



The Use and Abuse of Expert Evidence in Civil Litigation in New South Wales

A Seminar Paper

Written and Presented by John Graves SC

Member of 13th Floor Wentworth Selborne Chambers

174 – 180 Phillip Street Sydney

DX 394 Sydney

Tel: 9232 3681

Email: jgraves@13wentworthselbornechambers.com.au

Floor Clerk: Paul Walker

Tel: 9232 3776

Premise:

In civil litigation in this State the legal profession connives at the expert witness taking on the role of the advocate and the function of the trial judge.

For lawyers for a party embroiled in civil litigation, it is convenient, cost effective and far less work to allow the expert witness, who has been retained in the interests of their client, to be permitted by those lawyers to shape the case and, in court, advocate for its adoption by the trial judge.

Given a trial judge's legal obligation to provide reasons for decision reached, in a case in which experts have been allowed by the lawyers and the court to state the ultimate factual or legal conclusion and their reasons for those views, the losing party cannot complain when, uncritically, the trial judge "adopts" one expert's opinion and reasons as those of the court.

Discussion:

As with every witness, the evidence of an expert must be relevant to proof of a fact relevant to the determination of an issue for trial.

The issues for trial are defined by the pleadings.

A party need only prepare for trial evidence of a fact that, by its pleading, the opposite party contests.

A witness who is called to give evidence relevant to an inference that may be drawn by the judge or jury, in reliance upon common sense and ordinary experience, is not an expert; a witness cannot be called to give evidence of that which the tribunal of fact knows for itself.

Conversely, whenever the inference to be drawn is such that judge or jury is unlikely to prove capable of being able to form the judgment whether the inference should be drawn, the evidence of a person, appropriately qualified, is admissible.

Expert evidence is no better than the facts on which it is based.

So far as an opinion is based on facts "observed" by an expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based

on "assumed" or "accepted" facts, they must be identified and proved by other expert opinion or by lay evidence.

An expert may not give an opinion on an ultimate issue where that involves the application of a legal standard – for example, that the defendant was negligent or that a testator possessed testamentary capacity.

This rule against expert evidence of the ultimate issue is no more than an illustration of the rule that expert evidence is not admissible if that evidence is no more than a substitute for the judge or jury drawing his/her own inferences from other facts found to exist.

The expert witness code of conduct does not resonate comfortably with the “professional witness” who is retained by one party in hard fought adversarial litigation in which payment of that person’s fee is dependent on victory of the party who retained him/her; the outcome of the litigation turning on whether the tribunal of fact prefers his/her evidence or the evidence of the expert witness called by the other party.

With effect from 8 December 2006, Divisions 2 and 3 of the Uniform Civil Procedure Rules 2005 were replaced with a new Division 2 with five subdivisions and a reworked Schedule 7 relating to the Expert Witness Code of Conduct.

Rule 31.17 identifies the main purposes of Division 2.

Those include:

- ensuring that the court has control over the giving of expert evidence: 31.17(a);
- restricting expert evidence to proceedings in which it is necessary: 31.17(b);
- avoiding unnecessary costs associated with the parties retaining different experts: 31.17(c);
- enabling a single expert to be engaged by the parties of the court; 31.17(d);
- without leave of the court, limiting each party to one expert; 31.17(e); and
- declaring the duty of an expert witness to the court and the parties in proceedings: 31.17(f).

Rule 31.19 requires any party, intending to adduce expert evidence at trial, promptly, to seek directions from the court and excludes expert evidence where those directions have not been sought or complied with.

Rule 31.22 requires a person who is engaged as an expert witness to disclose in writing any contingent fee arrangement.

An expert witness cannot give evidence or will his/her report be admitted into evidence unless that person has declared his/her adherence to the expert witness code of conduct set out in schedule 7 to the rules: 31.23

In Subdivision 3, in rule 31.27, the mandatory elements of an expert’s report are set out and include:

- the facts, and assumptions of fact, on which the opinions in the report are based (a letter of instructions may be annexed: 31.27(b);
- any literature or other materials utilised in support of the opinions: 31.27(1)(e); and
- Any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out; 31.27(1)(f).

Rule 31.35 which permits the court, by directions given to the parties, to regulate the manner in which evidence will be given by opposing expert witnesses.

The expert witness code of conduct (Schedule 7) stipulates:

- a duty to the court, including compliance with its directions;
- a duty to work co-operatively with other expert witnesses;
- essential and mandatory elements of an expert's report; and
- the role and conduct of an expert witness during any conference: see also SC Gen 11 (Practice Note on Joint Conferences of Experts)

Conclusion:

In litigation an expert witness can perform a very worthwhile role, namely, to assist a tribunal of fact to reach a decision on an issue or on a fact relevant to an issue, in circumstances where common sense and ordinary experience of human affairs are not sufficient.

Division 2 of Part 31 of the Uniform Civil Procedure Rules is the latest attempt by the Courts' Rules' Committees to impress on the legal profession and the "professional witnesses" regularly engaged in litigation to "lift their game" when it comes to using expert witnesses by imposing greater regulation and supervision of their work.

John Graves SC
21 February 2008