

expert update

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The ultimate issue

Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) & Ors (No 2) [2011] VSC 153

“...a Court may not itself be able to form a view or reach a conclusion merely because an expert has the opinion the Court is asked to reach...”

Although a witness may qualify as an expert on a subject matter, there are limits on the admissibility of the evidence provided by the expert. One of these limits includes the provision of expert opinion on the “ultimate issue”, that is, the issue to be decided by the Court.

In this case, the Director of Consumer Affairs Victoria, sought orders against Professor Campbell, the sole director and shareholder of “Operation Hope” and “Hope Research” (the “Defendants”), that they had contravened s9 of the *Fair Trading Act 1999 (Vic)*, by publishing misleading or deceptive statements on their website and in printed materials.

The Defendants operated a clinic which offered treatments mainly for those suffering from cancer. The Defendants made declarations on printed material and on their website alleging that the treatments provided can cure cancer or slow its progress and that the treatments provided were supported by generally accepted science and published research findings.

Consumer Affairs alleged that the treatments provided by the Defendants were not supported by conventional medicine and current scientific knowledge.

In making its case, Consumer Affairs relied upon the evidence of Associate Professor Snyder, a qualified medical practitioner and Director of Cancer Services and Oncology at a hospital.

Associate Professor Snyder submitted three affidavits, which Consumer Affairs relied upon to demonstrate the point of view of “...conventional medicine and mainstream scientific opinion...”.

In his first affidavit, Associate Professor Snyder was asked to provide an opinion on whether the therapies as detailed on the Defendants’ website:

- *Can cure cancer, or reverse, or stop or slow its progress*
- *Can prolong the life of a person suffering from cancer*
- *Are supported by generally accepted science*
- *Are supported by evidence-based findings*



Associate Professor Snyder did not support the therapies offered by the Defendants and was of the view that the materials relied upon by the Defendants did not meet "...accepted scientific standards".

In his second affidavit, Associate Professor Snyder was requested to examine a large volume of documents submitted by the Defendants and to respond to their assertions that the documents would "...refute the conclusions contained..." in Associate Professor Snyder's first affidavit. He concluded that none of the materials submitted by the Defendants "...renders false any of the conclusions stated..." in his first affidavit.

In his third affidavit, Associate Professor Snyder was requested to examine a table containing "...the alleged false, misleading or deceptive representations made by the Defendants..." and to prepare advice as to whether the representations were false, misleading or deceptive. Associate Professor Snyder concluded that the representations made by the Defendants were false and misleading.

With respect to the expert evidence presented by Associate Professor Snyder, Justice Pagone stated:

...Expert evidence on the ultimate issue may not be strictly speaking inadmissible, but care should be taken about the evidence proffered as expert evidence to ensure that it is the most helpful to the Court for its task. It is for a Court to form its own view and a Court may not itself be able to form a view or reach a conclusion merely because an expert has the opinion the Court is asked to reach...A question for an expert in such terms, and a response by an expert on those terms, gives insufficient, if any, basis upon which the Court can reach a conclusion for itself beyond the fact that an expert had that view. The Court's task cannot be divested or "delegated" in that way. Nor can the Director [Consumer Affairs] discharge the burden of satisfying the Court by tendering evidence that shows only that an expert is satisfied of the matter which the law requires that the Court be satisfied about...

Moreover, Justice Pagone emphasised that:

The process of eliciting expert opinions in this way should not be encouraged. An expert is unlikely to know what is and what is not admissible in evidence and simply asking an expert for his or her "response" to another's "assertions" is not calculated to produce material that is likely to be helpful to a Court...



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Significance

This case highlights the following issues that should be considered in tendering expert evidence:

1. Caution should be taken when asking an expert to provide an opinion on the issue that is the very question the Court has been asked to determine.
2. Experts and their instructing solicitors need to ensure that the expert evidence is formulated in a manner that will assist the Court to make its own conclusion with respect to the issue it has been asked to determine.

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