EXPERT EVIDENCE: PRACTICALLY SPEAKING

5th September, 2014

Presented by:

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Introduction:

1. In the last 20 years in particular in this State there has been an explosion in the use of experts giving evidence in trials, both civil and criminal. As a consequence of the publication of Heydon JA's much quoted judgment in *Makita (Australia) Pty Limited v Sprowles (2001) 52 NSWLR 705* there came a much more rigorous consideration by lawyers and their experts of the admissibility of expert reports as evidence in trials. Ten years later the High Court again visited the question of expert evidence in *Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588* where once again Heydon J said at [90]:

> ***"… Opinion evidence is a bridge between data in the form of primary evidence and a conclusion which cannot be reached without the application of expertise. The bridge cannot stand if the primary evidence end of it does not exist. The expert opinion is then only a misleading jumble, uselessly cluttering up the evidentiary scene."***

2. The task to be set for practitioners is to make sure that expert opinions commissioned for the use in cases do not become such a "misleading jumble".

3. The importance of expert evidence was well demonstrated by Gleeson CJ (as he then was) in *HG v The Queen (1999) 197 CLR 414* where his Honour said at [44]:

> ***"Experts who venture 'opinions', (sometimes merely their own inference of fact), outside their field of specialised knowledge may invest those opinions with a spurious appearance of authority, and legitimate processes of fact-finding may be subverted."***

4. In the same year that the above case was reported the learned authors of Expert Evidence in Criminal Law (Ian Freckelton and Hugh Selby) said in the introduction:

> ***"… More and more, criminal prosecutions are determined wholly or substantially on the basis of scientific, medical, psychological, accounting and other expert evidence. For such witnesses to be asked the questions which will elicit the true import of their opinions, lawyers need to have come to grips with the parameters of the expert's discipline and to have at least a rudimentary understanding of the bases for the expert's views. Even more importantly for the criminal justice system is that experts be properly tested through cross examination. It is only in this way that the evidence of such witnesses can be made accountable."***

5. The word "accountable" used above is not accidental. The practitioner in this field must look at accountability both in terms of one's own expert or experts and the experts of the opponents in the case.

6. The correctness of the above statements of principle are obvious from a case with which you would all be familiar, namely *Chamberlain v R (No. 2) (1984) 153 CLR 521.*

7. *Chamberlain* was the case where there was massive publicity surrounding the disappearance of Azaria Chamberlain, who her parents asserted, was taken by a dingo. Front and centre at the trial was conflicting expert evidence. The appellate court (the Federal Court) rejected an appeal and the matter came before the High Court. Justices Gibbs CJ and Mason J in a joint judgment decided that the appeal should be dismissed. Justice Brennan agreed. Justices Deane and Murphy in separate judgments came to the conclusion that the appeal should be upheld.

8. The Appellate Courts had to wrestle with the problem of a case where both of the accused had given evidence before the jury and that evidence had obviously been rejected. In the joint judgment of Gibbs CJ and Mason J their Honours discussed the problem caused by the conflict in the expert evidence. Their Honours said at [54]:

> ***"[54]We have done no more than attempt a brief statement of the issues that were canvassed in expert evidence that was given at considerable length. It is of course the function of the jury to consider which of two bodies of conflicting evidence, technical or otherwise, they will accept. In the present case, Bowen CJ and Forster J in the Federal Court said at 46 ALR 493 page 520:***
>
> > ***'Had we seen and heard all the evidence on this topic being given, we might have concluded otherwise, but situated as we are, we have no doubt that the jury was entitled to prefer the evidence of one group of experts to that of the other group.'***
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> (**SJH:** This is the dilemma when one reaches appellate level namely that the Appellate Court may simply find that the decision below COULD have been reached on the evidence (as opposed to SHOULD have been reached) and therefore that decision ought not be disturbed on Appeal. That is one of the reasons why close attention to the evidentiary preparation with which this paper is concerned needs to be undertaken.)

Jenkinson J took a different view …

…

We agree with Jenkinson J. The most that could be said against Professor Boettcher and Nairn was that their work was done in the comparative seclusion of academic surroundings, so that they lack the day to day experience of the forensic scientists called for the Crown, and that they exhibited 'an unbecoming arrogance' … and that Professor Boettcher did not fare well in cross examination. There was no challenge to their knowledge or their honesty or impartiality. The criticisms they advanced appear to be rational and compelling. Of course the Crown witnesses had answers to those criticisms. WE DO NOT DOUBT THAT IF THE QUESTION WAS WHETHER THERE WAS EVIDENCE TO SUPPORT A FINDING THAT THE BLOOD IN THE CAR WAS FOETAL BLOOD, THE QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE. BUT WHEN THE QUESTION IS ASKED WHETHER SUCH A FINDING COULD SAFELY BE MADE IT SEEMS TO US THAT THE ANSWER MUST BE IN THE NEGATIVE. *(Capitals added by SJH)* ***The conflicting evidence should have raised the doubt in a reasonable mind, and there is no other evidence that can resolve the doubt before a decision on the verdict is ultimately reached. We conclude therefore that, in the present case, we must proceed on the basis that the jury were entitled to accept as a fact, from which inferences might be drawn, that those parts of the car, and those articles in it, that responded affirmatively to the tests had blood upon them, but that they could not safely accept as a primary fact that the blood was foetal blood.***

9. The above case establishes clearly that these things must best be tested at first instance. In that regard it is the responsibility of every practitioner engaged in a case to understand both the subject matter of the case and the evidence required to properly conduct that case.

10. The challenge therefore for any practitioner is to:

    i. Understand the case sufficiently well enough to know whether expert evidence is a necessary ingredient in it and, if so, what type of expert evidence is required.

    ii. Be capable of implementing, in a practical way, the processes necessary to engage the above conclusion.

iii. Steps 1 and 2 of course require a complete understanding of the opposition case in the same terms. Beware of the tunnel vision that often accompanies the ownership of your own case.

The Process:

11. I have titled this talk "Expert Evidence: Practically Speaking" because it is a paper specifically addressing the most rudimentary approach to aspects of expert evidence. Whole volumes of loose leaf practices and a multitude of authoritative texts have been written on the subject of expert evidence. The starting point of course is to keep it simple. Before running off to read all of the High Court authorities on expert evidence we would do well just to follow a few simple rules in our approach to cases, so that we can concentrate on our first instance work in a satisfactory manner. In that regard therefore I suggest the following checklist:

i. In civil cases read the pleadings and understand them. In criminal cases read the indictment or the charge and understand specifically the basis for those charges whether it be by legislation (usually the case) or charges brought pursuant to the common law.

ii. Having familiarised yourself with the case in the above way, you must then identify the specific issues to be engaged. Sometimes these issues will not be readily apparent. What you are in fact challenging yourself to do is understand the case as well as you would do at the end of it. This is often a difficult task. Remember that this task is **NEVER** to be rushed.

iii. You must not only understand your case but you must carefully examine the case of your opposition. Sometimes (probably often) we have tunnel vision about cases which I have spoken about. If it is a civil case we see our case and more slowly come to a recognition of the case being mounted against us. In criminal work we look at it from our position only, namely how to defend the allegation without putting ourselves in the shoes of the Crown who must establish the case against us. You must have a well-rounded view of the whole of the matter. Unfortunately this well-rounded view, or in other words, a view of both cases often develops during the running of a trial. Start out with the object

of understanding those matters from both sides of the fence before you get anywhere near a court room.

iv. With the proliferation of engagement of experts in cases there has been an exponential growth in the body of experts making themselves available for litigation. It would not be too harsh a criticism to say that some of these experts are self-proclaimed. It is therefore critical that you identify the correct type of expert that you need and validate the expertise that is being proffered.

12. In a recent Court of Criminal Appeal case *Wood v. R [2012] NSWCCA 21* the NSW Court of Criminal Appeal had to consider, inter alia, the application and use of expert evidence. In that case the Court had heard that Caroline Byrne had died on the night of June 7th, 1995. Her body was recovered from the rocks at The Gap at Watson's Bay in Sydney early the following morning. An assumption was made at the time that she had committed suicide.

13. Subsequently, however, Gordon Wood was charged and subsequently convicted of her murder. Central to the prosecution case was expert evidence given by A/Prof Cross in relation to the method that was probably used by *Wood* to propel Ms Byrne off The Gap. There was considerable factual evidence as to where it was that Ms Byrne had landed and how it was that she was able to reach that point.

14. In considering that matter the Chief Justice at Common Law, McClellan CJ said, in relation to the evidence of an expert called by the Crown and whose evidence was critical to the determination of guilt of the accused, the following:

> ***"[466] The challenge to the admissibility of A/Prof Cross' evidence at the trial was confined to his views on the likelihood of injury being caused to Ms Byrne as she landed on the rocks at the base of the cliff. Although his evidence was not otherwise challenged, significant and important aspects of his evidence were concerned with biomechanics, which required an understanding of the functioning and capacity of the human body …***
>
> ***[467] To my mind A/Prof Cross was allowed, without objection, to express opinions outside his field of specialised knowledge. (SJH**: I digress at this point to say that normally it would be fatal on an appeal to try to argue a point where specific objection was not taken at first instance. That rule seemingly is relaxed in criminal matters for policy reasons. In this case it was*

clear that the Court thought that specific objection should have been taken to the evidence given by A/Prof Cross because of his lack of relevant expertise).

[468] It was submitted to this Court that at the very least A/Prof Cross' lack of expertise in these areas diminished the weight that could reasonably be attributed to his evidence. A/Prof Cross' qualifications are in physics and his primary area of expertise is in plasma physics. He has spent some time since his retirement assisting the Police in the investigation of incidents of persons falling and has published alone, or with others, some papers concerned with the physics of sport. In the course of these tasks he has applied his knowledge of basic physics. HE HAS NO QUALIFICATIONS OR EXPERIENCE IN BIOMECHANICS."

15. Choice of the right type of expert is therefore important. This is to be distinguished from expert shopping. You are not simply seeking somebody who will agree with the argument you intend to pursue but somebody who has the expertise in the correct field and the correct part of the field to express an opinion about the matter at all. In a recent case in which I was involved we had to look at the cause of the explosion of a large wine vat at the Drayton's Winery in the Hunter Valley. Some welders were welding the vat and it exploded terribly causing massive damage and loss of life and injury.

16. We commissioned two experts. One was a welding expert so that we could examine what was actually happening at the time. That was straightforward. The second expert however was a mathematician. We specifically retained him because it was necessary to perform some calculations on liquid evaporation and gas expansion and the like from residual material at the base of the vat to discover the true cause of the explosion. Only by looking at something carefully to determine what type of expert was needed were we able to retain the persons in the correct field and to discover the cause of what happened.

17. It follows that the obligation of the practitioner is to be thoroughly engaged in the commissioning of the expert. My number one rule is to sit down and speak to the expert directly to, as I put it, "toss the case around". This is not a matter of suggesting an argument or the like, but a matter of thoroughly understanding each case on its merits. That exploration of both the subject matter and the particular factual

circumstances is, in my view, absolutely critical in any case whether it be civil or criminal. However, two very important things must be remembered:

i. Make sure you avoid bias at all costs. In that regard you should ensure that objectivity is maintained between the legal practitioners in the case and any expert retained. Assume that if any bias develops at all it will be exposed at trial to the detriment of your case.

ii. Always assume that any material that passes between legal practitioner and expert will become available on request to the other side. Do not assume that you will be able to claim legal professional privilege. Never, for example, provide full statements to an expert. In letters of instruction you can ask the witness to assume certain things and set out those assumptions in your instructing letter. They should be set out as assumptions and should not be referenced to any particular document which might subsequently be called for. This is particularly important when one for example considers criminal trials now where, pursuant to recent legislation, there is ostensibly an obligation on the defence to serve expert reports in criminal matters.

18. Often experts are asked to provide a report and simply respond as requested. However, because there is an obligation to provide all reports (although this rule is somewhat flexible) then in my view it is always important to simply obtain drafts of reports because instructions can be both misunderstood and incomplete from time to time. The process of providing a draft report is similar to the process of engaging the expert in conferences from time to time to ensure that all knowledge is passed between the practitioner and the expert and the relevant questions addressed. When those matters have been achieved then of course the expert will come to his or her own conclusions in the proper way and finalise what will become the report or reports.

19. Having taken into account what I have just said two further things need to be borne in mind:

i. Courts have sometimes criticised the practice of lawyers holding preliminary discussions with an expert before the engagement of that expert with the

objective of identifying the expert's probable approach. This is to be distinguished from retaining an expert and conferring with him or her in the manner that I have suggested so long as it is very clear that objectivity is being maintained at all times and that bias is not allowed to develop.

ii. It is not your responsibility to write the expert's report. However, it is your responsibility to ensure that it is in admissible form. Once again Courts have been known to offer criticism where lawyers have not ensured that commissioned reports are not in admissible form: *Jango v Northern Territory of Australia (No 3) [2004] FCA 1029 at [12] and [13]*.

20. We should then turn our attention to two things that are critical. They are the Evidence Act and the Code of Conduct.

<u>The Evidence Act:</u>

21. S. 56 of the Act is the section that provides that only relevant evidence is admissible.

22. S. 55(1) of the Act provides that relevant evidence is evidence that if it were accepted could rationally affect either directly or indirectly the assessment of the probability of the existence of a fact in issue in the proceeding.

23. S.57(1) of the Act provides that for a Court to determine the question of whether evidence is relevant depends on the Court making an additional finding (including the factual finding of what the evidence is). The Court may find that the evidence is relevant:

i. If it is reasonably open to make that finding, or

ii. Subject to further evidence being admitted at a later stage of the proceeding that will make it reasonably open to make that finding.

24. The so-called opinion rule is found in s. 76 of the Act which says:

""76.The opinion rule …

(1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

25. Finally, S.79 of the Act says the following:

> ***"79 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.***
>
> ***…"***

26. The above portions of the Act should be at the forefront of any lawyer's thinking when the question of expert evidence is being considered. There are, of course, many other sections of the Act that are relevant, such as the exclusionary sections, but a discussion about those is for another day.

<u>The Code of Conduct:</u>

27. In both civil and criminal cases experts are said to be bound, and must abide by, the Code of Conduct which is found in Schedule 7 to the Uniform Civil Procedure Rules (2005). The touchstone of the Code is of course impartiality which reflects the discussion about bias to which I have been referring. I have always maintained that it is imperative for the Code of Conduct to be complied with otherwise there is a risk that the opinion expressed by an expert will be rejected. That dogma of mine was tested somewhat in *Wood's* case to which I have already referred. Chief Justice McClellan said in *Wood* the following:

> ***"[728]It may be, as some previous decisions suggestion, that an expert's evidence is not inadmissible merely because the expert has breached or overlooked the Expert Witness Code of Conduct. … This position accords with the view that bias is 'no reason not to admit evidence of [the] expert'. …***
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> ***[729] This is not to say that the Expert Witness Code of Conduct is merely aspirational. Where an expert commits a sufficiently grave breach of the code, a Court may be justified in exercising its discretion to exclude the evidence under ss.135 or 137 of the Evidence Act."***

28. I digress to note that in *Wood's* case there was, after the trial, the release of a book by A/Prof Cross and another paper that he had delivered online. The contents of that

material was admitted as fresh evidence on the appeal. The Court felt that those documents were critical to the consideration of the Appeal. McClellan CJ said:

> ***"[715] After the trial A/Prof Cross published the book titled 'Evidence for Murder: How Physics Convicted a Killer'. It was, of course, published when this appeal was pending. It is a comprehensive account of A/Prof Cross' opinion of various aspects of the evidence and of his involvement in the investigation. Although A/Prof Cross, in his book, acknowledges contemporary concerns about the integrity of expert evidence, he appears oblivious of the serious problems which the book reveals about his own involvement in the Police investigations. The energy he applied to assisting the Police was no doubt a result of worthy intentions, but then this is almost always the case. Once an expert has been engaged to assist in a case, there is a significant risk that he or she becomes part of 'the team' which has the single objective of solving the problem or problems facing the party who engaged them to 'win' the adversarial contest. It is an almost inevitable result of the adversarial system.***
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> ***…***
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> ***[730] I do not believe it is necessary to resolve this issue in these proceedings. However, as I have said, to my mind the book which A/Prof Cross published has the consequence that his opinion on any controversial matter has minimal if any weight.***
>
> ***…***
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> ***[732] In the book A/Prof Cross indicates that he first became involved in the matter before the inquest which concluded in February, 1998. It is apparent that although the Coroner returned an open finding the Police had suspicions concerning the Applicant's role in the matter, which were suspicions that A/Prof Cross clearly shared. I am in no doubt that A/Prof Cross saw himself as the primary source of forensic assistance for the Police in proving that Ms Byrne did not commit suicide but was murdered by the Applicant."***

29. Clearly the Appellate Court thought that the expert evidence of A/Prof Cross was sufficiently tainted to be rejected. Whether you call it bias or absence of impartiality, there seemed to be no doubt in the Appellate Court's mind that A/Prof Cross had joined in effect the Prosecution team.

The Practical Approach:

30. As I have titled this paper as something to do with practicality, my suggestion is that the whole process be kept simple as I have said. Perhaps the easiest way to approach the task which I have outlined above is to consider a case where expert evidence has been served upon you. It is by conducting that enquiry that the lessons that will be learned in obtaining evidence to support your own cases will become easier to understand.

31. The first thing that I do is set out a table with 3 columns. The first of those columns is taken not only from the Common Law but from s.79 of the *Evidence Act* which I have referred to above and I usually head that column "Training, Study and Experience". The second column I title "Assumptions/Foundation". The third column I title "Opinion/s Expressed". I have names the columns in that order because that is usually how they appear in a written expert's report. It is however convenient to set the columns out with the opinion column being first.

Opinions Expressed	**Training, Study & Experience**	**Assumption/Foundation**

32. The first task is to extract the relevant opinions from the report. These should be then written in the relevant column. Then look at whether the training, study and experience provides somebody with the specialised knowledge entitling the expert to express that opinion. If it does not then, of course, you can deal with it appropriately. It follows that against each opinion you should write down the relevant training, study and experience and the specialised knowledge relied upon to enable that opinion to be expressed. If, however, the training, study and experience question is satisfied in favour of the expert, then one must look at the assumptions that are made and the foundation upon which the opinions are expressed to be formed. Once again, against each opinion the relevant assumptions/foundation should be set out clearly.

33. It is usually the foundation/assumption issue which is the most contentious area. It is almost impossible to convince an expert to change his or her mind. What one sets out to do is to demonstrate either that the expert did not have the requisite training, study and experience in the particular field and in the particular category in that field (as the Court of Appeal analysed in *Wood)* or that the assumptions made were not supported by the foundation material and hence the opinion expressed had no value.

34. The best way to understand the utility of the above approach is to look at specific examples. Some years ago I was involved in the civil litigation that arose out of the sinking of the N'gluka, a motor cruiser, which sank up at Port Stephens killing 5 children who were trapped in the boat after it sank. This was a motor cruiser that had 49 persons on it when it sank. There was considerable factual dispute about how it was that the vessel came to commence capsizing, however, the bulk of the trial was about expert evidence. My client was the manufacturer of the boat – Stebercraft. One of the other parties in the case qualified a Marine Architect to give expert evidence. He was a PHD. Unfortunately, his surname was Doctors. The continual reference to Dr Doctors became in the end, quite comical. It did not help that he looked like Mr Bean.

35. There is no doubt that Dr Doctors had training, study and experience. There was no doubt that he had specialised knowledge based on that training, study and experience. The question was whether those two things qualified him to give evidence in that particular case. In other words, was the evidence he was purporting to give substantially based on that knowledge. His experience was with large seagoing ships being bulk carriers and the like. His knowledge of and experience in relation to small motor cruisers was virtually nil. After a long voir dire and during evidence in the trial it became clear that his evidence would be rejected on any meaningful point because he did not fall into the correct category. That was a case where those who retained him simply understood he had specialised qualifications and retained him without doing the necessary exploration to ascertain whether he was the right expert. In other words, they did not explore whether he could give evidence based wholly or substantially on the relevant specialised knowledge.

36. The second example that I can give you is in relation to the assumptions/foundation question. I was involved in the coronial inquest after the Newcastle Earthquake which occurred in December, 1989. I was retained to act for the Workers' Club which as you know had collapsed. It was really the only building in Newcastle that actually totally collapsed. There were a lot of buildings demolished but that was a different insurance issue.

37. By the time all of the material was collected as requisitioned by the Coroner there were many volumes of material to be tendered at the Inquest. A large body of that material was in the nature of expert evidence. An expert engineering report had been commissioned by the Coroner from a well-known and well-established engineering firm in Newcastle. The conclusion reached was that a critical cord member at the top of the western wall was missing from the construction and as a consequence of that when the earthquake hit the weakness had been exposed and the collapse occurred from that point. This was said to be an opinion expressed as a consequence of the requisite training, study and experience providing specialised knowledge (in a relevant sense) to the expert.

38. The Coronial team however did not stop there. They commissioned an oversight report from a Professor at Newcastle University who studied in depth what had been examined by the reporting expert engineer and he put his imprimatur on the methodology and opinions reached. So it was presented at the Inquest and the witnesses were called.

39. We weren't terribly happy about that approach and so we looked at ways to properly test the expert evidence. Whilst I may not have, at that stage, been mindful of the 3 columns which I now advocate, the same process was engaged. What we needed to look at was the assumptions and the foundation material. The experts had said that because of the weakness at the top of the western wall the earthquake acted on the building in a particular way and therefore caused a collapse in a particular way. When I cross examined the engineering expert he proffered the view that if his opinion was right, the mechanism of collapse would cause the bricks at the top half of the western wall to collapse inwards. Those of you who can recall the original Workers' Club will know that on that side of the building there was an Auditorium. The Auditorium had a

mezzanine level. The mezzanine level was covered by a rich red carpet. Were the experts correct then clearly, because of the way the building collapsed, the bricks from the top half of the western side of the club would have fallen inwards onto the mezzanine level. I showed the expert many photographs taken in the aftermath of the collapse in which barely a brick was present on the thick red carpet. Other photos showed clearly that the vast majority of the western wall collapsed outwards as opposed to inwards. When the Professor was called and I cross examined him about this he agreed with me that the original opinion as expressed could not be correct.

40. An interesting sidelight to that event was that the Newcastle City Council who became a party to later litigation claimed on its insurance through GIO. GIO rejected the claim for specific legal reasons which it is not necessary to here examine. However, what is interesting is when the matter was litigated (that is the insurance matter) the parties agreed about the mechanism of collapse on the basis of what was prepared for the coroner. This mechanism as accepted in that litigation involved the missing cord and the original engineering opinion. That went unchallenged to the highest appellate court in our land. It seems that no-one had paid any attention to the evidence that was led in the Coronial Inquest.

41. Subsequent to the Coronial Inquest, I was then retained by the Insurer of the Club in relation to civil proceedings brought by 13 plaintiffs. The Council was also a Defendant. The Club, for whom I acted, also had a substantial claim against the Council alleging negligence in the approval of the building application, which had resulted in it collapsing during the earthquake. To say the least, this was difficult litigation.

42. In the course of that litigation many experts were retained. We retained an expert from the United States together with a number of experts from Australia including seismology experts from Melbourne.

43. The point of that story is that it is very important to critically examine each aspect of any case and it is crucially important not to simply succumb to what is no doubt a trap that is easily fallen into, namely, that when experts say something they are correct. As the Chief Justice said in *HG* as I have indicated above, there is a very valid danger to

that because “those opinions” might be cloaked “with a spurious appearance of authority” when that is the last thing they should actually be considered as having.

Summary:

44. Having traversed the above simple process you will now presumably:

i. Be in the best position to challenge expert evidence in the case against you.

ii. Have available to you admissible expert opinion to be tendered and relied upon which is in written form. As to that written report:

(a) It must contain a certification that the expert has read and agrees to be bound by the Expert Code of Conduct.

(b) It must contain an outline of the expert’s qualifications and experience which will sufficiently demonstrate the specialised knowledge required to answer the questions considered for opinion. The expert’s curriculum vitae which might disclose other matters of expertise and any matter which might impact on the expert’s independence should also be attached.

(c) If the opinion or any part of it is based on facts either experienced or observed by the expert, those facts must be identified and proved by the expert.

(d) If the opinion is based on facts that are assumed then those specific assumptions need to be identified in the report and proven independently. The question of admissibility does not initially depend upon that proof at the time the evidence is being given but its utility will certainly depend on such proof being available.

(e) It should have a list attached of any documents or materials provided to the expert and examined by that expert. If it is practical to attach copies of those documents to the report then that should also be done.

(f) It is usual to pose specific questions for an expert to respond to. Those questions should be set out verbatim in the report followed by the analysis in relation to each of them.

(g) In relation to the opinions so expressed it would be useful to have a summary of the opinion in relation to each of the questions so posed.

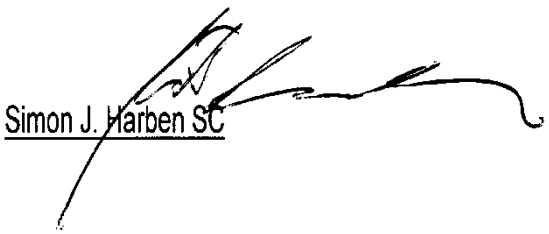
(h) It is important that the reasoning of the expert be exposed. This must be done comprehensively. It must be done with coherence and it must be transparent. If that is done properly that will also include a differentiation between assumed facts and opinion specifically reached by the expert.

(i) It must explain in relation to the field of specialised knowledge how that applies to the relevant facts to produce the opinion so expressed.

(j) It is often the case that opinion is sought in relation to the expert opinion from your opponent. Your expert needs to clearly articulate what is being responded to and why.

45. Having performed the above checklists you hopefully will now be ready (at least from the point of view of expert evidence) to otherwise prepare the case for trial.

Dated: 5th September, 2014.



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