expert matters

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What is a fact?

Rees v Lumen Christi Primary School [2010] VSC 514

Summary

Identifying assumed and accepted facts is crucial to enable the jury or judge to test and draw their own conclusions of the relevant disputed facts; otherwise the expert risks merely supporting the facts with his opinion of the facts. It is important that opinion evidence only be based on the experts specialised knowledge area, as any assumptions expressed outside the experts dedicated field risks being misleading or confusing to the jury or judge, and such will not be tolerated by the court.

Alternatively an expert may be able to provide a legal team with *expert assistance* which can help determine strategy or analysis. Having engaged an expert and obtained their insight into the matter, the legal team should consider whether the best way to use that knowledge is through an expert's report, assistance with submissions or some combination.

If an expert's report is to be provided then the need for careful consideration of what is a fact and an opinion should be stressed to the expert before they have drafted the report.

Background

The plaintiff was employed by the defendant as an integration teacher's aide. The plaintiff alleged that whilst in the course of her employment with the defendant at the school, the plaintiff suffered physical and psychological injury whilst attempting to restrain an aggressive and violent student. The plaintiff also alleged that following this incident, she was required to undertake duties in the course of her employment and was subjected to directions of the principal which further aggravated the injuries received as a result of the incident.

The plaintiff alleged that the defendant as an employer of the plaintiff was under a duty to the plaintiff to take reasonable care for her safety and that the injury suffered by her occurred as a consequence of the defendant's breach of that duty and/or negligence of the defendant.

Expert Opinion

When presenting the case, the plaintiff sought to call Professor T, an expert in the theory and practice of educational administration. In his main report, Professor T outlined a number of expert opinions regarding the plaintiff and her alleged mistreatment by the defendant and the principal in charge of the school. However, the plaintiff advised the court that a number of these opinions were to be omitted and amended, with the remaining opinions being used as oral evidence by Professor T.

The defendant objected to those parts of the written report not omitted by the plaintiff on the basis that, in substance:

- Professor T had assumed certain facts to be the facts of the case and then found as an opinion that they were the facts;
- These facts were, ultimately, the facts that the plaintiff sought to make out as her case; and
- Allowing them would be unfairly prejudicial to the defendant and misleading, or at least confusing, to the jury.

Thus, the defendant argued that it appeared Professor T had not adequately distinguished between facts and opinions.

"[this expert's] opinions are merely a means of repeating the facts he assumes and is merely a means of advocating the factual basis of the case the plaintiff seeks to put."

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In assessing whether Professor T's expert opinions were inadmissible, Justice Robson looked at Section 79 and Section 135 of the Evidence Act 2008.

Section 79 – Exception to the opinion rule

Basing his conclusions on the principles set out by Justice Gleeson in *HG v R*[1] and Justice Heydon in *Makita (Australia) Pty Ltd v Sprowles*[2], Justice Robson found there was no reason to doubt that Professor T was an expert in the theory and practice of educational administration.

However, in regards to whether Professor T's evidence was based "wholly or substantially" on his specialised knowledge, Justice Robson found significant problems, including that various opinions were merely factual observations which, for them to be drawn, did not rely on the specialised knowledge that was based on his training, study or experience.

In addition, Justice Robson found in this case that Professor T failed to correctly identify the assumed or accepted facts to which he applied his specialised skills based on training, study or experience. Rather, Justice Robson found that:

> *[Those] facts that Professor T does identify are conclusions of fact and constitute the very matters that he purports to express as opinion*
>
> *[Professor T] has not applied to primary assumed facts his specialised knowledge - as he has not identified any. He has not disclosed his reasoning to allow the jury to apply it themselves and make their own independent judgment. Rather, his opinions are merely a means of repeating the facts he assumes and is merely a means of advocating the factual basis of the case the plaintiff seeks to put.*

Using Justice Gleeson's terminology, Justice Robson suggests such evidence may be characterised as "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."[3]

Section 135 – General discretion to exclude evidence

Section 135, which allows evidence to a "balancing exercise" of the probative value of the evidence is outweighed by potential dangers, was also considered.

In this case, Justice Robson found that Professor T's expert evidence was potentially misleading or confusing to the jury. He stated that the jury would "not be assisted by a purported expert giving evidence squarely upon the ultimate facts in issue" and that opinion evidence based on unsupported facts could have a dramatic effect on the jury and their decision making capabilities for themselves.

Justice Robson rejected the evidence on discretionary grounds, being very specific in his rationale:

> *In exercising my discretion I have taken into account Professor [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 Professor [T] opines on are matters that the jury is capable of deciding itself without expert assistance.*

Expert assistance

Although not making a definitive statement, Justice Robson states that "perhaps" Professor T's evidence was better characterised as expert assistance, rather than expert evidence. He refers to Justice Allsop who stated[4]:

> *There may well have been great value in those preparing [the respondents] case obtaining the views of [an accounting expert]. Such views would no doubt have assisted them in analysing and preparing the case and in marshalling and formulating arguments. That is the legitimate, accepted and well known role of expert assistance for a party preparing and running a case...*
>
> *There is no ethical reason why [expert evidence] cannot be given by the person providing expert assistance, as long as that person and the legal advisers understand and recognise the difference between the two tasks, and keep them separate.*

Conclusion

In conclusion, Justice Robson dismissed Professor T's opinion evidence under both Section 79 and Section 135 of the Evidence Act. He found that Professor T did not express opinions that were wholly or substantially based on his specialised knowledge based on his training, study or experience and that the opinion evidence was based on unsubstantiated and wrongly assumed facts not proven to the court, thus being potentially misleading or confusing to the jury. It is interesting to consider whether the same conclusion would have been reached if no jury was involved. That being said, Justice Robson praised Professor T as "a highly qualified individual", who perhaps could have assisted the case through expert assistance rather than expert evidence.

This case highlights the need for experts to fully understand their role in the litigation process and have the issue of instructed assumptions, facts and opinions properly explained to them by their instructing legal team. It also highlights that the expert's knowledge and insight can sometimes be as effectively used through their assistance in submissions and doesn't always have to be used through an expert report.

Endnotes

1. *HG v R (1999) 197 CLR 414 at 427*
2. *Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705 at [87]*
3. *HG v The Queen (1999) 197 CLR 414 at 428, [41]*
4. *Evans Deakin Pty Ltd v Sebel Furniture Ltd [2003] FCA 171 at 676*

Whatever the factual, accounting, financial or e-discovery issues that arise, KordaMentha Forensics' expertise and experience can bring clear thinking, objectivity and effective communication of ideas to help find the facts, understand the relevant issues and clarify the financial and other impacts in a cost-effective way.

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