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Part 2

In *Makita* Heydon JA cited *Wigmore on Evidence*:¹

“1. Testimony in the shape of inferences or conclusions *always rests on certain premises of fact*. That which has been called observation, serving as the basis of belief in matters directly cognizable by the senses - as, the facts of an affray, a conversation, a trespass, and the like - is here replaced by what may be called a consideration of the premise. If the witness has not considered or had in mind these premises, his inference or opinion is good for nothing.

2. *These premises*, a consideration of which is essential to the formation of the conclusion or opinion, *must somehow be supplied to the jury by testimony*. The same witness may supply both premises or conclusion; or one witness may supply the premises and another the conclusion. The two are not necessarily connected.

3. If the latter method is chosen, and a witness is put forward to testify to the conclusion, *the premises considered by him must be expressly stated, as the basis of his conclusion*; otherwise, since his conclusion rests for its validity upon a consideration of the premises, if those premises are not made to accompany the conclusion, the tribunal might be accepting a conclusion for which the witness had considered premises found by the tribunal not to be true.

4. Hence, *the premises must be stated hypothetically in connection with the conclusion*; then, by other testimony, the material for determining the truth of the assumed premises may be furnished to the tribunal. The key to the situation, in short, is that there may be two distinct subjects of testimony - premises, and inferences or conclusions; that the latter involves necessarily a consideration of the former; and that the tribunal must be furnished with the means of rejecting the latter if upon consultation they determine to reject the former, ie of distinguishing conclusions properly founded from conclusions improperly founded.”²

“Clearly, the facts which the witness is assuming must be made clear to the jury. They must know upon what premises the conclusion is based. This is necessary not only to render the conclusion useful but to impeach it if the premises be not established. In what form then may the premises be conveyed to the witness? First, may

¹ As cited in *Trade Practices Commission v Arnotts Ltd (No 5)* (1990) 21 FCR 324 at 327 per Beaumont J

² *Wigmore on Evidence*, Vol II (Chadbourn revision, 1979), para 672, pp 933-934 emphasis as cited in *Makita*

the witness be asked - 'Upon all the evidence in the case what is your opinion as to X'? A question in this form is, it is suggested, *clearly objectionable*. First, because it renders it impossible for a jury to determine whether the opinion is based upon facts which have been proved, or indeed to determine at all upon what facts it is based. Second, it permits and encourages the witness to select for himself which of the evidence he accepts and which he rejects. The evidence of one witness whose testimony is furnished to the expert as part of his data may itself be internally conflicting, and this apart from the discrepancies between the evidence of witnesses called in the same interest."³

In *Trade Practices Commission v Arnotts Ltd* Beaumont J rejected the evidence of an expert who had attended or read the transcript of the whole hearing and had read all the exhibits and who then commented on particular allegations in the Statement of Claim. He said: "In my opinion, these authorities establish that there is a rule of evidence at common law that, except in a straight-forward, uncomplicated case, where the facts are admitted and readily identified, the opinion of an expert is admissible only where the premises, that is to say, the facts, upon which his or her opinion is based, are expressly stated. It follows that, in a complex case, where facts are not readily identifiable, it is not permissible to put the whole of the transcript and documentary evidence to the witness en bloc it is impossible for the court to know what facts Dr Williams had in mind when expressing his views. This objection to his evidence is not a mere technicality nor is it only a rule to be applied in jury trials. True, some of the authorities refer to the jury, but the rule is of general application. In complicated litigation, there are sound reasons of policy which support a rule that the premises considered by the expert should be expressly stated rather than left to speculation. It is preferable that these matters be clarified when the witness is examined in chief rather than leave room for argument later as to exactly what matters the expert had in his mind when expressing his conclusions."⁴ On appeal it was said: What the rule really means is that an expert must not express an opinion if to do so would involve unstated assumptions as to either disputed facts or propositions of law.⁵ The court described as "illegitimate" the "use of an expert witness to filter the facts, asking the witness to hear or read all the evidence and then express factual conclusions ..."

In *National Justice Compania Naviera SA* the judge set out a list of duties and responsibilities of expert witnesses in civil cases as follows:⁶

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation

³ Gordon J Samuels, "Problems Relating to the Expert Evidence in Personal Injury Cases" in (ed) Harold H Glass, *Seminars on Evidence* (Law Book Co Ltd, 1970) p 145

⁴ After also referring to authorities including *R v Turner* [1975] QB 834, *Paric v John Holland (Constructions) Pty Ltd* [1984] 2 NSWLR 505 at 509-510, *Paric v John Holland (Constructions) Pty Ltd* (1985) 59 ALJR 844 at 846 and *R v Fowler* (1985) 39 SASR 440 at 443,

⁵ *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313 the Full Federal Court Lockhart, Wilcox and Gummow JJ

⁶ *National Justice Compania Naviera SA v Prudential Assurance Co Ltd ("The Ikarian Reefer")* [1993] 2 Lloyd's Rep 68 at 81-82 per Cresswell J

2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise An expert witness in the High Court should never assume the role of an advocate.
3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report
6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.
7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports

As Heydon JA said in *Makita*, while some of these matters have an ethical dimension, taken together they point to the need for the trier of fact to be fully informed of the reasoning process deployed in arriving at the expert's opinions. He said that Cresswell J's list has been influential both in causing rules of court to be devised in this and other jurisdictions to control expert evidence and in later judicial pronouncements. He pointed to *Clough v Tameside and Glossop Health Authority*: "It is only by proper and full disclosure to all parties, that an expert's opinion can be tested in court: in order to ascertain whether all appropriate information was supplied and how the expert dealt with it. It is not for one party to keep their cards face down on the table so that the other party does not know the full extent of information supplied."⁷ This implies that not only must the appropriate information be supplied, but that the expert must reveal the whole of the manner in which it was dealt with in arriving at the formation of the expert's conclusions.

"Before an expert medical opinion can be of any value the facts upon which it is founded must be proved by admissible evidence and the opinion must actually be founded upon those facts ..."⁸ "As with any other evidence, expert opinion must be comprehensible and the conclusions reached must be rationally based. A court ought not to act on an opinion, the basis for which is not explained by the witness expressing it ... None of these requirements is satisfied, when all that the medical expert says is 'I have examined this patient and from what I know about plant operation I think he can drive a D10 bulldozer on production work'."⁹

⁷ *Clough v Tameside and Glossop Health Authority* [1998] 2 All ER 971 at 977 per Bracewell J

⁸ *Bollock v Wellington* (1996) 15 WAR 1 at 3 per Anderson J

⁹ *Bollock* citing *Steffen v Ruban*

He also said: “Unless the process of inference by which an opinion is reached is expressed in a manner which permits the conclusions to be scrutinised and a judgment made as to its reliability, the opinion can carry no weight ... “.¹⁰

Kotzmann said that it was desirable for juries to be directed that “expert evidence is no better than the facts on which it is based, that it is for the jury to be satisfied of the facts in issue at the trial and that ultimately it is their opinion that counts”. Batt JA said that even where the expertise of the witnesses is not questioned, and even where their evidence is contradicted or substantially contested, there should as well be a direction that “the weight to be given to the opinions of experts is to be assessed in the same way as the weight to be given to the evidence of other witnesses”. This cannot be done unless the intellectual basis of the opinion is laid out.¹¹

As Heydon JA summarised the matter: in short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of “specialised knowledge”; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be “wholly or substantially based on the witness’s expert knowledge”; so far as the opinion is based on facts “observed” by the 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 in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert’s evidence must explain how the field of “specialised knowledge” in which the witness is expert by reason of “training, study or experience”, and on which the opinion is “wholly or substantially based”, applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert’s specialised knowledge. *If the court cannot be sure of that, the evidence is strictly speaking not admissible*, and, so far as it is admissible, of diminished weight. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but, to use Gleeson CJ’s characterisation of the evidence in *HG v R* (1999) 197 CLR 414, on “a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise”.

There must be specific evidence as to specialised knowledge of the person in relation to that subject and as to the training, study or experience upon which that specialised knowledge is based. The further requirement that an opinion be *based on* specialised knowledge would normally be satisfied by the person who expresses the opinion demonstrating the reasoning process by which the opinion was reached. Thus, a report in which an opinion is recorded should expose the reasoning of its author in a way that would demonstrate that the opinion is based on particular specialised knowledge. Similarly, opinion evidence given orally should be shown,

¹⁰ Citing *Pownall v Conlan Management Pty Ltd* (1995) 12 WAR 370 at 390

¹¹ *R v Kotzmann* [1999] 2 VR 123 at 135 per Callaway JA

by exposure of the reasoning process, to be based on relevant specialised knowledge.¹² Evidence not complying with the principles described might be inadmissible as irrelevant.¹³

¹² *Ocean Marine Mutual Insurance Association (Europe) OV v Jetopay Pty Ltd* [2000] FCA 1463 at [21]-[23]

¹³ *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 123 at [19] per Einstein J