

Client Alert



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'In my opinion': when can an expert give opinion evidence?

In this alert we report on a recent decision of the New South Wales Supreme Court which illustrates the importance of experts proactively ensuring that they have the requisite 'specialised knowledge' to give opinion evidence. We also provide guidance on what study, training or experience may constitute the necessary level of knowledge.

What is 'opinion evidence', and what rules govern its admissibility?

When a person gives an opinion about the existence of a fact, the general rule is that this opinion cannot be admitted to prove the existence of that fact. For example, in an action against a builder for unsatisfactory building work, a person cannot usually give an opinion that the builder does not have the necessary skills to do the building work.

However, there is an exception to this rule that applies to an expert giving evidence. When a person has 'specialised knowledge' due to the person's training, study or experience, and the person bases an opinion about the existence of a fact wholly or substantially on that knowledge, the opinion evidence is admissible.

The recent case of *Azmin Firoz Daya v CX Reinsurance Co Ltd* NSWSC 1622 demonstrates that there is a difference between matters requiring only the 'specialised knowledge' which is available to all practitioners in a discipline, and matters that require the practitioner to have acquired further 'specialised knowledge' within a particular field of that discipline. If an expert gives an opinion without the requisite 'specialised knowledge' this not only affects the expense, conduct and potential success of the case, but also the expert's reputation.

Azmin Firoz Daya v Cx Reinsurance Co Ltd

The defendant in this case tendered reports of Mr. Campbell, an accountant, containing opinion evidence as to how a particular transaction should have been treated under the United States Generally Accepted Accounting Principles (US GAAP). Mr Campbell was a UK qualified accountant, with no qualification in the US, and no formal training to audit accounts according to the US GAAP. He had no practical experience in the preparation of accounts under the US GAAP, nor in auditing such accounts.

The plaintiff objected to the tender of the reports on the grounds that Mr Campbell did not satisfy the exception to the opinion rule. The plaintiff argued that Mr Campbell, despite his 'specialised knowledge' in the discipline of accounting generally, was not sufficiently qualified to give evidence on the interpretation and application of US GAAP. The plaintiff argued that the interpretation of the US GAAP was a specialised field of accounting, that was not necessarily analogous to aspects of UK accounting.

The Supreme Court agreed with the plaintiff, and rejected the tender of the expert reports. Justice Brereton considered that although Mr Campbell was an experienced UK accountant who had been incidentally exposed to some aspects of US accounting practice, this was not sufficiently 'specialised knowledge' to permit him to give opinion evidence on the particular field of accounting that concerned the

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US GAAP. The result was that the defendants were prevented from tendering Mr Campbell's reports.

The following principles extracted from this case may assist experts to determine whether or not they have the necessary 'specialised knowledge' required to give opinion evidence.

What 'study or experience' is sufficient to allow an expert to give the opinion?

The opinion must be based on:

- formal study or training; and/or
- clearly demonstrated experience

both within the particular field of the discipline, and within the relevant jurisdiction.

What 'experience' is not sufficient to allow an expert to give the opinion?

- Observing and discussing with practitioners in the particular field what they do and why they do it.
- Reading and familiarising oneself with a key document, code or standards that is central to the field.
 - Mr Campbell had read the US GAAP but this did not establish the requisite level of specialised knowledge in the field of US GAAP interpretation.
- Experience in the particular field, but in a different jurisdiction.
 - Mr Campbell had given advice on the appropriate accounting treatment of reinsurance policies in the UK GAAP, but this was not a basis to express an opinion on their appropriate treatment of reinsurance policies under the US GAAP
- Experience in the jurisdiction, but not in the particular field.
 - Mr Campbell had experience converting US accounts to UK accounts, but this did not qualify him in the interpretation of US accounting standards to the transactions in the present case.
- A bare assertion of competency.

Conclusion - implications for expert witnesses

When required to give an opinion, expert witnesses must ensure that they have 'specialised knowledge' on the subject matter of the particular fact.

Experts should consider whether they have formal qualifications or training on the particular issue, or can point to clear experience with the particular matter. Experts should be particularly cautious about giving an opinion on matters that are outside their native jurisdiction. It is important that experts proactively assess every opinion given in their expert report, against the knowledge upon which each opinion was based. Experts should not leave this solely to their lawyers, as it is the expert (rather than the lawyer) who is best placed to judge what study or experience is necessary in their field to demonstrate 'specialised knowledge' of a particular fact.

If in any doubt experts should raise their concerns with their instructing lawyers as early in the proceeding as possible. This will avoid the expert's capacity to give the opinion being questioned, and the expenses and reputational damage that may flow from rejection of the expert report.

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