

Legal Alert



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## High Court of Australia confirms requirements on the admissibility of expert evidence

This decision is the leading authority in Australia on the admissibility of expert evidence and it states very clearly that an expert's knowledge must relate to the specific subject matter of the proceeding and be specifically relevant to the precise question to be determined, rather than being generally relevant to the broad issues or questions.

It is therefore critical that experts make an assessment at the time of receipt of the brief, and as the case develops, as to their ability to provide an expert opinion on the central and critical issues to be determined by the Court or Tribunal.

If the questions being asked of the expert at any time take the expert outside their area of expertise they must inform their instructor and qualify their answers where necessary.

### *Dasreef Pty Ltd v Hawchar* [2011] HCA 21 (*Dasreef v Hawchar*)

#### ***In the first instance***

The case originated in the Dust Diseases Tribunal of New South Wales (**the Tribunal**). In the first instance, Mr Hawchar claimed damages for personal injury caused by contracting scleroderma and silicosis. In essence, Mr Hawchar alleged that due to Dasreef Pty Ltd's (**Dasreef's**) breach of its statutory duty, negligence and breach of contract, Mr Hawchar was exposed to unsafe levels of silica dust.

In finding that Dasreef was 20/23 parts responsible for Mr Hawchar contracting silicosis, the Tribunal relied on expert evidence tendered by Dr Kenneth Basden (**Dr Basden**) and its own experience derived from hearing cases in the specialist Tribunal.

The evidence in issue relates to an estimate made by Dr Basden about Mr Hawchar's exposure to respirable silica. Dr Basden made the estimate with the express limitation that it was "only a ballpark" figure.

However, in finding that Mr Hawchar was exposed to unsafe levels of silica dust, the Tribunal used this limited-purpose estimate to calculate the levels of silica dust to which Mr Hawchar had been exposed to in the course of working for Dasreef.

### ***In the Court of Appeal***

Dasreef appealed the Tribunal's decision to the New South Wales Court of Appeal (**the Court of Appeal**). The central questions considered by the Court of Appeal were:

- whether or not Dr Basden had the relevant expertise to give an opinion concerning the measurement of silica dust; and
- whether or not the Tribunal had acted legitimately in drawing on its specialist experience to reach its decision.

The Court of Appeal found that while there was a lack of reasoning for Dr Baden's opinion, that lack of reasoning did not render Dr Baden's opinion inadmissible: it was for another expert to refute the opinion on the grounds that it was worthless, of little weight, or otherwise unreliable.

As to whether or not the Tribunal had erred in relying on its previous experience, the Court of Appeal found that it had not acted illegitimately.

### ***The High Court's decision***

Both of the Court of Appeal's findings were appealed to the High Court of Australia (**High Court**), which ultimately found that both conclusions were incorrect.

The central issues considered by the High Court were:

- whether or not the opinion expressed was inadmissible in circumstances where the opinion was not based on any specialised knowledge Dr Basden had that was based on his training, study or experience; and
- whether or not the primary judge, when determining what caused Mr Hawchar's silicosis, erred in taking into account his experience in other cases before the Tribunal.

A majority of the High Court found that Dr Basden's evidence was not admissible and that the Tribunal's use of Dr Basden's provisional estimate as a building block to make another estimate, presented serious risks as to accuracy and did not afford the parties procedural fairness.

Further, the High Court noted that Dr Basden had not given any evidence asserting that his training, study or experience permitted him to give more than the "ballpark" estimate he proffered at the trial. Accordingly, this went to the *admissibility* of the evidence, and not merely its weight. Certainly, in this case, the absence of reasoning led to the unavoidable conclusion that there was insufficient connection between the opinion and Dr Basden's specialised knowledge.

In relation to the second issue considered by the High Court, the majority found that under the rules of evidence, the Tribunal was permitted to take account of matters not proved in evidence only if they were matters of which judicial notice could be taken. As the causes of silicosis were not suggested to be such matters, the High Court held that the primary judge erred in taking into account his previous experience derived from hearing cases in the Tribunal.

## What is admissible? Technical requirements for an expert giving opinion evidence in Australian courts

The High Court majority reasons note that in order for an expert's opinion to be admissible, it is necessary for the party tendering the evidence to:

- demonstrate that the expert has specialised knowledge based on his or her training, study or experience that permits him to make the opinion; and
- demonstrate that the opinion expressed by the expert is wholly or substantially based on that specialised knowledge.

Justice Heydon further enunciated some long-standing legal principles and rules relevant to the admissibility of expert evidence as follows:

- the expert must state the facts on which the opinion is based;
- the party relying on the opinion must admit evidence (whether from the expert or from some other source) which is capable of supporting findings of fact which are sufficiently similar to the factual assumptions on which the opinion is stated to be based; and
- the expert must state the reasoning by which the expert conclusion derived, flows from the facts provided or assumed by the expert, so as to reveal that the opinion is based on the expert's expertise.

## Additional implications for expert witnesses

In addition to the substantive requirements above, that while not new, were clarified and confirmed by the High Court, expert witnesses and their instructors ought also heed Justice Heydon's reasoning on the need for these requirements, namely, to address perceived difficulties associated with expert evidence as follows:

- the perceived partiality of expert witnesses in some cases;
- delay and expense occasioned by the large volume of expert evidence in certain cases;
- experts' excessive influence on the conduct of cases and on judicial outcomes;
- advocacy by experts; and
- experts' non-conformity with the rules of evidence.

## Conclusion

The position in Australia therefore is that when an expert expresses an opinion not founded on any specialised knowledge, specific training, study or experience, the opinion expressed will not be admissible.

Accordingly, in order to ensure that courts and tribunals accept the evidence given in their capacity as an expert witness, it is essential that an expert's report:

- clearly states the specialised skill and knowledge they have relating to each and every opinion they seek to give; and
- contains detailed reasoning to reveal that their opinion is wholly or substantially based on that specialised knowledge.

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