

# expert update

Uncovering the latest Expert Witness news with Ferrier Hodgson

## Choosing an expert – experience counts

*Whilst selecting an expert with appropriate educational qualifications and experience in the relevant field is essential, so too is ensuring the expert discloses all assumptions and provides sound reasoning for opinions expressed.*

Expert evidence is commonly used by parties in Court proceedings to assist them in establishing their case and to assist the Court's understanding of technical matters. In our experience, opposing experts are usually instructed to adopt different facts and assumptions. As a result, the evidence of two opposing experts will often be different. The question at trial is, which expert's evidence will the Court accept and why?

Three recent cases highlight that Courts prefer those experts with educational qualifications and experience directly relevant to proceedings.

In *Lisa De Marco v Italo-Australian Club (ACT) Limited ACN 106 455 314* [2010] ACTSC 28, Master Harper held that where there is an inconsistency he preferred the evidence of Dr C to that of Mr E as:

*Dr C [is] an acknowledged expert in the field of slip resistance of pedestrian surfaces, whereas Mr E is an experienced builder but with no specialist qualifications or experience in the area.*

In *McGrath Corporation Pty Ltd v Ryan* [2010] QSC 101 Wilson J held that:

*The plaintiff's valuer Mr E was an impressive witness...he is a registered valuer with extensive practical experience and he applied orthodox comparable sales methodology. His valuation was not seriously challenged in cross-examination. In contrast, the defendant's valuer Mr Q was not an impressive witness. He is a registered valuer with many years experience but I am not satisfied that residential valuations have been a prime focus of his work.*

These cases demonstrate that experts with greater experience in the area directly relevant to the issues to be determined in proceedings will often be preferred by the Courts.

However, while it is a relevant consideration, the qualification of an expert is not determinative of whether an expert's evidence will be preferred.

In *Building Professionals Board v Cohen* [2010] NSWADT 62, two different experts prepared reports: Mr R for the Plaintiff and Mr K for the Defendant. The Defendant argued in his written submission that the evidence of Mr K ought to be preferred, as Mr K had greater educational qualifications and experience.



O'Connor DCJ made the following remarks:

*On many matters the evidence of Mr R is preferred even though Mr K had greater qualifications and experience relating to building compliance issues.*

*Mr R's general approach in his report was preferred over the observations of the more qualified expert, Mr K. Mr K's model is simplistic...Mr K's approach is unpersuasive and does not address key points.*

This case shows that while the expertise of an expert is an important consideration for the Court, it is the persuasiveness of an expert's evidence that is often of primary importance.

In *Pearson v Sutherland Shire Council* [2010] NSWDC 1, the importance of ensuring that there is sound reasoning behind all assumptions adopted in an expert report is highlighted. Clear explanations as to how and why assumptions were adopted must be provided by the expert in order to convince a Court of the reliability of those assumptions, and thus the expert's opinion. Levy DCJ commented:

*It is important, as far as is possible, to reach an understanding of the reasoning behind any decision made by this process, including any assumptions that had been made.*

Levy DCJ further commented upon the importance of ensuring all assumptions are accurate as, not surprisingly, inaccurate assumptions may completely undermine the expert report:

*The plaintiff has submitted that each of the five assumptions made by Mr D was inadequate, incomplete, misleading or wrong...when the foregoing matters submitted by the plaintiff are taken into account, in my view, the probative value of the opinions in the report of Mr D becomes overwhelmingly diminished.*

Levy DCJ also noted that the probative value of the report of Mr W was at the outset limited by the fact that Mr W's expert report was "verbally commissioned" thus it is "not possible to examine with transparency the process by which Mr W was briefed". Further "the assumptions that the defendant had asked Mr W to make were not identified". Levy DCJ also commented upon the importance of assumptions and the expert writing his report within his field of expertise. He held:

*Mr McD, the expert civil engineer was a most impressive and careful expert witness. He was careful to identify his assumptions and he was also careful to limit his evidence to the confines of his expertise...in cross-examination he was willing to make concessions where this was appropriate... I have no*

*reservations about accepting his evidence and the expert analyses within his evidence.*

This was in direct contrast to the evidence provided by Mr W:

*I consider that whilst Mr W...gave truthful evidence, the depth and content of his evidence was somewhat limited by the terms of his engagement and also by the segmented process by which his opinion was formed.*

### Significance

As LJ Lawton noted<sup>1</sup>:

*In the lush pastures of the Common Law a number of sacred cows graze and no-one dares to cull them or even try to make them healthier. One answers to the name of "expert evidence"... It is a scraggy animal, despised by many, yet its continued existence is essential for the proper administration of justice. Properly cared for it could provide good progeny but the breeding would have to be selective as some strains may not be worth encouraging.*



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The above cases highlight the importance of expert selection and expose issues involved in the preparation of expert reports. It is important to ensure when selecting an expert to give evidence, that the expert has the relevant qualifications and experience in a directly relevant field and understands how to prepare an expert's report compliant with the Court's requirements.

<sup>1</sup> LJ Lawton, "The Limitations of Expert Scientific Evidence" (1981) 20 Journal of Forensic Science 237 – extract from Expert Evidence "Law, Practice, Procedure and Advocacy", Ian Freckelton and Hugh Selby, Lawbook Co.

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