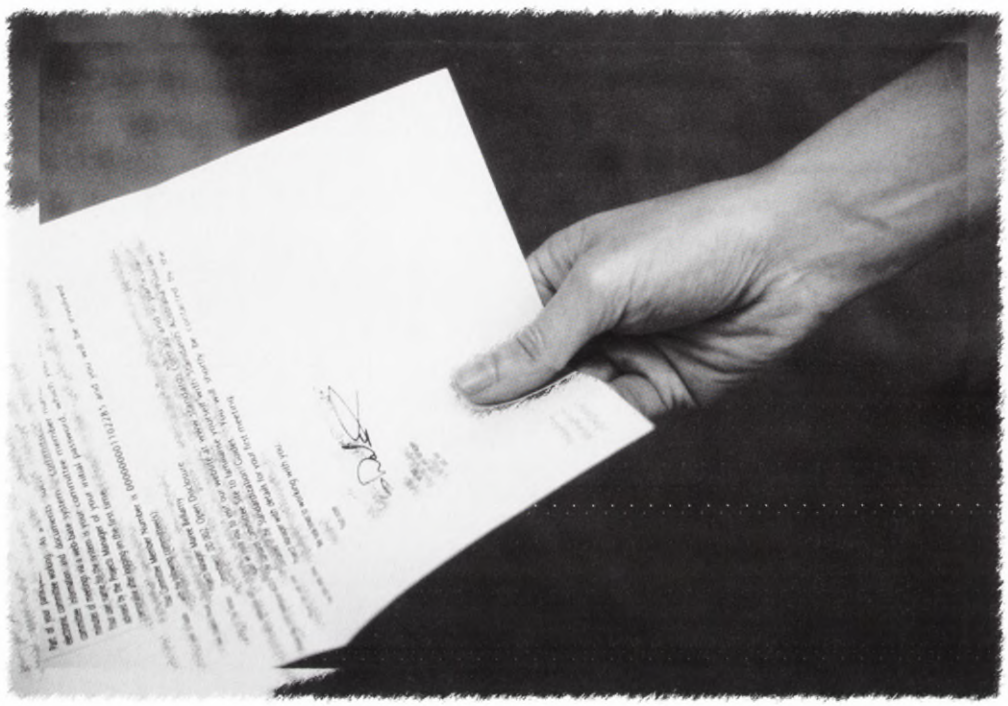
JOHN GRIFFIN QC, QLD



Expert witnesses: The continuing dilemma

John Griffin QC is a Barrister at Clashfern Chambers **PHONE** 07 3236 1344 **EMAIL** hfarley@qldbar.asn.au

The problems associated with expert evidence have not abated and, in fact, are more beguiling than ever. It remains the case that it is extremely difficult to predict whether or not expert evidence will be received in a particular situation. A good example is to be found in the evidence of accountants. Some judges will receive the evidence of an accountant on practically any matter, or in relation to any calculation, whereas others will resist.

It seems that there are a number of reasons why the "expert evidence" problem continues to bedevil practitioners.

The first is that applicable to the admission of expert evidence principles are not entirely clear, and, for Australian law, are in practice derived by making a contrast between two cases, namely *Clark v Ryan*[1], and *Weal v Bottom*[2]. Further, these two cases themselves are redolent with differing judicial approaches to the issues involved.

Clark v Ryan

In *Clark v Ryan*, the issue was whether a witness could give evidence that a semi-trailer of the kind involved in the collision could swing out when taking a bend if driven through the bend too fast. The witness had no engineering diploma or certificate, but had served an apprenticeship with an engineering company and at night had studied applied mechanics, drawing, physics and mathematics at a technical college. He claimed wide general engineering experience, and for many years had engaged in the investigation of road accidents.

The evidence was held (by majority) to be largely inadmissible.

Dixon CJ held that the opinion evidence lay outside any qualifications the witness could be said to possess and offended against the "common knowledge" rule in that it intruded upon matters that it was within the ordinary capacity of jurors to determine for themselves.

Menzies J said that the witness was not qualified to "express his conjectures which paraded as scientific opinion". He said:

". . . opinion evidence to account for a happening that is described to a witness is admissible only when the happening can be explained by reference to an organised branch of knowledge in which the witness is an expert ... Such skill as he has was derived from experience rather than from any course of study ... This ... is a case where a review of his evidence reveals that Mr Foster Joy had no expert qualifications in the branch of knowledge upon which he was allowed to speak as an authority."[3]

Windeyer J said it was a case of trying to turn a lay witness into an expert. He criticised the plaintiff's side for "thinking apparently that by describing him as an expert they could enlist him as an advocate".[4]

McTiernan J, who dissented, had an altogether different approach. He did not think that it was a case that offended the "common knowledge" rule. He said:

"The plaintiff sought to prove that speed could be a factor contributing to the jack-knifing of a semi-trailer travelling on winding road such as that on the Gosford side of the bridge and taking the severe bend in the road. The jury or some of them may not have needed any enlightenment on this subject. But it is not possible to determine a priori the amount of knowledge which a jury may have of the subject or that they have sufficient experience of the behaviour of articulated vehicles to be capable of forming a correct judgment on it. The plaintiff's advisers acted wisely in calling an expert to give evidence on the subject."[5]

> "...there are a number of reasons why the 'expert evidence' problem continues to bedevil practitioners."

He concluded that there was sufficient evidence before the trial judge to hold that the witness had "sufficient knowledge and experience on the subject of the jack-knifing of semi-trailers to warrant the opinion which he expressed as to what are the probable causes of jack-knifing".

Weal v Bottom

In *Weal v Bottom*, the relevant issue was very similar to that in *Clark v Ryan*. It was whether the rear end of a tanker trailer was over the middle of the road at the time of the collision. The witness had driven motor vehicles for 30 years and had frequently driven vehicles, including articulated vehicles, around the curve in question.

Barwick CJ said that evidence of what an articulated vehicle could do in such circumstances "could be given by an expert, properly so called, that is to ▶

say, by a person who by study and instruction in some relevant scientific or specialised field was able to express an opinion, founded on scientific or specialised knowledge thus acquired, as to the likely behaviour of such a vehicle so placed".[6]

He went further and said that what the vehicle might do in the circumstances could also be established by someone who had actually experienced or who had observed such behaviour. He was of the view that, strictly speaking, such evidence was not evidence of opinion, nor was the witness "strictly within the category of an expert".

Barwick CJ explained *Clark v Ryan* as being a case in which an inexperienced witness had not been permitted to give an opinion because such opinion depended entirely on a course of study. He said:

"[The decision] cannot be read as excluding the admission of evidence as to its capability grounded on practical experience in the use of or on adequate observation of the vehicle or apparatus whose nature or behaviour is in question. It would be most surprising if a course of study by reading and instruction warranted the admission of a statement as to the behaviour of a vehicle derived from its nature whereas a long course of actual experience in the use of the vehicle or of observation of its actual behaviour in relevant circumstances did not qualify a person to speak of such behaviour."[7]

Similarly, Taylor J said:

"I am by no means convinced that persons of long experience in the servicing of motor cars are not qualified to express an opinion on the question whether a tyre is, apparently, in a reasonably safe condition."[8]

Taylor J had no difficulty with the proposition that evidence of fact could be received from those well-experienced in the driving and observation of such vehicles that the vehicles had a tendency to swing out when rounding a curve.

Menzies J disagreed. He concluded that the evidence was inadmissible. He said the evidence was "not scientific". It was not a case of giving "explanation of proven facts by reference to some organised branch of knowledge".[9]

Extracting Some Principles

In endeavouring to extract the principles that thus emanate from the cases, it is apparent that three different strands come into play.

The first is the principle that evidence will not be received as expert evidence if it is within the capacity of the tribunal of fact to determine the matter for itself.

The second is the allied proposition that the subject matter of enquiry must be such that "inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it."[10]

The third is that "no one should be allowed to give evidence unless his professional course of study gives him more opportunity of judging than other people".[11]

Each of these propositions can be melded with one, or both, of the others. Thus King CJ said in *R v Bonython*[12], that the subject matter of the opinion must form "part of a body of knowledge or

"...evidence will not be received ... if it is within the capacity of the tribunal of fact to determine the matter for itself."

experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court."

A problem evident in the application of each of the principles is that their application involves a very subjective assessment on the part of the judge.

A Recent Examination of the Principles

A recent examination of the principles applicable to expert witnesses in personal injury cases occurred in *McMillen v Brambles Security Services*[13]. The case related to physical and psychological injuries suffered by a security guard who was set upon, and held hostage, by bandits. The security guard was a member of an escort team that was servicing banks. The team had serviced the ANZ Bank in Bay Street, Tweed Heads, and the driver moved the armoured van a short distance to the Commonwealth Bank. The plaintiff was outside the vehicle. In the course of checking the area, he walked to some nearby telephone boxes where he was taken hostage by two bandits. The driver and the rear guard were still in the armoured van. The driver, in accordance with instructions, drove the van away from the area, leaving the plaintiff in the hands of the bandits. The bandits then used the plaintiff as a hostage for the purpose of robbing the bank.

The bandits were observed by the employee in the van before they were observed by the plaintiff. However, as the plaintiff had no radio, it was not possible for a warning to be communicated to him.

White J held the defendant security firm liable primarily by reason of the inadequacy of the procedures in place at the location in question. In particular, she found it negligent of the defendant to allow a crewman to be out on the street without radio communication with the crew of the armoured car. Her Honour also considered that it was negligent of the defendant to allow a situation in which there was an unaccompanied crewman on the street at the location in question.

In the course of hearing the case, her Honour rejected evidence proffered from Mr Ken King to the effect that the defendant's risk management techniques were inadequate in a number of relevant respects. Mr King's professional qualifications were a Bachelor of Mechanical Engineering from the University of Queensland in 1970, a Certificate in Traffic Planning and Control from the University of New South Wales in 1974, and a Bachelor of Science (Honours) majoring in psychology from the University of Queensland in 1980. He was the principal of Ken L King & Associates Pty Ltd, a company that consults in ergonomics and safety.

Through Mr King, the Australian/New Zealand Standard on risk management was tendered. The standard contains a number of norms to be applied by management, and states that the standard "may be applied to a very wide range of activities or operations of any public, private or community enterprise or group". The principles are applied to workplace health and safety.

Her Honour considered that what Mr King had done was to identify the time-related factors for the events in sequence, leading to the conclusion that weaknesses in the defendant's system and opportunities for pre-emptive controls could be better identified and understood. For example, he had quoted from a paper on security guards from the International Labour Office in 1998 which stated that transport times and routes, as well as loading and unloading locations, needed to be varied if the risk of attack on the operative or operatives was to be reduced.

Her Honour considered that Mr King's proposed evidence on the desirability of the variation of timing and routes was an example of "a conclusion which it might confidently be said a finder of fact could reach unassisted". She concluded that the field of study in question was not one that the court needed to utilise to reach a conclusion in the case. It was therefore unnecessary to deal with the further question whether Mr King himself was an expert for the purpose of giving such evidence.

The essence of her Honour's ruling was that the examination of safe planning procedures was "not a process which a court would be unable to do unless aided in the analysis of the various factors which lead to a plaintiff sustaining damage".

Whilst Her Honour's ruling constitutes an application of the principles as stated, for example, in the High Court authorities referred to above, the ultimate determination appears again to be ▶

very largely a subjective determination by the judge, and it is very difficult to resist the conclusion that another judge might well have taken an entirely different approach to the issue. That being so, the practitioner viewing the matter at the earlier stage, that is, the stage at which consideration is being given to the engaging of such an expert, is faced with a real dilemma. Bearing in mind the cost of commissioning such reports, it is not a simple matter to determine whether or not one should incur the cost in circumstances in which such cost may not be recovered, or to avoid incurring the cost which might, in turn, lead to losing the case on account of the fact that expert evidence was not called.

Conclusion

The above analysis of the "expert evidence" issue does not provide any ready solution for the practitioner faced with the "dilemma" of deciding whether or not to bring in an expert, a choice which is not made any easier by the fact that there are from time to time cases which fail expressly on the ground that an appropriate expert was not called. Hopefully, however, the analysis of what has been said in the cases on the issue might assist in the making of a more informed choice than would otherwise have been the case. PL

Footnotes:

1 [1960] 103 CLR 486.
2 [1966] 40 ALJR 436.
3 at 591 – 592.
4 at 507.
5 at 495.
6 at 438.
7 at 439.
8 at 441.
9 at 445.
10 per JW Smith in the notes to *Carter v Boehm*, 1 Smith LC, 7th edn. (1876) p. 577.
11 per Vaughan Williams J during argument in *R v Silverlock* (1894) 2 QB 766 at 769.
12 [1984] 30 SASR 45 at 46 – 7.
13 unreported, White J, 8 June 2001.