the expert's prior opinions and the depth or currency of their experience.

With information about the prior evidence of witnesses becoming easier to obtain (through, for example, websites like AUSTLII), it should not be surprising that opposing parties and their legal advisors will undertake searches for contrary



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opinions expressed by an expert witness in other matters. If this is so, it may be necessary for those selecting expert witnesses to undertake similar checks or, in the alternative, require that the chosen expert provide details of all previous matters in which expert evidence has been given.

However, it may be more difficult to overcome the kinds of issues relating to the lack of relevant or current expertise that emerged in this matter. While it seems possible that Mr J's evidence would have been better received had he included appropriate qualifications (e.g. that he had not performed a security analysis of the premises), identified other data he could have been given, or expressed his opinions as a range rather than a definitive number of security guards required when the nightclub was full, the fact that he had not provided advice on that kind of question for more than a decade would have been difficult to overcome (especially where it seems that, in evidence in other matters, the need for current experience had been identified by the same expert).

That is not to say that all expertise needs to be recently acquired. Rather, in many matters the relevant issue relates to an event that occurred some time in the past (for example, the audit of a company that occurred some years earlier). In those circumstances, it may be more important to obtain evidence from an expert with familiarity with accepted practice at the date of the relevant event rather than accepted practice today. Further, some expertise may prove relatively timeless (for example, the fundamental principles of physics).

Finally, this case illustrates that, in many areas of expertise (including accountancy and business valuations), there will be a valid range of opinions and not a definitive answer to the issue being considered. Where that is the case, giving a range or highlighting limitations to an answer may result in the expert being perceived in a different light.



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