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Expert evidence in the Supreme Court of Victoria

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The following case notes refer to three rulings made by Forrest J in a case arising out of the disastrous bushfires in Victoria in 2009. The claim was brought pursuant to Pt 4A of the Supreme Court Act 1986 (Vic) by the plaintiff on behalf of group members who sustained personal injury and/or property damage, and/or economic loss as a result of one of the bushfires on 7 February 2009. The plaintiff alleged that the fire was a result of the failure of a wire conductor that formed part of an electricity distribution line. She claimed that she and members of the group suffered injury or loss as a result of negligence on the part of each of the defendants. Damages were claimed from the electricity distribution company, its contractor responsible for inspections of the distribution line, and from various State government parties.

In this large and complex case there were a number of experts giving evidence on a number of different issues. Each of these three reports relate to rulings made by Forrest J on aspects of the expert evidence process.

Matthews v SPI Electricity Pty Ltd; SPI Electricity Pty Ltd v Utility Services Corp Ltd (Ruling No 4)[1]

The ruling made by Forrest J in this report included the common questions formulated by his Honour (the answers to which will form part of the judgment pursuant to s 33Z of the Supreme Court Act 1986 (Vic)) that had been settled by agreement in the course of a case management conference.

The ruling also detailed the steps involved in the production and exchange of independent expert evidence, and the subsequent experts' conferences. Forrest J considered that it was appropriate for the complete expert evidence process to be completed prior to mediation, including expert conclaves. This would promote the just, efficient, timely and cost-effective resolution of the real issues in dispute, in accordance with the objectives of the Civil Procedure Act 2010 (Vic). By identifying the real issues in dispute in the proceeding as early as possible the prospects of success of the mediation would be enhanced.

Omitting the dates, Forrest J directed that the following steps were required in this case:

1. The parties finalise the discovery process.
2. The parties exchange draft questions for expert witnesses.
3. The parties file and serve lists of questions for experts.
4. The parties file and serve their expert reports.
5. The parties' experts on particular issues shall meet in conference and prepare for the court a joint report:
   (a) addressing each of the questions on particular issues;
   (b) identifying each of the matters on which they agree;
   (c) identifying each of the matters on which they do not agree; and
   (d) providing detailed reasons outlining the basis on which they are unable to agree on any matter relating to any of those questions on particular issues.

In respect of the conference(s) of the experts on particular issues it is directed:

   (a) the experts' conference(s) be private to the experts and confidential and there be no involvement of the parties or legal practitioners; and
   (b) the experts' joint report(s) be delivered to the parties' solicitors as soon as is practicable.

6. The parties file the experts' joint report(s).
7. The parties file an agreed chronology of events relevant to the plaintiff's claim.
8. The parties file an agreed chronology of events relevant to the plaintiff's claim.
9. Mediation of the proceeding be conducted by a mediator approved and/or appointed by the court. The mediation, to be attended by those persons who have the ultimate responsibility for deciding whether to settle the dispute and the terms of any settlement, and the lawyers who have ultimate responsibility to advise the parties in relation to the dispute and its settlement.

10. The mediator report to the court and to the Class Actions Coordinator on the outcome of the mediation.

Whilst the steps ordered were based on the specific features of the case at hand, they are a useful summary of the procedures currently used in the Supreme Court of Victoria in relation to expert evidence in complex cases. The importance of adherence to the procedure, and participation by the experts in the conclaves was emphasised by Forrest J:

> It will be necessary to hold separate conclaves of experts, given the disparate allegations of negligence, the different areas of expertise and the scope of the opinions likely to be expressed. The mechanics of this arrangement can be sorted out over the next couple of months — as long as the experts are aware that they must confer and be available to give evidence in May 2013. Whatever the timing of the conclaves, an important part of their function will be the provision of joint expert reports which will provide the basis for the concurrent evidence sessions at the trial. So that there is no misunderstanding about the importance of the conclaves, I emphasise that participation in the conclave and the production of a joint report is a pre-condition to the expert giving evidence in the trial.[2]

Matthews v SPI Electricity Pty Ltd; SPI Electricity Pty Ltd v Utility Services Corp Ltd (Ruling No 9)[3]

In this report Forrest J distinguished between three types of opinion evidence:

1. Opinion evidence given by "independent experts" "engaged" by a party to the proceeding who calls the witness;
2. Opinion evidence given by a witness not "engaged" by the party calling the witness; and
3. Opinion evidence given by an "internal witness" of the party calling the witness.

"Independent experts" are required to file their reports in accordance with O 44 of the Supreme Court Rules and, in particular, to ensure that their reports conform with r 44.03. Forrest J noted:

> The rationale for r 44.03, and O 44 as a whole, is twofold. One is to ensure that each party has an adequate forewarning of the expert evidence to be led at trial. This, it is assumed, assists in pre-trial dispute resolution, as well as ensuring that trial ambushes are kept to a minimum. In recent times, expert reports provide the foundation for meetings of experts and the subsequent preparation of a joint expert report. The other basis is to ensure that expert witnesses engaged by the party for the purposes of the trial are aware of their responsibilities to the court in preparing an independent opinion, notwithstanding the interests of the commissioning party. The aim is to eliminate, or at least reduce, the "gun for hire" approach endemic to adversarial litigation prior to the introduction of the Code.[4]

His Honour noted the general rule in Victoria that a witness expressing an opinion should comply with O 44, but the rule did not apply to a situation in which a party seeks to lead opinion evidence from a witness in circumstances where it is either impractical or unlikely that the witness will consent to an engagement to provide a report under the terms of r 44.03. Order 44 was directed to independent experts "engaged" by a party to prepare an opinion for the purpose of the trial, where engagement means an expert commissioned by a party to provide an opinion for the purpose of the relevant piece of litigation.

There may be various valid reasons why a person with relevant expertise may not be able or prepared to be "engaged" to prepare an expert report in compliance with O 44, but whose opinion may nevertheless be of assistance to the court in determining the issues before it. In this case, there were witnesses who had been involved in investigations into the bushfires and their causes who were able to give evidence as to factual matters surrounding the fire and the allegations made by the parties. The party calling these witnesses also wished to lead opinion evidence from them.

An "internal witness" is one employed by or contracted to one of the parties and whom that party would seek, primarily, to adduce factual evidence, but also an opinion relevant to the trial issues. As with the second category, these witnesses have not been "engaged" to provide a report.

Justice Forrest stated that, as the latter two categories of witness were not "engaged" by any of the parties to the litigation, their evidence did not have to satisfy the requirements of O 44. Nevertheless, in respect of any opinion evidence not satisfying r 44.03, the other parties and the court should be informed of the following essential matters:

(a) the witness' training, study or experience;
(b) the facts, matters and assumptions upon which the opinion is based (often this may be simply the observations made by the witness at a particular event);
(c) the substance of the opinion; and
(d) the reasoning underpinning the opinion which is to be expressed.

In this case the witnesses in category 2 had previously given evidence at the Victorian Bushfires Royal Commission, and these essential matters were generally known. However, where the evidence has not yet been adduced or placed into written form, it will be necessary for the party calling that witness to provide the essential details.

Forrest J also made two other observations in relation to opinion evidence:

- Merely because a witness has expertise does not mean that his or her evidence is necessarily opinion evidence.

- A witness with appropriate expertise may give factual evidence — for instance, a doctor as to his observations during a clinical examination. Notwithstanding that the witness's expertise may be relevant to the making of the observation, it remains admissible as evidence of an observed fact.

Thus, where a witness gives evidence based upon his or her own observations and/or scientific or specialised analysis, such evidence may not amount to opinion evidence, but rather be properly characterised as a factual conclusion.

It is therefore important to distinguish whether evidence sought to be adduced from an "expert" is truly an opinion within the meaning of s 79 of the Evidence Act 2008 (Vic) and r 44.03 of the Supreme Court Rules, or whether it is evidence of a fact based on the expert's own observations or analyses. The following is a useful definition of opinion evidence quoted by Forrest J that makes the distinction from factual evidence clear:

> Opinion evidence can be described as evidence of a conclusion, usually judgmental or debateable, reasoned from facts.[5]

Matthews v SPI Electricity Pty Ltd; SPI Electricity Pty Ltd v United Services Corp Ltd (Ruling No 10)[6]

This report contains the rulings made by J Forrest J in relation to the composition and conduct of the conclaves of expert witnesses. His Honour had to decide between two different proposals:

- Conclaves within four broad topics, in which there may be a larger number of experts for one party than the other, each with expertise in some aspects of the topics; or
- Specific issue-by-issue conclaves, requiring roughly fourteen separate meetings, each with a smaller number of experts all with expertise in the conclave issue.

Justice Forrest noted that, although the second model would require more conclaves and be challenging administratively, it was preferable for the following reasons:

1. By having a conclave devoted to specific issues there can be no question about the expertise of the particular witnesses who author the joint report. That report will ultimately form part of the evidence at trial and any issue about the expertise of the witnesses (which may arise in a mass conclave where witnesses possess differing areas of expertise) will be avoided. The alternative model has real potential to lead to the production of a joint report where there are issues about the capacity of the authors to express the opinion contained in the report, as happened recently in the case of *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd*.[7]
2. The expert evidence is not a "battle of numbers". The preferred model generally avoids an imbalance in the number of experts that would occur in the alternative model.
3. The provision of joint reports dealing with specific and discrete issues will help refine the issues and has a greater prospect of leading to clearer identification of the issues that are in dispute and those that are not.
4. There is scope to expand the conclaves if the experts think it would be of assistance — and it is legally permissible.
5. The provision of joint reports using the preferred model will not determine the composition of the concurrent evidence sessions at trial. After the reports have been received and considered, it may be apparent that a concurrent evidence session involving experts from more than one conclave would be appropriate.
6. "This is not a trial by expert. It is for the court to determine the issues having regard to all the evidence whatever the source."

In addition to ruling on the form of the expert conclaves, Forrest J also made the following directions in respect of the procedural aspects of the conclaves:

- An Associate Justice will undertake the supervision and management of the conclaves. She will conduct a case conference and be available subsequently to assist with the conduct of the conclaves.
- The decision as to whether a moderator is required for a conclave is a question for the experts, and not the lawyers or the judge. If the experts require a moderator, the Associate Justice will be available to act.
- Administrative assistance should be provided to assist the experts with recording their discussions and preparing the report, unless they think it unnecessary.
- It is preferable for the experts to meet face to face. However, where experts reside interstate or overseas, they should determine the best way to conduct their conclave.
- Provision of an agenda is worthwhile to assist in keeping the experts on track. The parties should meet and endeavour to agree an agenda, failing

which it can be discussed at a case conference with the Associate Justice supervising the expert conclaves.

- Although expert evidence will be determined on quality and not quantity, if one party feels disadvantaged by the numbers of experts on the other side, this can be canvassed with the Associate Justice.

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Footnotes

1. *Matthews v SPI Electricity Pty Ltd; SPI Electricity Pty Ltd v Utility Services Corp Ltd (Ruling No 4)* [2011] VSC 613; BC201110024.
2. *Matthews v SPI Electricity Pty Ltd; SPI Electricity Pty Ltd v Utility Services Corp Ltd (Ruling No 4)* [2011] VSC 613; BC201110024 at [11].
3. *Matthews v SPI Electricity Pty Ltd; SPI Electricity Pty Ltd v Utility Services Corp Ltd (Ruling No 9)* [2012] VSC 340; BC201205881.
4. *Matthews v SPI Electricity Pty Ltd; SPI Electricity Pty Ltd v Utility Services Corp Ltd (Ruling No 9)* [2012] VSC 340; BC201205881 at [14].
5. *RW Miller & Co Pty Ltd v Krupp (Aust) Pty Ltd* (1991) 34 NSWLR 129 at 130 per Giles J.
6. *Matthews v SPI Electricity Pty Ltd; SPI Electricity Pty Ltd v United Services Corp Ltd (Ruling No 10)* [2012] VSC 379; BC201206552.
7. *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 3)* [2012] VSC 99; BC201201727.