expert matters

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When the dust settles, Makita still stands...(Part 1)

Dasreef Pty Ltd v Hawchar [2011] HCA 21 (22 June 2011)

Summary

In a recent High Court appeal, the full bench concurred on a matter relating to the admissibility of an expert's evidence at trial.

The majority (of six) found that an expert's evidence had to show the relevance of their specialised knowledge to the opinion they were providing, and that their opinion is wholly or substantially based on that specialised knowledge.

They found, in this case, that whilst the expert had explained his specialised knowledge, he had also provided sufficient information that indicated his opinion was of limited use as a "ballpark" figure. They therefore found that the evidence was inadmissible *for the purpose to which the judge chose to use it.*

Justice Heydon split from the other six judges in providing an extended basis for his decision, which discusses topics including the "difficulties with expert opinion evidence" as well as the rationale, authority and principles behind three common law rules for expert evidence admissibility and their application to section 79.

We review Justice Heydon's comments in the next edition of *Expert Matters*, and in this edition focus on the background of the case and the majority decision.

"a lack of reasoning did not make [Dr B's] opinion inadmissible"

Background

Mr H worked as a stonemason for Dasreef from 1999–2005. During this time he allegedly developed silicosis as a result of breathing silica dust. In October 2007 he initiated proceedings for damages as a result of an alleged breach of statutory duty, negligence and breach of contract.

During trial, expert opinion was taken from Dr B, a chemist, and Professor H, an expert pathologist. Professor H provided evidence that Mr H had silicosis and it was contracted as a result of high-levels of silica dust exposure from 1999. Dr B gave evidence regarding appropriate defences, and *inter alia*, commented on the amount of silica dust exposure Mr H was exposed to.

The Tribunal found Dasreef was 20 in 23 parts responsible for Mr H's silicosis, the balance of responsibility resting with his work in Lebanon and the work he had done in Australia on his own account.

Dasreef appealed, primarily on two grounds:

> *the primary judge had "erred in admitting evidence of Dr [B] as to the numerical level of respirable silica dust in [Mr H's] breathing zone".*
>
> *Dasreef further alleged that the primary judge had "erred in relying on his 'experience' as a 'specialist tribunal'". The primary judge had said, in his reasons for judgment, that he could rely on that experience to conclude that [Mr H's] silicosis had been caused by exposure to silica dust.*

The Court of Appeal rejected both of these grounds.

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Issues

Contested Trial Evidence

During trial, Counsel for Dasreef objected to all of Dr B's report, submitting more than 70 specific objections.

Specific emphasis was placed on the following paragraph:

> *The **actual dust concentrations** generated in [Mr H's] breathing zone... **most certainly would not be from half to two ten-thousandths of a gram per cubic metre of air**, but more realistically would be of the order of a thousand or more times these values or even approaching one gram, or thereabouts, per cubic metre.*
>
> *[and]...**a considerable proportion of the size distribution of the suspension would be 4 µm and below**, and hence would constitute the 'respirable' fraction of the dust cloud. [emphasis added]*

On a voir dire, Counsel for Dasreef cross-examined Dr B with a view to demonstrating that Dr B did not profess to have expressed any opinion based on his specialised knowledge, experience, training or study about the amount of dust Mr H would have inhaled during his time with Dasreef.

Dr B agreed with a number of questions put to him by counsel for Dasreef to the general effect described, however at the end of the voir dire the primary judge did not rule on the admissibility of Dr B's evidence.

The primary judge's use of the evidence

The trial judge sought to calculate the levels of silica dust to which Mr H had been exposed in the course of working for Dasreef. He did so, in part, by relying on the evidence of Dr B relating to dust exposure levels.

The majority judgment suggested this not only involved "building estimate upon estimate to yield some apparently precise calculation" but also had "a more deep-seated problem. Was there admissible evidence before the primary judge?"

Court of Appeal outcome

The Court of Appeal considered the critical question to be whether Dr B "had the relevant expertise to proffer an opinion concerning the measurement of silica dust in the way he did".

The Court found that whilst the evidence may have been "contestable and inexact... it was then for someone qualified as an expert to say that his estimate was worthless, or of little weight, or for some other reason unreliable."

The Court concluded "a lack of reasoning did not make [Dr B's] opinion inadmissible".

Majority High Court judgment

The majority found that the trial judge had erred in not explicitly ruling on the expert's evidence earlier in the trial. They stated that:

> *Often the ruling can and should be given immediately after the objection has been made and argued. If, for some pressing reason, that cannot be done, the ruling should ordinarily be given before the party who tenders the disputed evidence closes its case.*

In addition, it was considered in doubt as to whether Dr B ever meant to give evidence as to the levels of silica dust that Mr H had been exposed to. Regardless, the majority found that for his evidence to be admissible, Dr B would have had to give evidence that he had:

- Relevant specialised knowledge (expertise) in order to measure or estimate dust levels in the context of a worker in Mr H's circumstances, and had
- Based his opinion wholly or substantially on that expertise.

Notwithstanding the theoretical issues around how this could or should be achieved, the majority found that Dr B had given evidence of his specialised knowledge, and that this specialised knowledge permitted him to provide no more than a 'ballpark' estimate of the dust exposure of Mr H.

However, the evidence was not admissible for the purposes of what the trial judge had used it for.

Contrary to the judgment of Justice Heydon (discussed next edition), the majority found that this case did not turn about the existence of the basis rule, finding that:

> *What has been called the basis rule is a rule directed to the facts of the particular case about which an expert is asked to proffer an opinion and the facts upon which the expert relies to form the opinion expressed.*
>
> *The point which is now made is a point about connecting the opinion expressed by a witness with the witness's specialised knowledge based on training, study or experience.*

Unfortunately for Dasreef, the rejection of Dr B's evidence regarding dust levels did not allow them to win the case. The majority dismissed the appeal, finding that the uncontested evidence of Professor H coupled with the evidence from Dr B that exposure to dust was readily preventable, meant that the Court of Appeal should have still dismissed Dasreef's case.

Relevance

The majority's ruling in this case showed, *inter alia*, that:

- Expert evidence admissibility should be resolved prior to the close of tendering evidence,
- Expert evidence must clearly show that the opinion being proffered is based wholly or substantially on the expert's specialised knowledge, and
- Appealing expert evidence can be successful, but it doesn't always lead to the result a party might hope for. Contesting expert evidence should be done in consideration with what other expert evidence has been tendered.

Justice Heydon takes a more wide-ranging view of this case and his judgment contains a high-level review of common law rules governing the admissibility of expert evidence and their implication to the construction of section 79.

We review Justice Heydon's judgment in the next edition of *Expert Matters*.

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