Chapter 2.0

THE COMMON LAW EXCLUSIONARY RULES OF EXPERT EVIDENCE

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> "To the jury's collective mind, a phrase such as 'consistent with coming from the same source' might well be translated, in the particular circumstances of this case, 'bearing the insignia of coming from the same source' and from there to 'in my scientific opinion, in fact come from the same source'. And thus the very phrase 'consistent with having come from the same source' would appear to come very close to an answer to the very question which the jury had to determine for itself."
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> *Royal Commission Report Concerning the Conviction of Edward Charles Splatt* (SA Government Printer, 1984, p 39).

The rules

[2.0.01] The following chapters deal with the five common law "rules of expert evidence":

- the expertise rule (see Ch 2.5);
- the area of expertise rule (see Ch 2.10);
- the common knowledge rule (see Ch 2.15);
- the basis rule (see Ch 2.20); and
- the ultimate issue rule (see Ch 2.25).

Chapters 3.0, 3.5 and 3.10 deal with the statutory regimes for expert evidence in Australia, New Zealand and the United States. Chapter 3.15 addresses issues relating to contemporary proposals for law reform relating to expert evidence.

Another means by which expert (and other) evidence can be regarded as proved is via "judicial notice". This is analysed in the common law context (see Ch 2.30) and

under statutory law (see [3.0.160]). Finally, at common law the exclusionary discretion, in particular in criminal trials, and under the statutory provisions for both civil and criminal trials is analysed (see Ch 2.35).

The role of the expert witness

The privilege of expert witnesses

[2.0.03] Fundamental to understanding the exclusionary rule regime for expert opinion evidence under the common law is the fact that expert witnesses are extended a privilege that is not, for the most part, permitted lay witnesses – that of giving evidence in the form of opinions and inferences. In addition, witnesses (including experts) cannot be sued in defamation or for negligence for the evidence that they give in court and the reports that they prepare for courts – they have immunity (see Ch 2.15), save to some degree in the United Kingdom as a result of the decision of *Jones v Kaney* [2011] UKSC 13.

Evidence of fact and opinion

[2.0.05] In principle, difficulties exist in relation to the distinction between "fact" and "opinion" (see ALRC (1985), Vol 1, para 156; Freckelton (1987); *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd (No 5)* (1996) 64 FCR 73 at 75; *Guide Dog Owners' and Friends' Association Inc v Guide Dog Association of NSW* (1998) 154 ALR 527 at 531; *R v DD* [2000] SCC 43 per Major J), a dichotomy which continues to pose practical problems as exemplified by the debate about whether a statement by a liquidator that a company is insolvent is a statement of fact or opinion: see *Jones v McKenzie* (1859) 13 Moo PC 1; 15 ER 1 at 9 (Moo PC), 4 (ER); *Re Action Waste Collections Pty Ltd (in liq)*; *Crawford v O'Brien* [1981] VR 691 at 703, on the one hand, and *Quick v Stoland* (1998) 157 ALR 615 at 618, on the other. However, generally courts have classified evidence as falling into the categories of "fact" and "opinion" without undue resort to technicality or subtlety of reasoning.

The limitations of expert evidence

[2.0.07] Lord President Cooper in *Davie v Magistrates of Edinburgh* [1953] SC 34 at 40 was specific about the limitations of experts' evidence:

> Expert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the functions of the jury or judge sitting as a jury, any more than a technical assessor can substitute his advice for the judgment of the Court … Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole of the evidence in the case, but, the decision is for the Judge or jury. In particular the bare *ipse dixit* of a scientist, however, eminent, upon the issue in controversy, will normally carry little weight, for it cannot be tested by cross-examined nor independently appraised, and the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert

(See also *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [59]; *Maudsley v Proprietors of Strata Plan Number 39794* [2002] NSWCA 244 at [52]).

It is not legitimate for experts to guess or speculate: *HG v The Queen* (1999) 197 CLR 414; *R v Berry* (2007) 17 VR 153; 176 A Crim R 195 at [69]; *R v Smart* (2008) 182 A Crim R 490; [2008] VSC 79 at A Crim R 494, VSC [27]; *Poynton v Poynton* (1903) 371 ILTR 54.

The purpose of expert evidence

[2.0.10] Saunders J, in the old case of *Buckley v Rice Thomas* (1554) 1 Plowd 118; 75 ER 182 at 124 (Plowd), 191 (ER), voiced a similar sentiment: "[I]f matters arise in our laws which concern other sciences and faculties we commonly call for the aid of that science or faculty which it concerns, which is an honourable and commendable thing for thereby it appears that we do not despise all other sciences but our own, but we approve of them and encourage them." Laughton LJ in *R v Turner* (1974) 60 Cr App R 80 at 83, expressed a similar sentiment and held: "An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience of a judge or jury." Finkelstein J put the same approach succinctly in 1998: "The function of the expert is to provide the trier of fact, judge or jury, with an inference which the judge or jury, due to the technical nature of the facts, is unable to formulate" (*Quick v Stoland* (1998) 157 ALR 615 at 625). Expert evidence has been held to be "necessary" on occasions to enable a court to evaluate matters observed and the drawing of correct inferences from facts: *Attorney-General (Ruddy) v Kenny* (1960) 94 ILTR 185 at 190.

Binnie J, in the important Canadian Supreme Court decision of *R v J-LJ* [2000] SCC 51 at [56] made an additional point, holding that the purpose of expert evidence is "to assist the trier of fact by providing special knowledge that the ordinary person would not know. Its purpose is not to substitute the expert for the trier of fact. What is asked of the trier of fact is an informed judgment, not an act of faith".

The exclusionary rules of expert evidence have functioned to contract substantially what might have been a dominating role in the courtroom for forensic experts. Historically, their entrance into the courts in the 18th century was accompanied by cynicism because of a perceived danger that they would engage in conjecture, merely offering opinions and not saying what they had seen, heard or experienced with their other senses: see Hand (1901); Wigmore (1975); McCormick (1984); Freckelton (1987); Stone and Wells (1991); Jones (1994); Golan (2004).

Ironically, although the role of specialist witnesses is of daily importance in courts of every jurisdiction, few conceptual analyses are to be found of the operation and jurisprudence of the rules of expert evidence. Such an exegesis and analysis is attempted in the following chapters, with liberal reference to decided cases which have considered the many difficult questions that pervade the utilisation of experts as witnesses.

Today's judicial ambivalence about the ability of jurors to evaluate complex expert evidence (see Freckelton Reddy Selby (1999); Freckelton Reddy Selby (2001)) is the product of three centuries of uncertainty about the role of judges and jurors as well as an escalating consciousness of the influence that experts can wield, one aspect of which is sometimes termed the "CSI effect" (see eg, Byers and Johnson (2009); Ramsland (2007)). In the 18th century, rules of evidence were almost non-existent and the control of the judge over courtroom proceedings was

limited to little more than preventing chaos and confusion. However, the mid-19th century in England, Australia, New Zealand, Canada and the United States saw an increase in judicial authority, as the mistrust by those holding the reins of power toward the growing influence of the populace led to a reduction in the role and scope of juries' involvement in the court system: see Jackson (1937); Stone and Wells (1991); Jones (1994); Freckelton (1994; 1997); Golan (2004). A major instrument in the execution of this political stance was the rules of evidence, which have been aptly described as representing "the judges' evaluation of the mental calibre of the jury": Stone and Wells (1991, p 55). They constitute a construction of the parameters within which the law is prepared to regard as safe the potential contribution by experts from disciplines outside the law.

A number of contemporary changes in judges' evaluation of the capacities of jurors can be discerned. While the rules of expert evidence are still being used to filter from juries information that they are regarded as being ill-positioned to evaluate, jurors are no longer being regarded as having the fragilities with which they were previously invested. They are being asserted by contemporary judges as having the capacity to conduct a variety of difficult tasks in the trial process and the exclusionary evidentiary rules are being interpreted so as to allow more and different forms of expert evidence before jurors. Mason CJ and Toohey J exemplified this approach in 1992 in *R v Glennon* (1992) 173 CLR 592 at 603:

> [I]n the past too little weight may have been given to the capacity of jurors to assess critically what they see and hear and their ability to reach their decisions by reference to the evidence before them.

(See too *Velevski v The Queen* (2002) 187 ALR 233; [2002] HCA 4 at [182]; *Caratti v The Queen* [2000] WASCA 279 at [282].)

As Dawson J termed it in 1989, "[T]he modern attitude towards expert evidence is, perhaps, less exclusionary than in the past": *Murphy v The Queen* (1989) 167 CLR 94 at 130-131; see also *Farrell v The Queen* (1998) 194 CLR 286. The result is that greater numbers of expert witnesses are being permitted to testify on a broader base of subject matter than has hitherto been permitted. The change means that a more conceptually coherent approach is being developed by the common law to those rules of expert evidence which are being strictly enforced and to those which are being interpreted with liberality. In Australia this process has been furthered by the passage of the *Evidence Act 1995* (Cth), the *Evidence Act 1995* (NSW), the *Evidence Act 2001* (Tas) and *Evidence Act 2008* (Vic) and, in New Zealand, by the *Evidence Act 2006* (NZ).

Anxieties generating the rules' development

[2.0.20] Until recent times, courts regularly expressed their anxiety about the risks of expert evidence. Such judicial concerns had been generated by a range of factors, including notorious miscarriages of justice in which cross-examination by well-known counsel had failed to expose significant deficiencies in expert evidence. The principal grounds for judicial concern have been that:

(1) jurors may not comprehend complex, conflicting expert evidence sufficiently well to evaluate it effectively;

(2) jurors may be overborne by the articulateness and impressiveness of expert witnesses;

(3) triers of fact may be deceived by the undisclosed partisanship, unrepresentativeness and even dishonesty of expert witnesses;

(4) expert evidence may unduly prolong litigation without significantly assisting the trier of fact, be it judge or jury;

(5) the role of juries may be "usurped" by evidence which trespasses into their domain; and

(6) cross-examination may not act as an effective check and balance to these risks.

For example, in *R v C(G)* (1995) 110 CCC (3d) 233 at 259, the Newfoundland Court of Appeal accepted the presence of an underlying concern in admitting any form of expert evidence, namely, that the aura surrounding the requisite specialised knowledge and the expert's credentials may result in the evidence being given more weight than is warranted by the proven facts:

> Thus, cases speak of apprehension that expert testimony cloaked as it generally is in scientific language, will acquire a mystical air of infallibility that technical vocabularies often communicate to those not versed in the expert's discipline. The fear is, therefore, rather than assist laypersons in forming judgments, that the use of expert evidence will usurp the function of the trier of fact and distort the proceedings by bolstering the evidence of parties and overwhelm a jury. For these reasons, even if relevant, where the trier of fact is able to form a conclusion without the professional's help, the expert opinion will not be admitted.

(See, too, *R v DD* [2000] SCC 43.)

The court noted that it has been for these reasons that in Canada the Supreme Court has found that in order for expert evidence to be admitted, four criteria must be met: relevance, necessity, the absence of the applicability of any exclusionary rule and the qualification of the expert: see *R v Mohan* [1994] 2 SCR 9.

The exclusionary rules and jury cases

[2.0.25] Although each one of the exclusionary rules has from time to time been enforced in civil cases, some of them by judge-alone, the strict application of the rules is being reserved more and more for jury cases. There is also a differential in the extent to which they are enforced. As Lord Reading put it in *DPP v Christie* (1914) 10 Cr App R 141 at 164: "The principles of the laws of evidence are the same whether applied at civil or criminal trials but they are not enforced with the same rigidity against a person accused of a criminal offence as against a party to a civil action." The rules have been the subject of a vast amount of litigation in recent decades. There is no sign of this changing in the aftermath of the passage of the Australian and New Zealand statutory reforms of the last decade of the 20th century and the first decade of the 21st century.

One of the major challenges lies within ascertaining the circumstances in which close control will be exercised over expert evidence under discretions to exclude evidence as more prejudicial than probative – especially in criminal trials. It is apparent that courts tend to exclude evidence where an attempt is made to encourage decision-making, particularly by jurors, on the basis of mathematical formulae (see *Doheny and Adams v The Queen* [1997] 1 Cr App R 369 at 375, approving *R v Adams (No 1)* [1996] 2 Cr App R 467 at 482 that: "To introduce Bayes Theorem, or any similar method, into a criminal trial plunges the jury into inappropriate and unnecessary realms of theory and complexity, deflecting them

from their proper task"). See also *R v Adams (No 2)* [1998] 1 Cr App R 377 at 383-384; *R v Karger* [2001] SASC 64 at [661]; *R v GK* (2001) 53 NSWLR 317; [2001] NSWCCA 413 at [26]. To similar effect, Hodgson (1995, p 736) commented that "decision-making generally involves a global assessment of a whole complex array of matters which cannot be given individual numerical expression". He warned that concentration on mathematical probabilities can prejudice the commonsense process which depends upon experience of the world and belief as to how people generally behave: see also *State Government Insurance Commission v Laube* (1984) 37 SASR 31 at 32-33; *R v Mitchell* (1997) 98 A Crim R 32 at 37-38; *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558; [2001] NSWCA 187 at [591]. Statistical evidence falls into the category of evidence that can be particularly difficult for jurors to evaluate (see *Perry v The Queen* (1982) 150 CLR 580 at 594 per Murphy J) but it does not follow that the mathematics of probability will generally be excluded: see Ch 12.30. Under s 137 of the Australian Uniform Evidence legislation, the key question is whether in criminal proceedings in evidence adduced by the prosecutor the probative value is outweighed by the danger of unfair prejudice to the defendant. "Unfairness" has been held to refer to evidence creating "a real risk that the evidence will be misused by the jury in some unfair way": *R v BD* (1997) 94 A Crim R 131 at 139 per Hunt CJ at CL. See also *Papakosmas v The Queen* (1999) 196 CLR 297 at 325-326; *Ordukaya v Hicks* [2000] NSWCA 180; *R v Lisoff* [1999] NSWCCA 364 at [52]; *R v Toki* (2000) 116 A Crim R 536 at 548; *R v GK* (2001) 53 NSWLR 317; [2001] NSWCCA 413 at [30]. Further elucidation of this concept will no doubt be generated (see [3.0.170]).

The exclusionary rules in family law litigation

[2.0.30] A number of decisions in England have addressed the extent to which the rules of expert evidence apply in family law cases. The situation is clearer in Australia by virtue of the application of the *Evidence Act 1995* (Cth).

In *Re M and R (minors)* [1996] 4 All ER 239 at 249 the United Kingdom Court of Appeal sought to resolve uncertainties arising from earlier authority including *Re S and B (minors) (child abuse: evidence)* [1990] 2 FLR 489; see also *Re F and S (minors)* [1966] 1 FCR 666; *Re N (a minor) (sexual abuse: video evidence)* [1996] 4 All ER 225. The court adopted the comment by Lord Parker CJ in *DPP v A & BC Chewing Gum Ltd* [1967] 2 All ER 504 at 506 that when dealing with children, the court needs "all the help [it] can get". It noted that in cases involving suspected child abuse, the expert evidence may relate to the presence and interpretation of physical signs, and also the more problematic area of the presence and interpretation of mental, behavioural and emotional signs (at 249):

> That evidence often necessarily includes, if not a conclusion, at least strong pointers as to the witness's view of the likely veracity of the child (ie credibility): indeed his diagnosis and the action taken by the local authority may depend on the conclusion reached.

The court noted (at 251) that family law judges in England had received "(without, it would seem, objection, demur, embarrassment, or prejudice) expert opinion evidence, including evidence as to the accuracy or truthfulness of child complainants": see also *Re B (child sexual abuse: standard of proof)* [1995] 1 FLR 904. Such evidence would normally be regarded as inadmissible but latitude had been extended to the reception of such evidence in the best interests of the child. The

court found (at 253-254) that there was no reason why it should be obliged to waste its time listening to superfluous and cumbersome testimony but that the judge was obliged never:

> [to lose] sight of the central truths: namely that the ultimate decision is for him, and that all questions of relevance and weight are for him. If the expert's opinion is clearly irrelevant, he will say so. But, if arguably relevant but in his view ultimately unhelpful, he can generally prevent its reception by indicating that the expert's answer would carry little weight with him. The modern view is to regulate such matters by way of weight, rather than admissibility. But when the judge is of the opinion that the witness's expertise is still required to assist him to answer the ultimate questions (including, where appropriate, credibility) then the judge can safely and gratefully rely on such evidence, while never losing sight of the fact that the final decision is for him.

Similar common law principles were articulated under the common law in Australia. For instance, in *Re Wakely and Hanns; Director of Court Counselling (Intervener)* (1993) 17 Fam LR 215 McGovern J accepted that the principle that concern for the welfare of a child may modify the rules of evidence was well established.

However, the provisions of the *Evidence Act 1995* (Cth) now apply to proceedings in the Family Court. Thus, in *Su v Chang* [1999] FamCA 1203, the Full Court of the Family Court held that the court is obliged to determine disputes before it according to the rules of evidence. However, s 190 of the *Evidence Act 1995* (Cth) allows the parties to dispense with the rules of evidence. The court held that this provision gives the parties a significant degree of control over the application of the rules of evidence, such as the opinion rule (at [70]). Where a litigant appears in person, though, the court is obliged to alert the unrepresented person to their rights in respect of evidence sought to be adduced but which may be inadmissible by application of the rules of evidence: *S v R* (1999) FLC 92-834; 24 Fam LR 213 at 85,675-85,676 (FLC), 229-230 (Fam LR); *Re F: Litigants in Person Guidelines* (2001) 161 FLR 189; [2001] FamCA 348 at [233].

In practice, the provisions of the *Evidence Act 1995* (Cth) have resulted in a somewhat more formal approach than previously existed in relation to evidentiary admissibility, but still a level of "flexibility" applies and it is not uncommon for the technical rules to be dispensed with informally. This particularly applies in relation to the reception of expert evidence.

Role of exclusionary rules outside criminal and civil litigation

[2.0.40] Although there are many forums in which the rules of expert evidence do not strictly apply, such as before coroners' courts (see Freckelton and Ranson (2006)), children's courts on occasions (*A and B v Director of Family Services* (1996) 20 Fam LR 549), tribunals and boards and during hearings on sentence, the Australian High Court has pointed out that in such contexts "every attempt must be made to administer 'substantial justice'": *War Pensions Entitlements Tribunal; Ex parte Bolt* (1933) 50 CLR 228 at 256. It has been held that "the rules relating to expert evidence at common law are largely based on good sense and fairness" and thus should be applied in substance: see *Lipovac v Hamilton Holdings Pty Ltd* (unreported, ACT Sup Ct, 13 September 1996) per Higgins J at 102. To similar effect, Lockhart J, in *Pearce v Button* (1986) 8 FCR 408; 65 ALR 83 at 422 (FCR), 97 (ALR) has held that a judge should be "slow" to invoke a power to dispense with

rules of evidence "where there is a real dispute about matters which go to the heart of the case", while the High Court in 1995 reaffirmed the underlying justification in terms of public policy for the hearsay rule: *Bannon v The Queen* (1995) 70 ALJR 25.

The better view is that courts and tribunals should not act on material that is of little probative value but of significant prejudicial effect: *Moore v Guardianship and Administration Board* [1990] VR 902; *Anderson v The Queen* (1992) 60 SASR 90; 64 A Crim R 312 at 98-99 (SASR); 320 (A Crim R); *A and B v Director of Family Services* (1996) 20 Fam LR 549. This may well mean that there needs to be substantial compliance with a number of the rules of expert evidence (see Freckelton (1992), (1994)), such rules simply being "rules of prudence and discretion": *DPP v Christie* (1914) 10 Cr App R 141 at 164 per Lord Reading.

Rationales for the exclusionary rules

[2.0.50] While there is an increasing liberality about the enforcement of certain of the rules of expert evidence, a number of common law decisions have also manifested a recognition that the privilege of expressing opinions may have vital consequences for the outcome of litigation. Thus, certain of the rules are, if anything, being more strictly enforced when the alternative would be to have expert evidence being admitted which would not be susceptible to any kind of meaningful evaluation by judges or jurors. An example is that experts must be experts (the "expertise rule") – they must be sufficiently qualified by training and/or experience to be able to assist the court in performing its fact-finding function: see Ch 2.5.

Traditionally, the courts were concerned to restrict expert evidence by reducing the areas regarding which it may be given. Restriction has been by reference to the principle that "what is generally known ought not to be the subject of expert evidence" (the "common knowledge rule": see Ch 2.15). It is possible to perceive something of a change in this rule at common law with increasing judicial recognition of the fact that the public may have an inkling about various matters that can form the subject of expert study but that their understanding may be misinformed and uninformedly intuitive. Thus, a shift in orientation towards consideration of whether triers of fact would be *assisted* by proposed expert evidence can be discerned. Allied with this has been a trend in some contexts to admit evidence of a counterintuitive nature (eg in relation to battered woman syndrome, and the operation of memory, at least when repression of memories is claimed) – so as to disabuse jurors of misperceptions under which their deliberations might otherwise labour.

Fear that jurors may be overwhelmed by the impressiveness of experts has led to the persistent operation of the rule that proscribes expert evidence upon matters central to the trier of fact's responsibility (the "ultimate issue rule": see Ch 2.25). However, criticism from many quarters appears to have resulted in an attenuation of this rule at common law (as well as under statute) so that it now operates primarily to prevent experts from employing legal terminology or interpreting legal standards.

The conservative basis of the rules

[2.0.60] Attempts are made from time to time to call experts to give evidence on "fringe" areas, ie, areas that are yet to be generally accepted among their peers as valid or reliable. The "area of expertise rule" (often referred to in the past as the *Frye* test: see Ch 2.10) has the potential to regulate the introduction of such "novel" evidence, as do the exclusionary discretions. The rule may be traced in Australasia to an early decision on fingerprinting (*R v Parker* [1912] VLR 152), although in this case it was not formally invoked. However, its actual origin is customarily said to be a 1923 United States decision on the admissibility of polygraph evidence: *Frye v United States* 293 F 1013 at 1014 (1923). It has found expression in Australian, New Zealand and United Kingdom common law in a variety of areas of novel scientific or psychological theory, in an attempt to sift the valuable wheat from the dangerous chaff. It has functioned avowedly as a conservative mechanism to protect triers of fact from having to be arbiters of reliability and validity on areas that are still the subject of disputation within their disciplines. Its application has resulted in evidence being rejected when it was not established to be "expert opinion in a recognised field of expertise": see, eg, "stylometrics" in *R v Jamieson* (1992) 60 A Crim R 68 at 77. A number of leading decisions in Australia, as well as in the United States and Canada, have also focused upon whether expert evidence emanates from a reliable field of expertise as a mechanism for determining whether evidence can safely be admitted. A series of decisions in the United Kingdom in relation to the reliability of new areas of scientific endeavour are starting to refocus principles of evidentiary admissibility: see Ch 12.10. The impact of the United States Supreme Court decisions of *Daubert v Merrell Dow Pharmaceuticals* 509 US 579; 125 L Ed (2d) 469; 113 S Ct 2786 (1993) and *Kumho Tire Co Ltd v Carmichael* 119 S Ct 1167 (1999), and of the Canadian decisions of *R v Melaragni* (1992) 73 CCC (3d) 348 at 352 and *R v Mohan* [1994] 2 SCR 9; *R v J-LJ* [2000] SCC 51; and *R v DD* [2000] SCC 43, which refocus away from the general acceptance of theories or techniques within the relevant scientific community to reliability, ascertained in part by reference to falsifiability, remains to be seen in Australia and New Zealand.

Limits to expert opinions – the accountability issue

[2.0.65] Australian courts have recently embraced the notion that expert opinions based upon the findings or theories of others are not susceptible of meaningful evaluation. Thus the "basis rule" at common law provides that the basis for expert opinions must be admitted in evidence as a precondition to admissibility of the expert opinion. This is essentially a protective device to safeguard the integrity of the trier of fact's responsibility to evaluate evidence. Expert opinions that function as a conduit for the work and opinions of others cannot adequately be tested by cross-examination and so cannot effectively be evaluated by triers of fact.

Evidence of speculation about a fact by an expert witness is not permitted where there is no evidence to support the conclusion that the fact was established: see *Straker v The Queen* (1977) 15 ALR 103 at 114; *Lipovac v Hamilton Holdings Pty Ltd* (unreported, ACT Sup Ct, 13 September 1996). See also *HG v The Queen* (1999) 197 CLR 414; 73 ALJR 281; 160 ALR 554; [7.5.370] below.

PART 6 – EXPERT WITNESSES AND DECISION MAKING

Chapter 6.0

COURT-APPOINTED EXPERTS

Ian Freckelton SC

> "The assessment of the expert should proceed in similar manner to the assessment of the lay witness. Inconsistency, over-confidence, vagueness, vested interest, prejudice, previous history of deceit or incompetence, clashing testimony, all have to be taken into account as with lay witnesses. In either case there are difficulties, imponderables, and risks, but in neither case is this a reason for abandoning the insights and values which the system embodies, however imperfectly."
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> C A J Coady, *Testimony: A Philosophical Study* (Oxford University Press, 1992, p 297).

Introduction

[6.0.01] Both assessors and court-appointed experts function as an alternative means of providing to the court professional opinion of a kind not directly contaminated by the partisanship of the parties appearing in litigation. The role of such "neutral" experts became very controversial from the 1970s onwards: see, eg, Basten (1977); Ogilvie (1979); Kenny (1983); Freckelton (1987; 1988); Gee (1987); Howard, Crane and Hochberg (1990); Howard, (1991); Spencer (1991); Gross (1991); Jones (1994); Freckelton, Reddy and Selby (1999); Van Kampen (1998); Meintjes-Van Der Walt (2001); New Zealand Law Commission (1999); Victorian Law Reform Commission (2008). However, courts in Australia, New Zealand, England, Canada and the United States have tended to avail themselves only rarely of these alternatives to the traditionally adversarial forms of expert evidence.[1] This is in spite of the fact that provision exists for courts to appoint their own experts and to use assessors in many jurisdictions. It is also in spite of the fact that considerable in principle support has been expressed for enhanced use of assessors: see Freckelton, Reddy and Selby (1999).

1 See, however, Rogers (1984, pp 616–617) for a discussion of the South African cases of *Milne & Erleigh* (1951) (1) SA 791; *R v Heller* (1970) (4) SA 679; and *R v Hartmann* (1975) (3) SA 532, where assessors were used in the criminal jurisdiction. His Honour also allowed "group expert evidence" in *Spika Trading Pty Ltd v Royal Insurance Australia Ltd* (unreported, New South Wales Supreme Court, 3 October 1985): see Freckelton (1987, pp 234–235).

However, the tendency towards increasing technical complexity of both civil and criminal trials is likely to reinforce the pressure on the legal system to scrutinise other than the conventional adversarial means of ensuring adequate evaluation of expert evidence. In light of this, the role of court-appointed experts and assessors may in time be enhanced.

Court-appointed experts

[6.0.40] A number of early English and Australian cases expressed the view that courts had an inherent power to appoint their own expert witnesses. The earliest reference to the appointment of court experts is said by Jones (1994, p 35) to be traceable to 1345 when surgeons were called to rule whether a wound was fresh, while in 1353 surgeons were asked their opinion upon whether a wound was mayhem. She states (at 35):

> In the case of *R v Coningsmark* in 1682, a surgeon was asked his opinion upon the nature of the bullet wounds and cause of death (see *R v Ferrers* (1758) 97 ER 483 and 522). Court experts were frequently doctors but this was not always the case. In 1554, in the case of *Buckley v Rice Thomas* (1554) 75 ER 182 the judges referred to an earlier case (7 Hen VI) in 1429 in which the court listened to one Huls "as men that were not above being instructed and made wise by him". The issue on which they needed to be made wiser was the meaning of the Latin word "licet".

For instance, in *Kennard v Ashman* (1894) 10 TLR 213 Wills J found the evidence of the surveyors before him so contradictory that, despairing of being able to ascertain the "true facts of the case from their evidence", he adjourned proceedings, apparently without objection being formally registered, to enable an independent surveyor to inspect the premises in question. Less than a decade later Lord McNaughten commented, once again referring to surveyors, "I have often wondered why the court does not more frequently avail itself of the power of calling a competent adviser to report to the court": *Colls v Home & Colonial Stores Ltd* [1904] AC 179 at 192. He regarded it as irrelevant that one of the parties to the litigation might object.

Similarly, in *Badische Anilin Und Soda Fabrik v Levinstein* (1883) 24 Ch D 156 at 167 (see also *Attorney-General v Birmingham, Tame and Rea District Drainage Board* [1912] AC 788) Pearson J maintained that he was entitled to the assistance of a professor to inform himself of matters relevant to his decision,[2] while in *Thorn v Worthing Skating Rink Co* (1877) 6 Ch D 415n at 417n, Lord Jessel MR had noted that courts "sometimes" appoint their own expert witnesses and commented that there was "no doubt" that they had power to do so. Nonetheless, even in the 19th century, court appointment of expert witnesses was a rare phenomenon: see Champagne (1996); Cecil and Willging (1993); Freckelton (1997); Freckelton, Reddy and Selby (1999).

Role of court-appointed expert

[6.0.50] Very little case law exists in explication of when court-appointed experts should be appointed, and which kinds of matters are appropriate for their

2 However, he used as his direct authority the case of *Mellin v Monico* (1877) 3 CP 142 at 149, which confirmed the appropriateness of use of an official or special referee's inquiry or report at the initiative of the court pursuant to legislative provisions.

evidence. However, RSC Order 40, r 1, in England has generated some guidance for courts in England. Order 40, r 1 provides:

(1) In any cause or matter which is to be tried without a jury and in which any question for an expert witness arises the Court may at any time, on the application of any party, appoint an independent expert or, if more than one such question arises, two or more such experts, to inquire and report on any question of fact or opinion not involving questions of law or of construction. An expert appointed under this paragraph is referred to in this Order as a "court expert".

(2) Any Court expert in a cause or matter shall, if possible, be a person agreed between the parties and, failing agreement, shall be nominated by the Court.

(3) The question to be submitted to the court expert and the instructions (if any) given to him shall, failing agreement between the parties, be settled by the Court.

(4) In this rule "expert", in relation to any question arising in a cause or matter, means any person who has such knowledge or experience of or in connection with that question that his opinion on it would be admissible in evidence.

Rule 2(5) provides that any part of a court expert's report which is not accepted by the parties is to be treated as "information furnished to the Court and given such weight as the Court thinks fit". Parties are entitled to apply for leave to cross-examine the expert.

In *Abbey National Mortgages plc v Key Surveyors Nationwide Ltd* [1996] 3 All ER 184 Sir Thomas Bingham MR said that he strongly suspected that the drafters of the order envisaged its use to resolve questions of a scientific or technical kind. However, he expressed the view that the resolution of questions was directed toward subsidiary matters, rather than the major issues in the case. He found (at 189) that the expert is not strictly bound by the rules of evidence and that a valuation expert, appointed as a court expert, is not confined to giving evidence based on comparables of which he or she has firsthand knowledge:

> In the course of his everyday practice, a surveyor asked to express a view on the open market value of a particular property will of course have regard to his own personal experience, if he has any relevant experience. He will also, however, have regard to the sales experience of his office, whether that is within his direct firsthand knowledge or not. He will also have regard to all sources from which information can be gleaned concerning market trends and conditions. This is the sort of information which customarily circulates among practitioners in any particular market, and it is information to which a competent surveyor will properly pay attention so long as the information appears to be reasonably reliable.

Sir Thomas held that the same approach to valuation is applicable in relation to cars, ships and properties: a surveyor was found to be entitled to rely upon what reasonably appears to him or her to be reliable information (at 190). In *Abbey National* it was argued that the trial judge ought not to have appointed an expert valuer on the basis that such a person needs to have an intimate firsthand knowledge of property values and market conditions in the area of the property to be valued, and that a single witness cannot give reliable evidence related to widely separated areas of the country of which he or she will necessarily have no detailed personal knowledge. Sir Thomas Bingham rejected the submission and

found that it was not self-evident that a valuer, having made appropriate inquiries and investigations, cannot express a reliable opinion on values within an area where the valuer has not worked. Thus, he found that the trial judge had not exceeded his jurisdiction in appointing as a court-appointed expert a valuer from outside the district in which the property was to be valued.

It had been argued that the appointment of a court expert in the case was "pointless", since it merely meant the instruction of an additional expert whose opinion would carry no more weight than any other. Sir Thomas' response (at 191) was straightforward:

> We feel bound to say that in our opinion this argument ignores the experience of the courts over many years. For whatever reason, and whether consciously or unconsciously, the fact is that expert witnesses instructed on behalf of parties to litigation often tend, if called as witnesses at all, to espouse the cause of those instructing them to a greater or lesser extent, on occasion becoming more partisan than the parties. There must be at least a reasonable chance that an expert appointed by the court, with no axe to grind but a clear obligation to make a careful and objective evaluation, may prove a reliable source of expert opinion. If so, there must be a reasonable chance at least that such an opinion may lead to settlement of a number of valuation cases.

Courts' power to call experts

Modern civil authority

[6.0.90] There is clear authority that in both England and Australia judges in civil matters cannot call witnesses not called by either party, save at the joint request of both parties or at least with their express or implied consent: see *Clark Equipment Credit of Australia Ltd v Como Factors Pty Ltd* (1988) 14 NSWLR 552 at 568 per Powell J, following *Re Enoch and Zaretsky, Bock & Co's Arbitration* [1910] 1 KB 327; at 331 per Cozens-Hardy MR, and at 332 per Fletcher Moulton LJ.[3]

Australia's best-known case involving discussion of the court appointment of experts in a civil case is *R v Jenkins; Ex parte Morrison* [1949] VLR 277 (the *Whose Baby Case*), in which Barry J called in aid the services of an assessor under what was then s 123 of the *Supreme Court Act 1928* (Vic).

His Honour noted the argument that to appoint a person to take a blood test, in this instance from the putative parents and from the child in question, involved a disregard of the limitation imposed upon a trial judge by the English Court of Appeal in *Re Enoch's Arbitration* [1910] 1 KB 327, which was applied by the High Court in *Titheradge v The King* (1917) 24 CLR 107. However, he held (at 284) that the cases:

3 See the critical comments of Hope JA in *Bassett v Host* [1982] 1 NSWLR 206 at 207:

> A trial is not a game; it is an attempt, on behalf of the community, to resolve in accordance with the law the questions at issue between the parties. A system which requires courts to resolve those issues in the circumstances in which the issues in this case have had to be resolved is surely deficient, for instead of assisting the finding of the truth, the system has prevented the court from having before it the only witnesses who could have spoken directly as to what the truth was. In some other parts of the world where the adversary system prevails, this patent defect has been remedied as regards civil cases by enabling courts to call, or to require the calling of, witnesses with adequate protection to the parties by the giving of directions as to examination and cross-examination, either generally or in respect of particular issues.

> proceed upon the view that a trial judge should not take upon himself the conduct of a case and call a witness to the events in dispute in the litigation before him whom the parties are not willing to call, but the reasoning of the judgment which states the proposition at its highest, that of Fletcher Moulton LJ, in *Re Enoch's Arbitration* [1910] 1 KB 327, may have no application in a proceeding where the welfare of a child is the issue before the court. But in any event, where the judge appoints an expert to perform an examination he is not calling a witness in the sense discussed in those cases; he is really supplementing by scientific technique the natural limitations of his own powers of observation. The expert is skilled in the specialty and disinterested in the result; he is appointed to perform a physical experiment which can be observed and checked by the parties if they so desire; and in the proper exercise of its discretion the court would always allow the parties the opportunity of cross-examination.

It is unclear whether his Honour's distinctions between civil cases and those involving children, and between the court-appointed expert and the expert appointed to conduct an examination or to perform a test will subsequently be applied. However, Family Court and Children's Court legislation emphasising the paramountcy of the welfare of children may well have an impact upon the interpretation of such courts' capacity to call and question witnesses.

Statutory powers

[6.0.100] Under a variety of court rules, expert witnesses can be appointed by courts. For instance, s 65M of the *Civil Procedure Act 2010* (Vic), a court can make an order appointing an expert to assist the court or to inquire into and report on any issue in a proceeding. In deciding whether to do so it must consider:

(a) whether the appointment of a court appointed expert would be disproportionate to
  (i) the complexity or importance of the issues in dispute; and
  (ii) the amount in dispute in the proceeding;
(b) whether the issue falls within a substantially established area of knowledge;
(c) whether it is necessary for the court to have a range of expert opinion;
(d) the likelihood of the appointment expediting or delaying the trial;
(e) any other relvant consideration.

(See too *Uniform Civil Procedure Rules 1999* (Qld), rr 429I and 429J.)

In addition, under r 10.01 of the *Supreme Court (Intellectual Property) Rules 2006* (Vic), in any intellectual property case:

> which in the opinion of the Judge involves a question for an expert witness, the Judge may at any time on the application of a party or on the Judge's own motion appoint an independent expert
>
> (a) to inquire into and report on a question of fact or of opinion (not involving questions of law or construction) or
> (b) to provide a demonstration for the Court.

"Expert" is broadly defined to include "any skilled person whose opinion on a question relevant to any issue in dispute in a proceeding would be received by the Court".

Similarly, r 23.01, of the *Federal Court Rules 2011* permits the court to appoint an expert on application or at its own motion.

(See also r 31.46 of the *Uniform Civil Procedure Rules 2005* (NSW); s 94(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).)

Practical difficulties in relation to the implementation of *Federal Court Rules* were encountered in *Newark Pty Ltd v Civil & Civic Pty Ltd* (1987) 75 ALR 350, in a case involving a contractual dispute and issues surrounding work and labour done. The applicant's liquidator had a limited sum of money available to meet debts and there was a danger that the litigation would consume the whole sum. Counsel for the respondents resisted the application for appointment of a court expert "to investigate matters of opinion relevant to the case". It was suggested to Pincus J that courts should be cautious in applying rules permitting court appointment of experts. His Honour, however, did not find any need for caution in the circumstances of the case before him and determined that the case was "peculiarly suited" to the use of such an expert (at 351):

> The amount in issue is very much less than the expected cost of the litigation and a competent person is available to look into the central questions requiring expert resolution, on behalf of the court. Experience suggests that too often expert witnesses display a degree of partiality, whereas the court-appointed expert may be expected to be indifferent as to the result of the case.

In *Trade Practices Commission v Arnotts* (1989) 89 ALR 131 a court expert was appointed under O 34 of the *Federal Court Rules*, with the consent of both parties, to inquire into and report to the Federal Court about certain survey material prepared by the Roy Morgan Research Centre. Beaumont J held that the expert's findings must be, and were, a genuine attempt to address the questions referred to him.

Family Court powers

[6.0.110] Part 15.38 of the *Family Law Rules 2004* (Cth) permits the Family Court to appoint an assessor while r 15.44 provides for the use of "single experts". In *Hall v Hall* (1979) FLC 90-713 at 78,814 the Full Court of the Family Court authorised the calling of a welfare officer as a court witness who could be cross-examined by both sides: cf *Baines v Baines* (1981) FLC 91-045.

Provision also exists under s 62G(1) of the *Family Law Act 1975* (Cth) for the court, where it thinks it desirable, to direct a "family consultant" to furnish to the court a report on such matters relevant to the proceedings involving the care, welfare and development of a child under 18. The court may make such orders or give such further directions as it considers necessary for the preparation of a report: s 62G(5). Such a report may be received in evidence: *Family Law Act 1975* (Cth), s 62G(8).

Under s 55A(2) where in proceedings for the dissolution of a marriage, the court is in doubt about the propriety of arrangements for the care, welfare and development of a child of the marriage, the court may adjourn proceedings until a report regarding the adequacy of such arrangements has been obtained from a family consultant.

Criminal authority

[6.0.120] An important divergence exists between English and Australian authority as to the inherent power of criminal courts to call their own witnesses, both lay and expert. In England the trial judge has been held to have the power to call a witness not called by either the prosecution or defence, even without their consent (see *R v Holden* (1838) 8 C & P 606; 173 ER 638 at 610 (C & P), 640 (ER); *R v Chapman* (1838) 8 C & P 558; 173 ER 617), if he or she considers it to be in the interests of justice: *R v Liddle* (1928) 21 Cr App R 3; *R v McMahon* (1953) Cr App R 95. However, it has been held that such a witness should not be called after the close of the defence case, except in a matter arising "ex improviso which no human ingenuity could foresee" (*R v Frost* (1839) 4 State Tr NS 385 at 386; *R v Harris* [1927] 2 KB 587; *R v Cleghorn* [1967] 2 QB 584; cf *Whitehorn v The Queen* (1983) 152 CLR 657; (1983) 49 ALR 448 at 684 (CLR), 462 (ALR)) and only where no injustice or prejudice could be caused to the defendant.

Australian authority is much less accepting of the practice of judicial officers intruding into the arena of conflict and themselves calling and questioning witnesses. However, the circumstances in which Australian judges are at liberty to call their own witnesses, expert or lay, remain most unclear.

The seminal Australian case is that of *Titheradge v The King* (1917) 24 CLR 107 where the accused was charged with assault on a girl under the age of 16 with intent to know her carnally. It was the Crown case that the accused had struggled with her in a bedroom prior to assaulting her. The victim said in her evidence that while she was struggling, she had been observed by a man named Payne. Payne was not called by the Crown or the defence but the trial judge formed the view that his evidence was indispensable to a proper consideration of the case. The judge called Payne, and recalled two others to whom Payne was said to have made prior inconsistent statements.

The High Court held that a miscarriage of justice had occurred but its members were not in agreement in relation to their reasons. Barton J noted the English approach and held that a trial judge does have power to call a witness but indicated that such a power should be circumscribed by limitations consequent upon the nature of the adversarial system. He appeared to draw a distinction between the calling and questioning of witnesses. His Honour held that while in civil cases there must be consent by the parties or acquiescence "from which the strong inference is consent" (at 116–117), in criminal cases the defence must be asked whether it consents.[4] Isaacs and Rich JJ, however, drew no distinction in their language between a judge calling and examining witnesses, and held that it:

> is impossible to see any reason why a judge has power to call any evidence ex mero motu in a criminal trial – except where the Crown raises no objection and, by statute, the accused may and in fact does consent in manner provided by law or where the court has special statutory authority otherwise.

They held that the necessary consent in this matter had not been given and so there had been a miscarriage of justice. Gavan Duffy J merely held there had been a miscarriage of justice and "was at pains to distance himself from any enunciation of principle": see also *R v Damic* [1982] 2 NSWLR 750 at 758.

After consideration of the various judgments in *Titheradge v The King* (1917) 24 CLR 107, Street CJ in *R v Damic* [1982] 2 NSWLR 750 at 758 came to the conclusion that the earlier decision was not binding authority "to the effect that there is no power in a trial judge to call a witness". He concluded (at 762–763):

4 It is possible that his Honour, in using the expression "conduct of the examination" and saying that it must be "used with extreme caution", was really speaking of the trial judge calling witnesses and not seeking to draw a distinction between calling and questioning, a distinction which he at no stage articulates unequivocally.

A case that provides a salutary warning about the limits of forensic nursing evidence is the 2006 decision of *R v Thomas* (2006) 207 CCC (3d) 86. Ducharme J of the Ontario Court of Justice was called upon to rule on the evidence of a nurse sexual assault examiner in a case involving allegations of sexual assault. Ducharme J found that the nurse had worked in her examiner role for seven years and was completing a PhD. Her qualification to become an examiner had consisted of a short certification course. Ducharme J found that she had not assessed the results of her examinations in any systematic way and was unable to relate her results to any professional literature in the area. He found that the nurse had not undertaken any research or academic writing in a relevant area and, although she had testified in a number of cases, had not previously been qualified to give opinion evidence of any type. Ducharme J found the nurse not to be acquainted with the literature involving injuries for sexual assault and determined that she was not qualified to testify as to whether the injuries sustained by the complainant were more consistent with non-consensual sex than consensual sex. On a number of occasions Ducharme J contrasted her evidence with that of a medical practitioner who had given evidence in comparable matters: see *R v Quashia* (2005) 198 CCC (3d) 337; *R v Liu* (2004) 190 CCC (3d) 233.

Much of the evidence from sexual assault nurses is in the form of evidence of fact arising from their observations and record-keeping. The importance of such evidence should not be under-estimated (see, eg, *R v Dahlman* (2007) BCSC 1912 at [8]).

The usual rules in relation to expert opinion evidence apply in the context of the sufficiency of the expertise of forensic nurses on a given subject. It is likely that courts will carefully scrutinise the evidence of forensic nurses as in *R v Thomas* (2006) 207 CCC (3d) 86 to ensure that parameters of expertise are not breached. A consequence is that it would be prudent practice (at least in the early phase of expert opinion evidence from forensic nurses) for complex matters of interpretation, such as the age of injuries or the likely aetiology of injuries, to be the subject of evidence (if at all) from forensic physicians, rather than from forensic nurses. It is important for suitable concessions to be made by sexual assault nurses. An example where this was done is *R v Siddiqui* (2004) BCSC 1717 where the evidence of an examiner was summarised by Bennett J as follows:

> Ms H is a sexual assault nurse examiner. She examined MS at [...] Memorial Hospital around 3:00 am on March 2, 2002. MS had her pants on backwards and was not wearing any undergarments. Ms Hildebrand observed a number of bruises to MS, the most serious being deep bruising to her knees. She noted tenderness and swelling in her genital area.
>
> Ms Hildebrand testified that the general injuries and the injuries to the vaginal area were consistent with nonconsensual sexual activity. However, she also agreed that the literature has reported studies that show these type of injuries to the vaginal area are also consistent with consensual intercourse.

PART 10 – MENTAL HEALTH EVIDENCE

Chapter 10.5

PSYCHIATRISTS' AND PSYCHOLOGISTS' EVIDENCE: GENERAL PRINCIPLES

Ian Freckelton SC

> "I would guess that, today, nine-tenths of the psychiatrists in this country [the United States] would probably unhesitatingly agree to the desirability of removing psychiatric experts from the legal adversary system."
>
> Bernard Diamond, *The Fallacy of the Impartial Expert* (1959).

Introduction

[10.5.01] Mental health professionals play a fundamental role in many forms of litigation in contemporary courts. In the Australian Institute of Judicial Administration surveys (Freckelton, Reddy and Selby (1999, p 40); Freckelton, Reddy and Selby (2001, p 33) psychiatry and psychology figured prominently as areas of particular difficulty for trial judges and magistrates.

A number of parameters exist in relation to the evidence which traditionally has been permitted from psychiatrists and psychologists. In particular, there are controversies about the areas in which they are regarded as having specialised knowledge and therefore expertise to be able to assist the courts. In addition, inhibitions have traditionally been expressed about the subject matter upon which opinions from psychiatrists and psychologists are permitted – normality, children, and credit and credibility. This chapter reviews the controversies and attempts to give guidance about the parameters of permitted testimony from psychiatrists and psychologists.

The parameters of mental health professionals' expertise

[10.5.40] All expert witnesses must be sufficiently qualified in respect of the subject upon which they propose to express opinions to be permitted to do so (Ch 2.5). It is not just a matter of possessing relevant credentials. Expertise is a function of possessing specialised knowledge, of reasonable contemporaneity, howsoever obtained.

This is the case with mental health professionals, as well with all other experts. In the leading case of *J v The Queen* (1994) 75 A Crim R 522 at 532, for instance, Brooking J noted that in respect of the evidence that a highly experienced forensic psychiatrist, Dr Bartholomew, gave in relation to battered woman syndrome, he "did not sufficiently make it appear … that he was qualified to speak about it". The psychiatrist had practised in the forensic domain for a long while but the question related to his ability to express informed opinions about the responses of young females to the trauma of sexual abuse either based on the relevant literature or on his own clinical experience.

There was a further problem. Brooking J noted that although the expert maintained that he was "reasonably au fait with" the syndrome, his familiarity with the relevant literature was not all that it seemed to be. He had not read any of a series of 14 articles to which he had made reference, had read a book on the subject written some 10 years previously and "had read other material but could not recall exactly what he had read or when he had read it" (at 527). The essence of this aspect of the decision by the Victorian Court of Criminal Appeal is that the substance of the expert's claimed expertise was fundamentally deficient.

Similarly, in *F v The Queen* (1995) 83 A Crim R 502 at 507, the New South Wales Court of Criminal Appeal was troubled (and disallowed) evidence from an experienced paediatrician who had a substantial amount of experience in dealing with children who had been subjected to sexual abuse: "She is not a psychiatrist or a psychologist. However, the evidence she was permitted to give included evidence concerning her reading of literature in the area of psychiatry or psychology and she gave evidence in the capacity of an expert."

The issue for psychiatrists and psychologists is reasonably straightforward. For them to hold themselves out in a report or to give oral evidence in the witness box about an area, they must be in a position to demonstrate convincingly that they have specialised knowledge about it that is up-to-date and of real substance. The more sub-specialised the area and the more it is controversial, in a practical sense the more onerous will be the burden.

Diagnostic expertise of psychologists

[10.5.80] There are important and not fully resolved issues about the parameters of mental health experts' expertise. Partly it is a question of industrial delineation of competence between psychiatry and psychology; partly it is a question of evidentiary admissibility. This is particularly so in relation to psychologists who may be regarded by the courts as "straying" inappropriately into the area as experts of pathology, utilising manuals of diagnosis prepared by psychiatrists (albeit with assistance on committees from psychologists) for psychiatrists.

In the controversial decision of *R v MacKenney* (1983) 76 Cr App R 271 at 275, for instance, Ackner LJ affirmed the decision of a trial judge to refuse to hear evidence from a psychologist on the existence of mental illness:

> Mr M submitted to us that Mr I was qualified to diagnose mental illness. His training, he submitted, as a psychologist enabled him so to do. We do not agree. No doubt his training as a psychologist gave him some insight into the medical science of psychiatry. However, not being a medical man, he had of course no experience of direct personal diagnosis. He was thus not qualified to act as a psychiatrist. Mr I's evidence was not medical evidence, and was not admissible.

It may well be that if a court were given a clear understanding of the skills, training and experience of a particular psychologist, a different result would ensue. However, the *MacKenney* decision is not without support. Wood J, in the case of *R v Peisley* (1990) 54 A Crim R 42 at 52 in the New South Wales Court of Criminal Appeal, made a similar point:

> I consider it necessary to observe once again that it is important that clinical psychologists do not cross the barrier of their expertise. It is appropriate for persons trained in the field of clinical psychology to give evidence of the results of psychometric and other psychological testing, and to explain the relevance of those results, and their significance so far as they reveal or support the existence of brain damage or other recognised mental states or disorders. It is not, however, appropriate for them to enter into the field of psychiatry.

(See also *R v Petroulias (No 36)* [2008] NSWSC 626 at [164].)

A similar view was expressed by Keall J in *Klimoski v Water Authority (WA)* (1989) 5 SR (WA) 148 at 150, who differentiated between the expertise of a psychologist to perform and interpret tests (see *R v Forde* (1986) 19 A Crim R 1) and to make diagnoses such as that a person suffers from "post-concussion syndrome". The Western Australian Court of Appeal was asked in *Ta v Lucky Import and Export Co Pty Ltd* [2002] WASCA 65 to overrule *Klimoski* but did not find it necessary to decide whether to do so.

In *Allanson v Toncich* [2002] WASCA 216 at [12] Murray J, faced with arguments about the propriety of psychologists providing diagnoses commented: "Of course a psychologist is not medically qualified, but if the diagnosis is received as a description of the fact that some traumatic event has caused an excessive degree of stress and anxiety in the patient, then I see no difficulty with it." Similarly, in *Trudgett v Commonwealth of Australia* [2006] NSWSC 575 at [42]-[43] the objection was taken to a psychologist's having made a diagnosis but the court did not find it necessary to rule on the issue as a matter of principle.

In the tribunal context, Judge Strong of the Victorian Administrative Appeals Tribunal in two 1994 judgments was highly critical of experts who, in his judgment, went beyond the scope of their expertise in offering views in relation to crimes compensation appellants suffering from post-traumatic stress disorder. In *Hood v Crimes Compensation Tribunal* (unreported, Vic AAT, 24 March 1994), after reviewing the nature of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* and its treatment of post-traumatic stress disorder, his Honour commented (at p 5):

> [T]he diagnosis and treatment of mental disorders is, principally, the province of psychiatrists. I do not doubt that suitably qualified and experienced health professionals of other disciplines can competently identify mental disorders of the kind described in DSM-III-R. But my recent experience at this Tribunal has, frankly, left me with some concern that the growth of the Crimes Compensation jurisdiction has encouraged psychologists in particular–some of them seemingly unsuited for the task–to arm themselves with DSM-III-R and enter the fray.

Five days later his Honour broached the subject once more in *Williams v Crimes Compensation Tribunal* (unreported, Vic AAT, 29 March 1994) where he took exception to excessively liberal use of the diagnosis of post-traumatic stress disorder by persons not medically qualified (at p 3):

> T [a clinical psychologist] correctly notes, and emphasises "... that definitive diagnosis of this condition must be made by a registered medical practitioner". Most psychologists appear not to appreciate or acknowledge this requirement.

A more liberal approach was taken by Hampel J in *R v Whitbread* (1995) 78 A Crim R 452; [1995] VSC 60; [1995] VICSC 60 (see further Freckelton (1997)) where the Victorian Court of Criminal Appeal was called upon to examine the distinctions between evidence properly to be given by psychologists and psychiatrists. It had been sought by the defence to lead somewhat dubious evidence from a psychologist about a "conversion disorder" in the context of the need to evaluate whether apparent lies told by a suspect in a baby-shaking case were indicative of consciousness of guilt. The opinion from the psychologist was as follows:

> Often the conversion disorder is accompanied by some form of dissociative disorder both being related forms of hysterical neurosis. One type of a dissociative disorder is psychogenic amnesia. It is characterised by a temporary disturbance in the ability to recall important personal information without underlying organic brain disease. This may occur in a situation in which a person has been overwhelmed by grief and anxiety leaving the painful memories totally repressed. Hysteria is not a planned deliberate response to panic or stress but an altered state of consciousness, in which painful psychological stimuli are blocked out in order to help the victim cope. It is a fairly common response to stress, especially in individuals whose internal resources are limited. It is my opinion that Mr Whitbread's description of his experiences during the events that occurred with Daniel are consistent with a diagnosis of hysteria.

The Crown contended in part that the psychologist was not qualified to give such evidence as he was not a psychiatrist. Hampel J (at 460) rejected this submission as "misconceived" and noted that standard and medical dictionaries define "psychology" as a "branch of science which deals with the mind and mental processes" – "the science of the nature, functioning and development of the human mind and the study of the behaviour of the mind". So much was unexceptionable. However, he then stated (at 460):

> The definition in the Glossary of Psychiatric Terminology refers to a psychologist as "A person, usually with an advanced degree, who specialises in the study of mental processes and the treatment of mental disorders."

Ironically, this demonstrates that the document to which Hampel J was having recourse to determine the entitlements of Australian psychologists was not only North American (because of its reference to psychologists normally having an "advanced degree", which they do not in Australia – the greater percentage being registered with a four year degree and two years' supervision) but, it appears, a psychiatric document, although he did not cite it in such a way as to allow identification of its authorship or its full title.

His Honour went further. He provided from the same source a definition of "psychiatry", by contrast, as "the medical treatment of mental illness, emotional disturbance and abnormal behaviour" (at 460).

He held (at 460) that nothing in the definitions or the literature about the functions of psychiatrists and psychologists "differentiates them on the basis that

one has more or less understanding and knowledge of the nature and functioning of the mind in its normal or abnormal state". Given the extent of tertiary study required as a baseline for psychologists and psychiatrists (accepting that a percentage of psychologists have postgraduate qualifications), this was a surprising contention.

His Honour held (at 460) that, once the question of medical treatment of mental illness was put to one side, "there is no reason why a psychologist may not be just as qualified or better qualified than a psychiatrist to express opinions about mental states and processes".

Ironically, too, the definition proffered by the psychologist in *Whitbread* was dated in terms of the DSM (see, eg, DSM-III-R (1987), at p 257; cf DSM-IV-TR (2000), at p 498) by its reference to "hysteria", a term generally utilised by followers of Freud, not practitioners applying modern taxonomies of diagnosis such as the DSM.

Australia's second decision offering a window of opportunity to psychologists to undertake diagnoses was that of Martin CJ in *Nepi v Northern Territory* (unreported, NT Sup Ct, 2 May 1997) (see further Freckelton (1998)). Martin CJ upheld an appeal against a determination by a magistrate in a crimes compensation matter on the basis that a psychologist's evidence about PTSD had been wrongly determined to be inadmissible. In the course of a voire dire, the psychologist had maintained that "[t]here are many blurred boundaries and the distinction between psychiatric and psychological is becoming less and less meaningful" (at p 4).

It is significant that no evidence about PTSD other than that from the psychologist whose evidence was objected to was called by either side in *Nepi*, meaning that there was no evidence to contradict the evidence of the psychologist or to assert that he was not competent to give his opinions. This was expressly noted by Martin CJ in his judgment.

Martin CJ observed that the magistrate had not adverted to the psychologist's evidence as to his academic qualifications and experience, nor to his evidence regarding whether PTSD was a psychological or psychiatric disorder. The Chief Justice also observed that the magistrate had not rejected what the witness had said because of some advantage he had arising from his having seen and heard him in the witness box. This meant that the rejection of the psychologist's opinion had not been upon the basis of the evidence before him: "Rather, he made the ruling by adopting observations made in a couple of reported cases in other jurisdictions at other times going to other mental disorders" (at p 5).

By contrast, Martin CJ observed that there was no question in *Nepi* that there had been any lack of testing or that the history given by the victim had been incomplete. His Honour also noted that the opinions of clinical psychologists as to PTSD "had been frequently received and acted upon by the courts". He commented that in a series of unreported cases such evidence had been given by psychologists (referring to *Enright v Windley* (unreported, Australian Capital Territory Supreme Court, 1 June 1995); *W & W v R & G* (unreported, Family Ct of Australia, 21 April 1994); *Caldwell v Caldwell* (unreported, New South Wales Court of Appeal, 30 August 1996); and *Milner v Australian Capital Territory* (unreported, ACT Sup Ct, 15 December 1994)).

His Honour accepted that the most prominent case to deal with "the difficulties which can sometimes arise as between psychology and psychiatry" was the decision of Hampel J in *R v Whitbread* (1995) 78 A Crim R 452; [1995] VSC 60; [1995] VICSC 60. He found that the magistrate had erred in making a finding that the psychologist had crossed the barrier of his expertise when there was no evidence to support such a conclusion. The Chief Justice proffered a second reason – that the magistrate had wrongly taken into account irrelevant material, namely, the observations in the cases to which he had made reference, namely *Klimoski v Water Authority (WA)* (1989) 5 SR (WA) 148 and *R v Peisley* (1990) 54 A Crim R 42. The Chief Justice's reasoning was no more extensive than this.

The decision as to whether a witness is qualified to give evidence as an expert is a decision of fact. The legal question for the Northern Territory Supreme Court was whether, on the evidence before the magistrate, it had been open to him to find that the psychologist could not diagnose PTSD because he had "crossed the barrier of his expertise" or "because he had taken into account irrelevant material" (at p 6). The only evidence in the case was the assertion from the psychologist that he had made the diagnosis previously, that the disorder was not exclusively a psychiatric condition and that the boundaries between psychiatry and psychology were becoming less clearly delineated. In the circumstances, the magistrate had little probative evidence before him and in principle was probably entitled to make a finding that the psychologist in providing a diagnosis using a medical manual, namely a manual of the American Psychiatric Association designed primarily for psychiatrists by psychiatrists, was going beyond his expertise. Therefore there are real limits upon the extent to which *Nepi* can be elevated to the status of being a significant authority upon the question of psychologists' capacity to diagnose. Evidence was not led on this vexed issue in the course of a contested hearing on the subject in which experts from opposed viewpoints were called. Neither the Australian Psychological Society nor the Australian and New Zealand College of Psychiatrists sought leave to intervene as an interested party to present its position on the subject.

In addition, it is questionable, with respect, whether Martin CJ was correct in finding fault with the magistrate for having taken into account irrelevant material, when it is seen that the material in question consisted of other decisions whose reasoning he chose to adopt. It was open to Martin CJ to hold that the magistrate had erred in applying decisions which the Northern Territory was prepared to distinguish or to reject as authoritative pronouncements but this is a question quite separate from whether an error of law had been made by the magistrate taking into account material which, properly described, was irrelevant to the questions of fact before him.

The issue arose afresh in *R v Kucma* (2005) 11 VR 472; [2005] VSCA 58, an appeal to the Victorian Court of Appeal on the ground of fresh evidence as to the appellant's mental state at the time of his commission of offences.

Under s 20 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic):

> (1) The defence of mental impairment is established for a person charged with an offence if, at the time of engaging in conduct constituting the offence, the person was suffering from a mental impairment that had the effect that - (a) he or she did not know the nature and quality of the conduct; or (b) he or she did not know that the conduct was wrong (that is, he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong). (2) If the defence of mental impairment is established, the person must be found not guilty because of mental impairment.

Batt JA permitted the evidence of two psychiatrists but in respect of the evidence of a psychologist declined to allow it, stating (at [26]):

> I do not, however, consider that the reports of Dr Kennedy are otherwise admissible. In my opinion, the field of expertise responsive to the matters raised by s 20 of the 1997 Act is psychiatry, the discipline concerned with mental health, and does not include psychology. The experience of counsel for the respondent that it has always been psychiatrists who give evidence in cases of insanity or mental impairment tends to support this opinion.

Eames JA acceded (at [56]-[57]) to the approach of Batt JA:

> Whether the Court should receive in evidence the opinion of Dr Kennedy, as a clinical and forensic psychologist, was not the subject of detailed argument before us. Counsel for the respondent contended that it was not usual for a psychologist to give such an opinion. …
>
> Batt, J.A. expresses the opinion that Dr Kennedy's qualifications do not permit him to diagnose mental illness, that being the exclusive province of psychiatry. I do not need to express a concluded view as to that question, which if there is a re-trial may fall for argument before the new trial judge. As presently advised, however, I do not consider the issue to be beyond argument. Since it is unnecessary to resolve this question, and having regard to the fact that we heard no argument on the issue, it is appropriate that I endorse the course proposed by Batt, J.A. that we not formally receive the report of Dr Kennedy as fresh evidence on the appeal.

Warren CJ agreed with the reasons and orders proposed by Batt and Eames JJA.

It appears then that the propriety of psychologists providing diagnoses of pathology remains unresolved and thus so does the admissibility of such evidence – at common law and under the uniform evidence scheme. The approach of the Victorian Court of Appeal in *R v Kucma* (2005) 11 VR 472; [2005] VSCA 58 brings into question the authority of the approach of Hampel J in *R v Whitbread* (1995) 78 A Crim R 452; [1995] VSC 60; [1995] VICSC 60 and Martin CJ in *Nepi v Northern Territory* (unreported, NT Sup Ct, 2 May 1997). It has underlined the importance of resolution of the issue.

There is much to be said for an individualised, case by case assessment of psychologists' levels of specialised knowledge entitling a diagnostic opinion about the presence or absence of a particular disorder, or its symptomatology. There are some psychologists who, by reason of their postgraduate training and/or their experience have ample knowledge to be able to assist courts with their opinions. Others do not fall into that category because of the modest nature of their training or the particular characteristics of their experience, which may not have facilitated the acquisition of specialised knowledge about the diagnostic criteria for particular disorders.

United States authority

[10.5.85] The issue, however, has been relatively settled since the 1960s in the United States, where psychologists for the most part hold doctoral qualifications and where in some states they can also prescribe medications. In *Jenkins v United States* 307 F 2d 637 (1962), in a trial for housebreaking, assault and intent to rape, a defendant presented the testimony of three clinical psychologists in support of

an insanity defence. All three psychologists testified, based on their personal contact with the defendant, review of his case history and standard psychological tests, that on the date the alleged crimes were committed, the defendant had been suffering from the mental disorder of schizophrenia. One of the three testified that he could give no opinion concerning the relationship between the illness and the crimes but the other two expressed the view that the schizophrenia and the criminal conduct were related and that the crimes were the product of the illness.

At the conclusion of the trial, the judge instructed the jury to disregard the opinions of the psychologists on the basis that they were not qualified to give expert testimony on the issue of mental disease. On appeal, the District Court Circuit reversed the decision and remitted the case for a further trial, holding that the psychologists were qualified as expert witnesses on the question of mental disease. The American Psychological Association submitted an amicus brief, arguing that: (1) psychology is an established science; (2) the practice of psychology is a learned profession; (3) a clinical psychologist is competent to express professional opinions concerning the existence or non-existence of mental disease or defect and their causal relationship to overt behaviour; and (4) experience is the essential legal ingredient of competence to give an expert opinion. On the issue of the psychologists' expert evidence, the District Court stated that some psychologists are qualified to render expert testimony on mental disorders. It held that the determination of a psychologist's competence to give an expert opinion based on his or her findings as to the presence or absence of mental disease or defect depends upon the nature and extent of the psychologist's knowledge and not simply on the claim to the title "psychologist".

Bases of mental health expert testimony

[10.5.120] It is incumbent upon psychiatrists and psychologists, like other experts, to identify the facts on the basis of which they advance opinions.

In *J v The Queen* (1994) 75 A Crim R 522 at 524, Brooking J held that this can be done by the expert sitting in court and hearing the evidence or later reading the transcript, or in evidence-in-chief having particular parts of the evidence identified to him or her:

> Whatever method is adopted, the important thing is to make it clear precisely what evidence, assumed to be correct, or precisely what supposed facts, assumed to be established, are being placed before the witness for the purpose of his expressing an opinion. An expert witness must identify the facts assumed as the basis of the opinion.

(See *Earl Ferrers Case* (1760) 19 How St Tr 885 at 943; *Turney* [1975] 1 QB 834 at 840; *Fowler* (1985) 39 SASR 440; 17 A Crim R 16 at 442-443 (SASR), 17-18 (A Crim R); *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313; 97 ALR 555 at 347-340 (FCR).)

Expert evidence on intellectual impairment

[10.5.160] A question exists about whether psychiatrists and psychologists possess specialised knowledge about persons neither suffering a mental illness nor an intellectual disability. Traditionally, the common law common knowledge rule precluded such testimony. Under the uniform evidence scheme the question is whether the cognition and functioning of "normal people" is a subject about which there is specialised knowledge.

Expert evidence about a person being of borderline intellectual disability (eg, between IQ 69 and 78) having the capacity to form the necessary intent to commit a crime has been permitted on a number of occasions (see, eg, *R v Schultz* (1981) 5 A Crim R 234; see also *Falconer v The Queen* (1989) 46 A Crim R 83 at 94). Similarly, expert evidence has been permitted on the question of reliability of a confession by a person with an intellectual disability: see, eg, *R v Barry* [1984] 1 Qd R 74. Both cases couched their language in terms of the normality versus abnormality test and had the effect of extending the *R v Turner* [1975] QB 834; (1974) 60 Cr App R 80 preclusion of expert evidence on people not suffering from mental illnesses to those assessed as being intellectually impaired.

In *R v Schultz* (1981) 5 A Crim R 234 the crucial issue was whether the accused had formed the necessary intent. His counsel sought to adduce evidence from a psychologist and a psychiatrist that he was of borderline mentally defective intelligence, having an IQ between 69 and 78. Burt CJ held (at 237-238) that:

> Once it be acknowledged that there is no legal presumption that a man intends the probable consequences of his acts and that in every case the finding to be made is specifically and exclusively as to the intention of a particular person at a particular moment in time, then, ... all facts personal to [him] which have bearing or which in the judgment of reasonable men have a bearing on the operation of his mind are relevant to that finding. ... Such facts as do distinguish the person concerned from his fellow in a way, which could ... weaken an inference as to intent otherwise based upon the facts found [are] relevant ... and if those facts cannot without the aid of expert opinion evidence be made known to the jury then such evidence directed toward their proof is relevant.
>
> The jury unaided may safely be left to pass judgment upon the ordinary man, notwithstanding the fact, which they can safely be assumed to know, that the "ordinary" man comes in many shapes and sizes. But ... they could not ... be expected to know by merely seeing and hearing the appellant in the witness box, that his intellectual functioning was impaired to the extent to be spoken of by the [proposed] witnesses. That evidence if accepted would ... take the appellant outside the range of the ordinary and would alert the jury to the fact that [he] was not "an ordinary man" and that he was in a class apart.

A slightly different approach was adopted by the English Court of Appeal in *R v Masih* (unreported, English Court of Appeal, 27 January 1986); [1986] Crim LR 395, where the defendant, who had an IQ of 72, was extremely immature and had a limited understanding of the ways of the world, had been charged with rape. Expert evidence was sought to be adduced to the effect that he would have been unable to comprehend adequately the nuances of the sexual interplay that had taken place in his presence and might have misconstrued the complainant's willingness or unwillingness to engage in sexual intercourse. Lord Lane expressed the view that the decision in *R v Schultz* (1981) 5 A Crim R 234 went too far and held that:

> (1) In cases where the IQ level is 69 or below and therefore the defendant is formally classified as "mentally defective" then subject always to its relevance in the particular case, generally speaking the psychiatric evidence would be admissible. That would enlighten the jury on a matter of abnormality which would ex hypothesi be outside their own experience.
>
> (2) Where the defendant is within the scale of normality, albeit (as Masih was) at the lower end of that scale, expert evidence will not as a rule be necessary and should be excluded.

(See Beaumont (1988, p 292)). His Honour added the following qualification:

> It is not necessary, for the purposes of this particular decision, to determine when, if ever, a defendant whose intelligence quotient is above that of a mental defective will be permitted to adduce evidence of mental capacity.

(See Beaumont (1988, p 293); see also the New Zealand Court of Appeal decision in *R v Moore* [1982] 1 NZLR 242.[1])

His Honour's decision was soon the subject of further interpretation in *R v Silcott* (see Beaumont (1987, p 807)), in which psychological and psychiatric evidence was offered to the court on behalf of a juvenile to challenge the reliability of a confession that he had allegedly made. This comprised evidence that the juvenile, although aged 15, had a mental age of seven and an IQ of 70 to 80, rendering him educationally subnormal. The first part was not challenged but the second was challenged on the basis that it was hypothetical opinion evidence as to the reliability of a confession made by someone possessing the characteristics of the young man in question.

Hodgson J interpreted Lord Lane's ruling in this way:

> The court said that in considering a person's intellect, no IQ above 69 should be considered abnormal, and therefore, expert evidence aimed at showing that a defendant was in the category of educationally subnormal, 70 or over, was inadmissible on the mens rea issue. 69 is apparently taken as the point at which mental defectiveness changes to educational subnormality. The Lord Chief Justice did, however, admit the possibility of: "A defendant whose IQ is above that of a mental defective", *being able*, "To adduce evidence of mental capacity". To draw a strict line at 69/70 does seem somewhat artificial.

It is likely that Hodgson J's commonsense view of the arbitrariness of classification of intellectual disability will be consolidated in cases which henceforth examine the issue.

His Honour held that when an adult jury has to consider the mens rea of a juvenile with the age of a young child, it should be permitted the assistance of expert evidence. The case broke new ground as an application of the rules of expert evidence to the admissibility of expert evidence in relation to a juvenile's confession. His Honour found further justification for his approach in the words of Lord Parker CJ in *DPP v A & BC Chewing Gum Ltd* [1968] 1 QB 159 at 164, a case that required a decision about whether bubble gum battle cards read by children were obscene:

> When considering the effect of something on an adult an adult jury may be able to judge just as well as an adult witness called on the point. Indeed, there is nothing more that a jury or justices need to know. But certainly when you are dealing here with children of different age groups and children from five upwards, any jury and any justices need all the help they can get, information which they may not have, as to the effect on different children.

(See *Epperson v Dampney* (1976) 10 ALR 227; [1976] FLC 90-061 at 233-234 (ALR); but note, however, *R v Anderson* [1972] 1 QB 304 at 312; *R v Calder* [1969] 1 QB 151; *R v Stamford* [1972] 2 QB 391; 2 WLR 1055.)

In *R v Henry* [2006] 1 Cr App R 6 the Court of Appeal considered the admissibility of mental health expert evidence in relation to an accused person

1 However, IQ estimation is not such an exact science as appears to have been contemplated in *R v Masih* (unreported, English Court of Appeal, 27 January 1986); [1986] *Crim L Rev* 395: see the Subscription Service, Ch 60.

with an IQ of 75. It reaffirmed the approach taken in *R v Masih* (unreported, English Court of Appeal, 27 January 1986); [1986] Crim LR 395 and declined the evidence.

As to the role of evidence about an offender's intellectual disability for the purposes of sentencing, see [10.5.200].

Mental health expert evidence about "normal" persons

[10.5.200] The leading Australian common law case on the operation of the common knowledge rule is the 1989 decision of the High Court in *Murphy v The Queen* (1989) 167 CLR 94; 40 A Crim R 361; [1989] HCA 28. It involved considerable discussion by members of the High Court about the circumstances in which mental health professionals can give admissible opinion evidence about the reliability of confessional evidence.

The case related to one of Australia's most notorious murders – that of Anita Cobby (Sheppard (1991)). A ground of appeal to the High Court was that the trial judge had erred in ruling inadmissible certain expert evidence proposed to be called on behalf of one of the accused men. The evidence was that of Ricki Sharpe, a consultant psychologist, whose evidence would have been that one of the accused was of limited intellectual capacity and that the confessional material adduced through the police record of interview with him was thereby rendered inadmissible or, at any rate, dangerously unreliable.

The trial judge had rejected the proposed expert evidence on the basis that Mr Sharpe's report had excluded brain damage and mental retardation. In those circumstances, he was of the view that the evidence related to matters of human nature and behaviour within the limits of "normality" – it was therefore an issue on which the members of the jury were competent to form their own views. The relevant parts of the expert's report are as follows (at 108-109):

> Leslie Murphy is functioning intellectually at the level of a ten year old person. He shows adequate adaptive functioning and could not be considered to be mentally retarded. His poor educational performance would seem to be almost entirely due to a disturbed childhood and inadequate educational opportunities and not due to any biological or anatomical reasons.
>
> Leslie Murphy shows great impairment in most of the basic educational skills. The greatest deficits are in his reading and comprehension skills. Spelling, vocabulary, arithmetic, reading and comprehension (silent and auditory) are in the nine to ten year old range.
>
> In my opinion, Leslie Murphy would have had great difficulty in reading and fully comprehending the record of interview. It would have taken him five to ten minutes to read each page with 50 per cent comprehension. If the record was read to him at normal speech rate, he would have had approximately 25 per cent comprehension. His auditory comprehension is very much dependent on the speed with which things are read or spoken, whether or not he is able to make interruptions so as to mark his own copy to "jog" his memory at the conclusion of the reading. I strongly doubt that he could fully comprehend the medical authorisations he signed, whether he read them himself or they were read out to him. I believe that the words mentioned in the medical authorisations would not have been within his vocabulary.

Mason CJ and Toohey J began their analysis of the case law in the area by accepting the statement of Lawton LJ in *R v Turner* [1975] QB 834; (1974) 60 Cr App R 80 at 841 (QB) that: "An expert's opinion is admissible to furnish the court

with scientific information which is likely to be outside the experience and knowledge of a judge or jury." However, they cavilled at the assertion (at 841) that:

> We all know that both men and women who are deeply in love can, and sometimes do, have outbursts of blind rage when discovering unexpected wantonness on the part of their loved ones. ... Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life.

Their Honours pointed out that such a statement assumes that terms such as "ordinary" and "normal" have a clearly understood meaning and that the distinction between "normal" and "abnormal" is well recognised. They continued (at 111):

> Further, it assumes that the commonsense of jurors is an adequate guide to the conduct of people who are "normal" even though they may suffer from some other relevant disability. And it assumes that the expertise of psychiatrists (or, in the present case, psychologists) extends only to those who are "abnormal".

Their Honours focused instead on whether the expertise that the witness could bring to bear was *"outside the experience and knowledge of the judge and jury"* (at 111, emphasis added). They accepted that the distinction between normality and abnormality could be of value in some cases, in spite of its "inherent difficulties", but held that "it tends to obscure the fact that in a particular case evidence may be offered to which the distinction has no relevance". They held the instant case to be an example of the inutility of such a dichotomy as the issue was not the accused's normality or abnormality but the standard of his vocabulary and literacy, and so of his comprehension. They held that the expert had been called to give evidence on a matter calling for his expertise and should have been permitted to give his evidence.

In broad terms Deane J agreed with the Chief Justice and Toohey J. He expressed the view (at 125-126) that the evidence sought to be given by the expert was properly the subject of the expert evidence of a qualified psychologist if the accused's "extraordinarily low levels of intellectual function, silent and auditory comprehension and linguistic ability were themselves relevant to a question to be decided by the jury". He held that the witness's evidence was at least relevant to, and may have been of great assistance in, determining the question of the reliability of the accused's allegedly voluntary confessional statements. The evidence would have been by a qualified expert, on a subject susceptible of expert evidence, it would have been useful and it would not have been precluded by the objection that it was on the very question that the jury had to decide.

Most importantly, Deane J rejected the view that psychological evidence should not be admitted in those situations where there is no evidence of "abnormality". He held (at 127) that:

> Expert psychological evidence of identified and significant difficulty in intellectual functioning or in comprehension and expression could well be admissible on the question of the reliability of a confessional statement notwithstanding that the identified difficulty did not take the case out of the lower range of what would be classified as normal.

However, his Honour decided the case on the basis that the relevant evidence relating to the level of the accused's functioning was evidence of abnormality (at 127). His Honour completed his judgment with these words (at 127):

> It appears to me to be irrelevant that those abnormally low levels of intellectual function, comprehension and linguistic ability were the result of environmental factors rather than innate mental defect.

However, Brennan and Dawson JJ took a different approach and denied that an error had been made by the trial judge in refusing to allow Mr Sharpe to give expert evidence. They pointed out that the evidence was being proffered to contradict the police evidence that the accused had given the incriminating answers that they alleged he had given in response to the questions they had asked him. Brennan J quoted a passage (at 120) from the leading United States textbook, *Wigmore on Evidence* (1979, Vol 2, p 750):

> The object is to be sure that the question to the witness will be answered by a person who is fitted to answer it. His fitness, then, is a fitness to answer on that point. He may be fitted to answer about countless other matters, but that does not justify accepting his views on the matter in hand. ... Since experiential capacity is always relative to the matter in hand, the witness may, from question to question, enter or leave the class of persons fitted to answer, and the distinction depends on the kind of subject primarily, not on the kind of person.

His Honour held that neither the expert's report nor his statement of qualifications revealed any expertise which would have permitted him to form a view about the accused's understanding of particular questions or his use of particular words or phrases. He found that the crucial link in the chain of proof of the witness's qualifications to give the expert evidence was missing – it had not been shown that the general expertise of well-qualified psychologists enables them to say whether a subject understands particular words and phrases or to assert the unlikelihood of the subject's use of such words or phrases: see above [2.5.70]–[2.5.230].

Brennan J disputed that the proper approach in this case was to ask whether a psychologist's evidence should be admissible to prove the state of mind of a "normal" accused. Rather, his view was that the expertise of the witness to give the evidence had not been sufficiently proved. Thus, Brennan J's approach is not necessarily inconsistent with that of Mason CJ, Toohey or Deane JJ; rather, he resolved the issue before him by reference to the expertise rule, rather than application of the common knowledge rule.

Dawson J adopted a slightly different approach but agreed with the result of Brennan J. His Honour was of the view that the psychologist's qualifications, as presented to the trial judge, would equip him to do no more than to express the view that the accused was poorly educated and of limited intellectual capacity. There was no material before the court which would indicate that the witness was qualified to express an expert opinion about whether the use in the record of interview of phrases and sentence structures was uncharacteristic of the accused.

As the expert's potential evidence was significantly circumscribed in Dawson J's view, the issue arose in his approach of whether, in effect, it was helpful to the jury (see Thayer (1898, p 525)) to hear such evidence from the mouth of an expert. He decided that in fact the jury was sufficiently equipped by their "ordinary, everyday experience adequately to assess the applicant's capabilities".

At the same time, his Honour acknowledged (at 130) that difficulties could exist in relation to the traditional formulation of the common knowledge rule:

> One such rule is that which says that expert evidence is not admissible to prove the behavioural characteristics of normal people. Normal behaviour, it is said, is within

Statutory provisions

[11.10.360] In South Australia (*Evidence Act 1929* (SA), s 64) and Western Australia (*Evidence Act 1906* (WA), s 72), courts are permitted expressly to refer to "such published books maps or charts as the court considers to be of authority on the subjects to which they respectively relate in matters of public history, literature, science or art".

Chapter 11.15

ANTHROPOLOGISTS' EVIDENCE

Ian Freckelton SC

"Contemplate all this work of Time,
The giant labouring in his youth;
Nor dream of human love and truth,
As dying Nature's earth and lime;
But trust that those we call the dead
Are breathers of an ampler day
For ever nobler ends."

Alfred, Lord Tennyson, *In Memoriam AHH*, CXVIII.

Introduction

[11.15.01] The specialised knowledge of an anthropologist derives from the function to be performed by the anthropologist for which he or she is trained and in relation to which study has been undertaken and experience gained. "Anthropology" is "the science that treats of the origin, development (physical, intellectual, moral, etc), and varieties, and sometimes especially the cultural development, customs, beliefs, etc of mankind": *Macquarie Dictionary* (2nd ed, 1991). Cultural or social anthropology is the science of human social and cultural behaviour and its development. Socio-cultural anthropology is traditionally divided into ethnography and ethnology. The former is the primary, data-gathering part of socio-cultural anthropology, that is, field work in a given society. This involves the study of everyday behaviour, normal social life, economic activities, relationships with relatives and in-laws, relationship to any wider nation-state, rituals and ceremonial behaviour and notions of appropriate social behaviour: Kottak (1982, p 12).

Anthropologists' evidence can provide a framework for understanding the primary evidence of indigenous witnesses in relation to matters such as the acknowledgment and observance of traditional laws and practices:

> Not only may anthropological evidence observe and record matters relevant to informing the court as to the social organisation of an applicant claim group, and as to the nature and content of their traditional laws and traditional customs, but by reference to other material including historical literature and anthropological material, the anthropologists may compare that social organisation with the nature and content of the traditional laws and traditional customs of their ancestors and to interpret the similarities or differences. And there may also be circumstances in which

> an anthropological expert may give evidence about the meaning and significance of what Aboriginal witnesses say and do, so as to explain or render coherent matters which, on their face, may be incomplete or unclear.

(See *Alyawarr, Keytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory* (2004) 207 ALR 539; [2004] FCA 472 at [89].)

The evidence of anthropologists tends to focus on relationships at a given time and extrapolate to more general observations about communities' social organisation. By contrast, it has been observed that historical evidence (see Ch 11.10) focuses on reconstructing a chronology of past events – for instance, on a claim area and on how events impacted on communities: see Ritter (1999); Reilly (2000); *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 58; *Ward v Western Australia* (1998) 159 ALR 483 at 501; *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 at [3].

However, anthropologists' evidence has been adduced in a wide range of cases. An example is *In the Marriage of H* (2003) 198 ALR 383; 30 Fam LR 264; [2003] FLC 93-162 where an anthropologist was called to give evidence about the social and cultural impact of proposals relating to the religious upbringing and education of children from the Lebanese/Australian community and whether the proposals were likely to impact upon the welfare of the children. Similarly, the role of an anthropologist has been recognised in respect of indigenous practices and values: see *In re CP* [1997] FLC 92-741; *Donnell & Dovey* (2010) 237 FLR 53; [2010] FamCAFC 15.

Physical anthropology often overlaps with forensic osteology and forensic pathology: see, eg, Joyce and Stover (1991); Jackson and Fellenbaum (1994); Manhein (1999); Rhine (2001). In North America it is regarded as a significant part of various categories of death investigations: see further, Freckelton and Kanson (2005); *R v Likiardopoulos* [2009] VSC 217 at [11]; *R v Holden* [2009] VSCA 254 at [12]; *R v Aydin* [2008] VSC 388 at [9]; see too *Roberts v Western Australia* (2007) 34 WAR 1; [2007] WASCA 48; *Western Australia v Rayney (No 3)* [2012] WASC 404 at [761]; Pickering and Bachman (2009); Klepinger (2006). Some anthropologists have also claimed expertise in the facial mapping context: see, eg, *SHJB v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 502 at [10].

Many areas of anthropology have been recognised as having a forensic relevance. For instance, anthropology has been utilised in a refugee review hearing in relation to "honour killings" in Jordan: see *071594635* [2007] RRTA 229.

However, in Australia, it figures most prominently in native title hearings where it has become a mainstay: see, eg, *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (the *Gove*) case at 161; *Yarmirr v Northern Territory* (1998) 82 FCR 533; 156 ALR 370; *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 at [3]; *Underwood v Gayfer* [1999] WASCA 56; *Chapman v Luminis Pty Ltd (No 4)* (2001) 123 FCR 62; [2001] FCA 1106; *Ward v Western Australia* [1998] FCA 1478; *Daniels v Western Australia* (2000) 178 ALR 542; [2000] FCA 858; *Lardil v Queensland* [2000] FCA 1548; *De Rose v South Australia* [2002] FCA 1342; *Neowarra v Western Australia* (2003) 205 ALR 145; [2003] FCA 1399; *Jango v Northern Territory (No 2)* [2004] FCA 1004; *Harrington-Smith v Western Australia (No 8)* (2004) 207 ALR 483; [2004] FCA 338; *Alyawarr, Keytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory* (2004) 207 ALR 539; [2004] FCA 472; *Bennell v Western Australia* (2006) 153 FCR 120; [2006] FCA 1243; *Risk v Northern Territory* [2006] FCA 404; *Griffiths v*

Northern Territory (2007) 165 FCR 391; 243 ALR 72; [2007] FCAFC 178; *Moses v Western Australia* (2007) 160 FCR 148; 241 ALR 268; [2007] FCAFC 78; *Western Australia v Sebastian* [2008] FCAFC 65; *Bodney v Bennell* (2008) 167 FCR 84; 249 ALR 300; [2008] FCAFC 63; *Roe v Western Australia (No 2)* [2011] FCA 102.

Expert anthropological evidence serves to provide a framework within which the primary evidence of Aboriginal witnesses can be considered: see Lee J in *Ward v Western Australia* (1998) 159 ALR 483 at 531; *Risk v Northern Territory* [2006] FCA 404 at [465] per Mansfield J. In *Alyawarr, Keytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory* (2004) 207 ALR 539; [2004] FCA 472 at [89] Mansfield J stated:

> Not only may anthropological evidence observe and record matters relevant to informing the court as to the social organisation of an applicant claim group, and as to the nature and content of their traditional laws and traditional customs, but by reference to other material including historical literature and anthropological material, the anthropologists may compare that social organisation with the nature and content of the traditional laws and traditional customs of their ancestors and to interpret the similarities or differences. And there may also be circumstances in which an anthropological expert may give evidence about the meaning and significance of what Aboriginal witnesses say and do, so as to explain or render coherent matters which, on their face, may be incomplete or unclear.

In relation to genealogies, Lee J in *Ward v Western Australia* (1998) 159 ALR 483 at 503 said that their preparation:

> involved distilling information from a broad context of ethnographic material and it involved the application of skill and expertise of anthropologists. … The charts as received in evidence were not restricted to the expression of opinion by anthropologists but were also evidence as to the truth of the statements contained therein. Genealogies duly prepared by anthropologists employing their specialised skill and understanding of the structure and culture of a society represent not only an appropriate field of expert evidence but also a record of statements made to the anthropologists, the record of which is likely to be reliable, the statements made being appropriate to be admitted in a case of this nature.

(See also *Roe v Western Australia (No 2)* [2011] FCA 102.)

The Federal Court has found that expert anthropological evidence of traditional laws, customs and connection to country based on field work, which accords with the member of the native title claim group's evidence, is probative: *Neowarra v Western Australia* [2003] FCA 1402 at [388]; *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025 at [263]; *Jango v Northern Territory* (2006) 152 FCR 150; [2006] FCA 318 at [291]-[292].

As the Full Court of the Federal Court has noted, an anthropologist may observe and record matters relevant to both the social organisation of a native title claim group and the nature and content of their traditional laws and customs. There may also be circumstances in which an anthropologist may give evidence about the meaning and significance of what Aboriginal witnesses say, and do, so as to explain or render coherent matters which, on their face, may be incomplete or unclear: *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442; 220 ALR 431; [2005] FCAFC 135 at [89]; *Wilma Freddie on behalf of the Wiluna Native Title Claimants/Western Australia/Kingx Pty Ltd* [2011] NNTTA 170 at [29].

This chapter reviews judicial decisions concerning the admissibility and probative value of anthropologists' evidence, concentrating upon the evidence of

social anthropologists, and focusing upon Australian land claim hearings. It should be read in conjunction with Ch 36 in the Subscription Service.

Expertise

[11.15.40] For the most part, the expertise of anthropologists has not been questioned by the courts, although it has been noted that "[a]nthropology is not a precise science" (*Roe v Western Australia (No 2)* [2011] FCA 102). However, with increasing specialisation within anthropology, it is likely that expertise on the part of some anthropologists will not be contextually sufficient on some occasions to reach the formal status of expertise for courts. By and large, the extent of anthropologists' academic qualifications will influence the weight given to their opinions, rather than the admissibility of their evidence: *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 159-161.

In *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 at [55] Olney J stated of an anthropologist that, while his evidence was not inadmissible, it suffered:

> from a combination of factors, notably that she had no prior anthropological experience in the area under consideration, she had not read the ethnographic literature of the region and had relied upon the written witness statements, not all of which were in evidence and some of which were shown to be inaccurate.

By contrast, in *Yarmirr v Northern Territory* (1998) 82 FCR 533; 156 ALR 370 at 562-563 (FCR), 399-400 (ALR) Olney J found that anthropologists had extensive qualifications and experience in the anthropology of land tenure in the region, had carried out extensive field work and had conducted considerable amounts of relevant genealogical mapping (see, too, *Ward v Western Australia* (1998) 159 ALR 483 at 531). Such considerations are relevant principally to the probative value accorded to anthropologists' opinions.

Often the opinions of anthropologists who have not carried out fieldwork and whose work is "just" academic will carry less weight than those of anthropologists who have immersed themselves in the day-to-day life of their subjects: *Neowarra v Western Australia* [2003] FCA 1402 at [120].

The relevance of the decision of the United States Supreme Court in *Daubert v Merrell Dow Pharmaceuticals* 509 US 579 (1993) to forensic anthropology remains unresolved and controversial (Grivas and Komar (2008)).

The bases of anthropologists' evidence

[11.15.80] A defining characteristic of anthropologists' evidence, and one that it shares to some degree with evidence by historians, is that their opinions are heavily dependent upon information provided by others. This raises the admissibility of their evidence in terms of proof of the bases of the opinions: see Ch 2.20.

The seminal Australian case on the subject is that of *Milirrpum v Nabalco Pty Ltd* (1970) 17 FLR 141 (the *Gove* case) where Blackburn J held (at 161) that it was not correct to apply the hearsay rule so as to exclude evidence from an anthropologist in the form of a proposition of anthropology – a conclusion which has significance in that field of discourse. He said it could not be contended – and was not – that the anthropologists could be allowed to give evidence in the form: "Munggurrawuy told me that this was Gumatj land." He continued:

> But in my opinion it is permissible for an anthropologist to give evidence in the form:
>
> I have studied the social organisation of these Aboriginals. This study includes observing their behaviour; talking to them; reading the published work of other experts; applying principles of analysis and verification which are accepted as valid in the general field of anthropology. I express the opinion as an expert that proposition X is true of their social organisation.
>
> In my opinion such evidence is not rendered inadmissible by the fact that it is based partly on statements made to the expert by the Aboriginals.

Blackburn J was considering the admissibility of expert evidence purporting to give an account of the social organisation or "laws" of Aboriginals. The opinion evidence was partly based on what the experts had been told by the Aboriginals. Of that fact Blackburn J said (at 161):

> The process of investigation in the field of anthropology manifestly includes communicating with human beings and considering what they say. The anthropologist should be able to give his opinion, based on his investigation by processes normal to his field of study, just as any other expert does. To rule out any conclusion based to any extent upon hearsay – the statements of other persons – would be to make a distinction, for the purposes of the law of evidence, between a field of knowledge not involving the behaviour of human beings (say chemistry) and a field of knowledge directly concerned with the behaviour of human beings, such as anthropology. A chemist can give an account of the behaviour of inanimate substances in reaction, but an anthropologist must limit his evidence to that based upon what he has seen the Aboriginals doing, and not upon what they have said to him.

In *Yarmirr v Northern Territory* (1998) 82 FCR 533 at 560-563 Olney J also considered objections to admission by way of anthropologists' report of statements by available living persons who have not been the subject of primary evidence. One of the main complaints about the report was that it recorded statements attributed to a person within the claimant group who was available to give evidence but was not called. Olney J provided (at 562-563) the following summary in relation to the use to be made of anthropologists' evidence (albeit in a context in which the rules of evidence did not strictly apply):

(i) to the extent that it sets out the basis upon which the applicants' claim to native title is formulated, it is in the nature of a pleading;

(ii) it contains, to some extent, expert opinion evidence of persons qualified in the relevant field of learning;

(iii) to the extent that it contains assertions of fact in the nature of hearsay, based upon information supplied by informants who later gave evidence, regard must be had to the evidence of the informants rather than to the contents of the report;

(iv) inconsistencies between facts asserted in the report and the evidence of the witnesses may reflect upon the credit of the witnesses, but this would not necessarily be so if the weight of evidence suggests that the report is inaccurate;

(v) the weight to be accorded to assertions of fact not in the nature of expert opinion which are not supported by the evidence of witnesses will depend upon the particular circumstances including whether or not the respondents have had a real opportunity to test the accuracy of the matters asserted in the report.

He continued (at 563):

> In the present case the anthropologists' report serves the very useful purpose of providing the contextual background against which the oral testimony of the

applicants' witnesses can be better understood. Whether or not a particular statement in the report is to be classified as mere pleading, as expert opinion or as hearsay is not always readily apparent but to a very large extent the report can be accepted as both reliable and informative. It contains some speculation but not much, and to the extent that it does, I have not found it necessary to refer to it.

In *Ward v Western Australia* (1998) 159 ALR 483; [1998] FCA 1478 at 531 (ALR) Lee J admitted into evidence genealogical charts prepared by anthropologists on the basis that they were not restricted to the expression of opinion by them but were also evidence of the truth of the statements contained therein. He said (at 532):

> Genealogies duly prepared by anthropologists employing their specialised skill and understanding of the structure and culture of a society represent not only an appropriate field of expert evidence but also a record of statements made to the anthropologists, the record of which is likely to be reliable, the statements made being appropriate to be admitted in a case of this nature.

Similarly, evidence was permitted in *Daniels v Western Australia* (2000) 178 ALR 542; [2000] FCA 858 from an anthropologist, though based on hearsay representations made by Aboriginal people. Nicholson J formulated the following principles for reception of evidence under the *Evidence Act 1995* (Cth) (at [30]):

1. The opinion will only be admissible if it can satisfy the requirements of s 79.
2. Section 79 does not require that for an expert testimony to be admitted it can only be founded on admitted evidence. However, as will appear, that does not mean that regard must not be had to the factual basis of the opinion.
3. For admissibility to follow from the section it is necessary for the court to find that the opinion is wholly or substantially based on knowledge based on the expert witnesses' training, study or experience.
4. As the expression of the opinion in oral testimony will precede findings concerning the matters on which it is based, the opinion could not be admitted into evidence until the court has made a finding that it is based wholly or substantially on knowledge of the type made requisite by s 79. For the court to make the findings it will be necessary for examination and cross-examination to make apparent the extent to which the opinion is the product of an inference of the requisite type. That will undoubtedly take the court to the passages in the expert's written report to which objection is made.
5. The focus for the court will be on the view, estimation or judgment inherent in the inference drawn by the expert from the factual basis. Having in mind the observations of Emmett J in *Quick v Stoland Pty Ltd* (1998) 87 FCR 371; 157 ALR 615, that does not preclude reference to the factual basis of the opinion in order for a finding to be made whether the specialised knowledge itself is the base of the opinion. To the extent the evidence considered by the expert, hearsay or otherwise, is able to be considered by the court without reference to the specialised knowledge of an expert, the opinion of the expert will not be an inference in the exercise of the specialised knowledge.
6. To the extent to which the opinion is akin to the form found permissible by Blackburn J in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (the Gove case), it would seem that it would be likely to fall within the description of knowledge derivative from the expert's training, study or experience.
7. Hearsay evidence from which the opinion is inferred, will (subject to the application of s 135 and s 136) qualify for admission pursuant to s 56 as relevant to the purpose of the basis upon which the expert holds the opinion so that its weight can be assessed. It could then be used for a hearsay purpose as a consequence of the application of s 60.

8. Admission of hearsay evidence with that consequence under s 60 leads inevitably to the need for the court to consider whether that admission should be limited under s 136 to the stated purpose of testing the knowledge on which the opinion is based.
9. Admission with the consequences flowing from s 60 would not occur if the court considered admission should be precluded in exercise of its discretion under s 135. It would seem that hearsay evidence comprising a statement as to the existence of native title made to the expert by a party not called (and being on an issue central to the case) would qualify for exclusion or admission limited to testing the opinion in the manner required by s 78.
10. If as a result of the court's consideration of the foundations of the opinion, it is found not to be wholly or substantially based on the type of knowledge specified in s 79, the opinion will not qualify for admission.

(See too *Risk v Northern Territory* [2006] FCA 404.)

Nicholson J also gave consideration to the procedures for declaring such evidence inadmissible by application of the discretion to do so. He held (at [31]) that the probative value of hearsay evidence is that it goes to establishing the foundations of the knowledge of the expert in the preparation of his report and the formation of his opinion but held (at [32]–[33]):

> If that evidence were admitted without limitation it could be unfairly prejudicial to a party where that party has not previously had the opportunity to cross-examine that witness on the issue. Use of it generally could be confusing because it would require to be weighed against the evidence of claimants who have given evidence and been cross-examined but without any proper forensic basis for undertaking that task in relation to the unexamined evidence. There could arguably be as a consequence an undue waste of time. However, the probative value of the evidence is high in relation to whether or not the expert's opinion qualifies for admission pursuant to s 79. It is necessary the court resolve that issue.

His Honour held (at [34]) that the hearsay evidence should first be considered for limited admission under s 136 of the *Evidence Act 1995* (Cth): "When it has been utilised for the purpose of the court finding whether the opinion of the expert has or has not qualified under s 79, it would then be necessary for the court to determine whether each particular piece of hearsay evidence should be excluded under s 135." He considered it more helpful in the circumstances of the case to approach that with the benefit of the examination and cross-examination in relation to the particular items of hearsay evidence (for the specific rulings, see *Daniel v Western Australia* [2000] FCA 1334; *Daniel v Western Australia* [2000] FCA 1356).

In *Lardil v Queensland* [2000] FCA 1548 Cooper J declined to make an order under s 136 of the *Evidence Act 1995* (Cth) limiting the use to be made of an anthropologist's evidence of representations made to him. The report contained references to published academic writings, the work of other anthropologists in relation to the islands in the South Wellesley group, his own observations and researches concerning the Kaiadilt people, and statements made to him over time by a number of named Kaiadilt people as to their culture, laws, practices and beliefs and their social structures and relationships. In summary, his reasons for declining to do so were that:

- if the applicants wished to rely on evidence of the facts alleged in the representations, they would have to recall the makers of the representations (a development which no party in the present proceeding would embrace) or give

a notice or notices under s 67 of the *Evidence Act 1995* and seek to have the hearsay evidence admitted under s 64 of that Act;

- s 60 made the hearsay evidence only some evidence of the asserted facts, and gave no added weight to that evidence; and
- it would remain open to the respondents to contend that the evidence should be given little or no weight.

The approach of Nicholson J was applied by Sundberg J in *Neowarra v Western Australia* [2003] FCA 1402 at [42], deciding that, in light of evidence from three anthropologists as to the way in which they prepared their parts of the genealogies, their expert evidence was admissible. He was satisfied that they had specialised knowledge based on their training, study and experience, and that the genealogies and the report accompanying them were substantially based on that knowledge. However, it may be that where genealogical charts are prepared by anthropologists but are not "authenticated" by reference to explanation about how the charts have been prepared, they will not be regarded as admissible: *Jango v Northern Territory (No 2)* [2004] FCA 1004 at [65].

It has been held that ordinarily an anthropologist's evidence of statements made to her or him about practices of members of that society will be relevant for the purpose of exposing the factual basis of the anthropological opinions expressed: *Harrington-Smith v Western Australia (No 2)* (2003) 130 FCR 424; [2003] FCA 893. An anthropologist is entitled in a report to identify hearsay material that goes to establish the foundations of the knowledge applied in preparing the report and in forming the particular opinions expressed in the report: see *Daniels v Western Australia* (2000) 178 ALR 542; [2000] FCA 858 at [30]; *Neowarra v Western Australia* (2003) 205 ALR 145; [2003] FCA 1399 at [38] (ALR); *Jango v Northern Territory (No 2)* [2004] FCA 1004 at [79]. However, Lindgren J in *Harrington-Smith v Western Australia (No 2)* (2003) 130 FCR 424; [2003] FCA 893 at [79], while following the approach of Nicholson J in *Daniel*, commented:

> I will follow the views expressed by RD Nicholson J and Cooper J [in *Lardil v Queensland* [2000] FCA 1548], which I do not think are clearly wrong, that ordinarily an anthropologist's evidence of statements made to him or her about practices of the society being examined by members of that society will be relevant for the purpose of exposing the factual basis of the anthropological opinions expressed. It is, however, odd that the tendering party should be in a better position because the anthropologist's report is in the form, "Informant A told me facts X, Y and Z", rather than (in my opinion, the orthodox and preferable model) "I assume, as the basis of my opinion, facts X, Y and Z". It is perhaps arguable that the choice of the former in preference to the latter suggests two purposes: the purpose of exposing the expert's factual assumptions and the purpose of proving the asserted facts by hearsay evidence. I am not satisfied in the present case that the hearsay form was chosen for the latter purpose. If I were, I would make an order under s 136 of the *Evidence Act 1995* limiting the use to be made of the evidence to the proof of the anthropologist's factual assumptions.

In *Bodney v Bennell* (2008) 167 FCR 84; 249 ALR 300; [2008] FCAFC 63 Finn, Sundberg and Mansfield JJ observed (at [92]–[93]):

> Before the *Evidence Act* it was well established that experts are entitled to rely upon reputable articles, publications and material produced by others in the area in which they have expertise, as a basis for their opinions. In *Borowski v Quayle* [1966] VR 382 at 386 (*Borowski*) Gowans J, quoting *Wigmore on Evidence* 3rd ed, vol 2 at 784-785, said that to reject expert opinion because some facts to which the witness testifies are known only upon the authority of others, "would be to ignore the accepted methods of professional work and to insist on finical and impossible standards". Experts may not only base their opinions on such sources, but may give evidence of fact which is based on them. They may do this although the data on which they base their opinion or evidence of fact will usually be hearsay information, in the sense they rely for such data not on their own knowledge but on the knowledge of someone else. The weight to be accorded to such evidence is a matter for the court. See generally *Borowski* at 385-387, *PQ v Australian Red Cross Society* [1992] 1 VR 19 at 34-35, *H v Schering Chemicals* [1983] 1 WLR 143 at 148-149, *Millirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 161-163 and *Jango v Northern Territory (No 4)* 214 ALR 608 at [8]. There is nothing in the *Evidence Act* that displaces this body of law.

Dangers exist in treating ethnographic studies and other historical records, whether prepared by anthropologists or other professionals, as infallible sources of reference: see *Commonwealth v Yarmirr* (2000) 101 FCR 171 at 255-257, [342]–[353]; *Shaw v Wolf* (1998) 83 FCR 113 at 130-131; *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606; *Chapman v Luminis Pty Ltd (No 4)* (2001) 123 FCR 62; [2001] FCA 1106 at [365]; *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 at 231-236.

Lindgren J in *Harrington-Smith v Western Australia (No 2)* (2003) 130 FCR 424; [2003] FCA 893, at [26], has identified "great practical differences" between anthropologists' reports and reports from experts in other disciplines:

> As indicated, there are great practical differences in the present respect between, for example, Makita, an appeal concerned with a report of expert opinion given by a "physicist who specialised in the investigation of slipping accidents" … in relation to the slipperiness of a stair, and a case such as the present one, concerned with reports of opinions given by historians and anthropologists in relation to the more complex question whether there are communal, group or individual rights and interests of Aboriginal peoples in relation to land or waters, where the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples, and they, by those laws and customs, have a connection with the land or waters…

On the same subject, Mansfield J, in *Risk v Northern Territory* [2006] FCA 404 at [468]–[470], has contended that inherent in such a dichotomy is the notion that science and mathematics are exact disciplines, whereas the disciplines of anthropology, humanity, much of economics, and history are not:

> In most if not all disciplines, opinion is formed by reasoning drawn from a group of "facts". The facts may be drawn from a scientific experiment, historical documents or a series of conversations held with members of a native title claimant group. However, "facts" themselves have varying degrees of primacy or subjectiveness. Some facts are now, in reality (and despite the deconstructionists) incontrovertible. Our communication systems make them so: the use of numbers in measurement is a clear example. Some are obviously more subjectively perceived: estimates, descriptions of persons or events, and the like … Some are complex and themselves involve judgment. In the realm of expert evidence, the primary data upon which an opinion is based may comprise a mixture of primary and more complex facts. The opinion may then be further based upon an interpretation (sometimes requiring expertise) of those facts and that stage may require an exercise of judgment, sometimes fine judgment, by the person concerned. The important thing in any expert's report, in my view, is that the intellectual processes of the expert can be readily exposed. That involves identifying in a transparent way what are the primary facts assumed or understood. It also involves making the process of reasoning transparent, and where there are premises upon which the reasoning depends, identifying them. An understanding of the nature of the judicial process in addressing expert evidence would readily

> recognise the need for the expert's report to communicate those matters to the court. The premises, whether based on primary facts or on other material, then need to be established. Their ready identification ensures that the means of satisfaction – whether by proof of primary facts or in some other way – can be addressed by the party relying upon that expert opinion, generally by the legal representations.

Avoidance of advocacy

[11.15.120] As in all areas, when an anthropologist commences to be partisan, her or his credibility is impaired. Thus, in *De Rose v South Australia* [2002] FCA 1342 at [352] O'Loughlin J criticised an anthropologist for becoming:

> too close to the claimants and their cause; he failed to exhibit the objectivity and neutrality that is required of a [sic] expert who is giving evidence before the court. Rather he seemed – too often – to be an advocate for the applicants.

(See, too, *Daniel v Western Australia* [2003] FCA 666 at [233]; *Chapman v Luminis Pty Ltd (No 4)* (2001) 123 FCR 62; [2001] FCA 1106 at [360], [373]; and Shaw (2001).)

However, the fact that an anthropologist has become close to her or his subjects does not necessarily mean that the expert has lost independence; it may even endow the evidence with particular value: *Neowarra v Western Australia* [2003] FCA 1402 at [112]–[119].

It remains important that anthropologists' reports not be subject to the observation made by Gleeson CJ, Gaudron, Gummow and Hayne JJ in *Commonwealth v Yarmirr* (2001) 208 CLR 1 at [84] that an anthropological report had been received in evidence in that case and without objection "despite it being a document which was in part intended as evidence of historical and other facts, in part intended as evidence of expert opinions the authors held on certain subjects, and in part a document advocating the claimants' case".

In particular, there is a risk with anthropologists' reports that stray into an advocacy function that opinions expressed will not be based on the specialist knowledge explicitly required under s 74 of the *Evidence Act 1995* (Cth), the *Evidence Act 1995* (NSW), the *Evidence Act 2001* (Tas) and the *Evidence Act 2008* (Vic).

Distinction between facts and opinions

[11.15.160] There is a particular need in anthropological reports for the authors to distinguish between the facts upon which opinions are based and the actual opinions: *Jango v Northern Territory (No 2)* [2004] FCA 1004 at [11].

A component of evidence from anthropologists is not, strictly speaking, opinion evidence as it is evidence of the anthropologist's own observations. As Selway J pointed out in *Gumana v Northern Territory* (2005) 141 FCR 457; [2005] FCA 50 at [156], such evidence is not necessarily opinion evidence and subject to the strictures of opinion admissibility: "In the case of anthropologists, it will often be direct evidence of the anthropologist's observations and thus admissible in the ordinary course" (*Bodney v Bennell* (2008) 167 FCR 84; 249 ALR 300; [2008] FCAFC 63 at [94]).

When an anthropologist advances an assertion that indigenous persons with ties to a country usually include persons whose claims on the same areas rest on something individual to themselves, the assertion may be rejected as inadmissible if it does not identify the facts or observations which form the basis of the opinion

as it may be impossible to determine whether the opinion is wholly or substantially based on the author's specialised knowledge: *Jango v Northern Territory (No 2)* [2004] FCA 1004 at [54].

Discretionary exclusion

[11.15.200] In some circumstances the absence of the capacity to cross-examine those supplying information to anthropologists could result in the anthropologists' opinions being held inadmissible as an exercise of judicial discretion. Often, though, such an issue will go to the weight given to the anthropologists' evidence: see, eg, *Harrington-Smith v Western Australia (No 8)* (2004) 207 ALR 483; [2004] FCA 338 at [79].

Role of lawyers

[11.15.240] Lindgren J, in *Harrington-Smith v Western Australia (No 2)* (2003) 130 FCR 424; [2003] FCA 893 at [19], has emphasised in the context of anthropologists' reports (emphasis in original):

> Lawyers *should* be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed. In the same vein, it is *not* the law that admissibility is attracted by nothing more than the writing of a report in accordance with the conventions of an expert's particular field of scholarship. So long as the Court, in hearing and determining applications such as the present one, is bound by the rules of evidence, as the Parliament has stipulated in s 82(1) of the NTA Act, the requirements of *s 79 (and of s 56 as to relevance) of theEvidence Act* are determinative in relation to the admissibility of expert opinion evidence.

Lindgren J's observations were strongly supported by Sackville J in *Jango v Northern Territory (No 2)* [2004] FCA 1004 at [10].

Self-referential reports

[11.15.260] Reports that deal in a theoretical way with how anthropologists, or some anthropologists, use words or concepts which themselves arise from certain High Court decisions, are likely to be of limited utility: *Larrakia People v Northern Territory* [2003] FCA 1175 at [30].

Gender restriction issues

[11.15.280] Anthropologists can be under a professional duty, because of the circumstances in which they have been made privy to information, to take those steps reasonably open to them to respect gender and cultural restrictions in respect of access to that information. This can present ethical dilemmas for anthropologists and challenges for courts. As McIntyre and Bagshaw (2002, p 11) have noted:

> The litigation process of the Federal Court, in the tradition of the legal system upon which it is based, has as one of its precepts a faith in the process of exposure of information to challenge by the public and adversaries, to test the efficacy of asserted fact. Aboriginal culture, on the other hand, has a tradition of sparing and incremental dissemination of the information, which it regards as most crucial to its existence, and then only to those who have demonstrated that they are worthy of receiving the