EXPERT EVIDENCE—THE PRE–CONDITIONS TO ADMISSIBILITY UNDER SECTION 79 OF THE EVIDENCE ACT

DASREEF PTY LTD V HAWCHAR (2011) 243 CLR 588

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INTRODUCTION

Section 76 of the *Evidence Act* sets out the exclusionary rule that evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed ('the opinion rule').

Expert opinion is an exception to the opinion rule. Section 79(1) of the *Evidence Act* provides that:

If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

The law as to the pre–conditions to admissibility of expert evidence under section 79 was laid down by the majority in *Dasreef Pty Ltd v Hawchar*.[1] In doing so the judges made reference ([36] and [37]) to two important decisions where admissibility of expert evidence under section 79 was also considered, namely *HG v R*[2] and *Makita (Australia) Pty Ltd v Sprowles*.[3]

In *Dasreef,* Heydon J took a different view as to the pre–conditions to admissibility under section 79. He held that the requirements to be satisfied were more extensive than stated by the majority. Whilst he made no reference to his decision in *Makita*, his judgment was to the same effect.

Before considering *Dasreef*, it is necessary to look briefly at *HG v R* and *Makita*.

HG V R (1998–1999) 197 CLR 414

HG v R concerned admissibility of a written report of a psychologist in which he concluded that although the complainant had been sexually assaulted, the perpetrator was not the appellant, but was her natural father (11).

Gleeson CJ held that the report was inadmissible under section 79 on the following bases:

(1) the opinion was not shown to have been based either wholly or substantially on the psychologist's specialised knowledge as a psychologist (41);

(2) rather, it was based upon a combination of speculation, inference, personal and second hand views as to credibility of the complainant (41); and

(3) the opinion amounted to putting from the witness box inferences and hypotheses on which the party calling him wished to rely (43).

MAKITA (AUSTRALIA) PTY LTD V SPROWLES (2001) 52 NSWLR 705

Makita concerned the respondent, Ms Sprowles who suffered injuries as a result of falling on stairs at her place of employment. She alleged that the accident was caused by the dangerously slippery condition of the stairs. Sprowles adduced evidence from Associate Professor Morton who was a physicist who specialised in the investigation of slipping accidents.

In his report, Morton said the stair treads were very smooth, were not provided with a non–slip finish, and were not fitted with non–skid strips near the edge of the nosings (25).

He concluded that the treads were in a dangerous condition at the time of the accident.

He opined that the accident was caused by the dangerously slippery condition of the stairs.

On appeal, Heydon JA (as he then was) identified (90–98) three significant problems with Morton's evidence which, when weighed against the lay evidence caused him to prefer the inference to be drawn from the lay evidence, namely that the stairs were not slippery (102).

The lay evidence (55) was that Sprowles had used the stairs each day for two and a half years prior to the accident, without any problems at all. Further, Sprowles' immediate supervisor, Mr Frith, gave evidence that he regularly used the stairs and had never found them slippery, and did not have any knowledge that there were extraneous substances on the stairs during the year that the accident occurred.

In the course of his judgment Heydon JA examined (59–84) the principles applicable to the admissibility of expert evidence under section 79 of the *Evidence Act* (NSW). He concluded the examination by summarising the requirements for admissibility as follows (85)—that in order for expert opinion evidence to be admissible:

(1) it must be agreed or demonstrated that there is a field of specialised knowledge;

(2) there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert;

(3) the opinion proffered must be wholly or substantially based on the witness's expert knowledge;

(4) so far as the opinion is based on facts observed by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on assumed or accepted facts, they must be identified and proved in some other way;

(5) it must be established that the facts on which the opinion is based form a proper foundation for it; and

(6) the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached—that is, the expert's evidence must explain how the field of specialised knowledge in which the witness is expert by reason of training, study or experience, and on which the opinion is wholly or substantially based, applies to the facts assumed or observed so as to produce the opinion propounded.

He held (85) that if all of the above matters were not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the Court cannot be sure of that, the evidence is strictly speaking not admissible, and, insofar as it is admissible, of diminished weight.

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Mr Hawchar was diagnosed with scleroderma in 2004, and subsequently in 2006, with early stage silicosis.

In 2007 he commenced proceedings in the New South Wales Dust Diseases Tribunal, claiming damages for personal injury [2]. He alleged that he contracted scleroderma and silicosis as a result of being exposed to unsafe levels of silica dust whilst working for Dasreef as a labourer and a stonemason between 1999 and 2005 [1]–[2].

The trial only proceeded in respect of Hawchar's silicosis claim.

The Tribunal found Dasreef was substantially responsible for Hawchar's silicosis and it awarded him $131,130.45 in damages and an order under section 11A of the *Dust Diseases Tribunal Act* [4].

The NSW of Appeal dismissed Dasreef's appeal (save for certain costs issues) [5].

A relevant issue regarding liability was the level to which Hawchar had been exposed to respirable silica.

The applicable standard prescribed the maximum permitted exposure to respirable silica as a time weighted average concentration of 0.2mg/m^3 of air to which a person was exposed over a 40 hour working week [6].

Hawchar engaged an expert, Dr Basden in relation to his claim. Basden was asked to provide a report addressing the following issues—whether it was reasonably foreseeable that an employee exposed to silica dust could suffer a silica related injury, what procedures an employer could have taken to materially reduce the risk of injury, and whether, if the employer had carried out these steps Hawchar's risk of injury would have been minimised [12].

One of the matters dealt with in Dr Basden's report was the level of dust concentration generated in Mr Hawchar's breathing zone when using a cutting wheel. In his report he noted that the actual dust concentrations generated in Mr Hawchar's breathing zone were 'presumably never measured with the appropriate instruments while work was in progress. However, it most certainly would not be from half to two ten–thousandths of a gram per cubic metre of air, but more realistically would be of the order of a thousand or more times these values or even approaching one gram, or thereabouts, per cubic metre' [16].

Dr Basden did not attempt to offer any calculation of the levels of respirable silica dust to which Mr Hawchar had been exposed at work [17].

The trial judge noted in his judgment that Dr Basden had admitted that he could not express a numerical opinion about Mr Hawchar's exposure to respirable silica, that he could not express an opinion about the amount of dust that Mr Hawchar would have inhaled during his time with Dasreef, and could not express

a numerical opinion about the time–weighted average of Mr Hawchar's exposure to silica [22]. Dr Basden also said in the course of his evidence that the amount of respirable silica in Mr Hawchar's breathing zone would have been 500 or 1,000 times greater than the permissible levels of exposure. Dr Basden put it 'only a ballpark to justify the reason I was recommending the protection factor of about 1000 for the use of a VAPR respirator. That was the purpose of it' [22].

It is also important to note that the 'ballpark' estimate was not proffered by Dr Basden in response to a request to estimate the levels of silica dust to which Mr Hawchar had been exposed, but to justify a recommendation he was making for the use of a PAPR respirator. Notwithstanding this, the trial judge used the estimate as the basis for making such calculation ([22] and [23]). He concluded that with respect to the applicable Standard the time–weighted average exposure to silica substantially exceeded the 0.2mg/m^4 permitted under the Standard [23].

Court of Appeal decision

The Court of Appeal formed the view that Dr Basden's evidence that the amount of respirable silica in Mr Hawchar's breathing zone would have been 500 or 1,000 times greater than the permissible levels of exposure, was not based on a precise measurement or a view expressed with precision, but rather was an estimate drawn from his experience [27]. The Court of Appeal held that although the opinion was contestable and inexact, it was for someone qualified as an expert to say that the estimate was worthless or of little weight or for some other reason unreliable, and that in the absence of this, the lack of reasoning evident in Dr Basden's evidence did not make his opinion inadmissible [27].

The High Court allowed the appeal, holding that the evidence of Dr Basden was inadmissible

Joint judgment of French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ

The majority held that Dr Basden's opinion was inadmissible under section 79(1) of the *Evidence Act* (NSW) because the evidence demonstrated that his 'ballpark' estimate that the amount of respirable silica dust in Mr Hawchar's breathing zone would have been 500 or 1,000 times greater than the permissible levels of exposure [22], was not an opinion wholly or substantially based upon specialised knowledge [39]. Accordingly the trial judge's calculation of the levels of silica dust to which Mr Hawchar had been exposed [23], based upon such evidence, had no basis [40].

Judgment of Heydon J

Heydon J held that Dr Basden's evidence was inadmissible. He did so on essentially the same basis as the majority [137]. However, he was in dissent on the issue of what are the pre–conditions to admissibility of expert opinion evidence under section 79(1).

Time at which admissibility of expert evidence should be ruled upon

The Court was critical of the fact that the trial judge did not rule on the admissibility of Dr Basden's evidence at the end of the voir dire ([19] and [135]).

The majority said that as a general rule trial judges should rule upon the objection to admissibility of evidence as soon as possible [19]. Often the ruling can and should be given immediately after the objection has been made and argued.

If for some pressing reason, that cannot be done, the ruling should ordinarily be given before the party who tendered the disputed evidence closes its case. That party will then know whether it must try to mend its hand, and the opposite parties will know the evidence they must answer [19]. The majority said that it is only for a very good reason that a trial judge should defer ruling on the admissibility of evidence until judgment [20].

Heydon J also said that the trial judge erred in not ruling on the objection to Dr Basden's evidence at the end of the voir dire, or, at the latest, at the end of Mr Hawchar's case [135]. He said that the desirable position was one where questions of admissibility were determined as they arose [83]. Alternatively, the less desirable options were for rulings on admissibility to be made before evidence closed, or before the party's case was closed.

Majority's judgment regarding pre–conditions to admissibility of expert opinion evidence under section 79

The majority stated the following principles concerning the pre–conditions to admissibility of expert evidence under section 79 of the *Evidence Act* (NSW):

Relevance—section 55(1)

The party seeking to have the evidence admitted must identify why the evidence is relevant. This requires identification of the fact in issue that the party tendering the evidence asserts the opinion proves or assists in proving [31].

Section 79(1) requirements

The evidence must satisfy two criteria [32]:

(a) that the witness who gives the evidence 'has specialised knowledge based on the person's training, study or expertise'; and

(b) that the opinion expressed in evidence by the witness is 'wholly or substantially based on that knowledge'.

Admissibility of opinion evidence is to be determined by the express requirements of the *Evidence Act*, but ordinarily the statement of reasoning requirement expressed in *Makita* will be a necessary requirement for admissibility

The majority said that [37]:

(a) the admissibility of opinion evidence is to be determined by application of the requirements of the *Evidence Act* rather than by any attempt to parse and analyse particular statements in decided cases divorced from the context in which those statements were made

(b) having said that, it is ordinarily the case, as Heydon JA said in *Makita*, that 'the expert's evidence must explain how the field of 'specialised knowledge' in which the witness is expert by reason of 'training, study or experience', and on which the opinion is 'wholly or substantially based', applies to the facts assumed or observed so as to produce the opinion propounded':[4] and

(c) the above requirements can be met in many, perhaps most, cases very quickly and easily. For example a specialist medical practitioner expressing a diagnostic opinion in his or her relevant field of specialisation is applying specialised knowledge based on his or her training, study or experience, being an opinion wholly or substantially based on that specialised knowledge, which will require little explicit articulation or amplification once the witness has described his or her qualifications and experience and has identified the subject matter about which the opinion is proffered.

The common law 'basis rule' is not a requirement for admissibility under section 79

The 'basis rule' is not a requirement to be satisfied for admissibility under section 79 of the *Evidence Act*. The basis rule is a rule by which opinion evidence is to be excluded unless the factual bases upon which the opinion is proffered, are established [41].

Heydon J's decision regarding pre–conditions to admissibility of expert opinion evidence under section 79(1)

Introduction by Heydon J—The potential difficulties and risk of injustice associated with expert evidence

By way of introduction, Heydon J said that the construction of section 79 was important because of the difficulties and risk of injustice associated with expert evidence.

He identified three matters:

First, the partiality of expert opinion witnesses. He said 'Indeed many litigation lawyers can doubtless recall instances of experts who say one thing in one case and a contradictory thing in another, each time to the supposed advantage of the party paying them' [56].

Secondly, the delay and expense caused by the disproportionate volume of expert evidence [57]. The tendency of experts to dominate proceedings creates the following perils for the integrity of the trial process [58]:

(a) the tendency of experts to take over the conduct of cases and exert excessive influence over their outcomes;

(b) experts will in effect appoint themselves as advocates for the party calling them; and

(c) experts render their evidence less than useful by giving it in a form conventional in their discipline but not conforming to the rules of evidence; and

(d) the tendency of experts to drift into giving the court's reasons why they should accept or reject the evidence of lay witnesses on matters of primary fact.

Thirdly, he referred to the increasing concern about the risk of injustice that may flow from unsatisfactory expert evidence, and accordingly the stricter the admissibility requirements for section 79 tenders, the greater the chance that evidence carrying that danger will be excluded [59].

Heydon J's decision regarding the 'basis rule'

Three basis rule requirements

Heydon J divided the 'basis rule' into three distinct requirements [61]:

Disclosure of facts and assumptions

The requirement that the expert disclose the facts and assumptions which found his opinion ('the assumption identification rule').

Proof of facts and assumptions

The requirement that the facts and assumptions be proved ('the proof of assumption rule').

Disclosure of expert's reasoning

The requirement that the expert state the reasoning showing how the facts and assumptions relate to the opinion stated, so as to reveal that the opinion was based upon the expert's expertise[5] ('the statement of reasoning rule').

After setting out the three basis rules, he then proceeded with a detailed explanation of why each is applicable under section 79 of the *Evidence Act*:

First, he said that each of the three basis rules exists at common law [64]–[94].

Secondly, he said that the *Evidence Act* is far from being a complete codification of the law of evidence, and that with respect to whether the basis rules apply under section 79, the question was not whether section 79 provides for the basis rules, but rather, whether section 79 abolishes these common law rules [110].

Thirdly, he said that with respect to the continued application of the basis rules under section 79:

(a) the assumption identification rule has not been abolished under section 79 as its abolition would have very unsatisfactory consequences [101]. Furthermore, its continued existence can be implied from the terms of section 79, as explained by Gleeson CJ in *HG v R* [97];

(b) the proof of assumption rule has not been abolished by section 79 [110]. Furthermore, the necessity for trials to be conducted in a business–like and efficient way, in combination with sections 55, 56 and 79, read against the common law rule, pointed to the continued operation of the rule under section 79 [127]; and

(c) the statement of reasoning rule has not been abolished under section 79 [130].

The reasoning of Heydon J regarding the above arguments is set out in further detail in the paragraphs below.

Existence of the assumption identification rule at common law

Heydon J said that there was no doubt the assumption identification rule exists at common law [64].

He described the rule's function as follows [65]:

It helps to distinguish between what the expert has observed and what the expert has been told; to ensure that the expert is basing the opinion only on relevant facts; to ensure that experts do not pick and choose for themselves what aspects of the primary evidence they reject, what they accept, how they interpret it and what the court should find; and to ascertain whether there is substantial correspondence between the facts assumed and the evidence admitted to establish them.

Existence of the proof of assumption rule at common law

First, Heydon J gave a precise articulation of the rule as follows [66]:

An expert opinion is not admissible unless the evidence has been, or will be, admitted 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 was stated to be based to render the opinion of value.

Secondly, he said the Law Reform Commission Evidence Report No. 26 (1985) Volume 1 at 417 [750] was wrong in stating that there is no proof of assumption rule at common law [67]–[80].[6]

Thirdly, he said there is no common law rule that expert evidence cannot be received unless there already exists 'admitted' evidence. It suffices if it can be seen that the appropriate evidence will be admitted later [68]. At [81] he said:

But in practice it is frequently not possible or convenient to call the expert evidence at the end of the tendering party's case. Ramsey V Watson makes plain that expert opinion evidence is unaffected by the fact that the primary evidence has not yet been given to support the assumptions on which the opinion rests. The admissibility of expert evidence can be secured by counsel undertaking to call the primary evidence later. Hence the proof of assumption rule does not cramp the party calling the expert witness by imposing an impracticably rigid order of witnesses [81].[7]

Fourthly, as to the function of the proof of assumption rule, Heydon J said [90]:

The function of the proof of assumption rule is to highlight the irrelevance of expert opinion evidence resting on assumptions not backed by primary evidence. It is irrelevant because it stands in a void, unconnected with the issues thrown up by the evidence and the reasoning processes which the trier of fact may employ to resolve them. If the expert's conclusion does not have some rational relationship with the facts proved, it is irrelevant. That is because in not tending to establish the conclusion asserted, it lacks probative capacity. Opinion evidence is a bridge between data in the form of primary evidence and a conclusion which cannot be reached without the application of expertise. The bridge cannot stand if the primary evidence end of it does not exist. The expert opinion is then only a misleading jumble, uselessly cluttering up the evidentiary scene.

Existence of the statement of reasoning rule at common law

First, Heydon J said that [91]:

An expert opinion is inadmissible unless the expert states in chief the reasoning by which the expert conclusion arrived at flows from the facts proved or assumed by the expert so as to reveal that the opinion is based on the expert's expertise ... the reasoning must be stated. The opposing party is not to be left to find out about the expert's thinking for the first time in cross–examination.

Secondly, the function of the statement of reasoning rule is [93]:

The rule protects cross–examiners by enabling them to go straight to the heart of any difference between the parties without the delay of preliminary reconnoitring.

Heydon J's decision that the three basis rules are pre–conditions to admissibility of expert opinion evidence under section 79(1)

(1) The assumption identification rule is a pre–condition to admissibility under section 79(1)

Heydon J held that the assumption identification rule was a pre–condition [95]–[101].

He referred to Gleeson CJ's decision in *HG v R* (1999) 197 CLR 414 at [39], that the continued existence of the assumption identification rule rested on an implication from terms of section 79 [97]:

An expert whose opinion is sought to be tendered should differentiate between the assumed facts upon which the opinion is based, and the opinion in question ... [T]he provisions of s79 will often have the practical effect of emphasising the need for attention to requirements of form. By directing attention to whether an opinion is wholly or substantially based on specialised knowledge based on training, study or experience, the section requires the opinion is presented in a form which makes it possible to answer that question.

Heydon J said that in the absence of the application of this rule, there would be very unsatisfactory consequences [101]:

(1) the Court may not be able to understand the opinion so as to decide what weight to accord it;

(2) the Court will not be able to assess whether it corresponds with the facts which the Court finds at the end of the trial;

(3) the Court will not be able to assess whether the opinion is wholly or substantially based on the expert's knowledge;

(4) there would be unacceptable difficulties for the cross–examiner, who should not have to perform in the dark, particularly in relation to lengthy and complex expert opinion evidence, the task of teasing out in cross–examination all the circumstances that the witness had in mind;

(5) the cross–examining party should not be left at a disadvantage in deciding whether and how to meet the evidence; and

(6) if the rule were not to apply under section 79, this would reduce the chance of the parties getting to grips, or at least getting to grips quickly and would thus cause trials to become slower, more complicated and more costly.

(2) The proof of assumption rule is a pre–condition to admissibility under section 79(1)

Heydon J said that the proof of assumption rule was a requirement under section 79:

Is an opinion tendered under s79 inadmissible unless there was evidence, admitted or to be admitted before the end of the tendering party's case, capable of proving matters sufficiently similar to the assumptions to render the opinion of value? The correct answer is in the affirmative: at [102].

The ordinary meaning of s79, taking into account its language, its context in the Act (including ss55–57), the function of the Act (which is the efficient and rational regulation of trials from an evidentiary point of view), and the unreasonable results which a contrary construction would produce, is that it does not abolish the common law proof of assumption rule. Failure by the tendering party to comply with the proof of assumption rule makes the opinion evidence irrelevant: at [108].

Heydon J said that the respondent had submitted that Law Reform Commission was wrong in concluding that there is no proof of assumption rule at common law, but that it followed from the Commission's decision 'to refrain from including a [proof of assumption] rule in its draft Bill, that the legislature had abolished that rule' [109].

However Heydon J said that this conclusion did not follow [109].

Heydon J stated that the correct question to ask was not whether section 79 provides for the common law proof of assumption rule, but rather, 'does section 79 abolish that rule?' [110]. He said that the *Evidence Act* was far from being a complete code and that it was necessary to examine the relevant part of the Act to determine whether the common law rule had been abolished [110].

He said that section 79 does not abolish the rule and he contrasted the position with section 80 of the Act which abolishes two common law rules [111].

Heydon J responded to various arguments raised by the Australian Law Reform Commission (and relied upon by the respondent in the appeal) as to why the proof of assumption rule should not apply under section 79 [112]–[119].

The first argument was that the proof of assumption rule requires proof of reports of technicians and assistants, consultation with colleagues and reliance upon a host of extrinsic material and information which might have been relied upon by the expert [112].

Heydon J said that the proof of assumption rule does not render such material inadmissible [113] ie. works of authority and research, conversations with colleagues, and the witness's past dealings with problems similar to that involved in the litigation. Nor does the rule prevent reference to contributions by others to the expert's report [114].

Secondly, Heydon J responded to the argument that there was no need for the proof of assumption rule because under the Act there is a discretionary power of exclusion under section 135 [119]. In response to this Heydon J said:

This technique eschews the primary technique of a rule of strict inadmissibility, and instead falls back on a weaker device. Expert evidence is expensive. For defendants in particular, it is necessary to know with reasonable certainty before the trial begins whether the expert evidence tendered by the moving party is admissible.

Next, Heydon J set out reasons why the proof of assumption rule was advantageous and applicable under section 79 [120]–[126]:

The proof of assumption rule safeguards against the admission of useless expert evidence [120] viz. whether evidence of primary facts is capable of corresponding with the expert's assumptions is a question which can be answered at the moment of tender. An expert witness's high qualifications and impeccable intellectual processes will produce only useless evidence unless there is a link between the opinion and a version of the primary facts made possible by the evidence [120].

Application of the proof of assumption rule at the time of admissibility enables early and decisive rulings in relation to the expert's evidence [121]–[124]:

If the admissibility of expert opinion evidence which is tendered and conditionally admitted is not finally ruled on until after the case for the tendering party is closed, and the evidence is then rejected, or its weight has become so questionable that it is useless, the tendering party may have lost an opportunity to repair the position before its case closed, either by calling further witnesses or tendering further documents, or by recalling witnesses who had already been in the box [124].

Heydon J's conclusion as to the application of the proof of assumption rule under section 79

Heydon J concluded, saying [127]:

A construction of s79 which holds that there is no proof of assumption rule in relation to s79 tenders is difficult to reconcile with the practical exigencies pursuant to which the parties conduct their cases. It is necessary for trials to be conducted in a business–like and efficient way. That is a matter of context pointing to the view that there is a proof of assumption rule with which those tendering expert evidence must comply by reason of ss55, 56 and 79 read against the background of the common law.

The statement of reasoning rule is a pre–condition to admissibility under section 79(1)

Heydon J said [129] that there was ample authority supporting the view that it was not enough for evidence tendered under section 79 merely to state the expert's qualifications in a field of expertise and the conclusion.

He explained the necessity for the application of this rule [129]:

It is necessary to avoid the insidious risk that the trier of fact will simply accept the opinion without careful evaluation of the steps by which it was reached, and hence the evidence must state the criteria necessary to enable the trier of fact to evaluate that the expert's conclusions are valid. The evidence must reveal the expert's reasoning—how the expert used expertise to reach the opinion stated. It is not enough for evidence tendered under s79 merely to state the expert's qualifications in a field of expertise and the conclusion.

As to the fact that there is no express mention of the application of the rule under section 79, Heydon J stated [130]:

There is nothing in s79 which suggests that the corresponding common law rule has been abolished. And the language of s79 positively supports its continuance: without a statement of the expert's reasoning it is not possible to say whether the opinion is wholly or substantially based on the specialist knowledge claimed.

Based upon the High Court's decision in *Dasreef*, what are the pre–conditions to admissibility of expert opinion evidence under section 79(1) of the *Evidence Act*?

Based upon *Dasreef*, the pre–conditions to admissibility of expert opinion evidence under section 79(1) of the *Evidence Act* are as set out below.

Relevance—section 55

The opinion rule in section 76(1) is expressed in a way that assumes that the opinion is tendered to prove the existence of a fact in issue in the proceeding [31]. The operation of section 79(1) requires identification of the fact in issue that the party tendering the evidence asserts the opinion proves or assists in proving [31].

Based upon what the majority said at [31] the fact in issue which the opinion is said to prove or assist in proving, must be identified in order for the opinion to be admissible under section 79(1).

Although not addressed by the majority, presumably identification of the fact in issue could either be stated by the expert witness (based upon instructions from the client's lawyers), or identified by counsel at the time it is sought to have the evidence admitted into evidence.

The two express requirements under section 79(1)
To be admissible under section 79(1) the evidence that is tendered must satisfy two criteria [32]:

The first is that the witness who gives the evidence 'has specialised knowledge based on the person's training, study or experience'.

The second is that the opinion expressed in evidence by the witness 'is wholly or substantially based on that knowledge'.

Combining the relevance requirement and the two express requirements under section 79(1), the majority in *Dasreef* said [35] that in order for Dr Basden to proffer admissible evidence about the numerical or quantitative level of Mr Hawchar's exposure to silica dust, it would have been necessary for the party tendering his evidence to demonstrate:

First that Dr Basden had specialised knowledge based on his training, study or experience that permitted him to measure or estimate the amount of respirable silica to which a worker undertaking the relevant work would be exposed in the conditions in which the worker was undertaking the work.

Secondly, it would have been necessary for the party tendering the evidence to demonstrate that the opinion which Dr Basden expressed about Mr Hawchar's exposure was wholly or substantially based on that knowledge.

Statement of reasoning rule will ordinarily be an applicable requirement for admissibility under section 79(1)
The majority in *Dasreef* said [37] that:

... it is ordinarily the case, as Heydon JA said in Makita that 'the expert's evidence must explain how the field of 'specialised knowledge' in which the witness is expert by reason of 'training, study or experience', and on which the opinion is 'wholly or substantially based', applies to the facts assumed or observed so as to produce the opinion propounded.

Heydon J said in *Dasreef* that satisfying the statement of reasoning rule was a pre–condition to admissibility of the experts evidence of opinion ([91]–[94] and [129]–[130]).

The other two basis rules identified by Heydon J in *Dasreef* are not requirements for admissibility under section 79(1)
In Heydon J's minority judgment in *Dasreef* he held that there were two other basis rules which must be satisfied in order for the opinion evidence to be admissible under section 79(1) [61]:

Assumption identification rule

That expert evidence is inadmissible unless the facts on which the opinion is based are stated by the expert—by way of proof if the expert can admissibly prove them, otherwise as assumptions to be proved in other ways [64].

Proof of assumption rule

That an expert opinion is not admissible unless evidence has been, or will be, admitted, 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 was stated to be based to render the opinion of value [66].

This part of Heydon J's decision is at odds with the majority judgment, and does not represent the law in Australia.

DURA (AUST) CONSTRUCTIONS PTY LTD V HUE BOUTIQUE LIVING PTY LTD (NO. 3) [2012] VSC 99

Dura (Aust) Constructions Pty Ltd v Hue Boutique Living Pty Ltd is a recent Victorian Supreme Court decision in which Dixon J was required to determine objections to the admissibility of the evidence of a number of expert witnesses.

His Honour adopted Heydon J's analysis in *Dasreef*, viz. he held that in addition to establishing that the evidence is relevant (section 55), that the witness has specialised knowledge (section 79(1)) and that the evidence of the opinion is wholly or substantially based upon that knowledge (section 79(1)), in order for the evidence to be admissible it is usually necessary that the three basis rules be satisfied. At [98] Dixon J said:

In summary, the matters that will usually be considered at both stages[8] of the inquiry that considers whether the exception under s 79(1) renders opinion evidence admissible may conveniently be referred to as four 'rules' (one of which is in three parts), which are:

(a) is the opinion relevant (or of sufficient probative value) (the relevance rule);

(b) has the witness properly based 'specialised knowledge' (the expertise rule);

(c) is the opinion to be propounded 'wholly or substantially based' on specialised knowledge (the expertise basis rule);

(d) is the opinion to be propounded 'wholly or substantially based' on facts assumed or observed that have been, or will be, proved, or more specifically (the factual basis rules):

(i) are the 'facts' and 'assumptions' on which the expert's opinion is

founded disclosed (the assumption identification rule);

(ii) is there evidence admitted, or to be admitted before the end of the tendering party's case, capable of proving matters sufficiently similar to the assumptions made by the expert to render the opinion of value (the proof of assumptions rule);

(iii) is there a statement of reasoning showing how the 'facts' and 'assumptions' relate to the opinion stated to reveal that that opinion is based on the expert's specialised knowledge (the statement of reasoning rule)' (footnotes not included).

His Honour's decision on this issue may be doubted. It is contrary to the majority judgment in *Dasreef*.

His Honour appears to have justified applying Heydon J's analysis on the basis ([90] and [97]) that the majority disposed of the appeal by finding that there was no footing on which the primary judge could conclude that an opinion expressed by the expert was wholly or substantially based upon specialised knowledge (i.e. non–compliance with the 'expertise basis rules', as termed by Dixon J), and that 'the majority did not consider it necessary to discuss the factual basis rules' [97].

To the extent that Dixon J was saying that the majority did not canvass the issue of whether satisfying the 'factual basis rules' (as termed by Dixon J [98]) was a pre–condition to admissibility under section 79(1), this may be doubted.

It is sufficiently clear from paragraph [41] together with paragraphs [31], [32], [35] and [37] of the majority judgment in *Dasreef*, that they found that the factual basis rules were not pre–conditions to admissibility of expert opinion evidence under section 79(1).

CONCLUDING OBSERVATIONS CONCERNING *DASREEF*, AND IN PARTICULAR HEYDON J'S JUDGMENT

Despite the view expressed above concerning the decision in *Dura*, one can well understand Dixon J's enthusiasm to draw upon Heydon J's judgment in *Dasreef* in deciding admissibility questions under section 79. As Dixon J said in *Dura* [97] Heydon J has provided an erudite and practical analysis concerning admissibility of expert opinion evidence under section 79.

Whilst Heydon J's judgment may not represent the law, his analysis and strength of the argument is compelling.

One would have a difficult job countering his analysis and reasoning concerning why the factual basis rules should be pre–conditions to admissibility of evidence of expert opinion. Amongst those arguments were the following:

That if the facts and assumptions upon which the opinion is stated to be based, are not proved, the expert opinion is irrelevant [90]:

It is irrelevant because it stands in a void, unconnected with the issues thrown up by the evidence and the reasoning processes which the trier of fact may employ to resolve them. If the expert's conclusion does not have some rational relationship with the facts proved, it is irrelevant. That is because in not tending to establish the conclusion asserted, it lacks probative capacity. Opinion evidence is a bridge between data in the form of primary evidence and a conclusion which cannot be reached without the application of expertise. The bridge cannot stand if the primary evidence end of it does not exist. The expert opinion is then only a misleading jumble, uselessly cluttering up the evidentiary scene;.

In view of the interdependence of the three basis rules, it would be odd if the factual basis rules were not a pre–condition to admissibility [133]:

If the assumed facts are not stated, no reasoning process can be stated and the opinion will lack utility; if there is no evidence, called or to be called, capable of supporting the assumed facts, no reasoning process, even if stated, will have utility; and even if there are facts both assumed and capable of being supported by the evidence, they will lack utility if no reasoning process is stated. In each instance, a lack of utility results in irrelevance and inadmissibility.

The majority's finding that the factual basis rules were not pre–conditions to admissibility of expert opinion evidence, was based upon the wording of section 79(1) [35] and [37]. However, the majority was clearly reinforced in that view by what had been said in The Law Reform Commission Evidence Report No. 26 (1985) Volume 1 at 417 [750], wherein the Commission denied the existence of the basis rule at common law and expressed the intention to refrain from including a basis rule in the legislation which the Commission proposed, and which was subsequently enacted in section 79 of the *Evidence Act* [41].

The majority chose not to examine the accuracy of the Commission's view that no basis rule existed at common law [41].

On the other hand, Heydon J demonstrated comprehensively that the Commission was wrong in its view that no basis rule existed at common law [66]–[80].

Heydon J noted that the respondent in *Dasreef* accepted that the Commission was wrong to deny or doubt the existence of the basis rule [70] and [109].

Heydon J also examined each of the reasons relied upon by the Commission in recommending that, if a proof of assumption rule did exist at common law, it should be abolished. These have been referred to earlier.

In summary they were:

• that the rule would eliminate much material from sources normally open to experts in their professional lives, for example reliance upon extrinsic material and information such as authoritative works, and reports of technicians and assistants [112]–[115];

• that the rule was unnecessary [116];

• that to insist on the rule would introduce costly, time–consuming and cumbersome procedures [117–118]; and

• that the discretion to exclude under section 135 would be a sufficient way of dealing with expert opinion evidence when the proof of assumption rule was not satisfied [119].

Heydon J's riposte to each of these arguments, demonstrated that they had little merit.

If one accepts that the Law Reform Commission was wrong in denying the existence of a common law basis rule, and in asserting that, if such rule did exist, there were good reasons for its abolition, it follows the decision to draft section 79 so as to exclude the basis rule, was predicated on false premises.

The result is unfortunate because, for the reasons so eruditely set forth by Heydon J in *Dasreef*, the factual basis rules should, it is submitted, be pre–conditions to the admissibility of expert opinion evidence under section 79(1), and it is unsatisfactory that non–compliance with such rules be addressed by way of discretionary exclusion or limitation of use under section 135 or section 136.

As Heydon J said [119]:

This technique eschews the primary technique of a rule of strict inadmissibility, and instead falls back on a weaker device. Expert evidence is expensive. For defendants in particular, it is necessary to know with reasonable certainty before the trial begins whether the expert evidence tendered by the moving party is inadmissible.

REFERENCES

1. (2011) 243 CLR 588 at paragraphs [35] and [37]

2. (1998–1999) 197 CLR 414

3. (2001) 52 NSWLR 705

4. Note that this is a quote from Heydon JA's decision in *Makita* at paragraph 85. It is the 'statement of reasoning rule' which Heydon JA restates in paragraphs [61] and [128]–[131] of his judgment in *Dasreef*

5. Note that in *Makita* at [85] Heydon JA referred to the point made by Gleeson CJ in *HG v R*, where Gleeson CJ explained the importance of this requirement because once the reasoning is revealed it may show that the opinion was not based on specialised expert knowledge but on 'a combination of speculation, inference, personal and second–hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise'—refer *HG v R* at paragraph 41

6. Note the majority at [41], although noting that there may be a question as to whether the basis rule exists at common law, they did not answer this question.

7. Heydon J further explained this at [82] by reference to the case of *R v Ping*

8. The two stages to which Dixon J was referring, were first, whether the evidence is relevant, and secondly, whether the evidence satisfies the two criteria under section 79(1) [87] and [88]