

"Expert Evidence"

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Ian Freckelton and Hugh Selby.

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BOOK REVIEW

Ian Freckelton and Hugh Selby, *Expert Evidence*, Law Book Company, Sydney, 1993, Looseleaf Service, 4 Volumes, 11 Parts, 130 Chapters, RRP \$595.00 (plus cost of updates)

Ian Freckelton and Hugh Selby have put together a remarkable loose-leaf service on expert evidence. They are a formidable team. Their previous joint work was *Police in Our Society* (Butterworths, Sydney, 1988). At the Hobart Legal Convention in 1993 they teamed up again to provide a much publicised session on expert evidence, Mr Selby concentrating on aspects of survey evidence and Mr Freckelton on the expert evidence conundrum before the jury. Now here is the ultimate product. Four volumes, more than a hundred chapters separated from each other by colour-coded dividers. The divisions comprise:

- Part 1: Law and Practice
- Part 2: Methodology and Research
- Part 3: Investigation of Remains
- Part 4: Medicine and Chiropractic
- Part 5: Psychiatry
- Part 6: Psychology and Social Work
- Part 7: Drug Analysis
- Part 8: Forensic Sciences
- Part 9: Environmental Analysis
- Part 10: Finance
- Part 11: Building and Construction

In addition to the red dividers there are large numbers of grey markers which divide off the chapters of this remarkable collection.

The authors come to their task of writing the opening sections on legal issues and editing the remaining scientific and expert contributions from a long-standing interest in the subject of expert testimony. Mr Freckelton, in particular, has been working at this topic for a full decade. In fact, I must take part of the blame because I recruited him into the Australian Law Reform Commission in 1983. He set

to work on the Commission's project to reform Australia's laws of evidence. That took him into the sub-project of opinion evidence. His work on expert evidence was begun. Within this Service there is a good summary (8.860) of the moves towards reform of Australia's evidence laws. Those moves are continuing both at a federal and state level.

I shall return to the basic chapters on the law which open the Service in Vol 1. But for the moment, I want to describe the remaining sections.

The Parts dealing with methodology and research open with an interesting essay by Professor Benjamin Selinger of the Australian National University. He is a chemist and his text seeks to explain the scientific approach to probability theory. In 28.120 he states:

"Protecting the innocent means letting off some suspects who are guilty. The balance between these is arbitrary."

It is natural enough for the lay writer to draw the contrast between the "innocent" and the "guilty". This is an error which is sometimes made by lawyers as well. However, it is critical to our criminal justice system (and not irrelevant to a text on expert evidence) that the real contradiction should be seen as being between the "guilty" and the "not guilty". Although for social reasons the law may generally impute the "not guilty" verdict to an equivalence of a finding of innocence, the real search in the criminal justice system is not for innocence but for whether the community, represented by the Crown or its prosecutorial manifestations, has successfully proved that the accused is guilty.

There is a subtle distinction here. But it is important to the control of the organs of the State. The accused is very rarely required by law to establish innocence. It is the State which must prove guilt. Talk of "innocence" can therefore run the risk of raising false issues and confusing witnesses, jurors and even some judicial officers. It would be as well if experts, and those who write on expert evidence, understood from the outset this most fundamental characteristic of our

accusatorial criminal justice system. It is one not always understood in the community. It is also one with which officialdom is frequently impatient.

There follows a chapter on on-line and on-disk data bases which are available in Australia for members of the legal profession seeking to research particular subject matters. This a very practical section written by a skilled law librarian.

In Part 3, concerning investigation of remains, Professor Stephen Cordner, occupant of the Foundation Chair of Forensic Medicine at Monash University, explains the proper conduct of forensic pathology investigations at the scene, at the mortuary and on post-mortem examination. Those unfamiliar with the indicia of *rigor mortis* will find it described. So are the classifications of injuries and indications of suicidal injury or self-mutilation as distinct from injuries inflicted by others. Very properly, Professor Cordner pays tribute to the outstanding work of Professor B D Plueckhahn, *Ethics, Legal Medicine and Forensic Pathology* (2nd Edition), published by Melbourne University Press. This section concludes with a chapter on forensic dentistry, one on forensic osteology (skeletal remains) and one on forensic anthropology. Interestingly, the last deals with Aboriginal land claims. The first use of this expertise in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 was not fruitful. However, following *Mabo v The State of Queensland & Ors* (1992) 175 CLR 1 and the legislation it will produce, it may be expected that expert anthropological testimony will become more important in Australian courts and tribunals.

The second volume opens with chapters on medical negligence and clinical forensic medicine. Dr Arnold Mann, author of *Medical Negligence Litigation: Medical Assessment of Claims*, outlines and describes various medical examinations and the aetiology of conditions of medico-legal interest. Given the large part which personal injuries claims play in litigation in Australia, it might have been expected that this chapter would have been expanded. This is the place where most ordinary lawyers come face to face with an expert. That expert is usually a medical practitioner with particular knowledge which the lawyer has to try to test before the decision-maker. Of course, usually the lawyer will have a conflicting expert's opinion; but not always. I

have great respect for Dr Mann and I believe that he should be commissioned in future editions to expand this piece.

The chapter on chiropractor's evidence is interesting, given the expansion of this profession in Australia in recent years.

There follows a part on psychiatry which opens with an examination of various criminal issues. There is a useful explanation for terms which are not always fully understood ("psychosis", "delusion", "illusion", "obsession", "neurosis" etc). A chapter on forensic psychiatry in civil cases collects various syndromes typically associated with trauma. The author, Dr George Mendelson, seeks to assist by differentiating malingering from genuine psychiatric or functional impairment. Long ago it was said that the "devil himself knoweth not the mind of man". In the practical business of litigation, differentiation between the genuine and the phoney usually depends as much upon investigators' films and judicial impression of the claimant as it does upon the competing evidence of experts. An extremely interesting chapter (52) is provided on "The Paraphilias". Written by Dr Ellen Berah and the late Dr Robert Myers, it describes the course of "deviant sexual attraction". One naturally hesitates to embrace this notion, given that not long ago ordinary homosexual conduct was ranked "deviant" and still is by some. The manifestations of sexual fantasy are so varied that it is sometimes difficult to know where the line dividing the "acceptable" and the "unacceptable" is to be drawn. Certainly, the law draws the line at paedophilia. But differences exist in fixing the arbitrary age below which sexual activity of a young person is prohibited and sanctioned. In a recent decision, by a slender majority, the House of Lords upheld the criminal punishment of adult males involved in consensual sexual sadism and masochism. See *R v Brown* [1993] 2 WLR 556 (HL). The decision has proved controversial. The courts also face very great difficulties in responding to intrafamily accusations of sexual deviance. This problem is subject to a sensitive and useful chapter which describes the problem without, I am afraid, offering many new solutions. (Chapter 63)

The chapter (53) on "Transcultural Issues in Forensic Psychiatry" provides useful insights of great relevance to a multi-cultural society such as Australia. One quote is worth repeating:

"Doctor, be careful when you have a Japanese woman patient who is well dressed and made up. Please do not be confused or misled by her appearance of wellness. Presentation in Japan is everything. The Japanese smile must be hard for foreigners to understand. Even if we smile, it does not mean we smile from our heart. It is very difficult for us to frankly and honestly show others, especially a stranger, how we are really feeling."

There are other illustrations of the difficulty of judging people by their appearance. Given the acceptance by the High Court of Australia of the impregnability, for most purposes, of the assessment of a claimant or witness by the primary decision-maker - based upon appearances - it would be as well if the lessons of this chapter were more widely understood in the legal profession than find reflection in such decision as *Abalos v Australian Postal Commission* (1988) 171 CLR 167, 178ff. Despite nearly a century of scientific evidence to the contrary, lawyers continue to nurture the illusion that, with the judicial mantle, comes an unfailing capacity to discern truth-telling from falsehood by the appearance of witnesses in the highly artificial circumstances of the courtroom.

The section of the work on psychology and social work starts with a useful description by Mr John Taylor of the variety of psychometric tests available for differential purposes. This is followed up by Dr Ken Byrne's chapter on the mental health expert in personal injury and worker's compensation litigation. Some of this chapter overlaps the earlier description of psychiatric and personality disorders. There follow chapters on pre-sentence reports and Dr Byrne's examination of allegations of sexual abuse in family law matters. The growth of such allegations, not confined to cases in the Family Court, possibly reflects the removal of the inhibitions which formerly prevented the public revelation of alleged conduct, subject to heavy cultural taboos. On the other hand, the law is quite frequently revealed, starkly, in its inadequacy in responding to such intrafamily crises, given that the persons involved

cannot wholly escape their association because it is grounded in blood, and often, a kind of enduring affection.

These chapters are followed by a useful examination of psychopharmacology, eyewitness testimony and the use of social workers as experts. The first of these contains one of the best descriptions (by Dr Jason M White) which I have ever read of the impact of narcotic drugs upon the subject. The second is a useful collection of the ways in which terrible mistakes can occur based upon identification evidence. The third describes the large range of activities in which social workers are now involved - often to follow up the long-term problems when the court has done its work, closed its file and shut the doors.

Volume 3 contains an excellent series of chapters on illegal drugs, their toxicology, manufacture, pharmacology and use in horse racing and human sport. There is then a series of chapters in the part dealing with forensic sciences. The first of these, suitably enough (Chapter 80), is on DNA typing. It is followed by an examination of forensic biology, parentage testing, the investigation of fires, firearms evidence and a separate chapter on firearm discharge residues.

The fourth volume continues this detailed examination of forensic evidence with chapters on fibres and hairs, glass, paint, forensic botany, soil and related substances. There are useful practical chapters on forensic photography and the methodology of photographing the scene of the crime described with terse guidelines by Sergeant Trevor Blake of the Victorian Police. This is followed by a description of methodology in document examination and two chapters on the fingerprinting science.

The part dealing with environmental analysis includes chapters on pesticides, environmental toxicology, water microbiology and chemical water analysis.

In the closing parts of the fourth volume of the series is a section dealing with the wholly separate issues of actuarial evidence, property valuation and forensic accounting. Even the architect as a forensic witness is covered by a chapter written by Mr John Permewan, an architect of Melbourne.

So it will be seen that this series is truly encyclopaedic in its coverage. The opening chapters on the law deal with the basic problems presented by the expert to the legal system. It must establish that the person presenting as an expert, has appropriate qualifications and should be given more credence than any other witness. It must prevent so-called experts detailing what is in truth merely common knowledge upon which the judge or jury can be expected to speak for the community without the pressure of so-called expertise. Even if the experts demonstrate some qualifications, these should not be a mandate to roam at large, offering opinions outside the realm of qualified expertise. The expert should not be permitted to usurp the ultimate issue which is reserved to the decision-making tribunal established by law. Because science and technology are advancing so quickly, it is impossible to define with absolute certainty the outer boundaries of most realms of expertise. Yet courts must be wary of surrendering the effective decision, crucial to a point in contest, to a witness put forward as an "expert" who may have gone far ahead of the authenticated discipline which sustains the opinion offered. Finally, where expert opinion is offered on the basis of an understanding or assumption about certain facts, it is always important to ensure that those facts are established by evidence in the trial. Otherwise the opinion hangs in the air, and is inapplicable to the facts as proved.

These basic rules are simple and logical enough. Of course, there are common threads that run through them and which connect them with each other. They represent the response of a legal system which, in the past, submitted most factual decisions to determination by a jury of ordinary lay citizens. It is to protect that jury from being over-awed by the expert - surrendering their decision to the opinion of the witness - that the evidentiary rules of the common law were crafted. But those rules remain as useful reminders to the judicial decision-maker, of the limits of expertise, of the need to scrutinise its foundations and of the obligation to make decisions which cannot be surrendered to any witness, however impressive, skilled and apparently authoritative.

Against the background of some notorious Australian cases where expert testimony went wrong and occasioned what were later found to be miscarriages of justice, it is appropriate that such a thorough careful and detailed review of expert testimony should now be produced.

As I worked my way through the four volumes and 130 chapters, I was lost in admiration for the conception of these editors and the unflagging industry that produced such an army of chapter writers. Most of them appear to deserve the accolades boasted in the promotion: Certainly they are amongst the Australians best qualified to write the respective chapters assigned to them.

The price is, of course, substantial. The difficulty in marketing such a series will be obvious. Because of the nature of the specialisation of legal practice today, those particularly interested in the problems of equine drug evidence will usually have little interest in firearm discharge residues. Those concerned about expertise in chiropractic may never have to turn their attention to toolmark identification or operational interviews in fingerprinting analysis. Those required to cross examine an expert on noise analysis may never have to venture upon the theories of pharmacology. Yet were we to wait for a specialised book on water analysis or one on forensic osteology, we might wait a very long time. At least now, every judge, tribunal, lawyer and expert in particular fields in Australia can know that there is a series, to which resort can be had, for the basic facts necessary in the particular field of expertise. Those facts are prefaced with an excellent analysis of the developing law. This charts the requirements of expert testimony and the limits which the courts have placed upon its reception.

I do not say that the chapters of this work will provide a complete grounding of the relevant expertise in each case. Each chapter represents the digested information of a life-time's experience presented in a logical and attractive fashion and generally in about thirty or forty pages. To have any success in testing the expert and cross-examining expert evidence, much more will be needed than this. How otherwise can a lay lawyer or other advocate pit his or her questions against the skill and

experience of theoretical and practical qualifications that take years to acquire. For such a task, expert evidence of one's own, conferences and years of acquired facility are indispensable. I will never forget the sinking feeling as I, a young solicitor, sought to cross examine an expert surgeon for the first time. He seemed so cool and self-assured, even contemptuous as my questions were presented. I had an awful, sinking feeling that I was making no headway at all. With the passing of time, the acquisition of greater skills and knowledge, I did better. I suspect I would have been better still if I had had Freckelton and Selby available to me.

The size and dimension, not to say the cost, of this major work will put it beyond the reach of many, probably most, ordinary legal practitioners. But every library should have this work. And I wish it well for commercial as well as intellectual success. It is a prodigious effort of legal publication in an area of the law where there are many risks of error and injustice. It is important that every Australian judge and lawyer - and many experts besides - know that this work exists. I know of no equivalent publication, anywhere in the world, that accepts the challenge of such a comprehensive feat of scholarship and relevant expertise on such an important topic.
