Handling Expert Evidence[1]

The Hon Justice Peter Davis[2] and J R Jones[3]

It is accepted that lay persons may give opinion evidence as to certain limited day to day issues.[4] However, experts are in the privileged position of being able to give evidence as to their opinion on matters within their expertise.

A fundamental precondition to the admissibility of expert opinion evidence is that the opinion must be expressed from a body or science of learning[5] so that the opinion is on matters beyond the common knowledge of members of the community. Experts are, therefore, placed in a position where they are giving evidence about matters not within the general understanding of the jury. That naturally means that expert opinion evidence is likely to be highly persuasive.

The basic principles governing the admissibility of expert opinion evidence are well settled. However, their application is often either misunderstood or not the subject of proper consideration and application.

We will briefly identify the relevant principles and then, by reference to several cases, demonstrate how expert evidence should be approached. In doing that, we will also consider the forensic ramifications of making proper objections to the admissibility of the evidence.

The relevant principles

The fundamental principles were stated by the High Court in 1960 in *Clark v Ryan*.[6] There, Dixon CJ followed *Carter v Boehm*[7] being:

> "… That the opinion of witnesses possessing peculiar skill is admissible whenever the subject matter of inquiry is 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 the knowledge of it."[8]

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1 A paper delivered to the Australian Defence Lawyers Alliance Symposium on 18 March 2022.
2 Judge of the Supreme Court of Queensland and President of the Industrial Court of Queensland and the Queensland Industrial Relations Commission.
3 Barrister of the Supreme Court of Queensland, Murray Gleeson Chambers.
4 Apparent age, estimates of speed and distance, identification of handwriting, etc.
5 With the exception of ad hoc experts; *Butera v Director of Public Prosecutions (Vic)* (1987) 164 CLR 180 at 195.
6 (1960) 103 CLR 486.
7 1S LC, 7th Ed (1876) page 577.
8 *Clark v Ryan* at 491.

As the law has developed, the elements of the admissibility of expert opinion have been defined as follows:

1. Apart from the exception concerning *ad hoc* experts, there must be a recognised field of science or learning.

2. The witness must be an expert in that field.

3. The evidence must be an expression of opinion based on the expertise which the witness has in the particular field.

4. The opinion must be probative of a fact in issue in issue in the proceeding.

One issue that often arises is what we will call the "adjustment" of an opinion. An expert may express an opinion but accept that there are qualifications to it. This often arises in relation to expert evidence sought to be given in motor vehicle accident cases. An expert will provide an opinion which may very well be solidly based in science but will then be cross-examined about several factual variables which may impact upon the opinion. Experts often then wish to perform some recalculation. If the quantum of the recalculations and adjustments are not themselves based in science and within the expertise of the witness, the entire opinion will fall.[9]

That principle will often render motor vehicle accident opinion evidence inadmissible.[10]

How do the problems arise?

In some cases, the identification of a field of expertise is easy. A pathologist will give expert evidence as to the cause of death and the area of expertise is broadly medical, and more particularly the science of forensic pathology. Others are far less obvious.

For example, it is the practice of the members of the Queensland Police Service Accident Investigation Unit to prepare their reports to appear like scientific papers. That pretence is then exaggerated by having the paper "peer reviewed" by another police officer who is, like the primary author, a so-called "crash investigation expert". As will be explained, most of the opinion evidence sought to be given by officers of the Accident Investigation Unit is

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9 *R v Bjordal* (2005) 93 SASR 237, *Read v Nominal Defendant* [2007] QSC 297, *Berwick v Clark & Anor* [2018] QSC 116 at [110].

10 *Fox v Percy* (2003) 214 CLR 118 at [149].

inadmissible even if it is "peer reviewed" by another officer who also can't give admissible evidence.

Often a court hears evidence from a witness who is no doubt qualified to give expert opinion evidence in a particular field. However, the witness may only give relevant evidence within the field of science and within the witness' expertise. It often happens that an expert witness will be called, will give admissible opinion evidence in relation to the relevant field of expertise, but will then be allowed to stray into other areas, giving completely inadmissible opinion evidence under the guise of his or her "expertise".

A related question concerns the limitations on any field of expertise. The jury is the constitutional tribunal of fact.[11] An expert may give evidence on matters beyond the common knowledge of citizens. Matters within the common knowledge of citizens may form the basis of opinions, but the relevant opinion is that of the jury, not of a witness. It is often the case that an expert will stray into expressing opinions on matters of everyday knowledge and experience and therefore impinge upon the function of the jury.[12]

Regard also must be had to properly identify the field of expertise. Both plastic surgeons and pathologists are qualified doctors. However, the plastic surgeon would not be called to express views of cause of death of a person, except where the cause of death would be apparent to anyone who has general medical training. Often, a witness is called who has expertise in a general field but not the specific field which would qualify the witness to express the opinion sought to be given.

R v Fletcher

In July 1987, a 15-year-old schoolgirl, Janet Phillips, went missing in Wynnum. She was found dead near the Gateway Arterial Road. She had been stabbed to death. There was evidence that she had intercourse and the theory was that she'd been raped by her killer.

Fletcher was identified as a suspect but was not charged until over a decade later when DNA technology had reached the point where the sperm found on swabs taken from the deceased could be identified, at least statistically, as Fletcher's. The case was the first significant DNA case in Queensland having predated *Butler* by some years.[13]

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11 *Strickland v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325 at [195] following *Hocking v Bell* (1945) 71 CLR 403 at 440.

12 *R v Faulkner* [1987] 2 Qd R 263, *Smith v R* (2001) 206 CLR 650.

13 *R v Fletcher* [1998] 2 Qd R 437 on an issue as to directions, *R v Butler* [2001] QCA 385, and later on a reference under s 672A of the *Criminal Code*; *R v Butler* [2010] 1 Qd R 325.

Fletcher was charged on indictment with two counts:

1. the murder of Janet Phillips; and

2. the rape of Janet Phillips.

A pathologist gave evidence of the cause of death and made various other observations, all of which were clearly admissible. During the trial, it became apparent that the Crown would struggle to prove that Ms Phillips was alive at the time of the intercourse with Fletcher. Fletcher having intercourse with Ms Phillips after her death may render him guilty of an offence, but not the offence charged, namely rape. Once the issue became apparent to the Crown, they sought to recall the pathologist. It was flagged that he would give evidence that the state of the body was inconsistent with intercourse occurring after death because if intercourse had occurred after the stabbing, there would be blood smudges, etc…, across the body.

In the end, the argument was never litigated. Other evidence emerged and an admission was made that any intercourse must have occurred before death. However, the proposed evidence of the pathologist raised various issues.

There was no question that the pathologist was an expert in the field of forensic pathology. He was clearly qualified to give opinion evidence about the stab wounds and how much blood would seep from them and the force with which the blood would emerge from the body depending upon whether the stabs had penetrated muscles, organs, veins, or arteries, etc... What was his expertise though to conclude that smudges of blood would be on the body if intercourse had occurred after the stabbing? He clearly wasn't an expert in the field of intercourse with bleeding bodies.

If he gave the evidence which he could give as to the amount of blood which would emerge from the stab wounds and how it would emerge, it was then clearly a jury question as to whether the state of the body was consistent with Fletcher having had intercourse with her post-mortem.

Potentially, these things had significant forensic consequences.

If the pathologist is allowed to give inadmissible opinion evidence that the absence of blood smears, etc…, on the body was inconsistent with intercourse post-mortem, any cross-examiner would have to challenge that evidence. Defence counsel would have to put theories consistent with intercourse occurring post-mortem and being consistent with the state of the body as it

was. That then, of course, invites further inadmissible evidence by the pathologist commenting on the theories contrary to the inadmissible evidence that he had already given.

If the opinion evidence though is not led, there is no witness to whom contrary theories need to be put. The theories can simply be put in counsel's final address and, given that Fletcher did not give evidence, those submissions would not be answered by the Crown except to the extent that they had been anticipated by the Crown prosecutor and dealt with in his final address.

Blood stains

Police forensic officers regularly attend the scene of violent events and make observations. They also take photographs and measurements. Often this work concerns blood found at the scene.

There is no doubt that the evidence of observations, photographs and measurements given by these officers is admissible (if relevant). However, under the guise of expertise, the police are often asked to give opinion evidence interpreting the blood stains. This is very dangerous.

In interpreting blood stains, these police officers use terms such as "drip stains", "spray stains" and "transfer stains". However, much of this is not truly expert evidence in the sense that it is not beyond the knowledge of the general community. For example, a "transfer stain" is nothing more than a blood stain which has been placed on one surface when it met a bloodstained surface. Most citizens would simply describe that as a "smudge', hardly a matter for scientific interpretation. Is opinion evidence that a neat round droplet of blood results from a source perpendicular to the stain and an oblong droplet has hit the surface at an angle, really expert opinion?

Much of this type of evidence is given without objection. Sometimes it is contentious. When it is, the initial step ought to be to object to its admissibility on the basis that it is not "expert" opinion.

Other dangers lurk when the police officers offer views about such things as the force used to splash the blood or they start speculating as to the mechanism of the force used.

Arona Peniamina stabbed and then bludgeoned his wife to death in March 2016 at their home in Kippa Ring on the Redcliffe Peninsular. It was obvious that there had been a confrontation

between Mr and Mrs Peniamina in the kitchen of the matrimonial home. There was blood on the floor and on many surfaces of the kitchen cupboards and appliances.

Low on the kickboards of the kitchen cupboards were blood splashes. The Crown led evidence from a police officer that the splashes came from a source on the floor. Whether that was truly expert evidence or not hardly mattered because it was obvious from the photographs that the source was perpendicular to the kickboard. However, the officer was then asked whether the splash mark was consistent with the victim having been kicked. She answered affirmatively. No basis was laid for such an opinion. The fact is that there was obviously some application of force to the victim while she was on the floor. A kick was at least one possibility, but there were others. A police officer trained in identifying, photographing and measuring blood stains is clearly in no better position than the jury to determine whether the splash is consistent with having been made by a kick or otherwise.

In the same case, the police officer identified a footprint which was in blood. She photographed that. Its position and orientation were established. The Crown prosecutor then asked whether the police officer had "formed any opinion as to the directionality of the footprint". As the jury looked at the photograph of the footprint, it was obvious that the toes were pointing to the hallway and the heel was pointing back towards the kitchen. The only possible issue could be whether the footprint was left by a person (who the Crown said was the victim) when she was walking forward or backwards, a matter upon which the police officer could not possibly give evidence.

Then, the police officer was asked as to what opinion she could give from the fact that the footprint was smudged. The jury were removed while the proposed evidence was investigated. Incredibly, it was proposed to lead evidence from the police officer that the smudging of the footprint indicated to her that the person who made the footprint was injured. That was evidence which was clearly inadmissible as being beyond her expertise. The police officer had no expertise in biomechanics. Again, the conclusion drawn by the police officer might not be thought to be contentious. Much of the deceased's blood was found in the kitchen and she was later found dead outside. However, allowing the police officer to give evidence beyond her expertise is to afford her a status she does not deserve, and one which might bolster the force of her evidence in areas that are the subject of challenge.

As already observed, often a lot of this type of evidence is led and no objection is taken. Often a lot of it just doesn't matter. Sometimes it does. For example, if Mr Peniamina's instructions

were that he didn't kick his wife while she was on the kitchen floor, submissions would ultimately have to be made to the jury by both sides pointing to the admissible evidence and asking for the drawing of inferences. However, if the police officer is allowed to give inadmissible opinion evidence to the effect that there was a kick, then she must be then cross-examined on that opinion and a forensic issue arises as to the weight which should be put on her evidence. In reality, she shouldn't give that opinion at all, and the argument should be as to what inferences can be drawn from the admissible evidence.

Brown v Daniels[14]

Engineers are no doubt experts. Problems though often arise where the opinion sought to be expressed is not based on the science of engineering or is beyond the specific expertise of the witness.

In *Brown v Daniels*, a civil case, the plaintiff, a motorcyclist, was travelling north along the Gladstone-Monto Road. It intersects with Collingwood Lane which runs east-west and forms a T-intersection on the eastern side of the Gladstone-Monto Road. The defendant was driving a utility which was hauling a horse float. She entered the Gladstone-Monto Road from the plaintiff's right, and she turned right to head north. Observable damage opened a possible inference that the plaintiff struck the left forward tyre of the horse float before impacting with the left rear corner of the tray of the utility. He was very badly injured.

The plaintiff sought to call an engineer, Dr Kahler. He prepared a video and a series of photographs taken from Collingwood Lane on the eastern side of Gladstone-Monto Road looking south. The point of the photos was to support a submission about the view the defendant would have had as she approached the intersection. That evidence was relevant and therefore admissible.

Dr Kahler then sought to draw conclusions from the damage to the utility. He sought to give this evidence:

> "The damage to the Ford F250's mud flap and mudguard suggests that the motorcycle has impacted the F250 before its alignment was parallel to the Gladstone-Monto Road and that the F250 was part way through the turn. The damage also suggests that the motorcycle's speed would be reduced to the speed of the F250 in the impact phase and that the motorcyclist separated from the F250

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14 (2018) 85 MVR 440.

> at the speed of the vehicle. The incident does not involve a glancing contract by the motorcycle."

That opinion is clearly not based on any science. Dr Kahler may be an engineer, but the opinion is nothing more than a theory, which any person could propose as to how the damage came to be on the utility.[15]

Dr Kahler also sought to draw some opinions from scientific studies into the reaction time of drivers. However, if the opinion is based on factual issues that have not been resolved, the evidence cannot be said to be properly based in science.[16] Ultimately, this was ruled:

> "[45] In a sense, Mr Brown obviously did not react quickly enough to avoid the accident. However, a number of questions then arise. When did the hazard arise? Did the utility and horse float shoot out suddenly in front of him? Was he keeping a proper lookout himself? Was it possible to react quickly enough to avoid the collision? These are issues for the Court and evidence of reaction time adds nothing. The evidence was excluded."[17]

Dr Kahler further opined:

> "This report discusses an incident in which a collision has occurred between a motorcycle and a Ford F250 towing a horse float.
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> Based on the assumption that the Ford F250 stopped, the study of this incident shows that the driver of the Ford F250 was not likely to see the motorcyclist unless a head shift was completed in order to be able to observe up the road. The motorcyclist would have been within the field of view of the person in the left front passenger seat.
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> The Ford F250 was within the field of view of the motorcyclist, but the incident is consistent with the motorcyclist's expectations being defeated in that the Ford F250 pulled out: hence, the motorcyclist's Reaction Time was increased.
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> The measurements taken at the intersection, the calculations completed, and the trials conducted, show that the motorcyclist would have been in the Ford F250's driver's field of view when stopped at the intersection of Colinwood Lane and the Gladstone-Monto Road, but only if the driver had shifted his head so as to see past the visual obstructions presented by the vehicle's passengers and the B-pillar.
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> The intersection is of a design where it is at the limits of design and accident rates are known to increase.
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> The incident is not consistent with the motorcyclist travelling at very high speed and being out of the Ford F250 driver's field of view when stopped at the

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15 *R v Faulkner* [1987] 2 Qd R 263, *Fox v Percy* (2003) 214 CLR 118 at [149], *Anikin v Sierra* (2004) 79 ALJR 452.

16 *R v Bjordal* (2005) 93 SASR 237, *Read v Nominal Defendant* [2007] QSC 297, *Fox v Percy* (2003) 214 CLR 118 at [149].

17 *Brown v Daniels* (2018) 85 MVR 440.

> intersection. The incident is also less consistent with a scenario wherein the Ford F250 did not stop but rolled into the intersection when the motorcyclist would have been quite close to the impact point."

Dr Kahler may be an engineer and he may have expertise in motor vehicle accidents. However here he is seeking to draw conclusions as to what the driver would have or should have seen if she looked south down the Gladstone-Monto Road. Put bluntly, Dr Kahler is not an expert in looking down a road. What the driver could have or should have seen is a pure matter of fact drawn from whatever physical evidence is before the court. The evidence was excluded.

R v Sleba

Mr Sleba was a truck driver. A cyclist was killed on a western Queensland road. It was obvious that a vehicle has struck the cyclist. The vehicle did not remain at the scene.

A truck of the general description of Mr Sleba's truck was caught on CCTV footage shortly before the accident. A Main Roads Department traffic counter was on the road between the service station and the scene of the accident. It was conceded that the traffic counter was activated at a relevant time by a vehicle passing over it with an axle configuration the same as that of Mr Sleba's truck.

Discovered on the deceased's body was a GPS tracking device. It effectively recorded the time of impact.

Mr Sleba was suspected of being the driver of the vehicle and his grain truck was seized and examined. The Queensland Police Service Accident Investigation Unit became involved. An officer examined the truck, the scene and the bicycle and he then prepared a report.

In the course of the committal proceedings, an email was produced which was sent by the accident investigation "expert" to investigating police raising issues to be investigated which he thought would "increase jail time". The fact that he then signed a report where he certified that he knew the requirement of independence of an expert witness is, at the very least, concerning.

Cross-examination at the committal proceedings showed that the approach of the officer was to form a theory, namely that the truck that had been seized was the truck involved in the accident, and then tailor the investigation only to gain evidence to prove that theory. An example of this is that the notes discovered showed that the only part of the truck that had been examined for scratches was the passenger side. There were no notes of any scratches on the driver's side of the truck. When confronted with this, the officer said that he had looked all

over the truck but only found scratches on the passenger side. This was a grain truck that was a couple of years old and had spent its life on country roads and farms. Of course, proper inspection showed scratches and marks on the driver's side of the truck as well.

Putting aside questions of the honesty and objectivity of the report, it contained:

1. various photographs the police officer had taken of the scene;

2. a recording of various measurements which had been made of things discovered at the scene or observed at the scene;

3. information that had been obtained from the cyclist's GPS device and also from the truck's "black box";

4. identification of various scratches on the truck;

5. an opinion that scuff marks on the side of the road could be used to reconstruct the movement of the cyclist's body after impact;

6. an opinion that the injuries suffered by the deceased were consistent, not only with being struck by a truck, but with being struck by Mr Sleba's particular truck;

7. scratches on the truck could be matched to damage to the bicycle's chain and sprocket leading to the conclusion that Mr Sleba's truck hit the bike;

8. what was described as "throw analysis" which could be used to determine the appropriate speed of the truck at the time of impact; and

9. a "time and distance study" which began with the assumption that the truck at the service station was Mr Sleba's truck and that the Main Roads Department traffic counter had recorded Mr Sleba's truck. It then adopted the time of impact from the GPS device. From that information, the police officer sought to give an opinion as to the speed of Mr Sleba's truck.

The opinion which the police officer was obviously eager to express, and had no doubt engineered his report to achieve, was:

> "I have completed a crash analysis of this incident. As a result I am of the opinion that the injuries suffered by the deceased and the damage sustained by his bicycle are consistent with having been caused by impact with the front left corner of the identified … truck."

Objection was taken to effectively the totality of the police officer's evidence, except where all he was producing was real evidence. By agreement, the police officer was allowed to give evidence of taking the photographs and producing them, of his various measurements and physical observations. Evidence from the cyclist's GPS and the truck's black box and the traffic counter was led into evidence by agreement through the police officer. He was also allowed to give evidence of his observations of scratch marks on the truck.

His opinion as to the scuff marks and his reconstruction of the movement of the cyclist after impact was clearly inadmissible. There was no science to support the opinion. It was an obvious attempt to have the police officer vaguely qualified as an "expert" and then give lay opinion evidence.[18]

The opinion that the injuries suffered by the deceased were consistent with being struck by any truck, let alone Mr Sleba's truck, was, if anything, evidence within medical expertise, not the evidence of a police officer. Incidentally, the medical evidence tended to disprove the theories contained in the report.

The comparison of scratches on the truck with damage to the bicycle chain and sprockets is nothing more than a comparison of two pieces of physical evidence. That is a jury question.

The objections to the "throw analysis" are too numerous to comprehensively list. Based on some studies in America, the police officer measured the suspected point of impact and the point that he surmised the cyclist landed on the ground and calculated the apparent speed of the truck from the distance the cyclist was "thrown". If such a calculation was supported by any science, it was certainly not a field of science in which the police officer had expertise. It would be a matter of physics, or perhaps engineering.

The US studies concerned the impact of motor vehicles on objects of similar weight to that of pedestrians. Here, the pedestrian was on a bicycle. Secondly, he was hit at an angle. When confronted at committal with these difficulties, the police officer said that he'd made adjustments based on his "expertise" and lowered the speed so as to take those things into account. Perhaps unsurprisingly, the adjusted speed placed the speed of Mr Sleba's truck still above the speed limit.

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[18] See generally *R v Faulkner* [1987] 2 Qd R 263.

Even if there was some science behind the initial calculation, there was certainly no science behind the adjustments and therefore the opinion was inadmissible.[19]

The police officer's training clearly qualified him to take photographs, take measurements and make observations as to the physical aspects of accident scenes. It qualified him to do nothing else, at least relevantly to Mr Sleba's case. His evidence was so confined.

R v Windeatt

This case involved a charge of arson.

A significant part of the case was said to be supported by two "fire experts". These people had done various courses/diplomas and investigated fires for the Queensland Fire Service. They gave opinions about ignition, fuel and burn patterns and then concluded that the fire was maliciously lit with the use of accelerant and by a "mobile ignition source".

This evidence was tested at a 590AA hearing. Expert evidence concerning fires gives rise to various fields of expertise, including physics and chemistry, but also sub-expertise within fire fields (certain Australian bush etc… certain fuel etc…). Opinion evidence in this area is nearly always going to be subject to challenge based on the different variables that may be in play. For example, different materials will be consumed by fire at different rates and in different ways.

Although the application to exclude this opinion evidence was lost, the prosecution did not proceed and entered a *nolle prosequi* on the first day of the trial.

R v Moddejongen

This was a case involving a charge of possessing silencers contrary to a provision of the *Weapons Act 1990*. The accused had possession of some fuel filters. As these *could* have been used to reduce the sound of a rifle when fired, it was said that they met the description in the *Weapons Act* of "silencers".

A "gun expert" was to give evidence at trial. His qualifications – among other things – included a Certificate of Expertise in Firearms by the Australian Forensic Field Sciences Accreditation Board (AFFSAB) under the auspices of the Australasian Police Professional; Standards

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19 *R v Bjordal* (2005) 93 SASR 237.

Council (APPSC) from an institution called the Australian Forensic Science Assessment Body. This institution is describes itself as:

> The National Institute of Forensic Science is a directorate within the Australia New Zealand Policing Advisory Agency (ANZPAA NIFS). We were founded in 1992 and are an internationally respected agency, with no counterpart in any other country. We are the contact point for requests requiring forensic representation from Australia and New Zealand. We are governed by the Australia New Zealand Forensic Executive Committee (ANZFEC) and our member agencies are the government forensic service providers in Australia and New Zealand.

This seems to be the police qualifying themselves as experts.

One of the issues is whether, even though the fuel filter might be able to muffle the sound of a rifle when fired, it could actually act as a silencer, or whether it would interfere with the passage of the bullet from the muzzle. The expert wished to give evidence of his opinion on a manner of things which traverse the fields of engineering, audiology and metallurgy. Of course, he has no expertise in any of these things.

Some Considerations

There could be an entire series of presentations covering the considerations when approaching expert evidence. Many of you will have your own check list when assessing expert evidence from a prosecution witness, but may we suggest a few extra considerations with some practical examples (as stated, this is not exhaustive).

1. The prosecution will no doubt produce a very scientific looking report of the expert which will contain his opinions and no doubt other material. Request particulars of the precise evidence the prosecution intends to lead from the expert. Very often an expert may opine about things that are a mixture of fact and opinion, both admissible and inadmissible. Often the Crown will concede that some opinions are inadmissible. Before time is wasted working out what is admissible or inadmissible, it's best to ask the prosecution to isolate what the Crown will be seeking to actually lead.

2. Request disclosure of all notes, the witness's CV, published papers, etc and the letter of instruction (including all correspondence between the engaging party/investigator and the expert) together with the brief that was provided to the witness.[20] You then must consider what irrelevant and prejudicial information has been provided to the expert and

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[20] See *Mallard v The Queen* (2005) 224 CLR 125 regarding disclosure.

the consequences of that information on the opinion, both conscious and subconscious. Two examples from a recent case disclosed the following from the engaging party / investigator to the expert:

> Paragraph 12 I have highlighted a sentence which I think should be removed as it is an assumption as to why the platform was installed. This may prejudice the prosecution case as the comment suggests that the component was structurally adequate despite the flawed installation. This may cast doubt on the prosecution's argument and gives defence a potential out. (our emphasis)
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> Paragraph 26 I have highlighted a sentence which I think should be removed. I appreciate your opinion I don't think that statement is necessary… I don't think we can go so far as saying… (our emphasis)

3. In relation to similar conduct in another case, Justice Wilcox in *Universal Music Australia Pty Ltd v Sharman License Holdings* [2005] FCA 1242 at [231] observed that he was:

> …forced to conclude that Professor Ross was prepared seriously to compromise his independence and intellectual integrity.

4. Often the full brief of evidence is supplied to an expert. We can provide two relevant examples to illustrate the problems with this approach. The first example is Mr Sleba's case discussed earlier. There, he raised the possibility that he had suffered a "micro sleep" because of sleep apnoea. He had, many years earlier, accidently shot and killed his wife. That was the subject of a coronial inquest. The prosecution engaged a "sleep expert" to provide an opinion regarding sleep apnoea and micro-naps, etc. The prosecution provided the full brief of evidence to the doctor, which relevantly included:

(a) the almost entirely inadmissible "crash expert" opinion in the form of a full report;

(b) potentially information about the earlier shooting of the accused's wife; and

(c) the autopsy report of the deceased.

Obviously, this information was highly prejudicial and unnecessary for the "sleep expert" to consider. How would one ever unscramble the egg?

The second example is a boat accident case. The "boat expert" was again provided with the full brief and asked for his opinion on safety. He read all sorts of inadmissible evidence about injuries, pain and suffering to the victims and then provided his ultimate

opinion that the accused was, in effect, guilty of the offence charged. Again, how does one unscramble the egg?

4. Once all the material is obtained, the approach ought to be:

   (a) Identify the precise opinion.

   (b) Identify the factual bases of the opinion.

   (c) Identify the field of expertise from which the opinion is allegedly given, remembering that if the opinion is something within the ordinary knowledge of the community, it's not a matter of expertise, but a jury question.

   (d) Identify the qualifications of the witness.

   (e) Analyse each opinion sought to be expressed against:

      (i) the evidence supporting the opinion;

      (ii) the field of experience; and

      (iii) the witness's qualification and experience.

Sometimes the opinion evidence sought to be led by the Crown will be of assistance to the defence. In these circumstances, consideration will no doubt be given to allowing the evidence to be admitted without objection. However, the evidence will invariably never be completely exculpatory. It will generally be difficult to engineer an objection to the inculpatory inadmissible evidence while maintaining that the exculpatory evidence of the same expert is admissible. By admitting the evidence, a risk is run that forensic issues will be raised which will then have to be dealt with.

Hon Justice Peter Davis
JR Jones, Barrister