Law Reform

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Accident Investigation Services Pty Ltd, Sydney, September 2003
Editorial published in Momentum Journal Volume 11 No. 2.

Over the past few years we have experienced significant development of procedural law reform, part of which resulted in the development and introduction of the Expert Witness Code of Conduct that applies to various civil court jurisdictions. We have also seen much judicial research, presentation and precedent on the overall accreditation, accountability and admissability of expert evidence, particularly in reference to the field of accident investigation.

Two notable cases which every accident investigator should be aware of, are those of *Makita v Sprowles [2001] NSWCA 305* and *Fox v Percy [2003] HCA 22*.

These are cases which go to the very core requirements of expert evidence in accident investigation matters. Unfortunately, it is still the case that many practitioners (lawyers included), are still coming to grips with the concept and adherence to the Expert Witness Code of Conduct, and of admissibility issues generally, surrounding expert reports.

In the NSW Court of Appeal judgement of *Makita v Sprowles*, Justice Heydon noted at 85:

"……. 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 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."

In the High Court of Australia judgement of *Fox v Percy*, Justice Callinan noted at 149:

"…. Mr X (name removed) was described by counsel for the appellant as an "accident reconstruction expert". That is an ambitious claim. Three things may be said about the evidence in this case and running down cases generally. Rarely in my opinion will such evidence have very much, or any, utility. Usually it will be based upon accounts, often subjective and partisan accounts, of events occurring very rapidly and involving estimates of time, space, speed and distance made by people unused to the making of such estimates. Minor, and even unintended but inevitable discrepancies in relation to any of these are capable of distorting the opinions of the experts who depend on them. It is also open to question whether variables in relation to surfaces, weather, and the tyres, weight and mechanical capacities of the vehicles involved can ever be suitably accounted for so as to provide any sound basis for the expression of an opinion of any value to a court. The engagement of experts in running down cases, other than in exceptional circumstances, is not a practice to be encouraged."

In context, the cases of *Makita v Sprowles* and *Fox v Percy* give an abundantly clear message to the accident investigation expert, and the comments by Justice Heydon and Justice Callinan should not be taken lightly.

Your overriding duty is to assist the Court impartially on matters relevant to your area of expertise, and our high courts have directed us unequivocally on how this is to be done. You must be thorough and comprehensive in your reviewing of information, follow-up data collection, and recording; you must clearly identify and prove the facts and/or assumptions upon which you seek to rely; and your investigation process, research, calculations and conclusions must be fully set out in your report, in a clear and transparent manner. There is absolutely no room for speculation or conjecture.

If you are reviewing a previous factual or police investigation, then you, as the expert impartially assisting the Court, need to ensure that the investigation is credible and complete, has been documented correctly and adequately, and that no matters of significance have been overlooked.

As most of our members will be aware, there is often much information within a major police investigation that does not get to Court, and unless you have an understanding of their overall investigation process, you'll be none the wiser, and may well be later caught with your facts down. To unquestionably accept and rely upon a set of facts or assumptions from a client is not, in my view, conducive to professional conduct..

As noted by Justice Williams in his 2000 paper Accreditation and Accountability of Experts, *"… an expert opinion is often sought on a set of facts put forward by the client paying the bill. In those circumstances there is a temptation not to question the factual correctness of the data provided; the opinion will be given on the data without questioning its accuracy in circumstances where objectively that should be done."*
