

Litigation & Dispute Resolution Update

The Admissibility of Expert Evidence

Issues relating to how courts should deal with the admissibility of expert evidence recently were clarified by the High Court of Australia in *Dasreef Pty Ltd v Hawchar* [2011] HCA 21.

Background

Mr Hawchar (**Hawchar**) worked as a stonemason for Dasreef Pty Ltd (**Dasreef**) between 1999 and 2005 where he developed silicosis resulting from exposure to silica dust. In October 2007, Hawchar began proceedings against Dasreef in the Dust Diseases Tribunal of New South Wales claiming damages for personal injury alleging breach of statutory duty, negligence and breach of contract.

The Tribunal found Dasreef was 20 in 23 parts responsible for Hawchar's contraction of silicosis. The balance of responsibility was held to rest with other work.

The Trial

At trial Counsel for Dasreef objected to Dr Basden's report and on a *voir dire* Dr Basden did not profess to have expressed his opinion based on specialist knowledge, experience, training or study about the amount of dust Hawchar would have inhaled during his time with Dasreef.

The primary judge did not rule on the admissibility of Dr Basden's evidence but did calculate the levels of silica dust to which he found Hawchar had been exposed in the course of working for Dasreef by partly using estimates given by Dr Basden and relying on the Judge's own experience in dust disease cases.

The Court of Appeal

Dasreef appealed claiming that the primary judge had erred in admitting evidence of Dr Basden and further that the primary judge had erred in relying on his own experience in the specialist tribunal to draw conclusions not supported by the evidence.

The Court of Appeal found that Dr Basden's opinion was not based on precise measurement or a view expressed with precision, but rather an estimate drawn from his experience. The Court was not prepared to rule the evidence was worthless, or of such little weight that the lack of reasoning rendered his opinion inadmissible.

The High Court

The High Court ruled that the evidence of Dr Basden was not admissible for the purposes for which the primary judge used it and that the primary judge was not entitled to take account of his experience as a member of a specialist tribunal in determining what caused Mr Hawchar's silicosis.

In so ruling, the High Court canvassed a number of issues relating to expert evidence.

To be admissible under s79(1) of the *Evidence Act*, the evidence that is tendered must satisfy two criteria as follows:

1. The witness who gives evidence has specialised knowledge based on the person's training, study or experience; and
2. The opinion expressed in evidence by the witness is wholly or substantially based on that knowledge.

Dr Basden gave evidence of his training, study and experience. He did not give evidence asserting that his training, study or experience permitted him to provide anything more than what he called a ballpark figure estimating the amount of respirable silica dust to which a worker would be exposed in certain circumstances.

There was, in these circumstances, no basis on which the primary judge could conclude that a numerical or quantitative opinion expressed by Dr Basden was wholly or substantially the result of specialised knowledge based on training, study or experience.

Dr Basden's evidence was not admissible as the basis to found the calculation made by the primary judge of the level of respirable dust to which Hawchar was exposed.

As for his own experience the primary judge was permitted to take account of matters not proved in evidence only if they were matters of which judicial notice could be taken. The causes of silicosis were not matters for judicial notice.

As a general rule, trial judges confronted with an objection to admissibility of expert evidence should rule upon that objection as soon as the objection has been made and argued, or 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".

The High Court held that Dr Basden's evidence of his "specialised knowledge" did enable him to offer the "ballpark" estimate of Hawchar's exposure, and that his expert evidence "is better understood as offering an opinion about what measures could have been taken to prevent Hawchar contracting silicosis...".

That led the High Court to discuss the "basis rule", stating:

"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."

The outcome

Despite the wrong use by the tribunal of expert evidence and the primary judge's impermissible reliance on his own experience as a judge in a specialist tribunal, the High Court dismissed Dasreef's appeal.

Other uncontested evidence supported Dr Basden's conclusion about Hawchar's exposure to silica dust.

In the result, the finding that Dasreef was liable to Hawchar was upheld.

**This article was produced by Herbert Geer Lawyers.
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