

# expert update

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## When is an opinion not an opinion?

*Experts must apply their specialised knowledge in forming opinions or risk inadmissibility.*

*Rees v Lumen Christi Primary School [2010] VSC 514*

While employed as an integration teacher's aide by Lumen Christi Primary School, Ms Rees alleges she suffered physical and psychological injury while attempting to restrain an aggressive and violent student. Following the incident, she alleged she was required to undertake duties as part of her employment and carry out directions given by the principal which aggravated the injuries received during the incident. The Plaintiff claimed negligence and/or a breach of duty.

The Plaintiff sought to rely on evidence of Prof T, an expert in the theory and practice of educational administration. The Defendant contended that Prof T's evidence was not admissible given he had assumed certain facts to be true and then found as an opinion that these assumptions were the facts.

Robson J found Prof T's report was inadmissible under section 79, or alternatively section 135, of the Evidence Act 2008 (the Act).

### Section 79

In respect of the inadmissibility of opinions, Section 79 (1) of the Act states that:

*Exception - opinions based on specialised knowledge*

*(1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.*

There was no contention by the Defendant that Prof T did not have the 'specialised knowledge' required by section 79 (1). However, Robson J queried whether Prof T's opinions were 'wholly or substantially' based on that specialised knowledge.

By way of example, Robson J summarises one of Prof T's conclusions as follows:

*(Prof T) assumes the Principal and the school failed to provide appropriate support in relation to (Ms Rees') concerns about the disturbed conduct of (the student) and then offers the opinion that the Principal and the school failed to provide appropriate support in relation to her concern.*

With reference to the principles in *Makita (Australia) Pty Ltd v Sprowles* (2001 52 NSWLR 705) Robson J concluded that Prof T's evidence was inadmissible since his

opinions represented factual observations that did not rely upon the application of his specialised knowledge. Prof T's opinions were found to be a repeat of the assumed facts and purported to advocate the factual basis of the case being put forward by the Plaintiff.

### **Section 135**

Robson J further tests the admissibility of Prof T's evidence against section 135 of the Act. Section 135 of the Act states that:

*General discretion to exclude evidence*

*The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might-*

- (a) be unfairly prejudicial to a party; or*
- (b) be misleading or confusing; or*
- (c) cause or result in undue waste of time.*

Robson J found that Prof T's evidence was likely to be 'misleading or confusing' to the jury in that it purports to be expert evidence. In the face of a 'highly qualified individual', the jury may place more weight on Prof T's evidence than appropriate, and accordingly Robson J determined Prof T's evidence should be excluded.

Robson J stated:

*In exercising my discretion I have taken into account Prof T's failure to identify with precision the facts he relies on, the fact that he assumes many of the very conclusions he draws, the fact that many of his opinions do not appear to involve the application of any specialised knowledge, and if they do, that train of reasoning has not been fully disclosed to the jury, and that the matters Prof T opines on are matters that the jury is capable of deciding itself without expert assistance.*



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## Significance

The admissibility of 'expert' evidence can be challenged on many grounds. It is essential for legal teams when obtaining expert assistance to ensure their expert evidence complies with the principles outlined in Makita's case. Experts must apply their 'specialised knowledge' to 'assumed' or 'observed' facts to produce their opinion; and the assumed facts must be clearly identified and proved in some other way.

A factual observation is not an opinion unless it relies upon the application of specialised knowledge.

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