

Expert Evidence

Checklist



Laina Chan

Barrister

Nine Wentworth Chambers

T: (02) 8815 9211

F: (02) 8815 9205

E: laina.chan@ninewentworth.com.au

Liability limited by The New South Wales Bar Association Scheme
approved under the *Professional Standards Act 1994* (NSW)

laina chan
barrister

Checklist for Expert Evidence

1. What are you trying to prove? You must know your case - both the facts and the relevant law.
2. Is the evidence that you need properly the subject of expert evidence?
 - (a) It must be agreed or demonstrated that there is a field of “specialised knowledge”.
 - (b) In a professional negligence case, expert evidence is admissible of an accepted or standard professional practice, conduct or standard. Expert evidence is also admissible of what is commonly considered professional practice of competent and careful professionals in the field.
 - (c) Expert evidence is not admissible of what the expert would himself or herself have done in the circumstances, at least if that evidence is tendered to support the inference that other careful and competent professionals would have done the same things professionally; nor is expert evidence admissible of what as a matter of law reasonable care is required; that is a question of law for the court and not for an expert.
 - (d) Expert evidence of what a competent and prudent practitioner would have done in the particular circumstances of the defendant is not admissible if, in effect, it is no more than one professional commenting on the conduct of another, at least in the absence of evidence that the expert has additional training, study or experience to demonstrate the acquisition of specialist knowledge of what a competent and prudent practitioner would do. However, expert evidence of what a competent and prudent practitioner would have done in certain circumstances may have been admissible if the witness has by training or experience such additional special qualifications or experience as to equip him or her to give evidence with competence of what the general body of competent and general practitioners would do (see *Lucantonio v Kleinot* [2009] NSWSC 853).

3. If it is, who would be qualified to provide that evidence?
 - (a) Expert evidence is admissible as an exception to the hearsay rule via section 79 of the *Evidence Act*. A person with specialised knowledge which can be based on the person’s training, study or experience is qualified to provide evidence of an opinion that is wholly or substantially based on that knowledge.
 - (b) They must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, studies or experience, the witness has become an expert.
 - (c) The opinion proffered must be “wholly or substantially based” on the witness’s expert knowledge.
4. How do you brief your identified expert? I suggest:
 - (a) Identify the assumptions upon which you would like the expert to base their opinion on.
 - (b) Have a preliminary conference with the expert to discuss with them the evidence that you need.
 - (c) Prepare the brief which will usually be structured in the following way:
 - Letter of instruction
 - Expert’s Code of Conduct
 - Assumptions of Fact;
 - Plaintiff’s (and co-defendant’s) expert reports.
5. On receipt of the draft expert report, work through the following:
 - (a) Has the expert acknowledged the relevant code of conduct?
 - (b) Has the expert sufficiently stated the assumed circumstances upon which the opinion is based? Where the expert witness does not sufficiently state the assumed circumstances of the defendant’s position on which the opinion is based, that may impact on the fairness to the defendant of admitting the evidence to such an extent as to warrant its rejection under (NSW) *Evidence Act 1995*, s 135, even if it is technically admissible.
 - (c) Is the reasoning process of the expert exposed? A good test is to test whether the question “why” has been answered in relation to each opinion proffered (the essential integers and rationale must be provided).

- (d) Has the expert restricted his opinion to matters within his experience? I.e, is the opinion “wholly or substantially based” on his “specialised knowledge”?
 - (e) If the report has been prepared by 2 persons, both persons should be qualified in the report with the intention that both experts may be eventually called to give evidence.
 - (f) If the opinion is based on facts “observed” by the expert, these must be identified and admissibly proved by the expert. In the case of medical reports, **beware** the operation of section 60 of the *Evidence Act* which allows a patient’s medical history given to a doctor is admissible as direct evidence of what was said and not hearsay.
6. Remember that:
- (a) Insofar as the opinion is based on “assumed” or “accepted” facts, they must be identified and proved in some other way.
 - (b) It must be established that the facts on which the opinion is based forms a proper foundation for it.
 - (c) The opinion of an expert requires demonstration or examination of the scientific or other intellectual bases 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.
7. Finally, are you satisfied that the intellectual processes of the expert are exposed, the factual assumptions have been clearly identified, and that these assumptions will be proved by a lay witness?

