Unreliable expert opinion evidence

Exclusion proves difficult under existing law

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Wood v R is one of several cases highlighting the issue of the extent to which the Evidence Act adequately addresses the reliability of expert opinion evidence and the effectiveness of the judicial power to exclude such evidence.

The issue of the reliability of incriminating expert opinion evidence has been brought into the spotlight with the NSW Court of Criminal Appeal (NSWCCA) decision of *Wood v R* [2012] NSWCCA 21 (*Wood*).

In its judgment to acquit Gordon Wood of the murder of his girlfriend Caroline Byrne in 1995, the NSWCCA was, among other things, particularly critical of the expert testimony of Associate Professor Cross relied upon by the Crown in the trial in 2008.[1] This case is one of a number of highly publicised appeal cases[2] resulting in acquittals that have brought attention to the issue of the reliability of incriminating expert opinion evidence adduced by the prosecution.

Practitioners should be aware that the issue of whether the *Evidence Act 1995* (NSW) (the Act) adequately deals with unreliable expert evidence appears to still be unsettled,[3] even in light of *Wood*, and that the narrow approach adopted by the courts in the application of s.79 and s.137 is arguably of limited assistance in preventing unreliable expert opinion evidence from being admitted at trial and the consequences that follow.

It is arguable that s.79 and s.137 should have a more exclusionary role and that, if the reliability of expert opinion evidence cannot be demonstrated by the prosecution, then a judge should exclude it – rather than for the defence to test it via cross-examination or rebuttal expert evidence and it be left for the jury to determine.[4]

It has been suggested that judges should actually determine probative value and introduce a specific requirement of reliability rather than continue with the prevailing narrow approach in order to afford some protection to the accused.[5] Other measures reportedly considered include the possible introduction of a conference of expert witnesses to decide what evidence should be put before the court, known as 'hot-tubbing', or expert referees being appointed to assist judges in complex cases.[6] Justice Peter McClellan has foreshadowed the possibility of a comprehensive review of the role of the judge and the jury in cases where increasingly complex expert evidence has a prominent role.[7]

Reliability of expert opinion evidence and s.79

The opinion rule in s.76(1) provides 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 exception to the opinion rule providing for the admissibility of expert opinion evidence under the Act is set out in s.79(1). The section provides that if a person has specialised knowledge based on their training, study or experience, the opinion rule does not apply to render inadmissible evidence of an opinion of that person that is wholly or substantially based on that knowledge.

The Australian Law Reform Commission considered that matters such as whether the opinion is derived from a field of expertise or is reliable should be left to the court's discretion in s.137.[8]

Gaudron J in *Velevski v The Queen* [2002] HCA 4 (*Velevski*) said that the "concept of 'specialised knowledge' imports matters which are outside the knowledge or experience of ordinary persons and which 'is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience'".[9] This could be interpreted to impose a standard of evidentiary reliability on expert opinion evidence for it to be admissible.[10] For example, in relation to novel scientific evidence (such as facial mapping and body mapping), the party adducing such evidence should arguably have the burden of proving its reliability.[11] A failure to disclose a reliable or valid basis of an expert opinion may lead to the conclusion that the evidence could not be said to rationally affect the assessment of the probability of the existence of the fact in issue and therefore be inadmissible under s.56.

Heydon JA in *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305 (*Makita*) said the primary duty of an expert giving opinion evidence was to provide the trier of fact with criteria enabling evaluation of the expert's conclusions.[12] The case is a leading authority on expert opinion evidence and one in which Heydon JA

explains in detail the approach to be taken when applying s.79.[13] The approach was also referred to and applied in the more recent High Court case of *Dasreef Pty Ltd v Hawcher* [2011] HCA 21 (*Dasreef*).

In *R v Tang* (2006) 65 NSWLR 681, the court held that facial mapping and body mapping was not specialised knowledge for the purposes of s.79 that could be relied on to form an opinion on the identification of unknown persons in CCTV security images.[14] The evidence of the expert professing expertise in facial mapping and body mapping did not satisfy s.79 and was therefore inadmissible as expert opinion evidence.[15]

There, Spigelman CJ said that when applying s.79, the focus of attention has to be on the words specialised knowledge, not on the introduction of some extraneous idea such as reliability.[16] This approach to s.79 is arguably narrower than that of Gaudron J in *Velevski* and suggests that s.79 does not require a specific test of reliability of the expert opinion evidence sought.

It should be noted that the most senior judge in NSW at that time appears to have dismissed the need for reliability of incriminating expert opinion evidence and placed the emphasis instead on the notion of specialised knowledge.[17] This also appears to have occurred in the Wood trial.[18]

Application in Wood

In *Wood*, expert opinion evidence on physics and biomechanics was adduced by both sides on the issue of whether the deceased could have jumped or was thrown off the Gap. In support of the Crown case that Wood could have thrown the deceased off the Gap to the relevant landing point, a series of experiments were conducted by Cross in which male cadets of a height and building similar to Wood were spear-throwing a female cadet into a police academy swimming pool.

Cross's expert opinion evidence was criticised by the judges for its lack of reliability and validity. His evidence, together with the various other matters raised in the judgment in its entirety was held to be unable to support the jury's guilty verdict and establish beyond reasonable doubt that the deceased did not commit suicide and that Wood was guilty of her murder.[19] The expert evidence was found among other things to have caused the trial to miscarry.[20]

McClelland CJ at CL found that the tests Cross carried out were all conducted in daylight and in fine conditions where none of the test participants had reason to fear for their safety. The circumstances on the night of Ms Byrne's death were different. Among other things, it was a pitch black night, cold, surfaces were slippery from sea spray and there was a sheer drop of 30 metres from the cliff edge.[21] If Cross's conclusions in his expert opinion evidence were to be of probative value it must be assumed that the conditions under which his experiments were conducted were not materially different to the conditions on the night Ms Byrne died. In this case, they were.[22]

The above highlights the point that practitioners need to be aware that s.79 may not always be effective enough in preventing unreliable expert opinion evidence from being admitted into evidence at trial and the consequences that follow.

Unreliable expert opinion evidence and exclusion under s.137

Part 3.11 of the Act sets out a number of discretionary and mandatory exclusions that are available to the court to, among other things, exclude or limit the use of evidence that otherwise has been admitted in proceedings, including expert opinion evidence under s.79. In dealing with incriminating expert opinion evidence adduced by the prosecution in criminal proceedings, the most relevant and effective power would be that found in s.137 which provides that in a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

It has been observed that judges may be reluctant to exclude expert opinion evidence if it might merely confuse, complicate or waste the court's time in criminal proceedings and that it is assumed that juries can generally cope with complex expert opinion evidence and disagreement between differing expert opinions.[23] The mandatory nature of the power under s.137 emphasises the importance of ensuring a fair trial for the defendant, although the onus to have the evidence excluded nevertheless lies with the defence.[24]

A narrow approach in the application of s.137 was taken by Hunt CJ in *R v Carusi* (1997) 92 A Crim R 52 where it was held that the "trial judge can exclude the evidence only where, taken at its highest value, its probative value is outweighed by its prejudicial effect".[25] Incriminating expert opinion evidence that is potentially unreliable would on this approach be given the highest probative value possible by the court, before it undertakes the balancing exercise against the danger of unfair prejudice.[26] Actual probative value, after allowing for issues such as the credibility, reliability or validity of the evidence, would not be taken into account in assigning the highest probative value.[27]

In *Li v The Queen* [2003] NSWCCA 290, Ipp JA held that for the purposes of the balancing exercise in s.137 in respect of voice identification evidence adduced, reliability of the evidence had little to do with the discretionary exercise and was essentially a matter for the jury.[28] On the other hand, McHugh J in dicta in *Papakosmas v The Queen* (1999) 196 CLR 297 stated that the assessment of probative value necessarily would involve considerations of reliability.[29] But it appears that s.137 played no part in the court's decision in *R v Tang* where Spigelman CJ adopted a narrow approach.[30]

The narrow approach to the application of s.137 was confirmed by the NSWCCA in *R v Shamouil* [2006] NSWCCA 112 where Spigelman CJ held that the majority of the court authorities were in favour of a restrictive approach to the circumstances in which issues of reliability and

ENDNOTES

1. *R v Wood* [2008] NSWSC 1273.
2. At the time of writing, another recent well-publicised judgment in *Gilham v R* [2012] NSWCCA 131 was handed down on 25 June 2012 which, similar to *Wood*, highlights the issue concerning the reliability of expert opinion evidence. In that case, the NSWCCA quashed Jeffrey Gilham's convictions for murdering his parents in their home in 1993 with a knife and then setting fire to the premises. He had pleaded guilty to his brother's manslaughter but claimed his brother killed his parents, which provoked him to stab and kill his brother. The NSWCCA found, among other things, certain expert evidence in relation to the rate and spread of the fire and expert evidence in relation to the similarity of stab wounds on his parents and brother were wrongly admitted into evidence as expert opinion evidence under s.79 and even if so admitted should have been excluded by the trial judge under s.137 as their limited probative value, if any, was outweighed by the prejudicial effect it would have had on the jury.
3. I. Freckelton, "Expert Evidence Accountability: New Developments and Challenges" (2011) 19 *JLM* 209 at 223.
4. G. Edmond, "Specialised knowledge, the exclusionary discretions and reliability: Reassessing incriminating expert opinion evidence" (2008) 31 *UNSW Law Journal* 1 at 41;
G. Edmond, "Actual innocents? Legal limitations and their implications for forensic science and medicine" 2011 *Australian Journal of Forensic Sciences*, 43:2-3, 177 at 184-185.
5. Above n.4, G. Edmond, *UNSW Law Journal*, at 55. See also J. Binnie, "Wrongful convictions and the magical aura of science in the courtroom" (2011) 10 *The Judicial Review* 141 at 152.
6. Above n.4, G. Edmond, *Australian Journal of Forensic Sciences*, at 192. See also S. Washington, "Appeals spark concern over use of scientific evidence", *Sydney Morning Herald*, 17 December 2011, see *tinyurl.com/8pg96tc*.
7. The Hon Justice Peter McClellan, "The future role of the judge: Umpire, manager, mediator or service provider", *LSJ*, April 2012, at p.71.
8. S. Odgers, *Uniform Evidence Law*, 9th ed, 2010, Lawbook Co, at 331.
9. *Velevski v The Queen* [2002] HCA 4 at [82].
10. Above n.8 at 331.
11. Ibid; G. Edmond and A. Roberts, "Procedural Fairness, the Criminal Trial and Forensic Science

"The expert's failure to understand their responsibilities ... may result in the probative value of the evidence being substantially outweighed by the danger that it might mislead, confuse or be unfairly prejudicial."

credibility are to be taken into account in determining the probative value of expert opinion evidence for the purpose of determining admissibility.[31] This approach was followed in *R v Sood* [2007] NSWCCA 214, in which it was held by Latham J that the probative value of evidence sought to be excluded under s.137 should be assessed by taking such evidence at its highest,[32] and that questions of credibility and reliability play no part in the assessment of the probative value of evidence sought to be admitted by the Crown.[33]

However, in adopting this approach, if it is not open to the jury to conclude that the evidence could rationally affect the assessment of the probability of the existence of a fact in issue, the evidence is not relevant and therefore arguably inadmissible under s.56(2) and s.137 has no application.[34] It follows that taking expert opinion evidence adduced by the Crown at its highest assumes that the evidence is in fact reliable before it is compared against the danger of unfair prejudice, thus demonstrating an arguable lack of interest of trial judges in the validity and accuracy of expert opinion evidence.[35]

Rather, questions of reliability, validity and credibility of incriminating expert opinion evidence led by the prosecution are left for the defence to test in cross-examination, rebuttal expert evidence and for the jury as the ultimate trier of fact.[36] Such an approach "effectively excludes an independent role for the trial judge to exclude evidence of little real significance that also creates a perceptible risk of a miscarriage of justice in a criminal trial".[37] In *Wood*, the impact of unreliable incriminating prosecution evidence of questionable probative value being admitted is well-illustrated.

Reliability of expert opinion evidence and court rules

In *Wood*, the applicant submitted that fresh evidence before the appeal court from Cross, comprising a book written by him after the trial as well as material on his website, was impartial and unreliable, breached the Expert Witness Code of Conduct (the code)[38] and therefore should not be admissible.[39] The court briefly covered the key cases of *HG v Queen* [1999] HCA 2, *Makita* and *Dasreef*[40] before considering the interaction of the court's rules,[41] including the code and s.137 (along with s.79 and s.135).

The court referred to the code which applies to expert evidence in criminal proceedings and to Cross's evidence by virtue of Part 75, rule 3(j) of the Supreme Court Rules 1970.[42] The Supreme Court Rules 1970 provide, among other things, that expert opinion evidence, whether oral or in a written report, is not admissible unless the expert has agreed to be bound by the code.[43] The code provides that an expert witness has an overriding duty to assist the court impartially on matters relevant to their area of expertise,[44] to include all facts, assumptions, reasons, literature, and tests relied upon and where incomplete or inconclusive must state the qualification or inconclusiveness.[45]

The court referred to various authorities that suggested that expert evidence would not be inadmissible merely because the expert breached or overlooked the code.[46] But the court went on to say that where an expert commits a sufficiently serious breach of the code, a court may be justified in exercising its discretion to exclude the evidence under s.135 or s.137. The expert's failure to understand their responsibilities under the code may result in the probative value of the evidence being substantially outweighed by the danger that it might mislead, confuse or be unfairly prejudicial to a party.[47]

In *Wood*, McClellan CJ at CL did not provide a resolution to the issue, but nevertheless in a scathing criticism of Cross's evidence held that his expert opinion evidence was of little evidentiary value, if any at all. His Honour illustrated what an expert should not do if their opinion evidence is to have any weight even if admitted: "Cross took upon himself the role of investigator and became an active participant in attempting to prove that the applicant had committed murder. Rather than remaining impartial to the outcome and offering his independent expertise to assist the Court he formed the view from speaking with some police and Mr Byrne and from his own assessment of the circumstances that the applicant was guilty and it was his task to assist in proving his guilt."[48]

Practitioners should note that the court rules (including the code) have a limited role in ensuring the reliability of incriminating expert opinion evidence adduced by the prosecution. Complying with them would make it more likely for expert opinion evidence to be admitted.[49] The code will not affect the interpretation of s.79 but they do evidence the understanding of the way in which the section applies.[50]

Practitioners should be aware that exclusion by the court under s.135 or s.137 may be appropriate where there is a danger that the court might be misled, or the opposing party unfairly prejudiced, because the expert engaged is expressing an opinion which demonstrates their failure to understand their responsibilities as an expert.[51]

As a result, the reliability of incriminating expert opinion evidence adduced by the prosecution in criminal proceedings continues to be a contentious and ever-evolving issue for practitioners to watch.[52] □

Medicine" (2011) 33 *Sydney Law Review* 359 at 381-387.
12. *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305 at [59].
13. Ibid at [85].
14. *R v Tang* (2006) 65 NSWLR 681, at [141] and [154].
15. Ibid at [141].
16. Ibid at [137].
17. Above n.4, G. Edmond, *UNSW Law Journal* at 6-7.
18. Above n.1.
19. *Wood v R* [2012] NSWCCA 21 at [36]-[37].
20. Ibid at [534].
21. Ibid at [275]-[276].
22. Ibid at [476].
23. Above n.4, G. Edmond, *UNSW Law Journal*, at 15; and *R v Lisoff* [1999] NSWCCA 364 per Spigelman CJ, Newman and Sully JJ at [60].
24. Above n.8 at 744 citing *Gilmour v EPA; Tableland Topdressing v EPA* [2002] NSWCCA 399 at [46].
25. *R v Carusi (1997) 92 A Crim R 52* at 66.
26. Above n.4, G. Edmond, *UNSW Law Journal*, at 17.
27. G. Edmond and M. San Roque, "Oxymoronic Law: Ad Hoc Expert Opinion Evidence" (2009) 93 *Precedent* 12 at 16.
28. *Li v The Queen* at [78].
29. *Papakosmas v The Queen* at [86].
30. *R v Tang*, at [137].
31. *R v Shamouil* at [60].
32. *R v Sood*, at [38].
33. Ibid at [36].
34. Above n.8 at 752.
35. Above n.4, G. Edmond, *UNSW Law Journal*, at 22 and G. Edmond, *Australian Journal of Forensic Sciences*.
36. Ibid; and above n.8 at 361.
37. Above n.8 at 754; G. Edmond and A. Roberts, "Procedural Fairness, the Criminal Trial and Forensic Science Medicine" (2011) 33 *Sydney Law Review* 359 at 379-380.
38. Schedule 7 to the Uniform Civil Procedure Rules 2005.
39. *Wood v R*, at [725].
40. Ibid at [726].
41. Supreme Court Rules 1970; Uniform Civil Procedure Rules 2005.
42. *Wood v R*, at [725].
43. Supreme Court Rules 1970, r.75.3J(3).
44. Schedule 7, Uniform Civil Procedure Rules 2005, clause 2.
45. Ibid at clause 5.
46. Above n.19 at [728].
47. Ibid at [729].
48. Ibid at [758].
49. Above n.8 at 352.
50. Above n.8 at 353, citing *Australian Competition & Consumer Commission v Emerald Ocean Pty Ltd* [2002] FCA 740 at [4].
51. Above n.8, at 352 and 353, citing *United Rural Enterprises Pty Ltd v Lopmand Pty Ltd* [2003] NSWSC 870 at [15]-[19].
52. See *Gilham v R*, above n.2. □