

## **+EXPERT EVIDENCE: OBJECTIVITY, SUBJECTIVITY AND ADVOCACY**

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### Abstract:

Expert opinion evidence in occupiers' liability cases, particularly those involving slip and fall accidents, must tread a fine line between objectivity and advocacy, the distinction being made more difficult in cases where informed subjective opinion and interpretation of data may be valid areas for the expression of expert opinion. In architectural copyright cases and town planning appeal cases involving analysis of design quality and originality the lack of a well established body of objective data puts experts at particular risk of lapsing into advocacy when giving opinions. This paper examines the difficulties for experts and courts.

### **1. Experts are not advocates for the parties**

In contrast to lay witnesses, expert witnesses are permitted to express opinions and to draw inferences from facts. An expert witness does not perform the function of advocate for the party relying on the opinion of the expert. Far from supporting the "client", such advocacy will tend to discredit the expert and taint or nullify the whole of that expert's evidence.

For example, in *Cubillo v Commonwealth of Australia* (unreported, Federal Court, Foster J, 14 December 1995) at pp 98-119, Foster J said of an expert witness, "He tended to be abrasive, partisan and dogmatic. He not infrequently appeared to assume the role of an advocate rather than of an impartial expert...Dr K's Theorising was shallow, unsubstantial and unacceptable" (Freckleton & Selby 2.250).

In *London Underground Ltd v Kenchington Ford plc* (1998) 63 Con LR 1 at 20, Wilcox J (QBD Technology & Construction Court) said of the engineer expert witness:

“The expert witnesses, as to the concourse slab claim in this case, were both impressively qualified academically and by professional experience. Each brought a wealth of long practical and relevant experience to the case. The weight of their respective evidence however I did not find equally matched...Throughout Mr Marshall demonstrated fairness and objectivity and a proper awareness of the role of the expert witness. Mr Courtney signally ignored his duty to both the court and his fellow experts in relation to the request for information DLR precast case [sic]. In relation to the concourse slab claim he seems to be affected by his earlier assumed role in LUL’s defence of KF’s fee claim; Mr Courtney has continued to assume the role of advocate for his client’s cause.”

and (at 33):

“It is a sadness to hear an expert prepared to write such a condemnatory report and support it by giving evidence in court alleging negligence against a fellow professional, on such a flimsy basis”.

In *Newbould v City of Canada Bay* (a slip and fall case in a public hall) His Honour Judge Naughton said in his judgment delivered on 1 February 2002 in the District Court of New South Wales, “Dr E’s report [relied upon by the Claimant] [was] largely based on speculation and inferences made by him which he considered necessary for the Claimant’s case to succeed”, “largely breached the rules in relation to the forensic use of expert witnesses” and his report “read like a barrister’s final submissions” and was “not objective”. Finding in favour of the defendant, His Honour stated that the Claimant’s case “failed to have regard to any other conflicting responsibilities and did not present a balanced analysis of the conflicting interests”.

In *F J Mancer Company Pty Ltd v St Mary’s Private Hospital Pty Ltd*, Supreme Court of New South Wales Common Law Division Building & Engineering List, unreported, 30 March 1990, Smart J said of an architect who had appeared as an expert witness for the building owners, at 185-186:

“L & H [a firm of architects; one of the defendants] submitted that Mr Moody acted as an advocate in his client’s cause and did not adhere strictly to the truth...Mr Moody was in a difficult position. He had an extensive knowledge of the building and its problems and how they had emerged and developed since August 1981...As he gave his evidence it was clear that this building had become part of him. He had become too close to them and his determination to fix Mr Lamaro, F H Smith & Associates Pty Limited, L & H and the Council with liability emerged. His manner of giving evidence was very much that of an advocate and not that of the independent, objective expert. There was a considerable amount of hindsight present in his opinions despite his assertions to the contrary. His evidence has to be approached with caution when he ventures into areas such as cause, expresses opinions or deals with professional standards, practice and knowledge of ordinary practising architects exercising due care and skill.”

## **2. Duties and responsibilities of expert witnesses**

The following passage from the judgment of Heydon JA in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 739 (a slip and fall case) includes the list of

duties and responsibilities of expert witnesses in civil cases set out by Cresswell J in his judgment in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd* (“*The Ikarian Reefer*”) [1993] 2 Lloyd’s Rep at 81-82:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation... .
2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise... . An expert witness in the High Court should never assume the role of an advocate.
3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. If an expert’s opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one... . In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report... .
6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side’s expert’s report or for any other reason, such changes of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.
7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports... .

Similar requirements have been enacted as part of the Rules in various Australian jurisdictions, including the Federal Court of Australia.

Expert evidence in New South Wales is primarily regulated by the *Evidence Act* 1995 (NSW) (ss. 76-80):

- s. 76. Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.
- s.77. The opinion rule [s.76] does not apply to evidence of an opinion that is admitted because it is relevant for a purpose other than proof of the existence of a fact about the existence of which the opinion was expressed.
- s. 78. The opinion rule does not apply to evidence of an opinion expressed by a person if:
  - (a) the opinion is based on what the person saw, heard or otherwise perceived about a matter or event; and
  - (b) evidence of the opinion is necessary to obtain an adequate account or understanding of the person’s perception of the matter or event.
- s. 79. 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.
- s.80. Evidence of an opinion is not inadmissible only because it is about:

- (a) a fact in issue or an ultimate issue; or
- (b) a matter of common knowledge.

After discussing the analysis of ss. 76-80 of the *Evidence Act 1995* (NSW) by Gleeson CJ (High Court of Australia) in *HG v R* (1999) 197 CLR 414 in which he “construed these provisions as enacting some of the central elements of the common law”, Heydon JA said in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 743-744:

“In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of ‘specialised knowledge’; 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; the opinion proffered must be ‘wholly or substantially based on the witness’s expert knowledge’; 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; it must be established that the facts on which the opinion is based form a proper foundation for it; and 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. If all of these matters are 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, so far as it is admissible, of diminished weight. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but, to use Gleeson CJ’s characterisation of the evidence in *HG v R* (1999) 197 CLR 414, 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’.”

### **3. Experts as advocates of their opinions**

There is a distinction between acting as advocate for the client’s cause and providing opinion evidence that supports or may support the client’s cause. If the two coincide a written report containing that opinion is likely to be served on the opposing side, resulting in settlement or a court hearing. It is not surprising that some or all of the opinions expressed by an expert witness in the report served by the party engaging the expert or opinions expressed in court by that expert in oral testimony tend to lend support to that party’s case. It would be surprising if such opinions were largely detrimental to the party’s case.

Opinions not supporting the “client’s cause” tend not to be served. That is not to say that such opinions have no value. An opinion in agreement or substantial agreement with the damaging opinion of the opposing party’s expert may lead to a settlement before the hearing has commenced. Consequently, the opinions in expert reports

served and relied upon in court by the opposing sides tend to be in conflict in whole or in part.

There is an important distinction between an expert witness acting as an advocate for the client's cause and persuasively putting forward the arguments in favour of an opinion supporting the client's cause. The difference is described in the following passage from *Arnotts Ltd v Trade Practices Commission* (1990) 21 FCR 313, in which the Full Court of the Federal Court of Australia quoted from Sir Richard Eggleston's opinion on the role of the expert as advocate in *Evidence, Proof and Probability* (2<sup>nd</sup> edition, 1983, p. 154):

“This is the area in which experts find themselves in the greatest trouble. It is of course not permissible for the expert to take over the role of the advocate from counsel in the case - the law does not allow unqualified people to act as barristers, except in special courts like industrial courts like the industrial tribunals or the small claims courts. But the expert has a legitimate role of advocacy in that, having expounded to the tribunal the rules applicable to the case (these may not even be in dispute), his evidence may then consist of an argument as to the conclusions that should be drawn from the facts, interpreted in the light of those rules. The difficulty arises because the expert often finds it difficult to distinguish between arguments on the assumption that the ‘facts’ put forward by his side are the correct ones, and telling the judge or jury which facts they should accept as true. If he makes his assumptions clear, there is no objection to his arguing what the consequences of accepting those assumptions should be; but he is not to do the jury's fact-finding for it, where this depends on accepting one or the other of contradictory witnesses” (cited with approval in the judgment of Heydon JA (New South Wales Court of Appeal) in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 738).

#### **4. Objectivity**

There are potential pitfalls in an expert acting as advocate for an opinion. One is to avoid or downplay factors detrimental to the client's cause. This is particularly tempting to do if no expert report has been served by the other side when the opinion is being prepared. The temptation must be resisted. Just as a well prepared legal case will consider the strengths and weaknesses from both sides, a well prepared expert opinion will consider all relevant aspects (on the assumed facts or facts as instructed or pleaded) whether or not they support the client's cause. An opinion playing down or ignoring the arguments against the client's cause is easily and ruthlessly exposed or characterised as partisan in cross examination.

It is highly inadvisable for an expert, under the influence of the adversarial environment of the common law system, initially, merely to provide objective data on aspects of the case supporting the client's cause, leaving the opposing expert (if any) to provide an opinion on unfavourable aspects and commenting on the initial opinion. To avoid unnecessary costs the client's legal advisers need to be able to assess as early as possible the likelihood of success. In fact a quick oral expert opinion can be very useful for prospective plaintiffs and defendants alike in preventing a hopeless case from commencing or proceeding to a court hearing.

If the case proceeds to a hearing the expert whose written testimony ignores or does not give due weight to detrimental factors (on the assumption that the expert on the other side will deal with the factors supporting the other party's case) will appear partisan. This impression will be reinforced by a skilful, or even pedestrian, cross-examination in which the expert will be invited to agree with the opinions of the opposing expert on matters supporting the other party's case and in which doubt will be cast on opinions apparently based on incontrovertible data and regarded by the expert as entirely objective. As it is a "prime duty of experts giving opinion evidence...to furnish the trier of fact with criteria enabling evaluation of the validity of the expert's evidence" (*Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 per Heydon JA at 729, citing *Davie v The Provost, Magistrates and Councillors of the City of Edinburgh* 1953 SC 34 at 39-40, in which Lord President Cooper was dismissive of the value of "an oracular pronouncement by an expert"; see also *R v Jenkins; ex parte Morrison* [1949] VLR 277 at 303 and other cases and judicial opinions cited by Heydon JA at 730), an opinion ignoring conflicting arguments suggests advocacy (for the cause rather than advocacy for the opinion) and is unlikely to give the impression that the criteria on which the opinion is based are adequate. This impression may be heightened if no expert is called for the other side. In any event, a "court is not obliged to take the opinion of an expert as conclusive even though no other expert is called to contradict it" (*Makita (Australia) Pty Ltd v Sprowles* (2001) 62 NSWLR 705 per Heydon JA at 745).

Heydon JA in *Makita* summarises the position as follows (at 731-2):

"The basal position is that what an expert gives is an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the assumption is based, or state explicitly the assumptions of fact on which the opinion is based. If other admissible evidence establishes that the matters assumed are 'sufficiently like' the matters established 'to render the opinion of the expert of any value', even though they may not correspond 'with complete precision', the opinion will be admissible and material: see generally *Paric v John Holland Constructions Pty Ltd* [1984] NSWLR 505 at 509-510; *Paric v John Holland Constructions Pty Ltd* (1985) 59 ALJR 844 at 846. One of the reasons why the facts proved must correlate to some degree with those assumed is that the expert's conclusions must have some rational relationship with the facts proved."

In *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 745, Heydon JA asked the following questions about the expert witness's report:

"Can it be said that [the expert's] report goes beyond a series of oracular pronouncements? Does it usurp the trier of fact? More vitally, did it furnish the trial judge with the necessary scientific criteria for testing the accuracy of its conclusion? Did it enable him to form his own independent judgment by applying the criteria furnished to the facts proved? Was it intelligible, convincing and tested? Did it go beyond a bare *ipse dixit*? Did it contain within itself materials which could have convinced the trial judge of its fundamental soundness?"

A technique often employed in cross-examination is to postulate a highly unlikely or remote event, so improbable as to have been ignored or barely considered by the expert when preparing the initial written opinion: "Can you say that such and such

could never happen?” It is submitted that the natural reaction of an expert asked such a question is to be dismissive, for two reasons. One is that to accede to such a remote possibility may be thought to weaken an otherwise very strongly held and solidly based opinion in support of the client’s cause. The other is that the question may be posing an almost absurdly remote possibility, unworthy of serious consideration. However, to deny the possibility of such an occurrence, however remote, is likely to have the opposite effect from that intended. Rather than showing the strength of the expert’s opinion under attack, by refusing to admit to the possibility of any weaknesses the expert is likely to appear dogmatic and unyielding in defence of an opinion supporting the client’s cause. Experts who deny a remote possibility may appear to be attempting “to formulate their empirical knowledge as a universal law”. This is not acceptable: *R v Parker* [1912] VLR 152 at 159 per Cussen J and *Clark v Ryan* (1960) 103 CLR 486 at 491 per Dixon J, cited by Heydon JA in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 746.

Two examples serve to illustrate the point:

1. The plaintiff fell down a stair in darkness after leaving a flat by the front door. The stair was very close to the front door. The expert architect for the plaintiff expressed the opinion that it was a breach of good practice for the architect to have designed the stair to be so close to the front door. In cross-examination he was asked whether an architect exercising reasonable care and skill would never design a stair to be in that relationship to a door. When asked a question in such absolute terms the expert architect was unable to rule out that possibility, however remote, and agreed that it was possible. This answer did not alter his opinion that the stair in question was in breach of good practice.
2. The plaintiff alleged that he slipped on a wet front porch and fell through the upper panel of a glazed front door. The expert architect for the defendant found that no rain had fallen in the area on the night in question, although did not rule out the possibility of dew (which does not show in rainfall records), tested the floor surface and found that it was slip resistant under the Australian standard, and expressed the opinion (based on measurements of distances and the plaintiff’s height) that the plaintiff would not have fallen against the glass panel if he had slipped on the area of the porch as alleged. Under cross-examination the expert was asked whether it was impossible for the plaintiff to have fallen against the glass. The expert architect answered, “I cannot completely rule out that possibility. All I can say is that in my opinion, for the reasons given, it did not happen.” The plaintiff lost.

Another pitfall is the risk of being drawn into the appearance of advocacy through skilful cross examination. It must be remembered that cross-examination is not a debate between two people with opposing views. Counsel conducting the cross-examiner is trying to weaken or destroy the force of the expert’s opinions. Cross-examination is not intended to show the strengths of the expert’s opinion. The expert naturally wishes to show the strength of the arguments in favour of his client’s cause. It is a mistake to try to make up for lack of opportunity provided for this in cross examination by giving answers not strictly relevant to the questions put, on the basis that the cross examiner has asked the “wrong” question, or to build up the arguments supporting that opinion by means of debating techniques. In a well prepared case, re-examination should be able to fill in the gaps in the answers given under cross

examination, if the expert's written opinion is not enough in itself to explain the opinion.

An important reason for a thorough analysis of all arguments for and against the client's case when the written opinions are being prepared is the likelihood that cross-examination will probe into the areas where the opposing party's case is strongest and will attempt to explore incidental matters not dealt with or only touched on by the expert. It is unwise to rely on pre-trial conferences with counsel to prepare for such questioning. The conferences may never take place or may be far too brief for all the relevant aspects of the case to be thoroughly explored. One experience of encountering a barrister about to go into court at 10.00 am with a brief received at 8.30 am that day is enough to show that the expert must be prepared well in advance with complete mastery of the material relevant to all of the arguments in support of and against all parties within the expert's field. Peripheral arguments and related material that appears irrelevant should be carefully considered in advance. It is too late after cross-examination has finished to think of a better answer. Re-examination is a poor substitute for thorough preparation by the expert before cross-examination.

It may be thought that a good test for an expert to use before signing off on an opinion is "would I have written the same report if I had been engaged by the other side?" In practice, the test may not be able to be applied in full when the nature of the instructions and assumptions is considered. Another militating factor may be the defendant's expert's reluctance to extend the boundaries of inquiry unnecessarily in view of the tendency for plaintiffs to "mould" evidence to expert opinion to advance their case (as was alleged in the *Makita* case (see extract from trial judge's decision in the judgment of Heydon JA in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 717)), (at least in New South Wales) for particulars to lack clarity, for particulars and the original statement of claim to be subject to amendment after expert opinions on the original pleadings have been considered, and in some cases for particulars to be amended or provided for the first time during the hearing in the plaintiff's testimony.

In the *Arnotts* case the court criticised an expert witness on the basis "that he attempted to act as advocate without making his assumptions clear. He did not assume a set of identified facts, consistent with those contended for by the appellants. Rather, he told the judge what facts he should accept" ((1990) 97 ALR 555 at 596).

The basis of the expert opinion should be crystal clear to the court. An example is an architectural glass injury case. The plaintiff alleges injury caused by falling against a glass shower screen in an aluminium frame. The premises appeared to date from the 1920s, but the shower screen was more recent. Expert architectural evidence served by the defendant might be as follows:

"From the architectural style of the building and its apparent age, my opinion is that it dates from the 1920s. At that time glass shower screens in aluminium frames were not used. Screw holes at both sides of the top of the doorway indicate that a shower curtain was provided at some stage and was subsequently replaced by the glazed shower screen. I have examined a shard of glass provided to me. I have been instructed [asked to assume] that the shard of glass is from the shower screen broken in the plaintiff's accident. The glass is



annealed glass with a surface pattern. I am aware from my experience in architectural practice that the glass is Pilkingtons "Satinlite". I specified that glass in 1973-1974 for bathroom windows. Mr X at Pilkingtons Australia has advised me that "Satinlite" has been in continuous production since the 1930s. The use of annealed glass in shower screens was permitted until the building regulations were amended in 1972 to require the use of safety glass in shower screens (copy attached). Accordingly, if the shower screen was built before 1972 it complied with the building regulations. If it was built after 1972 it was in breach of the building regulations. I have not been provided with any material enabling me to give an opinion on the precise date of construction of the shower screen."

This evidence is based on the assumption [or instruction] about the glass that could not be tested by the architect. As the plaintiff's case was that the injury was caused by annealed glass and that the defendant was negligent for not providing a shower screen glazed with safety glass, the type of glass was not in issue. The opinion about the possible age of the glazed screen is based on experience in architectural practice and expertise in identifying building age from architectural style, although nothing turns on that evidence as the critical date is the date on which the shower screen was installed. That date is unknown. (In some cases it is possible to find construction dates from building approval documents issued by consent authorities.) If there had been an issue about the type of glass, the basis of the expert's opinion (that the glass is annealed glass from the shower screen) is clear: the opinion about the type of glass is based on expertise; the assumption (or instruction) that the glass came from the screen is a stated assumption (or instruction). The opinion about the relevant regulations is based on the expert's reading of the regulations, copies of which are appended to the written report. The information from Pilkingtons about the availability of the glass from the 1930s is peripheral to the opinion and is hearsay. It could be tested in court, if necessary, by calling evidence from Mr X of Pilkingtons.

Generally speaking, it is preferable not to include hearsay in expert opinions and no opinion should rely on hearsay. In *R v Fowler* (1985) SASR 440 at 442, King J said,

"Strictly speaking it is not permissible for him [an expert witness] to recount what he has been told, as distinct from what he assumes as the basis of his opinion, as that would result in hearsay material coming before the notice of the Court. The strictness of this rule is often relaxed in civil proceedings where there is no jury, as the judge is able to disregard the hearsay as non-probative and discount the opinion if the assumption of the witness as to the correctness of the hearsay material is not substantiated by admissible evidence. But adherence to the rule is of the utmost importance when evidence is given before a jury." (Cited by Heydon JA in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 734).

## **5. Subjectivity**

Very few if any expert opinions are devoid of all subjective interpretation of data. It is necessary for the objective and subjective elements to be clearly differentiated. In at least two areas of current litigation, subjective expert opinion is unavoidable. One is the area of architectural copyright; the other is found in planning appeal cases relating to design merit.

Architectural copyright cases are likely to involve opinions coloured by subjectivity. For example, in *Ancher Mortlock Murray & Woolley Pty Ltd v Hooker Homes Pty Ltd* [1971] 2 NSWLR 278, two professors of architecture for the opposing parties disagreed on whether copying had occurred. Street J said, at 287, that this

“would appear a somewhat surprising divergence”, but went on to explain that the “reason for the divergence lies, however, in the differing approaches made by these witnesses to the problem under consideration...[Professor Johnson] has a high regard for the architectural quality of Mr Woolley’s plans, and hence the houses. He regards the plagiarism with distaste, and is understandably disposed to condemn it and those responsible for it.

“Professor Freeland also appears to admire the architectural concept expressed in the plans and houses. He also, along with Professor Johnson, regards the defendant’s houses as of less architectural quality. To his expert eye the differences are of greater significance by reason of the poor opinion he holds of the defendant’s plans and houses.”

To Street J, “It is impossible to avoid a subjective element entering into the determination of similarity. Indeed, my own assessment is coloured by the view that I have formed regarding the unmeritorious use made by the defendant of the plaintiff’s plans and houses.” (At 288)

Building and planning control legislation is inextricably bound up with value judgments. Thomas J said in *Broad v Brisbane City Council* (1986) 59 LGRA 296 at 298, “I do not think that the concept [of amenity] admits of a tidy ‘objective or subjective’ classification”. But there is general agreement that subjectivity is involved *Re Parramatta City Council; Ex parte Tooth & Co Ltd* (1955) 20 LGR(NSW) 60 at 75-76; *Jones v Shire of Upper Yarra* (1989) 38 APA 183 at 187; see also cases cited by Ryan (1987), pp. 203-205). Local authority administrators and functionaries, aldermen and politicians, designers and architects, landowners and, finally, the lawyers, judges, assessors and expert witnesses involved in the appeal process are all required, in some way, to interpret and apply the legislation. In doing so their subjective reactions and responses inevitably come into play. Social position, education, background, personal taste, and political predilections will all have some influence, just as they will in other areas of law, but the subjective element is more readily acknowledged than the other influences (Dickinson (1929), p. 309).

It would seem almost beyond question that the assessment of design quality involves subjective judgment (McAuslan (1980), p. 2; Norberg-Schulz (1963), p.15; Stretton (1970), p.274; Davis (1988), p.49; Costonis (1989), p. 435; Dickinson (1929), p. 309; Heap (1960), p. 387; Keene (1990), p. 40; Ryan (1987), p. 204; *Simpson v Hunters Hill Municipal Council* LGAT No 78-5870, 9/5/78, p. 2: “questions of aesthetics involve judgments which are often as much subjective as objective”). This has been officially recognised in England, for example, in the “Statement of Minister’s Policy on Design” (1959). While accepting that a design may be “plainly shoddy or badly proportioned or out of place”, the statement begins with the following:

“One of the objectives of planning is to prevent bad design and to encourage good. But unfortunately it is not possible to lay down rules defining what is good and what is bad; and much may in any event depend on the site. Moreover, opinions, even expert opinions, can often differ.” (Reproduced in Ministry of Housing and Local Government, *Selected Planning Appeals*, June 1959, p. 3 and 1961.)

Only rarely is the suggestion made that objective assessment of design quality is possible. An example is in the foreword to a report published in 1990 by the Royal Fine Art Commission calling for local authorities to draw up guidelines on matters of environmental impact, community impact and visual effect. The proposal is justified as “the seeking of objective standards of truth and beauty in the arts which is the foundation of our culture”. “Subjectivism [or the insistence that taste is an individual matter] is philosophically and intellectually inadequate and does not accord with the facts - selection of buildings or of areas for conservation is clearly based on objective standards” (Hillman (1990); cited in Saxon (1990), p. 66). It is difficult not to agree with Saxon (an architect partner in Building Design Partnership) that this is an astonishing eighteenth-century assertion” (Saxon (1990), p. 67).

But it is necessary to distinguish the question of whether the exercise of design judgment is subjective from arguments about whether such judgment is a proper concern for local authorities. Saxon does concede that some guidance by local authorities is admissible (Saxon (1990), p. 72). Council intervention becomes more widely accepted, perhaps, within a system of design control where it is possible to make an objective judgment on whether a design conforms to the pattern of subjective preferences of a particular community, as postulated by Costonis (1982), p. 435.

Expert evidence planning appeals on design merit falls into two categories: objective examination of a design for conformity with quantifiable aspects of a design code and informed or educated subjective opinion. In the *Ancher Mortlock & Woolley Pty Ltd v Hooker Homes Pty Ltd* copyright case referred to above, Street J referred, at 289, to the “practised eye” of Professor Freeland “on an inspection going beyond an instant appraisal on first impressions, that impressed the dissimilarities” on him. As long as specialised planning appeal courts exist to determine the design merits of proposals it seems valid for expert opinion evidence on subjective matters of design to be heard to assist the specialist tribunals in their deliberations, in much the same way that criticism by a panel of expert “design jurors” (often visitors to the faculty as well as faculty staff) of architecture students’ designs is a well established component of design teaching.

The function of educated subjective expert witness evidence or evidence of lay witnesses with standing to give opinions evidence can be seen in the Black Mountain Tower case, in which opponents of a proposed telecommunications tower in virgin bush in the Australian Capital Territory argued that it would be “positively displeasing” (*Kent v Johnson* (1973) 21 FLR 177 at 209). A different opinion was held by another witness, the portrait painter Sir William Dargie, who could see merit in the design of the tower as a piece of modern sculpture and as an accent of verticality which would be good for “the whole visual environment of Canberra basin and hills”. Smithers J regarded such subjective views “clearly, honestly and persuasively held” by lay witnesses as well as those “with town planning and architectural skills and experience able to speak with expertise” as “opinion of real

value from the point of view of the break in the skyline which the tower will create” (at 210).

In planning appeal cases involving design merit, subjectivity is inherent in the opinions expressed by architectural and planning experts in expert evidence about building aesthetics, streetscape and the like. The typical assessor in a planning appeal case is empowered to consider the merits of an application and is often qualified to do so as an expert on the topic. However, the opinions of architects, planners and other recognised experts on architectural design, planning and urban design are admitted in evidence in specialised planning appeal courts such as the New South Wales Land and Environment Court. The opinion of the architect of the design under review is also admitted in evidence.

Expert evidence of this sort, however subjective, may help the court to come to a decision. In this respect planning appeal cases are no different from other areas of law. In another respect expert evidence in the area of design review is unique. In cases involving aesthetics its purpose is to assist the court with the task of evaluating design merit (a process acknowledged by the courts as involving subjective judgment), to a greater extent than in the architectural copyright cases.

In the landmark post war planning appeal case of *Farley v Warringah Shire Council* (1948) 17 LGR(NSW) 9 Sugerman J, as he then was, was persuaded by expert evidence on the merits of Modernism, as espoused by Walter Gropius in his teaching at the Bauhaus before the Second World War and then at the Harvard Graduate School of Design, that it was in the public interest for Australian architects of repute to be permitted to try out architectural ideas with a European or North American pedigree. The case involved the rejection of a domestic design because the house had a flat roof. Walter Gropius was a staunch advocate of flat roofs, supposedly on the basis of logic, but in reality flat roofs were no more than a stylistic feature of Modernism with little or no logical basis. It was quite appropriate that the flimsy arguments of the expert witnesses in support of the proposition that all pitched roofs were bad should be met with the municipal response that all domestic flat roofs were ugly (see Cooke (1996)). The expert architectural evidence, which held that it was valid to ignore the architectural context, was no more free of subjective prejudice than the lay municipal arguments against flat roofs which at least were based on considerations of architectural context.

## **6. Judicial notice**

The conflict between the whims of fashionable architectural opinion and generally reactionary public taste is highlighted by Lord Denning’s decision in *Winchester City Council v Secretary of State for the Environment* (1979) 77 LGR 715 to accede to a request for expert opinion to be admitted on the basis that the design issue was a matter of “commonsense”. The issue was whether a proposed addition to a listed house was compatible with the old building. This is perhaps an extreme example of judicial notice, with echoes of the lay arguments supporting limits on clashes of architectural style in the *Farley* case.

A similar approach can be seen in the judgment of Callinan J in the Australian High Court decision in *Brodie v Singleton Shire Council* (2001) 180 ALR 145 at 240:

“Even if I were to assume that an action in negligence lay against the respondent for any failure to maintain or improve the footpath to keep or make it safe, whether as a matter of misfeasance or otherwise, I would not conclude that there was a failure in that regard because the footpath was not, despite what the expert witness was allowed to say, unsafe. The case of the applicant in negligence was that a differential in height between the concreted part of the footpath and the earthen part of it created a dangerous situation...A court is not obliged to accept that a matter of ordinary observation such as the readily apparent state of the footpath is a matter calling for expert opinion.”

The objection to the expert’s opinion that the pathway was unsafe appears to stem from the fact that the question of safety not only went to the ultimate issue but was based on a subjective analysis clouded by a question of law as the condition of the path was able to be analysed without expert assistance by the application of common sense. Callinan J held that there was

“no concealment of the difference in height [between the concrete path and the eroded ground beside the path]. It was plain to be seen. The world is not a level playing field. It is not unreasonable to expect that people will see in broad daylight what lies ahead of them in the ordinary course as they walk along. No special vigilance is required for this. The applicant herself admitted in cross-examination that she knew before the day of the accident that the earthen surface was lower than the concrete surface. The photographs tendered at the trial clearly show that there was a discernible difference between the kerb and the earthen verges. There was no negligence on the part of the respondent either in the construction of the footpath or in not keeping the concrete strip and verges level”.

For Callinan J, therefore, the condition of the path was not caused by the defendant’s negligence and the obvious condition of the path was not unsafe and did not result in a “hazard” (the word used by the plaintiff’s expert).

In *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 the plaintiff’s expert expressed the opinion that the treads of the stair on which the plaintiff fell were sufficiently slippery on the basis of his tests to be dangerous for common synthetic sole materials such as those used in the plaintiff’s shoes. The plaintiff succeeded at the trial and was awarded more than \$A1 million in damages. The relevant Australian standard (AS/NZS 3661.1:1993) specifies a minimum dynamic coefficient of friction for a pedestrian surface to be regarded as slip resistant, based on tests with a prescribed rubber slider fitted to appropriate test devices. It does not take into account the relative grip afforded by other types of shoe sole and heel materials on the surface. The New South Wales Court of Appeal found a lack of certainty in the scientific basis for that opinion that the stair was unsafe and preferred the lay evidence that there was no prior history of slipping accidents on the stair, reversing the trial judge’s decision. The plaintiff’s expert’s opinion relied to an extent on a subjective interpretation of his test results.

The prior history of accidents in the case of a clear breach of a statutory building code (for example, *Voli v Inglewood Shire Council* (1963) 110 CLR 74, in which the plaintiff was awarded damages for injuries suffered in the collapse of an incorrectly

designed stage floor in a municipal hall) is likely to be of less relevance than in cases of the *Makita* type where there is no clear breach of standards.

## 7. The ultimate issue

Expert witnesses in slip and fall and building design cases generally are frequently instructed to give an opinion on liability, whether the defendant was negligent, the allegations of negligence in the statement of claim, or the safety of a stair, ramp or some other building component alleged to be dangerous. Such instructions either explicitly or indirectly invite the expert witness to give an opinion on the ultimate issue. As all expert evidence has some bearing on the ultimate issue it can be difficult to draw the line between an opinion relevant to the court in its decision on the ultimate issue and an opinion purporting to decide the case. Expert opinions going to ultimate issues are not on that ground inadmissible (*Evidence Act* (NSW) 1995, s. 80; *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 per Heydon JA at 745), but a court is not bound to accept it, even if it is uncontradicted, particularly when it is on ultimate issues: *Brodie v Singleton Shire Council* (2001) 75 ALJR 992 per Callinan J (*Makita* at 705).

For example, if a structure collapses because of structural failure under normal load conditions and the structural design does not comply with a relevant statutory code an expert engineer or architect would be able to give evidence that the collapse was caused by failure to comply with the code and that a competent engineer would have designed in accordance with the code. Structural design codes are intended to produce safe structures. It is submitted that in a case where failure to comply with a code causes structural failure, an appropriately qualified expert witness is qualified to express an opinion on the safety of the structure. Such evidence, if uncontradicted, may be all that is needed to decide the case, but that does not entitle the expert to express an opinion on liability.

Lack of compliance with a building ordinance “does not in itself establish a breach of a duty of care” (*Makita* at 750); lack of compliance with an advisory standard does not “of itself establish” negligence by the architect or engineer (*Voli v Inglewood Shire Council* (1963) 110 CLR 74 at 85 (per Windeyer J)), although it may well be decisive (*Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners* [1975] WLR 1095); and it has been held that any departure from published recommendations should be based on “good scientific reasons” (*Victoria University of Manchester v Hugh Wilson & Lewis Womersley* (1984) 2 Con LR 43 at 74). But it is not for the expert to make the link between the departure from regulations or standards and liability.

It is submitted that it is equally inappropriate for an expert to make unequivocal connections between a defect and causation. That is for the court on the evidence. It may be helpful to the court for the expert to point to a breach of regulations or standards posing a potential hazard in the expert’s opinion. It is for the court to make the connection in the particular case. Even if the connection exists the plaintiff’s case may not succeed. For example, a “lay history of incident-free use” of stairs (as in *Makita* (at 750)) or similar lack of prior history of accidents may be relevant to the assessment of occupier’s liability, or the building may have been constructed before the publication of a standard, compliance with which would have eliminated the

hazard (as, for example, in the architectural glass injury case of *Jones v Bartlett* (2000) 176 ALR 137 (High Court of Australia)).

As with the ill-defined area of judicial notice, it is submitted that the expert should not be too particular about avoiding expressions of opinion going to the ultimate issue, although advocacy and opinions suggesting a fully formed opinion on the appropriate outcome of the case should be strenuously avoided. It is one thing for the defendant's expert to express the opinion that no breach of standards, statutory regulations or good practice has occurred. It is quite another thing to assert that the plaintiff has no case, even though the expert opinion may ultimately lead to that outcome. The "most important rule [is] that it is for the court to judge the reliability of evidence in support of the case" (*Pownall v Conlan Management Pty Ltd* (1995) WAR 370 at 390 per Anderson J, quoted by Heydon JA in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 741).

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