Clark v Ryan - [1960] HCA 42

HIGH COURT OF AUSTRALIA

Dixon C.J., McTiernan, Fullagar, Menzies and Windeyer JJ.

CLARK v. RYAN
(1960) 103 CLR 486
5 July 1960

Evidence

Evidence—Expert witness—Qualifications—Opinion evidence—Principles governing admissibility—Evidence wrongly admitted—New trial.

Decisions

July 5.
The following written judgments were delivered:-
DIXON C.J. The questions upon which this appeal depends are the admissibility of some opinion evidence in reference to the causes of a collision on the highway between two motor vehicles, and, if the evidence be inadmissible, the consequences upon the validity of the verdict of erroneously admitting it. (at p489)

2. The accident upon the highway occurred on 8th September, 1955. It was in broad daylight but on a drizzly day at a place called Piles Creek some miles south of Gosford on the Pacific Highway.

Ryan, who is the plaintiff-respondent, was driving a panel-van northwards. Clark, the defendant-appellant, was driving a semi-trailer southwards. It was an articulated vehicle about six tons in weight unladen and forty-five feet in length. The prime-mover ran on two wheels at the front and two double wheels at the back and the trailer on two double wheels at the back. As the two vehicles approached the respective speeds as estimated in the evidence were thirty to thirty-five miles per hour for the semi-trailer and thirty miles per hour for the panel-van. At a bend in the road involving a left-hand swing for the semi-trailer and a right-hand movement for the panel-van, as they were nearing one another the semi-trailer "jack-knifed"; that is to say, instead of following the prime-mover round the bend in an apparent curve, it and the prime-mover took the form of a half-open clasp knife, the right-hand corner of the tray of the semi-trailer coming across the centre of the road well upon the wrong side of the road. Ryan in his panel-van in an attempt to avoid it ran off the bitumen into the channelling on his left; but the right-hand side of his van hit the right-hand corner of the semi-trailer and he was seriously injured. The plaintiff's case was that having regard to the nature of the defendant's vehicle, the wet roadway and the approach of the plaintiff's van, the defendant attempted to turn round the bend at an excessive speed. The defendant's case was that there had been a film of dust on the road surface at that place which became in consequence very slippery, once it was wet with the rain, causing him to go into a skid and that his speed was not excessive. The jury found for the plaintiff and the Supreme Court dismissed an application for a new trial by the defendant. From the order dismissing his application the defendant now appeals as of right to this Court. (at p490)

3. In the course of his charge to the jury Maguire J. before whom the action was tried, referred to the evidence given by a Mr. Foster Joy who was called on behalf of the plaintiff as an expert witness. His Honour said in effect that according to that evidence, if the jury accepted it, such a vehicle as the defendant's has particular characteristics one of which is that in taking a bend it has a tendency to swing out: in other words there is a time lag between the alteration in the direction of the prime-mover and of the trailer. If that was so the jury might take the view that the exercise of reasonable care required a different handling perhaps for such a vehicle, a greater degree of care than would be called for in driving an ordinary motor vehicle. The appeal to this Court is based upon the contention that the evidence of Mr. Foster Joy was inadmissible. His evidence was in fact more extensive than the passage referred to by his Honour and it was tendered upon the footing that he was a qualified expert and that the opinions he expressed formed part of the subject of his special knowledge. It is not easy to define the subject of his special knowledge. He said that he was a consulting engineer formerly practising in the city but now at Manly, and he had had fifty years experience of engineering problems in Australia; over a great number of years he had been engaged in investigating road accidents for insurance companies and others and in assessing losses. His investigations covered accidents in which semi-trailers had been involved. He had no engineering diploma or certificate but from 1907 to 1912 he served an apprenticeship with an engineering company and at night studied applied mechanics, drawing, physics and mathematics at a technical college. He described his subsequent employment in various kinds of work related to engineering. The evidence which after objection the witness was permitted to give was not directed to any precise matter of engineering or special knowledge which might have been the subject opinion evidence if Mr. Foster Joy had been qualified as an expert to give such evidence. It dealt with the movements and tendencies of a semi-trailer in an articulated vehicle. The learned judge had ruled that the witness could not state his opinion on the causes of the collision between the two vehicles but under cover of saying as an expert what might cause vehicles to behave in different ways according to circumstances (a thing his Honour ruled that he might do) the witness did in substance and effect put before the jury his opinion in detail of the causes of the accident and how it was brought about. If it had been desired to prove how in fact semi-trailers of the kind driven by the defendant Clark do in

practice behave, perhaps a witness or witnesses experienced in their actual use might have given admissible evidence, not of opinion, but of the fact. But Mr. Foster Joy did not possess that experience. If it had been desired to give technical evidence of the physics involved and of any relevant opinions deduced therefrom, possibly that might have been done by a qualified witness although one may doubt how intelligible to the jury the evidence would have been and what useful purpose it would have served. But it certainly does not appear that Mr. Foster Joy was qualified to give such testimony and in fact he did not essay to do so. What in truth occurred was to use the witness to argue the plaintiff's case and present it more vividly and cogently before the jury. (at p491)

4. The rule of evidence relating to the admissibility of expert testimony as it affects the case cannot be put better than it was by J. W. Smith in the notes to Carter v. Boehm, 1 Smith L.C., 7th ed. (1876) p. 577. "On the one hand" that author wrote, "it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it." Then after the citation of authority the author proceeds: "While on the other hand, it does not seem to be contended that the opinions of witnesses can be received when the inquiry is into a subject-matter the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it." Adopted by Harding A.C.J. in Reg. v. Camm (1883) 1 QLJ 136 . (at p491)

5. In R. v. Parker (1912) VLR 152 , one of the cases establishing the evidentiary use of finger prints to prove identity, Cussen J. in that connexion said that expert witnesses may give in evidence statements based on their own experience or study but that they cannot be permitted to attempt to point out to the jury matters which the jury could determine for themselves or to formulate their empirical knowledge as a universal law. To this should be added the observation made by Vaughan Williams J. during the argument of Reg. v. Silverlock (1894) 2 QB 766 , viz. "No one should be allowed to give evidence as an expert unless his profession or course of study gives him more opportunity of judging than other people." (1894) 2 QB, at p 769 The words "profession or course of study" have of course a wide meaning and application; see per Lord Russell C.J. (1894) 2 QB at p 771 . The evidence of Mr. Foster Joy included much that offended against these principles. Some of it was evidence of opinion that lay outside any qualifications that upon any view however benevolent he could be supposed to possess. Some of it was an attempt to guide the jury upon matters which it was within the ordinary capacity of jurors to determine for themselves. Perhaps particular pieces of evidence may be picked out concerning the behaviour of the kind of semi-trailer the defendant Clark drove but Mr. Foster Joy was not qualified by practical experience to give evidence of their behaviour in fact. In short no small part of his evidence was outside the range of opinion evidence by experts and as to more still Mr. Foster Joy was not a qualified expert. The objection to its admissibility should have been sustained. (at p492)

6. This conclusion, of course, means that prima facie the defendant is entitled to a new trial. But a very serious question arises as to whether countervailing considerations exist sufficient to outweigh the prima facie right. After all, the matters about which Mr. Foster Joy spoke were things upon which the jury could judge for themselves unencumbered by his assistance. His evidence really amounted to putting from the witness box the inferences upon which the plaintiff's case rested. A further consideration is that the plaintiff's case is in any case strong and moreover it is now a very long time since the happening of the accident. These considerations are by no means without weight, but on the other side it must be remembered that on the defendant's part the reception of the

evidence was strongly objected to, while on the plaintiff's part it was strongly pressed. The purpose was to influence the jury to accept the inferences supporting the plaintiff's case and no one can say that the evidence did not contribute materially to the result. A new trial therefore seems an unavoidable consequence of the inadmissibility of the evidence. (at p492)

7. The appeal should be allowed and a new trial directed. (at p492)

McTIERNAN J. The plaintiff suffered serious and permanent personal injuries in a collision between a panel-van which he was driving on the Pacific Highway towards Gosford and a semi-trailer which the defendant was driving on that road in the opposite direction. The plaintiff alleged in the action that his injuries were caused by the negligence of the defendant, consisting in a breach of his duty to drive the semi-trailer with reasonable care and skill. The defendant denied the allegation of negligence. The case was tried by Maguire J. with a jury, who returned a verdict for the plaintiff with damages amounting to 23,245 pounds. The defendant appealed to the Full Court of New South Wales. (at p493)

2. His major ground of appeal was that the damages were excessive and a minor ground was that a witness, W. F. Joy, a professional engineer, was not sufficiently qualified to give evidence as an expert regarding the movement of a semi-trailer which the witnesses in the case called "jack-knifing". This is a term applied to the behaviour of a semi-trailer by truck drivers when the prime-mover, for example, enters a bend with a downward grade and the wheels of the trailer continuing their course, that part of the vehicle swings away from the prime-mover. (at p493)

3. The Full Court, (Owen, Richardson and Brereton JJ.) unanimously dismissed the appeal. They affirmed the decision of Maguire J. that the witness, W. F. Joy, was sufficiently qualified to give evidence as an expert on the phenomenon of "jack-knifing" and its causes. (at p493)

Following paragraph cited by:

Superannuation Warehouse Australia Pty Ltd and Australian Securities and Investments Commission (31 January 2019) (Deputy S A Forgie P)
Vestas - Australian Wind Technology Pty Limited and Comptroller-General of Customs (31 May 2017) (Deputy S A Forgie P)
Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd (No 8) (20 November 2014) (Dixon J)
CONFIDENTIAL and COMMISSIONER OF TAXATION (01 March 2013) (Deputy President S A Forgie)
Re Baini and Commissioner of Taxation (12 July 2012) (Deputy President S A Forgie)
Munro and Repatriation Commission (24 November 2010) (Deputy President S A Forgie)
JTMJ and Australian Securities and Investments Commission (11 May 2010) (Deputy S A Forgie P)

> 50. Opinion evidence that is given by a person who has specialised knowledge based on the person's training, study or experience and that is wholly or substantially based on that specialised knowledge is in a different category. It is admissible in the courts as an exception to the opinion rule [22] and is taken into evidence in the Tribunal. As Gaudron J expressed the principle in *HG v The Queen*: [23]

> *"The position at common law is that, if relevant, expert or opinion evidence is admissible with respect to matters about which ordinary persons are unable 'to form a sound judgment … without the assistance of [those] possessing special knowledge or experience … which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience'."* [24]
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> *via*
> [24] *HG v The Queen* (1999) 197 CLR 414; 160 ALR 554 at 432, 566 ; [58] quoting from a judgment of King J in *R v Bonython* (1984) 38 SASR 45 at 46-47 and see also *Clark v Ryan* [1960] HCA 42; (1960) 103 CLR 486 at [4] ; 491 per Dixon CJ adopting the notes by JW Smith to *Carter v. Boehm* 1 Smith L.C., 7th ed. (1876) p. 577

4. In the defendant's notice of appeal to this Court these two grounds of appeal were taken, but the question of W. F. Joy's qualification to give evidence as an expert was put first and the question whether the damages were excessive relegated to last place. The latter ground of appeal was abandoned at the hearing. (at p493)

5. A witness, A. J. Brown, who was sitting next to the plaintiff in his panel-van, gave evidence of the collision. The plaintiff could not give evidence as to how the accident occurred. He broke down after answering a few questions and could not continue giving evidence. The evidence of the witness A. J. Brown began with events occurring when the panel-van was approaching Piles Creek on the Pacific Highway over which there is a bridge or culvert. The panel-van was travelling north on its correct side of the road. It was descending a grade towards the bridge. The incline on which they were running was about a third of a mile in length. On the opposite side of the bridge the road bent to the right and it was downhill on that road until near the bridge. The witness said that you could see from the panel-van across the gorge between the two sections of the road divided by the bridge, and it was daylight at the time. Continuing his evidence, the witness A. J. Brown said he saw a semi-trailer coming down the road on the further side of the bridge and it was travelling on its correct side when he first saw that vehicle. Then the witness said that he noticed that the semi-trailer "seemed to be going across the road" and that "when it approached the corner I saw the trailer pass the prime-mover of the truck in the centre of the road". He described the movement of the trailer as a "jack-knife". Describing the further movement of the semi-trailer he said its trailer part was coming down on the side of the centre of the road on which the panel-van was being driven, and the trailer part of the defendant's vehicle was passing the cabin of the prime-mover. Before the panel-van reached the bridge the witness said that the plaintiff drove it off the bitumen to the ditch running on their correct side of the road. The evidence shows that this manoeuvre, obviously the only one which the plaintiff could take, did not succeed in taking the panelvan out of the course of the jack-knifing trailer of the defendant's vehicle. The right front end of the trailer crashed into the driver's compartment of the panel-van. The plaintiff suffered most serious injuries and the witness, A. J. Brown, was also injured, but was not rendered unconscious. His estimate of the speed of the semi-trailer when he saw it coming downhill towards the bridge was thirty-five miles an hour and he said that the vehicle did not slacken speed from the time he saw it until the collision occurred. The witness was, according to his evidence, an experienced driver of motor vehicles. At the time the accident happened it was drizzling rain. The evidence of the witness A. J. Brown, which I have set out, states the substance of the plaintiff's case. (at p494)

6. Some particulars of the semi-trailer which appear from the evidence are that it was unladen, its

unladen weight was six tons and it was forty-five feet long. (at p494)

7. The defendant gave evidence that there had been enough rain to wet the road, that his semi-trailer was running down the road towards the bridge, its speed was thirty miles an hour and he was driving on his correct side of the road ; and that as he came to the bend in the road he could see the panel-van when it was two hundred yards away. (at p494)

8. The evidence of the defendant, on which he asked the jury to exculpate him from the plaintiff's allegation of negligence, was short. It was to the effect that when he passed over the bridge he "touched" his trailer brakes. He said that is "an extra precaution taken on bends", more so in wet weather ; and when he touched the brakes "the trailer seemed to skid and I slid into a jack-knife and crossed the road". According to his evidence, the trailer was about three feet over the centre line of the road when it collided with the plaintiff's panel-van and pushed it off the road "leaving the corner of the trailer embedded in the side of the panel van". His evidence as to speed "in the very last moment" before striking the panel-van was that the speed "could be probably down to fifteen or twenty miles an hour". The defendant made no allegation of contributory negligence against the plaintiff. The plaintiff's allegation of negligence was founded upon the evidence of the speed at which the defendant drove the semi-trailer down the hill into the bend. The plaintiff sought to prove that speed could be a factor contributing to the jack-knifing of a semi-trailer travelling on a winding road such as that on the Gosford side of the bridge and taking the severe bend in the road. The jury or some of them may not have needed any enlightenment on this subject. But it is not possible to determine a priori the amount of knowledge which a jury may have of the subject or that they have sufficient experience of the behaviour of articulated vehicles to be capable of forming a correct judgment upon it. The plaintiff's advisers acted wisely in calling an expert to give evidence on the subject, especially as the defendant's case was really that his vehicle actually skidded across the road because of its wet condition, thus seeking to negative any negligence on his part. As stated above, the expert was W. F. Joy, a professional engineer. (at p495)

9. In summing up to the jury the learned trial judge gave only the following direction on the expert's evidence. "According to the evidence of Mr. Foster Joy, if you accept it, that sort of vehicle" (an articulated vehicle) "has particular characteristics which are not associated with the ordinary motor car and one of the characteristics, according to his evidence, if you accept it, is on taking a bend an articulated vehicle such as this we are concerned with has a tendency to swing out ; in other words, there is a time lag between the alteration in the direction of the prime-mover on the one hand and the trailer portion of the vehicle on the other". Continuing, the learned judge said this : "You are entitled to consider all the circumstances of the case. What might be a perfectly proper speed to drive any particular vehicle on a straight road might not be a proper speed to drive that same vehicle at, be it semi-trailer or not, when one is negotiating a bend in the road. What might be a perfectly proper speed for any sort of a vehicle on a dry road might not be a proper speed on a wet road. I am mentioning these matters merely as being matters that you are entitled to take into consideration in determining whether or not reasonable care was or was not exercised by the defendant, Mr. Clark, in relation to this particular vehicle on this particular day under the particular circumstances where this accident occurred". In the Full Court, Owen J., who gave the judgment for the Court, dealt with the ground of appeal founded upon the objections to Mr. Joy's evidence at the trial as follows : "In the course of the plaintiff's case, a man named Joy was called, he being a person who is not unknown as a witness in these courts, and who, not infrequently, is called to give so-called scientific evidence in motor-car collision cases. The objection made to his evidence was that it was not shown that he was sufficiently qualified as an expert to give the evidence which he in fact gave. His evidence was to the effect that, where a vehicle such as a semi-trailer is travelling downhill and the prime-mover is

turned to its left, centrifugal force tends to cause the rear part of the vehicle to swing out to its right. He said also that where, as here, such a vehicle was travelling at thirty-five miles per hour downhill that tendency would operate, and expressed the opinion that that was probably the cause of the accident. This evidence was objected to on the ground that the witness was not sufficiently qualified to give it. I feel considerable doubt whether it needs such expert knowledge to be qualified to express an opinion of that kind. The matter is one on which I would have thought any intelligent person could speak with some authority but, in any event, I think the witness was sufficiently qualified. He said that he had had considerable experience in the investigation, on behalf of insurance companies and others, of road accidents and their causes, and I think it is impossible to say that the learned judge fell into error in allowing the evidence to be given, although, for my part, I would not have thought that the weight to be attached to it would be very great". This passage contains an accurate statement of the substance of the evidence given by Mr. Joy which the defendant contends was inadmissible. That evidence was clearly admissible if Mr. Joy was sufficiently qualified to give it. At the outset of his evidence he gave some evidence of his qualifications and then he gave considerable evidence without objection. It included this evidence : "Q. You have heard evidence as to the semi-trailer's movement along the road ? A. Yes. Q. With a vehicle such as that, an articulated vehicle, it depends for its movements upon traction from the prime mover, in front ? A. Yes, and in this case it was approaching down a grade - I saw the scene of the accident and I viewed the road approaching the scene, and from the northern end and the southern end, in other words, from the Gosford end and the Sydney end, the road has a bitumen surface approximately twenty to twenty-two feet wide with gravel shoulders eight feet wide on the one side and four feet wide on the other side. They both approach a distance of flat, reasonably level road. They both approach down the grade towards the bridge over Piles Creek and a distance of flat and reasonably level road in two directions - by two directions I mean level longitudinally in the direction of travel and level transversely - there is no bank on the road at that point. Approaching from the Gosford end it is a long grade approximately one in three - I am wrong, one in thirty-three - and it winds slightly but it is approximately - you can see at least a third of a mile of it and it is a downgrade, a gentle well made downgrade all the way. Q. That is from - . A. From the Gosford end coming towards Sydney ; coming from the north and proceeding south. On the other side of the bridge there is also a long wellformed downgrade, slightly steeper, about one in twenty-five and of the same width - twenty to twenty-two feet, of bitumen with gravel shoulders eight feet and four feet. That approaches the level portion at the bottom near the bridge. The two form nearly a right-angle, not quite a right-angle, the junction being the bridge and the flat portion of the highway, thereabouts. Q. The flat portion is south of the bridge ? A. Yes. Visibility for drivers, of both motor vehicles, that is approaching from the southern end or the northern end, would be good. In this case, I was shown a position on the roadway where the Standard Vanguard . . ." That was the plaintiff's panel-van. The objection to the witness giving expert evidence was made when the plaintiff's counsel, having summarized to the witness the material facts proved by the evidence led for the plaintiff describing how the accident happened, asked Mr. Joy this question : "Assuming that happened, what in your opinion was the cause of that occurring ?" In rejecting that question the learned trial judge said that if the witness was sufficiently qualified he could tell the Court what can cause vehicles to move in certain ways, but that is not the same thing as asking him to express an opinion as to what caused the defendant's vehicle to move in the way described in the evidence led for the plaintiff. Then plaintiff's counsel asked a question framed in accordance with the judge's ruling. Counsel for the defendant objected to the question and challenged the qualifications of the witness to express an opinion on "the behaviour of motor vehicles on roadways, and particularly the behaviour of semi-trailers on roadways". Counsel for the plaintiff elicited from the witness that he had investigated accidents in which semi-trailers were involved on a number of occasions, that the accidents had happened on curves and grades and that in cases of some of the accidents a semi-

trailer had moved from its side of the road on to the other side and the impact was with the front end of the trailer. The witness further said that over many years he had been considering such problems and had made reports to persons engaging him to consider them. Counsel for the defendant then asked leave of the Court to ask the witness questions on the voir dire. The evidence which the witness gave at the outset before his qualifications were called into question was as follows. He was a professional engineer and had been in practice for thirty-six years and had fifty years experience of engineering problems in Australia and abroad. In the course of his practice he had investigated road accidents for insurance companies and aircraft accidents for Lloyds Aviation Group ; he was Lloyds' aviation surveyor for twenty-five years : during the war he was an engineer officer in the Royal Australian Air Force : he is a past Associate Member of the Institute of Engineers and past Associate of the Institute of Engineer Surveyors. As I have already stated, his evidence proved that he investigated many accidents in which semi-trailers were involved, on curves and grades and where, as in the present case, the surface of the road was bitumen. On the voir dire counsel for the defendant asked the witness questions as to his investigation of accidents in which semi-trailers were involved. The witness gave a number of specific instances. Some were cases in which the witness said that he "personally accompanied the driver on a reconstruction of an accident with regard to the behaviour of semi-trailers attached to prime-movers". Asked whether he had done any automobile engineering course, the witness said he had not, adding that he had been trained in places where automobile engines have been built. His present practice, he said, is particularly "in engineering surveying ; surveying machines" ; and that it also involves "automobile engineering work of various kinds where an opinion is required or an investigation or report with regard to causes of failure or causes of something else happening on roads is concerned, and traffic engineering". In order to carry out such work he said : "You have to have general knowledge of the vehicle and its power, and its weight, its length and its steering, manoeuvring and its braking and the rate at which it travels grade both ways, if there are grades both ways". The semi-trailer in the present case was an "International". In answer to questions the witness said that he had in the course of his practice examined the engines of many of such vehicles and personally inspected and supervised their dismantling and repair. The enquiry into the qualifications of the witness went back to his apprenticeship in the Clyde Engineering Co. at Granville and his studies at the Sydney Technical College where the subjects which he studied were mathematics, applied mechanics, drawing and physics. There is much more in the appeal book which was elicited in the course of the enquiry on the voir dire as to the qualifications of the witness to be called to give evidence as an expert in this case. It is sufficient to say that it strengthens the proofs of his qualifications which have been detailed, if indeed that is necessary. In the case of Reg. v. Silverlock (1894) 2 QB 766 , Lord Russell C.J. discussed the question whether a witness was an expert on handwriting. He said that to be qualified to give evidence as an expert a witness need not become peritus in any definite way. "The question is," said Lord Russell, "is he peritus? Is he skilled? Has he an adequate knowledge? Looking at the matter practically, if a witness is not skilled the judge will tell the jury to disregard his evidence. . . . When once it is determined that the evidence is admissible, the rest is merely a question of its value or weight, and this is entirely a question for the jury, who will attach more or less weight to it according as they believe the witness to be peritus" (1894) 2 QB, at p 771 . In my opinion, there was evidence on which the learned trial judge was justified in holding that Mr. Joy had sufficient knowledge and experience on the subject of the jack-knifing of semi-trailers to warrant the opinion which he expressed as to what are the probable causes of jack-knifing, to be left to the jury, and that the direction which the learned judge gave as to that evidence was correct. I think that the reasons of the Full Court for its judgment on that question are right. In my opinion, the appeal should be dismissed. (at p499)

FULLAGAR J. I agree with the judgments of the Chief Justice and Menzies J., which I have had the

advantage of reading, and I do not think that there is anything that I can usefully add. (at p499)

MENZIES J. In an action by the respondent against the appellant for damages for personal injury, the jury returned a verdict in favour of the plaintiff for 23,245 pounds damages. The collision between a panel-van driven by the plaintiff in a northerly direction along the Pacific Highway and an unladen six-ton semi-trailer transport driven by the defendant in a southerly direction, which gave rise to the action, took place at a point on the road some five miles on the Sydney side of Gosford. At the time, light drizzling rain was falling and the road was wet. The plaintiff was unable to remember the accident or anything about it, but the evidence of a passenger in the panel-van, one Brown, was to the effect that the collision occurred because the semi-trailer did not follow the course of the prime-mover as it came up to a left-hand curve on a flat section of the road after coming down a decline, but the front off-side corner of the trailer first projected across the centre of the road, then the trailer overran the prime-mover and both slid or broadsided across the road and crashed into the panel-van, which the plaintiff, attempting to avoid a collision, had swung over to the extreme edge of his correct side of the road. The defendant's version was different. He gave evidence that when he touched his brake, the wheels of the semi-trailer skidded to the right on a mucky section of the road and that the collision occurred when the semi-trailer had reached a line about three feet across the centre line of the road. (at p500)

2. An appeal upon both the question of liability and the quantum of damages was dismissed by the Full Court. This appeal is concerned with the question of liability only, and the one ground taken is that certain evidence tendered on behalf of the plaintiff and objected to on behalf of the defendant was wrongly admitted. The Full Court held that the evidence was admissible. (at p500)

3. The evidence in question was that of Mr. Foster Joy, whom it was sought to qualify as an expert to support Brown's factual evidence by giving scientific reasons for a vehicle behaving as Brown described the movements of the transport. After an examination of Mr. Joy's qualifications as an expert, which, with accompanying argument, covered some twenty pages of the transcript of the proceedings, the learned trial judge ruled in favour of the admissibility of some opinion evidence and said to counsel for the plaintiff: "I have ruled in your favour that Mr. Foster Joy is qualified as an expert, but I do not think it is within the province of an expert witness to express an opinion as to what was the cause of any particular event. He can tell us as an expert what can account for various things, if there are various of them, which can cause vehicles under different circumstances to perform in different ways. That is how it seems to me and that is the ruling I give. I think you had better adhere to it and frame your question in accordance with it." In the course of the evidence that was admitted pursuant to this ruling, Mr. Joy said, inter alia: "A vehicle with or without a semi-trailer attached, particularly with a semi-trailer attached, unladen and travelling down a grade and being suddenly called upon to make a turn, the tendency for the trailed portion of the assembly to swing out due to the turning of the prime-mover, the tendency for the trailed portion of the vehicle to swing out is greater where the speed of the vehicle is increased; in other words, the greater the speed the greater the centrifugal force, the greater the tendency for the trailed vehicle to swing out. It can swing out to such an extent that the prime-mover can endeavour eventually to pull it around into form but it cannot be done quickly. The momentum of the trailed portion which runs into quite a weight at a speed can tend to go on in the direction in which it was primarily travelling and it takes a terrific pull to pull it off its intended direction of travel and there is a lag. Although the prime-mover can clear an obstruction when travelling forward there is a slight lag between the movement of the prime-mover and the movement of the vehicle being trailed. In other words, the primemover can get out of the road of something which can be struck by the front corner of the semi-trailer. . . . It is not uncommon - having seen this scene and noting the grades, the down grade and the flat and the left-

hand turn of the grade up, and that turn is as near as - the plan will show, or as near as I can remember - I saw it on Saturday - it is merely at the turn of a right angle turning left. A vehicle travelling down the first grade from Gosford at a speed, not slowly by any means, at a speed and taking the turn, the vehicle gets around the turn and the trailer wants to rush on forward or rush out to the wrong side and that is what I think would happen here." Replying to the following question by Mr. Miller: "I want you to assume that the semi-trailer was travelling at a speed of approximately thirty-five m.p.h. What is your opinion as to that speed in that situation?". Mr. Joy said: "On a left-hand turn? You would expect the semi-trailer to swing out, particularly an unladen trailer." When asked: "In the case of an unladen semi-trailer, is there in your experience, a tendency of the trailed portion to swing on curves?", his reply was: "If you travel sufficiently fast, yes." (at p501)

4. Much of Mr. Joy's evidence was not really opinion evidence at all and it may be that so much as was not inadmissible as irrelevant, but we are here concerned only with that part of his evidence that put forward a scientific explanation for what occurred and was admissible only if Mr. Joy were an expert. As to this, I have, with respect to those who have taken a different view, reached the conclusion that Mr. Foster Joy was not qualified as an expert to express his conjectures, which paraded as scientific opinions, that if the semi-trailer was being driven at thirty-five miles per hour at the place where the collision occurred, it was likely to swing out to its right; or that what happened was that the prime-mover got around the turn and the trailer rushed out to the wrong side - and, therefore, that his evidence to this effect was wrongly admitted. (at p501)

5. Opinion evidence to account for a happening that is described to a witness is admissable only when the happening can be explained by reference to an organized branch of knowledge in which the witness is an expert. As Lord Mansfield said in Folkes v. Chadd (1782) 3 Dougl 157 (99 ER 589) , (as quoted by Lord Merrival in United States Shipping Board v. The Ship St. Albans (1931) AC 632, at p 642 , "the opinion of scientific men upon proven facts may be given by men of science, within their own science". I have no doubt that there is an organized branch of knowledge which would afford an explanation of a semi-trailer keeping on its course as the prime-mover drawing it veered to the left so that in the end the vehicle as a whole crossed to the right of the road, but Mr. Foster Joy was not skilled therein, as his reference to centrifugal force as the explanation of what occurred perhaps demonstrates more forcefully than any criticism of his credentials. It is unnecessary to detail the various qualifications that were relied upon to equip him to express the opinions that he did. It is sufficient to say that such skill as he had was derived from experience rather than from any course of study, and his experience was principally as an engineer concerned with the construction and repair of engines and the construction of buildings. He had also had some experience in the investigation of aircraft accidents and road accidents for insurance companies, and he gave evidence that he had frequently watched the behaviour of semi-trailers. He was not a scientist or mathematician either by study or experience. This is not a case where a witness has some qualifications and it is in question whether they are sufficient to give his opinions the authority of an expert. If such were the case, any appellate court would give great weight to the decision of the trial judge admitting his opinion evidence and would but rarely form an independent opinion of its own upon the sufficiency of those qualifications. This, however, is a case where a review of his evidence reveals that Mr. Foster Joy had no expert qualifications in the branch of knowledge upon which he was allowed to speak as an authority. (at p502)

6. On the question of an appeal court reviewing the decision of a trial judge that a witness is or is not an expert, the statement in Wigmore on Evidence 3rd ed. (1940) vol. II, par. 561, that "the trial Court must be left to determine, absolutely and without review, the fact of possession of the required qualification by a particular witness", if it is intended as a statement of the law rather than of policy -

and the words italicized perhaps indicate the latter - is too widely expressed and the American cases cited to support the proposition show that courts of appeal will review the decision of a primary judge upon a witness's qualifications when the qualifying facts relied upon are undisputed, or where there was no evidence of any qualifications, or the primary judge has made a palpable mistake, or his decision "appears on the evidence to be erroneous or to have been founded upon some error of law". See also Nightingale v. Biffen (1925) 8 BWCC 358 ; Wise v. Musolino (1936) SASR 447 ; Enston v. Pardel (1958) 75 WN (NSW) 370 and, further, United States Shipping Board v. The Ship St. Albans (1931) AC 632 ; Shepherd v. Pike (1955) 72 WN (NSW) 85 at p 86 ; Reg v. Spooner (1957) VR 540, at p 541 . In truth, the decision of a trial judge that a witness is qualified to give expert evidence is very much a question of fact and it is entitled to all, but no more than, the weight that a court of appeal gives to a finding of fact upon the hearing of an action. In Bratt v. Western Air Lines (1946) 166 ALR 1061 and the annotation thereto (1946) 166 ALR, at p 1067 , what appears to me to be the correct rule is stated as follows: "The qualification and competency of one to give opinion evidence as an expert is primarily in the discretion of the trial court, and the admission or exclusion of such testimony on the ground that the witness was or was not qualified to testify as to his opinion as an expert, will not be reviewed or reversed by the appellate court except where such discretion has been abused, as where there is absolutely no evidence that the witness had the qualifications of an expert and his opinion testimony has been admitted as that of an expert, or where in deciding upon the question of his competency the trial court has proceeded upon erroneous legal standards". (at p503)

7. Evidence having been wrongly admitted, notwithstanding objection to it, the question now is whether this is a case where a new trial should be ordered. (at p503)

8. This is a case where I would have thought that the jury, unassisted by any expert evidence, could on the factual evidence have reached the conclusion that the defendant's transport did first protrude across, and then cross, the centre line of the road because the trailer did not follow the prime-mover in taking the curve, but this circumstance provides no justification for the admission of inadmissible opinion evidence that science explained or supported this version of the happening. It may be that in the circumstances there was no room for the reception of the opinions of experts, because the tendency of a trailer to overrun a prime-mover as it changes course might be thought to be something of which an intelligent but unskilled person would be aware. This is, however, of little importance now because, in my opinion, inadmissible evidence was submitted to the jury, and even if there were no room for expert evidence at all, that cannot now be used to excuse the reception of Mr. Joy's evidence; it is only if the evidence can be regarded as insignificant that a new trial should not follow its wrongful admission. (at p504)

9. The Full Court thought Mr. Joy's evidence to be of little weight, and with that estimate I agree. The plaintiff had a strong case and the defendant, in cross-examination, admitted that he applied his brakes as a precaution to prevent the trailer swinging out. Furthermore, in his summing-up the learned judge, although he referred to Mr. Joy's evidence, did so in terms which emphasized only so much of that evidence as might almost be regarded as a matter of common knowledge. He said: "This was a semi-trailer, as it is called. It was forty-five feet in overall length. Its unladen weight was in excess of six tons and it was an articulated vehicle, and according to the evidence of Mr. Foster Joy, if you accept it, that sort of vehicle has particular characteristics which are not associated with the ordinary motor car, and one of the characteristics, according to his evidence, if you accept it, is on taking a bend an articulated vehicle such as this we are concerned with has a tendency to swing out; in other words, there is a time lag between the alteration in direction of the prime-mover on the one hand and the trailer portion of the vehicle on the other. Gentlemen, if that is the position

you might take the view - it is entirely a matter for you as I have said - but you might take the view that the handling of that sort of a vehicle if reasonable care is to be exercised requires some different handling, perhaps a greater degree of care, than would be called for in the matter of driving an ordinary motor vehicle such as you or I might drive". (at p504)

10. These things taken together afford some ground for concluding that notwithstanding that evidence was erroneously admitted, the Court should not exercise its discretion to order a new trial, occasioning, as it probably would, nothing more than further litigation without a different result. This probability is, however, not enough to warrant refusing a new trial. In Piddington v. Bennett &Wood Pty. Ltd. (1940) 63 CLR 533 , Dixon J. (as he then was) said: "The reception of inadmissible evidence gives an unsuccessful party against whom it was tendered a prima facie right to a new trial. But if it appears that the verdict cannot have been influenced by the inadmissible evidence or that independently of that evidence a verdict other than that found would have been unreasonable or unsustainable the prima facie right to a new trial is displaced". (1940) 63 CLR, at p 554 Here, therefore, the question is whether the verdict cannot have been influenced by the inadmissible evidence, and, having regard to the importance attached to it by both sides, to the fact that it was admitted as evidence of an expert, and to the reference to it in the learned trial judge's summing-up, I do not feel that I can reach an affirmative conclusion on this point. In Balenzuela v. De Gail (1959) 101 CLR 226 , where the Court decided that a new trial should follow the wrongful rejection of evidence because it could not be said that the evidence rejected could not have affected the verdict, Dixon C.J. said: "When material evidence has been erroneously rejected at the instance of the party who succeeds, then to deny nevertheless to the unsuccessful party the remedy of a new trial the Court must have some sure ground for saying that the reception of the evidence would not have affected the result or that it ought not to have done so". (1959) 101 CLR, at p 232 Later, his Honour said that the true view may be "that at common law it was necessary to grant a new trial unless the court felt some reasonable assurance that the error of law at the trial whether in a misdirection or wrongful admission or rejection of evidence or otherwise was of such a nature that it could not reasonably be supposed to have influenced the result" (1959) 101 CLR, at pp 234, 235 . Although I think it quite likely that the jury would have found a verdict for the plaintiff without the evidence wrongfully admitted, I find that I lack the assurance that Mr. Joy's evidence could not reasonably be supposed to have influenced the result. (at p505)

11. In these circumstances, I think that the appeal should be allowed and that there should be a new trial. (at p505)

WINDEYER J. I have no doubt that, for reasons I shall give, much inadmissible evidence was received. Nevertheless, if it were not that other members of this Court think there must be a new trial, I would hesitate to allow the appeal. Of course a new trial cannot be refused merely because the jury's decision seems to have been right as it seems to me this one was. The issues must be decided by a jury, and by a jury properly instructed and on proper evidence. Yet a new trial may be refused if, disregarding any evidence wrongly admitted, a different verdict from that given would be set aside as unreasonable. And the position here seems to me not far from that. I can see no basis at all for the suggestion that without the inadmissible evidence the plaintiff would not have made a case to go to the jury. The defendant's semi-trailer failed to negotiate a bend in the road and went so far across the road that it collided with the plaintiff's vehicle, although the plaintiff in an endeavour to escape had swerved off on his side of the road as far as he could go. The semi-trailer came to a standstill with the trailer portion across the road and facing west, and with the primemover facing east, its nearside almost touching the nearside of the trailer. These facts alone I think established a strong prima facie case of negligence on the part of the defendant. And a passenger in the plaintiff's

vehicle who was called as a witness related what occurred as it appeared to him, using the word "jack-knife" to describe it. This expression has been long used colloquially in the United States, meaning to double-up like a jack-knife. It has apparently been adopted here by drivers of articulated vehicles to describe what happened in this case. It is obvious that when an articulated vehicle, such as a semi-trailer, travelling at any speed, is turned at a sharp corner it may jack-knife, unless it be driven with care. If there be a risk of jack-knifing occurring notwithstanding that the vehicle be driven with care and skill, that would only tend to show that to take such a vehicle on a public road was negligent. And if, as the defendant stated, applying the brakes of the trailer as a necessary precaution against jack-knifing when turning a corner is risky in wet weather because this may cause the trailer to skid, that shows only that the vehicle should be driven at a speed which, having regard to the condition of the road and of the weather, will avoid this risk. The defendant's case was that, without any fault on his part, the trailer skidded on the wet road. It was a matter for the jury; but there was much that told strongly against this. (at p506)

2. It was no doubt necessary for the jury to understand what is meant by a semi-trailer jack-knifing. If it were thought that they would not be aware of the nature of a semi-trailer, a photograph or diagram and a brief explanation by a competent witness of the lengths and weights of the prime-mover and the trailer and the nature of the joint between them, the system of brakes, and so forth, would suffice to enlighten them. Once they were possessed of that knowledge it would hardly be necessary to explain why the equipment might jack-knife on a sharp bend after travelling at a fast speed downhill. If further evidence was thought to be needed of the behaviour on a turn of a semi-trailer, it could be given by anyone with practical experience of driving such a vehicle. To explain jack-knifing in terms of physical causation only an elementary knowledge of physics is needed. It could be done, if it were necessary to do it, in simple terms by reference to momentum, acceleration resulting from travelling downhill, and generally in relation to Newton's first law of motion. Evidence concerning the scene of the accident could always be given by anyone who had seen the place and who could describe what he had seen. Evidence of the width of the road could be given by anyone who could use a measuring tape and had measured it. If evidence were needed of the gradient of the road it could be given by any surveyor who had ascertained it. But the plaintiff's advisers were not prepared to rely on ordinary witnesses to speak of ordinary things. They called one William Foster Joy, thinking apparently that by describing him as an "expert" they could enlist him as an advocate. From the time he entered the witness box the proceedings took a strange course, despite the attempts of the learned trial judge to direct them. The witness described himself as a consulting engineer and a past associate member of the Institute of Engineers and past associate member of the Institute of Engineer Surveyors. What were the particular attainments by which he qualified as an associate member of those bodies, and why he had relinquished his membership did not appear. But at that stage no one seemed really concerned with his competence as an engineer. He was put forward as an expert in the investigation of road accidents] He said he had seen the place where this accident occurred, and he then explained in general terms, and by reference to photographs, the character and gradient of the road. There could be no objection to that, although the police constable or a surveyor who had made a plan could have done it as well or better. But counsel for the plaintiff apparently regarded a road accident as like a bodily ailment, and thought of the witness as if he were a medical expert skilled in the diagnosis of disease who, although he had not seen the patient, might be invited to assume the existence of symptoms described and then asked to give his opinion as to the nature of the ailment. Here was a witness skilled, it was said, in the diagnosis of the causes of road accidents. So counsel related to him what purported to be the circumstances of this accident, and then asked: "Assuming that happened, what, in your opinion, was the cause of that occurring?" Naturally this question was objected to and rejected, the learned trial judge remarking, however, that "if he is sufficiently qualified he can describe the vehicles and

how they move and what the result of certain actions is - if he is qualified". His Honour's advice was, however, either misunderstood or unheeded by counsel, for the witness was then asked whether in his "years of experience in investigating accidents" he had investigated accidents in which semi-trailers were involved. He said that he had and that he had reported to the persons engaging him - that was to say insurance companies - and had expressed opinions as to the causes. But telling underwriters what, in his opinion, were the causes of other accidents could not entitle him to tell a jury what he thought was the cause of this one. That should have been obvious. Apparently it was not, for counsel, relying on the additional information he had elicited that past activities of the witness had made him aware of accidents involving semi-trailers, repeated the rejected question. It was still patently inadmissible. But counsel who appeared for the defendant at the trial, instead of objecting, sought and was given leave to question the witness on the voir dire. He cross-examined him about the circumstances of other accidents that he had investigated in which semi-trailers were involved. Forth both sides the question seems somehow to have become, was the witness - an experienced investigator of accidents generally - sufficiently experienced in semi-trailer accidents] After asking some thirty-six or more questions about the circumstances of two or three other accidents to semi-trailers of which the witness had some knowledge, counsel for the defendant submitted that he was not qualified to express an opinion, because, he said, those accidents were "nowhere near the circumstances of this case". Near or far, this was wide of the mark. The witness was an experienced loss assessor and experienced in making investigations for insurance companies into accidents of motor vehicles and aircraft. And if loss assessing and accident investigating involve techniques that are an organized branch of knowledge, his opinion of how losses should be assessed and accidents investigated might perhaps be admissible in an action against a loss assessor or accident investigator for negligently performing his duties. But how could his hearsay knowledge of other accidents, however like this one, make his opinions relevant in this action? His Honour, trying again to bring the matter to somewhere near where it should have been, said: "I would have thought somebody might have asked him what sort of technical knowledge or training is required to understand these things and then asked him what sort of technical training and knowledge he has had". So counsel then turned his attention to this and asked him about his knowledge of automobile engineering. He had no academic qualifications by degree or diploma; but he gave evidence of having served an apprenticeship to an engineering company and having over many years worked for various employers engaged in a variety of engineering undertakings and of having studied, for some period not stated, at the Sydney Technical College. His actual work for most of his employers was he said that of a designing engineer. He had practised as a consulting engineer. In answer to his Honour, he said that he was acquainted with the make of semi-trailer which the defendant was driving. His Honour then ruled that he was qualified as an expert to give evidence within limits, observing that "there is a difference between asking a properly-qualified expert to tell us what can cause a vehicle to behave in a certain way and, on the other hand, asking him to express an opinion as to the cause of this accident". In my view his Honour was, as the matter then stood, justified in accepting the witness as qualified to give evidence of the kind he indicated. He had given an impressive recital of what seemed to have been responsible employments with a number of well-known engineering firms. And, although he was not searchingly questioned on what duties he had actually performed in those employments, it seemed that by his experience and practical training he was qualified to give evidence of fact within the limited area his Honour said he would permit. His Honour was not to know that what he would say, in so far as it went beyond argumentative statements of the obvious, would reveal him as apparently confused on simple scientific matters or as incapable of explaining clearly what he had in mind. He said that on a left-hand turn "you would expect the semi-trailer to swing out, particularly an unladen trailer . . . to radially swing to the right". He was asked what would cause that to happen. His answer was "Centrifugal force of the whole assembly on the turn moving at a speed sufficient for the force behind it to take that weight out".

There was a lot more like that; for example he said that "travelling as an unladen vehicle, the road adhesion between the prime-mover and the semi-trailer is less than the road adhesion when there is a lot of weight in the semi-trailer". The plaintiff's case was not that the rear of the trailer swung out, but that the composite vehicle jack-knifed. The witness's evidence was garbled and in parts somewhat contradictory. A new trial cannot be granted because a witness seemingly qualified as an expert shows by his answers much less knowledge than his seeming qualifications suggested or than he professed to have. But what happened here was that inadmissible evidence got to the jury. The witness persistently referred to the circumstances of this accident. He expressed opinions. His evidence thus travelled outside the boundaries that his Honour had properly laid down; and counsel seemingly did not try to keep it within them. The acrid remarks in Taylor on Evidence concerning expert witnesses do not lose significance when the expertise is spurious: "These witnesses are usually required to speak, not to facts, but to opinions; and when this is the case, it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond with the wishes or the interests of the parties who call them". (at p510)

3. With regret, I agree that, notwithstanding the strength of the plaintiff's case and the failure of the defendant's counsel to persist in his objections, there should be a new trial. (at p510)

Orders

Appeal allowed with costs.

Order of the Supreme Court of New South Wales discharged. In lieu thereof order that the appeal to that Court be allowed with costs, the verdict of the jury set aside and a new trial be had: the costs of the former trial to abide the event.

Cited by:

Kristiansen & Kristiansen [2025] FedCFamC1A 129 -
Palmer v CITIC Ltd [No 17] [2025] WASC 224 -
Palmer v CITIC Ltd [No 17] [2025] WASC 224 -
Uniform Evidence Manual [2023] JCV Uniform_Evidence_Manual -
Rictor v The State of Western Australia [2025] WASCA 39 -
Rictor v The State of Western Australia [2025] WASCA 39 -
Rictor v The State of Western Australia [2025] WASCA 39 -
ACN 117 641 004 Pty Ltd (in liq) v S&P Global, Inc (No 4) [2025] FCA 72 -
ACN 117 641 004 Pty Ltd (in liq) v S&P Global, Inc (No 4) [2025] FCA 72 -
Stone v Belmore Bulk Materials Pty Ltd [2024] ICQ 23 (20 December 2024)

> [53] Relevantly, an expert will not be permitted to give evidence of matters which the tribunal of fact could determine for themselves or to formulate the expert's empirical knowledge as a universal law. [21] The onus of establishing the conditions of admissibility of such material rests on the tendering party. [22]

via

[21] *Clark v Ryan* (1960) 103 CLR 486, 491.

Stone v Belmore Bulk Materials Pty Ltd [2024] ICQ 23 -

Kipoi Holdings Mauritius Limited v Robert Michael Kirman and Robert Conry Brauer as joint and several administrators of Tiger Resources Limited (Subject to Deed of Company Arrangement) [No 4] [2024] WASCA 145 (22 November 2024) (Buss P; Mitchell and Vaughan JJA)

Clark v Ryan [1960] HCA 42 ; (1960) 103 CLR 486

Kipoi Holdings Mauritius Limited v Robert Michael Kirman and Robert Conry Brauer as joint and several administrators of Tiger Resources Limited (Subject to Deed of Company Arrangement) [No 4] [2024] WASCA 145 -
Kelly v The State of Western Australia [2024] WASCA 116 -
Kelly v The State of Western Australia [2024] WASCA 116 -
Kelly v The State of Western Australia [2024] WASCA 116 -
R v Whitfield [2024] NSWCCA 124 (19 July 2024) (Harrison CJ, Cl, Davies and N Adams JJ)

24. Moreover, Mr Whitfield emphasised that Mr Ryan has no experience with or study concerned with what skills are required in navigating jet skis. He did not refer to any studies, articles or opinions expressed by others relevant to determining the necessary skills or how to assess the crash risks based on the impairment of the skills required to navigate jet skis in particular or watercraft in general. His opinion is solely based on studies of crash risks in relation to the consumption of alcohol when driving a motor vehicle on a road. Mr Whitfield submitted that the expression of any opinion in relation to the skills required to navigate a jet ski, and the impairment of such skills, is outside his area of specialised knowledge and is inadmissible: *Clark v Ryan* (1960) 103 CLR 486; [1960] HCA 42 .

R v Whitfield [2024] NSWCCA 124 -
R v Whitfield [2024] NSWCCA 124 -
R v Whitfield [2024] NSWCCA 124 -
Mattina & Falconi [2024] FedCFamC2F 931 (18 July 2024) (W J Neville J)

4. First, [Ms K] is not qualified to make a recommendation as to where either child should live. As a therapist, her role is to support the parties who consult her. She is qualified to say what history she took and to support the participants to reach a resolution between themselves, that is suitable to them. She is not qualified to make a recommendation. Clark v Ryan (1960) 103 CLR 486 . Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd [2002] FCAFC 157

Re ZD (pseudonym initials) [2024] WADC 42 -
Re Branch [2024] WADC 41 (05 June 2024) (Ritter DCJ)

39. There is also the publication of the speaking notes of Justice Burns of the Supreme Court of Queensland from a presentation to a Criminal Law Continuing Professional Development Seminar on 24 April 2022. The presentation, by his Honour entitled 'The Use of Psychiatric and Psychological Evidence on Sentence'. The speaking notes said:[35]

> 10. A view has sometimes been expressed that psychologists are not qualified to express a diagnostic opinion about an offender's mental state because that requires the expression of a medical opinion: see, e.g., ***R v MacKenney*** (1981) 76 Cr App R 271, 274275 ; ***Klimoski v Water Authority of Western Australia*** (1989) 5 SR (WA) 148; ***R v Kucma*** (2005) 11 VR 472, [26] . On the other hand, there are numerous case where diagnostic evidence from psychologists has been received: see, eg (e.g., ***R v Nguyen*** [2015] QCA 205; R v SCZ [2018] QCA 81). There is however no longer any room for debate because the Court of Appeal recently affirmed that the admissibility of such evidence will depend entirely on an application of the established principles for the determination of the admissibility of expert evidence: ***R v Bassi*** [2021] QCA 250, [61] . Those principles are well-known: ***Clark v Ryan*** (1960) 103 CLR 486, 491 ; ***Makita (Aust) Pty Ltd v Sprowles*** (2001) 52 NSWLR 705, [85] . As such, the 'question whether evidence of a psychologist's diagnosis is admissible as expert evidence has to be decided on a

case-by-case basis and, in general, it will not be open for a judge to conclude that evidence of that kind is inadmissible just because it is to be given by a psychologist rather than by a psychiatrist': ***R v Bassi*** [2021] QCA 250, [61] .

11. Of course, to be admissible, there must be an opinion expressed within the witness' specialised field of knowledge. A psychologist who churns out what in reality is not much more than a statement of the offender's antecedents expresses no admissible opinion at all.

12. In the same vein, where the relevant expert opinion is based on, or substantially on, the offender's own account without any supporting evidence, caution may be required: ***R v Peisley*** (1990) 54 A Crim R 42, 52 ; ***R v Qutami*** (2001) 127 A Crim R 369, [58][59] ; ***R v Palu*** (2002) 134 A Crim R 174, [40]-[42] . As a general proposition, the weight given to such opinions could be significantly eroded unless supported by clinical testing or other evidence independent of the offender. ...

Prouten v Buxton [2024] NSWDC 182 -
Selkirk v Wyatt [2024] FCAFC 48 -
R v Dobrenov [2023] QDC 258 -
Lang v The Queen [2023] HCA 29 (11 October 2023) (Kiefel CJ; Gageler, Gordon, Edelman and Jagot JJ)

470. The evidence of Dr Ong did not involve merely "putting from the witness box the inferences upon which" the prosecution's case rested [136] . Given his expertise and the underpinning of the impugned evidence, Dr Ong's opinion as to the likelihood of the fatal wounds being inflicted by another person rather than selfinflicted was not cloaked "with a spurious appearance of authority", and thereby did not involve any risk that "legitimate processes of factfinding may be subverted" [137] .

via

[136] *Clark v Ryan* (1960) 103 CLR 486 at 492.

Lang v The Queen [2023] HCA 29 (11 October 2023) (Kiefel CJ; Gageler, Gordon, Edelman and Jagot JJ)

223. The detail and method of application of these numerous strictures for expert evidence in *Unif orm Evidence Act* jurisdictions have been said to be "inadequate, incoherent, and difficult to apply in practice"[72]. But at a higher level of generality, the rules set out in *Makita (Australia) Pty Ltd* reflect three fundamental requirements that must be met, in addition to the ordinary rules of evidence, before the opinion evidence of an expert witness can be admissible [73] . The first is that the expert witness must identify an accepted field of expertise that they have which can be applied to the facts. The second is that the expert witness must identify a factual basis or foundation for the opinion in the admissible evidence or matters that are, or can be taken to be, before the court. The third is that the expert witness must expose how their expertise is the substantial basis connecting the factual foundation to the opinion given.

via

[73] See also *Clark v Ryan* (1960) 103 CLR 486 ; *HG v The Queen* (1999) 197 CLR 414 at 427-428 [40] ; *R v Juric* (2002) 4 VR 411 at 426 [18] ; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at 623-624 [92] .

Lang v The Queen [2023] HCA 29 -
Lang v The Queen [2023] HCA 29 -
Lang v The Queen [2023] HCA 29 -
Lang v The Queen [2023] HCA 29 -
Lang v The Queen [2023] HCA 29 -
Lang v The Queen [2023] HCA 29 -
Murphy (a pseudonym) v The King [2023] SASCA 107 -

Murphy (a pseudonym) v The King [2023] SASCA 107 -
Murphy (a pseudonym) v The King [2023] SASCA 107 -
Youfen Deng v FYF Pty Ltd (Ruling No.4) [2023] VCC 1663 (11 September 2023) (Ginnane)

> 88 In addition, even if the assumed facts were not contestable, and all of them had been disclosed, as opposed to assumed by Mr Hennessy, the report provides no, or no sufficient basis, to admit of the requirement for the expression of specialised knowledge in a specialised field. It is a relevant fact that the trial of this proceeding is before a jury. In *Clark v Ryan* , [10] Dixon CJ held that an expert is not entitled to give opinion evidence on matters the jury was capable of deciding for themselves. In short, if the jury accepts the plaintiff's evidentiary account, they will bring their common sense in assessing if the common law obligation to provide a safe workplace and system of work, and the obligation under regulation to identify risk, control risk, and eliminate or reduce the same as far as is practicable, has been met by the defendant.

Youfen Deng v FYF Pty Ltd (Ruling No.4) [2023] VCC 1663 -
Youfen Deng v FYF Pty Ltd (Ruling No.4) [2023] VCC 1663 -
Maher v State of Tasmania [2023] TASCCA 7 -
Maher v State of Tasmania [2023] TASCCA 7 -
LP 202001 v Council of the Law Society of the Act (Appeal) [2022] ACAT 80 -
Milanovic v Ventura Transit Pty Ltd (Ruling) [2022] VCC 909 -
Milanovic v Ventura Transit Pty Ltd (Ruling) [2022] VCC 909 -
Milanovic v Ventura Transit Pty Ltd (Ruling) [2022] VCC 909 -
Drill Engineering & Pastoral Company Pty Ltd v Seymour [2022] QDC 136 -
Reserve Capital v Seascapes Supermarket WA Pty Ltd [2022] WASC 56 -
Reserve Capital v Seascapes Supermarket WA Pty Ltd [2022] WASC 56 -
R v NB (No 1) [2022] NSWSC 23 -
Lee v Commissioner of Police [2021] QDC 296 -
Lee v Commissioner of Police [2021] QDC 296 -
QUESTION OF LAW RESERVED (NO 1 OF 2021) [2021] SASCA 148 (09 December 2021)

> 191. In addition, the common law precludes experts from expressing opinions on matters outside their recognised area of expertise, or on matters the Court may determine for itself, as Dixon CJ had explained in *Clark v Ryan* : [131]
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> > In *R v Parker*, one of the cases establishing the evidentiary use of fingerprints to prove identity, Cussen J in that connexion said that expert witnesses may give in evidence statements based on their own experience or study but that they cannot be permitted to attempt to point out to the jury matters which the jury could determine for themselves or to formulate their empirical knowledge as a universal law.

QUESTION OF LAW RESERVED (NO 1 OF 2021) [2021] SASCA 148 (09 December 2021)

> 188. Whilst the parties jointly relied on the written reports of the forensic psychiatrists, it is necessary to say something about the proper role for expert evidence in a case such as this. Under the common law applicable in South Australia, usually only experts may express an opinion. As was explained by Dixon CJ in *Clark v Ryan* : [128]
>
> > ... the opinion of witnesses possessing peculiar skill is admissible whenever the subject matter of enquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without assistance. ... but [expert witnesses] ... cannot be permitted to attempt to point out to the jury matters which the jury could determine for themselves or to formulate their empirical knowledge as a universal law.

QUESTION OF LAW RESERVED (NO 1 OF 2021) [2021] SASCA 148 -
QUESTION OF LAW RESERVED (NO 1 OF 2021) [2021] SASCA 148 -
QUESTION OF LAW RESERVED (NO 1 OF 2021) [2021] SASCA 148 -
QUESTION OF LAW RESERVED (NO 1 OF 2021) [2021] SASCA 148 -
R v Bassi [2021] QCA 250 (23 November 2021) (Sofronoff P; Davis and Williams JJ)

51. Whether the evidence of a person who is called as an expert witness should be accepted is to be decided according to long established principles which, relevantly, include these:

(a) There must be a field of specialised knowledge; [8]

(b) The witness must demonstrate that, by reason of study or experience, the witness is an expert in a particular aspect of that field and this is a question of fact. [9]

via

[8] *Clark v Ryan* (1960) 103 CLR 486 at 491.

R v Bassi [2021] QCA 250 -
R v Bassi [2021] QCA 250 -
R v Bassi [2021] QCA 250 -
Yebdoo v Holmewood [2021] NSWCA 119 -
Yebdoo v Holmewood [2021] NSWCA 119 -
Yebdoo v Holmewood [2021] NSWCA 119 -
Hiemstra v The State of Western Australia [2021] WASCA 96 (02 June 2021) (Buss P, Mazza JA, Beech JA)

72. At common law, expert or opinion evidence is admissible in criminal proceedings if:

(a) the evidence is with respect to matters that are relevant to a fact or facts in issue; and

(b) the tribunal of fact would be unable to form a sound judgment about those matters without the assistance of a person or persons possessing special knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience.

See ***Clark v Ryan*** ; [20] ***R v Bonython*** ;[21] ***Murphy v The Queen*** ;[22] ***Farrell v The Queen*** ;[23] ***Osland v The Queen*** ;[24] ***HG v The Queen*** . [25]

Hiemstra v The State of Western Australia [2021] WASCA 96 -
Scylla v Police [2021] SASC 18 -
Scylla v Police [2021] SASC 18 -
Scylla v Police [2021] SASC 18 -
Miles v Amos [2021] NSWSC 38 (03 February 2021) (Hallen J)

109. In *Clark v Ryan* (1960) 103 CLR 486 at 491 ; [1960] HCA 42 , Dixon CJ (Fullagar J agreeing) quoted, with approval, from J W Smith's notes to the decision of *Carter v Boehm* in *Smith's Leading Cases*:

"... it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it."

R v Daw [2021] NSWDC 5 -
Amaca Pty Ltd v Werfel [2020] SASCFC 125 -
Hubbard v CPB Contractors Pty Limited [2020] NSWSC 1921 (08 December 2020) (Cavanagh J)

13. As Dixon CJ said in *Clark v Ryan* : [3]

> "On the one hand ... it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it."

Hubbard v CPB Contractors Pty Limited [2020] NSWSC 1921 -
Secretary, Department of Planning, Industry and Environment v Auen Grain Pty Ltd; Merrywinebone Pty Ltd; Greentree; Harris (No 2) [2020] NSWLEC 126 -
Secretary, Department of Planning, Industry and Environment v Auen Grain Pty Ltd; Merrywinebone Pty Ltd; Greentree; Harris (No 2) [2020] NSWLEC 126 -
Sochorova v Durairaj [2020] QCA 158 -
Sochorova v Durairaj [2020] QCA 158 -
O'CALLAGHAN v Police [2020] SASC 50 (09 April 2020) (Livesey J)

CH2M Hill Australia Pty Ltd v New South Wales [2012] NSWSC 963; *Clark v Ryan* (1960) 103 CLR 486 ; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588; *Elliott v Police* (2009) 54 MVR 2; *Folkes v Chadd* (1782) 3 Dougl 157; 99 ER 589, 590 ; *Fox v Percy* (2003) 214 CLR 118; *Gazepis v Police* (1997) 70 SASR 121; *House v The King* (1936) 55 CLR 499; *Kentwell v The Queen* (2014) 252 CLR 601; *Lee v Lee* (2019) 93 ALJR 993; *Martelli v Police* (2007) 46 MVR 568; *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507; *O'Callaghan v Police* (2019) 133 SASR 147; *Oneflare Pty Ltd v Chernih* [2016] NSWSC 1271; *Police v Butcher* (2014) 119 SASR 509; *Police v Cadd* (1997) 69 SASR 150; *Police v Dinovitser* [2016] SASC 77; *Police v Young* (2012) 114 SASR 567 ; *R v Taylor* [2014] SASCFC 112; *Sharman v Police* [2015] SASC 159; *Such v Police* (2011) 57 MVR 313; *Police v Wyatt* 2016) 74 MVR 368 , considered.

O'CALLAGHAN v Police [2020] SASC 50 -
The State of Western Australia v Samura [No 3] [2019] WASC 465 (23 December 2019) (Derrick J)

Clarke v Ryan [1960] HCA 42 ; (1960) 103 CLR 486

The State of Western Australia v Samura [No 3] [2019] WASC 465 -
Kilby v Harrison; Saxon Energy Services Australia Pty Ltd v Harrison [2019] ICQ 21 -
Kilby v Harrison; Saxon Energy Services Australia Pty Ltd v Harrison [2019] ICQ 21 -
Kilby v Harrison; Saxon Energy Services Australia Pty Ltd v Harrison [2019] ICQ 21 -
Sanrus Pty Ltd v Monto Coal 2 Pty Ltd (No 7) [2019] QSC 241 -
Sanrus Pty Ltd v Monto Coal 2 Pty Ltd (No 5) [2019] QSC 210 -
Baynah v The State of Western Australia [No 2] [2019] WASCA 103 -
Baynah v The State of Western Australia [No 2] [2019] WASCA 103 -
Baynah v The State of Western Australia [No 2] [2019] WASCA 103 -
Wilmar Sugar Australia Limited v Queensland Sugar Limited [2019] QSC 116 -
Wilmar Sugar Australia Limited v Queensland Sugar Limited [2019] QSC 116 -
Curran v Yourtown & Anor [2019] QIRC 59 -
Curran v Yourtown & Anor [2019] QIRC 59 -
Hodges v Boe [2019] QCATA 39 -
R v Warwick (No.37) [2019] NSWSC 196 -
Cargill Australia Ltd v Viterra Malt Pty Ltd (No 20) [2019] VSC 44 -
Superannuation Warehouse Australia Pty Ltd and Australian Securities and Investments Commission [2019] AATA 88 -
Superannuation Warehouse Australia Pty Ltd and Australian Securities and Investments Commission [2019] AATA 88 -
Laegal v Scenic Rim Regional Council [2018] QIRC 136 (15 November 2018)

34. *Clark v Ryan [14]* involved a debate about the admissibility of the expert evidence of a Mr Foster Joy relating to the way in which articulated vehicles jack-knife on corners. As Dixon CJ explained:

> If it had been desired to prove how in fact semi-trailers of the kind driven by the defendant Clark do in practice behave, perhaps a witness or witnesses experienced in their actual use might have given admissible

evidence, not of opinion, but of the fact. But Mr. Foster Joy did not possess that experience. If it had been desired to give technical evidence of the physics involved and of any relevant opinions deduced therefrom, possibly that might have been done by a qualified witness although one may doubt how intelligible to the jury the evidence would have been and what useful purpose it would have served. But it certainly does not appear that Mr. Foster Joy was qualified to give such testimony and in fact he did not essay to do so. What in truth occurred was to use the witness to argue the plaintiff's case and present it more vividly and cogently before the jury.

via

[14] (1960) 103 CLR 488 , 492.

Laegal v Scenic Rim Regional Council [2018] QIRC 136 -
R v Warwick (No.56) [2018] NSWSC 2015 -
Brown v Daniels [2018] QSC 209 (14 September 2018) (Davis J)

30. Expert opinion evidence is admissible if:

(i) there is a recognised field of study;

(ii) the witness is an expert in that field;

(iii) the opinion is based on the witness's experience and expertise in the field; and

(iv) the opinion evidence is probative of a fact in issue. [17]

via

[17] *Clark v Ryan* (1960) 103 CLR 486 at 491–2 ; on the necessity for the opinion evidence to be probative, see *Smith v The Queen* (2001) CLR 650.

Wassim Hijazi by his tutor the NSW Trustee and Guardian v Sry Constructions Pty Ltd; Sry Constructions Pty Ltd v Wassim Hijazi [2018] NSWCATCD 53 -
Hrdavec v State of New South Wales [2018] NSWSC 1081 -
Hrdavec v State of New South Wales [2018] NSWSC 1081 -
Hrdavec v State of New South Wales [2018] NSWSC 1081 -
Hrdavec v State of New South Wales [2018] NSWSC 1081 -
Liverpool City Council v McGraw-Hill Financial Inc (No 2) [2018] FCA 686 -
The State of Western Australia v Martin and Namnik [2018] WASC 151 (04 May 2018) (Fiannaca J)

100. The threshold issue, therefore, is whether the evidence concerns a field of specialised knowledge upon which expert evidence can be given. To be admissible, the evidence must concern a subject matter that is:

1. likely to be outside the knowledge or experience of ordinary members of the community on the jury; and

2. of such a nature that the jury would be unlikely to be able to form a sound judgment upon an issue affected by the subject matter without the assistance of a witness who possesses special knowledge or experience in the area. [39]

via

[39] See *Clark v Ryan* (1960) 103 CLR 486 at 491 (Dixon CJ); [1960] ALR 524, 526 ; *Murphy v R* (1989) 167 CLR 94, 111, 130; 86 ALR 35, 47, 62, approving *R v Turner* [1975] QB 834, 841; [1975] 1 All ER 70, 74 ; *R v Bonython* (1984) 38 SASR 45, 46 - 47 (King CJ).

The State of Western Australia v Martin and Namnik [2018] WASC 151 -
R v Okoli [2018] WASC 116 (13 April 2018) (Hall J)

13. Whether expertise can be obtained through experience may depend upon the nature of the particular field of knowledge. In some cases, the necessary knowledge may be obtained by experiment and observation, in others this may not be possible. [2] It is for the judge to determine whether the witness has undergone such a course of special study or experience as will render the witness an expert in a particular subject. It is not necessary for the expertise to have been acquired professionally. [3]

via

[2] *Clark v Ryan* [1960] HCA 42; (1960) 103 CLR 486 .

R v Okoli [2018] WASC 116 -
R v Okoli [2018] WASC 116 -
WINDEYER & WINDEYER [2018] FamCA 153 -
WINDEYER & WINDEYER [2018] FamCA 153 -
R v Sabet [2018] SASCFC 18 -
The Thistle Company of Australia Pty Ltd v Bretz [2018] QCA 6 (09 February 2018) (Gotterson and Philippides JJA and Bond J)
Clark v Ryan (1960) 103 CLR 486; [1960] HCA 42 , cited

The Thistle Company of Australia Pty Ltd v Bretz [2018] QCA 6 -
Kalis v New [2017] ACTSC 334 -
CQX v Children's Guardian [2017] NSWCATAD 286 -
CQX v Children's Guardian [2017] NSWCATAD 286 -
Pallett v Commonwealth of Australia, Department of Human Services - Centrelink [2017] FCA 1132 (22 September 2017) (Charlesworth J)

53. Different considerations arise when the fact to be proven is a loss of function or other condition affecting the mind. In *R v Perry* (1990) 49 A Crim R 243, Gleeson CJ said (at 249):

> As a general rule witnesses may only give evidence of that which they have observed. Inferences from observed facts, or opinions, are not ordinarily receivable in evidence. One of the qualifications to that general rule relates to expert opinions on matters not within the ordinary experience of unqualified persons. The courts will receive the relevant opinions of witnesses possessing particular qualifications when the subject matter is such that inexperienced persons are unlikely to be capable of forming a correct judgment upon it without expert assistance: *Clarke v Ryan* (1960) 103 CLR 486 ; D Byrne and JD Heydon, *Cross on Evidence* (3rd Aust ed, 1986), Ch 15. Whether a given topic is susceptible of becoming the subject of expert evidence may give rise to debate: cf *Murphy* (1989) 167 CLR 94; 40 A Crim R 361. There is, however, no doubt that psychiatry is such a topic.

Liyanage v The State of Western Australia [2017] WASCA 112 -
Liyanage v The State of Western Australia [2017] WASCA 112 -
Vestas - Australian Wind Technology Pty Limited and Comptroller-General of Customs [2017] AATA 791 -
Noske v The Queen [2017] WASC 56 -
Noske v The Queen [2017] WASC 56 -

SWD v The State of Western Australia [2017] WASCA 39 -
SWD v The State of Western Australia [2017] WASCA 39 -
R v Wilkinson [2016] QDC 199 (09 August 2016) (Long SC DCJ)

18. It can be observed that it remains to be seen whether any objection to the first and second aspects is persisted with, having regard to what is now disclosed as to the witness' training and experience in respect of matters to which his evidence is directed, the techniques he has utilised and consideration as to whether what is proposed, in the first instance, is use of contemporary technology to present and assist in a comparison exercise that could otherwise be done at the trial or by the jury. And in respect of the third aspect, it will remain to be seen whether the prosecution does seek to lead such evidence, in light of the rule that may prevent opinion as to matters which are within common experience and therefore, matters for the jury. [40]

via

[40] See *R v Bonython* (1984) 38 SASR 45, at 46-7, Clark v Ryan (1960) 103 CLR 486 , at 491 , *Murphy v R* (1989) 167 CLR 94, *Osland v R* (1989) 167 CLR 316, at [53] and *HG v R* (1999) CLR 414, at [58] .

RST v The State of Western Australia [2016] WASCA 59 -
RST v The State of Western Australia [2016] WASCA 59 -
Algeri v Pennington [2016] WADC 41 (06 April 2016) (Gething DCJ)

Clark v Ryan [1960] HCA 42 ; (1960) 103 CLR 486

Algeri v Pennington [2016] WADC 41 (06 April 2016) (Gething DCJ)

50. In relation to the first precondition, the classic starting point is the following observation by Dixon CJ in ***Clark v Ryan*** [1960] HCA 42; (1960) 103 CLR 486, 491 :

> The rule of evidence relating to the admissibility of expert testimony as it affects the case cannot be put better than it was by *J. W. Smith* in the notes to *Carter* v. *Boehm,* 1 Smith L.C., 7th ed. (1876) p. 577. 'On the one hand' that author wrote, 'it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it.' Then after the citation of authority the author proceeds: 'While on the other hand, it does not seem to be contended that the opinions of witnesses can be received when the inquiry is into a subject matter the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it.'

Chi Building Pty Ltd v Wedgwood [2016] NSWCATAP 64 -
AZAFG v Minister for Immigration and Border Protection [2016] FCA 81 -
The State of Western Australia v Liyanage [2016] WASC 12 -
The State of Western Australia v Liyanage [2016] WASC 12 -
The State of Western Australia v Liyanage [2016] WASC 12 -
The State of Western Australia v Liyanage [2016] WASC 12 -
Trilogy Funds Management Ltd v Sullivan (No 2) [2015] FCA 1452 (18 December 2015) (Wigney J)

742. Overall, the opinions expressed in Mr Robinson's report could fairly and accurately be characterised as being "based on a combination of speculation, inference, personal and second-hand views ... and a process of reasoning which went well beyond" whatever field of expertise Mr Robinson professed to have: *HG v The Queen* (1999) 197 CLR 414 (***HG v The Queen***) at [41] (per Gleeson CJ). Mr Robinson was in truth simply putting the inferences and hypotheses upon which Messrs Sullivan, Swan and Donaldson wanted to rely (*HG v The*

Queen at [43] referring to *Clark v Ryan* (1960) 103 CLR 486 at 492) or "filter[ing] the facts", or telling the Court what facts it should find: *Arnotts Limited v Trade Practices Commission* (1990) 24 FCR 313 at 353 ; *Makita* at [78] .

Trilogy Funds Management Ltd v Sullivan (No 2) [2015] FCA 1452 -
Saunders v The Public Trustee [2015] WASCA 203 -
Saunders v The Public Trustee [2015] WASCA 203 -
R v Jones [2015] QCA 161 (01 September 2015) (Holmes JA and North and Henry JJ,)

Clark v Ryan (1960) 103 CLR 486; [1960] HCA 42 , considered
Osland v The Queen (1998) 197 CLR 316; [1998] HCA 75, followed
R v Bonython (1984) 38 SASR 45, considered
R v Pollock [2009] QCA 268, cited
R v Runjanjic (1991) 56 SASR 114; [1991] SASC 2951 , considered
Ramsay v Watson (1961) 108 CLR 642; [1961] HCA 65 , **considered**
Roach v The Queen (2001) 242 CLR 610; [2011] HCA 12, **considered**
Wilson v The Queen (1970) 123 CLR 334; [1970] HCA 17, cited

R v Jones [2015] QCA 161 -
Dupois v Queensland Television Ltd [2015] QCA 160 -
Dupois v Queensland Television Ltd [2015] QCA 160 -
Sands v Vanderkyl [2015] QDC 125 -
Sands v Vanderkyl [2015] QDC 125 -
AZAFF v Minister for Immigration [2015] FCCA 1133 (04 May 2015) (Judge Brown)

58. In support of his submission, Mr O'Leary relies on a variety of cases in which evidence as to the causes of a truck jack-knifing; comparisons of handwriting; and the identification of voices speaking in a foreign language, from an audio tape; were characterised as matter requiring expertise to express. [10]

via

[10] See *Clark v Ryan* (1960) 103 CLR 486 ; *R v Bonthyon* (1984) 38 SASR 45; and *R v Leung & Wong* [1999] NSWCCA 287

AZAFF v Minister for Immigration [2015] FCCA 1133 -
AZAFG v Minister for Immigration [2015] FCCA 1134 -
AZAFG v Minister for Immigration [2015] FCCA 1134 -
X v Y [2015] WASCA 70 -
Applebee v Monash City Council (Review and Regulation) [2014] VCAT 1513 -
Applebee v Monash City Council (Review and Regulation) [2014] VCAT 1513 -
Gray v Brimbank CC (Review and Regulation) [2014] VCAT 1485 -
Sallur v Howse [2014] QCATA 340 -
Volvo Group Australia Pty Ltd v Simon Blackwood (Workers' Compensation Regulator) [2014] QIRC 192 (21 November 2014)

2 *Clark v Ryan* (1960) 103 CLR 486 .

Volvo Group Australia Pty Ltd v Simon Blackwood (Workers' Compensation Regulator) [2014] QIRC 192 -
Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd (No 8) [2014] VSC 567 -
Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd (No 8) [2014] VSC 567 -
R v Cluse [2014] SASCFC 97 -
R v Cluse [2014] SASCFC 97 -
Campbell v R [2014] NSWCCA 175 -
Matthews v SPI Electricity (Ruling No 38) [2014] VSC 102 (21 March 2014) (J Forrest J)

67. This proposition was emphasised by Dixon J in *Clark v Ryan* , [46] a seminal case on opinion evidence under the common law , [47] and repeated by Gleeson CJ in *HG v The Queen* [48] in which his Honour said:

> ... in trials before judges alone, as well as in trials by jury, it is important that the opinions of expert witnesses be confined, in accordance with s 79 , to opinions which are wholly or substantially based on their specialised knowledge. Experts who venture "opinions" (sometimes merely their own inference of fact), outside their field of specialised knowledge may invest those opinions with a spurious appearance of authority, and legitimate processes of fact-finding may be subverted. [49]

via

[46] (1960) 103 CLR 486 .

Matthews v SPI Electricity (Ruling No 38) [2014] VSC 102 -
Matthews v SPI Electricity (Ruling No 38) [2014] VSC 102 -
Matthews v SPI Electricity (Ruling No 39) [2014] VSC 109 -
Matthews v SPI Electricity (Ruling No 39) [2014] VSC 109 -
Matthews v SPI Electricity (Ruling No 39) [2014] VSC 109 -
Coral Rose Jardine v Sonja Vaughan (No 2) [2013] ACTSC 283 (10 December 2013) (Refshauge J)
Clark v Ryan (1960) 103 CLR 486
Cooke v the Commissioner of Taxation

Coral Rose Jardine v Sonja Vaughan (No 2) [2013] ACTSC 283 -
Regent Holdings v State of Victoria [2013] VSC 601 -
FRIEND, Catherine Application under Part 7 Crimes (Appeal and Review) Act 2001 [2013] NSWSC 1475 -
CONFIDENTIAL and COMMISSIONER OF TAXATION [2013] AATA 112 -
R v Banhelyi [2012] QCA 357 -
R v Banhelyi [2012] QCA 357 -
Australian Capital Territory v Crowley [2012] ACTCA 52 -
Australian Capital Territory v Crowley [2012] ACTCA 52 -
R v Fischer (No 1) [2012] SADC 186 -
R v Fischer (No 1) [2012] SADC 186 -
The Owners - Strata Plan No 69312 v Rockdale City Council; Owners of SP 69312 v Allianz Aust Insurance [2012] NSWSC 1244 (18 October 2012) (Lindsay J)

52. His evidence was received, subject to a general objection as to relevance, as on a *voir dire*, on the basis (accepted by all parties) that a ruling on the admissibility of the evidence would be incorporated in the Court's determination of the Separate Question. Expediency, and the absence of opposition to its adoption, commended this procedure (for which *Re Michael; Ex parte Epic Energy (WA) Nominees Pty Limited* (2002) 25 WAR 511 at 541 [100] stands as a precedent) despite the risk, identified in *Clark v Ryan* (1960) 103 CLR 486 at 492 and 507 , that a witness engaged as an expert may be deployed as an advocate.

THE PROVINENCE AND NATURE OF THE BCA

Re Baini and Commissioner of Taxation [2012] AATA 440 -
R v Harding [2012] SADC 40 -
R v Harding [2012] SADC 40 -
Allianz Australia Ltd v Sim [2012] NSWCA 68 (04 April 2012) (Allsop P, Basten and Meagher JJA)

115. To say, as Allianz did, that "the opinions on individual causation offered by the plaintiff's witnesses in the present case are indistinguishable in principle from the opinion offered by Mr Joy in *Clark v Ryan* " is so vapid a proposition as to cast doubt upon the ground of appeal generally, as it formed the primary basis of the written submissions: see par 50. However, there were three attempted refinements on the submission which need to be addressed.

Allianz Australia Ltd v Sim [2012] NSWCA 68 -
Allianz Australia Ltd v Sim [2012] NSWCA 68 -
Allianz Australia Ltd v Sim [2012] NSWCA 68 -
Allianz Australia Ltd v Sim [2012] NSWCA 68 -
Ananda Marga Pracaraka Samagha Ltd v Tomar (No 4) [2012] FCA 385 -
R v Sica [2012] QSC 430 (10 January 2012) (Peter Lyons J)

21. I was also referred to the following passage from the judgment of Dixon CJ in *Clark v Ryan* , [3] where his Honour adopted a statement in the notes to *Carter v Boehm* [4] as follows:

> "'On the one hand ... it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it ... While on the other hand, it does not seem to be contended that the opinions of witnesses can be received when the inquiry is into a subject-matter the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it.'"

via

[3] (1960) 103 CLR 486 at 491.

R v Sica [2012] QSC 430 -
R v Sica [2012] QSC 430 -
Anandan v The Queen [2011] VSCA 413 -
Byrd and Byrd (Conditional Admission of Expert's Evidence) [2011] FamCA 810 (29 September 2011) (Le Poer Trench J)

24. On page 15 of the report, Ms D sets out appendix "D". In that appendix, she calculates the "enterprise value" of S Company as $5,144,000. To reach that figure, she made adjustments to the reported results of the business in the 2009, 2010 and 2011 financial years. One of the adjustments was for "*commercial salary package – related parties*." This is directed solely to the husband's remuneration. Note 8 to appendix "D" appears on page 17 of the report and includes the basis for her adjustment of the husband's remuneration package for the purpose of valuation. In that section of the report, she says, inter alia, "*I note that I am not an expert in remuneration*." She also says, "*I understand that [X] adopted a notional advisor salary of $120,000 per annum when considering the valuation of an [X]-based financial planning business on a capitalised earning basis.*" In note 8, she again cites, "[Z *Financial Recruitment Company] – Australian consolidated salary guide and market report 2011-2012.*" She said, "*A commercial salary package for the husband has been considered by reference to that publication*." The husband says that adopting the decision in *Clark v Ryan* (1960) 103 CLR 486 , her opinion based on the above is inadmissible unless Mr Z, the author of the service, is in evidence.

Byrd and Byrd (Conditional Admission of Expert's Evidence) [2011] FamCA 810 -
Byrd and Byrd (Expert's Report Inadmissible (No 2) [2011] FamCA 804 -
Byrd and Byrd (Expert's Report Inadmissible (No 2) [2011] FamCA 804 -
Spencer and Davidson [2011] FMCAfam 529 (25 July 2011) (Howard FM)

Clark & Ryan (1960) 103 CLR 486
Collu v Rinaldo

Spencer and Davidson [2011] FMCAfam 529 -
Combe v Katsaros [2011] SADC 93 -
Noone v Operation Smile (Australia) Inc (No 2) [2011] VSC 153 -
Noone v Operation Smile (Australia) Inc (No 2) [2011] VSC 153 -
R v Landon [2011] SASCFC 12 -
McKay and Repatriation Commission [2010] AATA 1067 -
Police v Barber [2010] SASC 329 -
Munro and Repatriation Commission [2010] AATA 942 -
Ross and Comcare [2010] AATA 928 -
Doddridge v Tasmania [2010] TASCCA 18 -
Doddridge v Tasmania [2010] TASCCA 18 -
Li v Toyota Motor Corporation Australia Ltd [2010] VSC 458 -
Li v Toyota Motor Corporation Australia Ltd [2010] VSC 458 -
Li v Toyota Motor Corporation Australia Ltd [2010] VSC 458 -
JONATHON HAZELTON and CIVIL AVIATION SAFETY AUTHORITY [2010] AATA 693 -
Schnitzel World Pty Ltd v Yung Chon Pty Ltd [2010] QCAT 474 -
K v The State of Western Australia [2010] WASCA 157 -
K v The State of Western Australia [2010] WASCA 157 -
Creek and Repatriation Commission [2010] AATA 563 -
Rees v Lumen Christi Primary School [2010] VSC 514 -
Rees v Lumen Christi Primary School [2010] VSC 514 -
JTMJ and Australian Securities and Investments Commission [2010] AATA 350 (11 May 2010) (Deputy S A Forgie P)

50. Opinion evidence that is given by a person who has specialised knowledge based on the person's training, study or experience and that is wholly or substantially based on that specialised knowledge is in a different category. It is admissible in the courts as an exception to the opinion rule [22] and is taken into evidence in the Tribunal. As Gaudron J expressed the principle in *HG v The Queen*: [23]

"*The position at common law is that, if relevant, expert or opinion evidence is admissible with respect to matters about which ordinary persons are unable 'to form a sound judgment ... without the assistance of [those] possessing special knowledge or experience ... which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience'.*" [24]

via

[24] *HG v The Queen* (1999) 197 CLR 414; 160 ALR 554 at 432, 566 ; [58] quoting from a judgment of King J in *R v Bonython* (1984) 38 SASR 45 at 46-47 and see also *Clark v Ryan* [1960] HCA 42; (1960) 103 CLR 486 at [4] ; 491 per Dixon CJ adopting the notes by JW Smith to *Carter v. Boehm* 1 Smith L.C., 7th ed. (1876) p. 577

R v Farquharson [2009] VSCA 307 -
R v Farquharson [2009] VSCA 307 -
Cha v Oh (No. 22) (Part 1) [2009] NSWDC 299 (08 December 2009) (Gibson DCJ)

[580] In making this analysis of the fourth and fifth defendants' audit reports, I had been careful not to step into the shoes of an expert. It is not for me to opine on whether or not the fourth and fifth defendants' report complies with auditing rules, or even what these are. These are matters

upon which the onus of proof lies on the defendants. As is set out in the section of this judgment concerning the reports of Mr Finney, he has done no more than express an opinion about the truth or falsity of the imputations, which is opinion evidence that is argument in support of the defendants case and thus not admissible under s 79 : *Clark v Ryan* (1960) 103 CLR 486 at 491 ; *ASIC v Rich* [2005] NSWSC 149 at [280] per Austin J.

Cha v Oh (No. 22) (Part 1) [2009] NSWDC 299 -
Cha v Oh (No. 22) (Part 1) [2009] NSWDC 299 -
Cha v Oh (No. 22) (Part 1) [2009] NSWDC 299 -
Unimin Australia Limited v State of Queensland [2009] QSC 384 (30 November 2009) (Applegarth J)

Clark v Ryan (1960) 103 CLR 486 , cited
Fletcher v May [2001] QDC 081 , cited
Fox v Percy (2003) 214 CLR 118, applied
Hobbs & Anor v Oildrive [2008] QSC 45 , cited
Kelly v The Queen (2004) 218 CLR 216 , cited
Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705 , applied
Minnesota Mining and Manufacturing Co v Beiersdorf (Australia) Ltd (1980) 144 CLR 253, applied
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, applied
Re Clark [2005] QLRT 118, cited
Re Miles v Armstrong [2001] QLRT 93, cited

Unimin Australia Limited v State of Queensland [2009] QSC 384 -
Hill Top Residents Action Group Inc v Minister for Planning [2009] NSWLEC 185 -
Hill Top Residents Action Group Inc v Minister for Planning [2009] NSWLEC 185 -
Turner v Victorian Arts Centre Trust [2009] VSCA 224 (02 October 2009) (Ashley, Mandie JJA and Beach AJA)

67. So far as the good management practices which the appellant sought to have adduced in evidence from Mr Bailey are concerned, in our view the trial judge was correct, upon the material with which he was provided, to characterise them as matters that did not require the assistance of an expert in order for the jury to be able to form a sound judgment. The jury was more than capable of judging those matters for themselves unencumbered by Mr Bailey's assistance. [25] Whilst calling this evidence from Mr Bailey might have presented the appellant's case more vividly and cogently before the jury, as Dixon CJ explained in *Clark v Ryan* , [26] this is not a sufficient basis upon which such evidence can be admitted. So far as they were articulated, then, the good management practices which the appellant sought to adduce in evidence from Mr Bailey were matters of argument that could easily have been advanced by counsel for the appellant at trial. Whether or not the arguments should have been accepted was, of course, a matter for the jury.

Turner v Victorian Arts Centre Trust [2009] VSCA 224 -
Turner v Victorian Arts Centre Trust [2009] VSCA 224 -
Turner v Victorian Arts Centre Trust [2009] VSCA 224 -
R v Ferguson [2009] VSCA 198 -
Sydney South West Area Health Service v Stamoulis [2009] NSWCA 153 -
Sydney South West Area Health Service v Stamoulis [2009] NSWCA 153 -
Walter Mining Pty Ltd v Hennessey [2009] QSC 102 (07 May 2009) (McMeekin J)

33. I do not think the criticism justified. "Underground coal mining" is an activity with which most judicial officers will have little or no personal knowledge. It takes place in an environment foreign to common experience. The subject matter of the inquiry includes an understanding of the risks inherent in such activity in such an environment and how they can best be met. The test postulated for the receipt of opinion evidence by Dixon CJ in *Clark v Ryan* [23] that "inexperienced persons would be unlikely to prove capable of forming a correct judgment upon [the subject matter of the inquiry] without [the assistance provided by the opinion of a witness possessing peculiar skill]" is, in my view, sufficiently

satisfied. Someone of Mr Smyth's background, involved in such activity and in such an environment for over 20 years, will almost certainly have knowledge and expertise of assistance to the Coroner in forming a correct judgment.

via

[23] (1960) 103 CLR 486 at 491.

Walter Mining Pty Ltd v Hennessey [2009] QSC 102 -
Walter Mining Pty Ltd v Hennessey [2009] QSC 102 -
Walter Mining Pty Ltd v Hennessey [2009] QSC 102 -
R v Butler [2009] QCA 111 -
SZNCR v Minister for Immigration & Anor [2009] FMCA 338 (22 April 2009) (Scarlett FM)

9. Counsel for the Minister drew the Court's attention to the decisions of *Makita (Australia) Pty Ltd v Sprowles* [1] at [59], [84]-[90], *HG v The Queen* [2] at [39]-[41], *Clark v Ryan* [3] at 491, *Velevski v R* [4] at [81]-[85], and *Australian Securities and Investments Commission v Vines* [5] at [15].

Submissions on behalf of the Applicant

via

[3] (1960) 103 CLR 486

SZNCR v Minister for Immigration & Anor [2009] FMCA 338 -
R v BDX [2009] VSCA 28 (12 March 2009) (Vincent, Nettle, Ashley, Redlich and Weinberg JJA)

77. The basic principles are those set out by the High Court in *Clark v Ryan.* [44] In that case, it was held that a consulting engineer, who over many years had been engaged in investigating road accidents for insurance companies, could not give evidence as to the movements and tendencies of a semi-trailer in an articulated vehicle. He was thereby precluded from expressing an opinion as to how a particular collision between a panel van and semi-trailer had occurred.

via

[44] (1960) 103 CLR 486 .

R v BDX [2009] VSCA 28 -
R v BDX [2009] VSCA 28 -
R v BDX [2009] VSCA 28 -
R v Rich (Ruling No. 10) [2009] VSC 10 -
Landmark Operations Ltd v J Tiver Nominees Pty Ltd [2008] SASC 322 -
Landmark Operations Ltd v J Tiver Nominees Pty Ltd [2008] SASC 322 -
R v Vinayagamoorthy [2008] VSC 599 -
R v Vinayagamoorthy [2008] VSC 599 -
Peak v Dunleavy [2008] NSWDC 232 (10 October 2008) (Levy SC DCJ)
Clark v Ryan (1960) 103 CLR 486
Davies v Swan Motor Co. Ltd

Peak v Dunleavy [2008] NSWDC 232 -
Baulch v Lyndoch Warrnambool & Anor (Ruling No 3) [2008] VSC 420 (03 October 2008) (Forrest J)

15. I now turn to the application of those principles to the evidence sought to be adduced from Mr Bailey. The first issue is the field of expertise; Mr Bailey disavows any expertise in sleep deprivation. Rather he has experience of many years in personnel and human resource management. It is this which is said to enable him to give evidence as to the appropriate management of employees on consecutive shifts and the management of fatigue which may flow from engaging in those shifts. I am prepared to accept that there is a field of specialised knowledge in this area of shift management and rostering and the impact of fatigue in determining such arrangements. I do not accept the defendant's contention based upon the judgment of Menzies J in *Clark v Ryan* [8] that this is a matter of such common experience that a jury's task is not assisted by such evidence. In my view it is an area of specialist knowledge.

via

[8] (1960) 103 CLR 486

Baulch v Lyndoch Warrnambool & Anor (Ruling No 3) [2008] VSC 420 -
WorkCover Authority of New South Wales (Inspector Woodington) v Australand Holdings Limited and Sassall Glass & Joinery Pty Limited [2008] NSWIRComm 153 -
Police v Kontro [2008] NTMC 43 -
Police v Kontro [2008] NTMC 43 -
Rylands v Regina [2008] NSWCCA 106 -
Rylands v Regina [2008] NSWCCA 106 -
Spirkovski v Ogden [2007] WADC 222 -
Spirkovski v Ogden [2007] WADC 222 -
Spirkovski v Ogden [2007] WADC 222 -
Koljibabic v WMC Resources Ltd [2007] WADC 199 (12 November 2007) (Keen DCJ)

28 Mr Willenborg's evidence as to his experience of various plants with which he has been involved and how those plants produce various gases is not in my opinion evidence of an expert nature – it is factual evidence; *cf* the example given by Dixon CJ in ***Clark v Ryan*** at 490-491 .

Koljibabic v WMC Resources Ltd [2007] WADC 199 -
Koljibabic v WMC Resources Ltd [2007] WADC 199 -
Koljibabic v WMC Resources Ltd [2007] WADC 199 -
R v Cooper [2007] NZCA 481 -
Oblak v The State of Western Australia [2007] WASCA 176 -
Oblak v The State of Western Australia [2007] WASCA 176 -
Oblak v The State of Western Australia [2007] WASCA 176 -
Oblak v The State of Western Australia [2007] WASCA 176 -
R v. Liu [2007] QCA 113 (05 April 2007) (Williams and Holmes JJA and Mackenzie J,)

24. In the present case, the ruling went much further, enabling Mr Tootell to identify "specific conduct" as "unusual" and to comment on certain physical movements. In some circumstances it might be permissible for an expert to say that a player's conduct is unusual, in the sense that it does not fall within the parameters of the game; but these were simple bodily movements by Mr Zhao. They were as visible to the jury as they were to Mr Tootell. The jury was as well placed as he to assess whether Zhao had the opportunity to conceal a card and whether at any given time he was doing so. Mr Tootell's evidence in the passages quoted was not expert opinion evidence. It consisted of observations and interpretations which were equally available to the lay person. It constituted "an attempt to guide the jury upon matters which it was within the ordinary capacity of jurors to determine for themselves". [3]

via

[3] *Clark v Ryan* (1960) 103 CLR 486 at 492.

R v. Liu [2007] QCA 113 -
R v. Liu [2007] QCA 113 -
R v Truong [2007] NTSC 20 -
R v Truong [2007] NTSC 20 -
Collaroy Services Beach Club Ltd v Haywood [2007] NSWCA 21 -
Collaroy Services Beach Club Ltd v Haywood [2007] NSWCA 21 -
Collaroy Services Beach Club Ltd v Haywood [2007] NSWCA 21 -
Collaroy Services Beach Club Ltd v Haywood [2007] NSWCA 21 -
R v Ciantar [2006] VSCA 263 -
Hannes v Director of Public Prosecutions (Cth) (No 2) [2006] NSWCCA 373 -
Hannes v Director of Public Prosecutions (Cth) (No 2) [2006] NSWCCA 373 -
Kastelein v Newmont Australia Limited [2006] NTMC 81 (28 September 2006)
Clark v Ryan (1960) 103 CLR 486
Makita (Australia) Pty Ltd v Sprowles

Kastelein v Newmont Australia Limited [2006] NTMC 81 (28 September 2006)

42. The purported area of expertise is not simply "the value to a worker of the benefit of accommodation, etc" it is the general expertise of commercial valuation of remote accommodation and amenities. To be of assistance to the Court, the expertise need not be as specific as the "value to the employee" as asserted by counsel for the employer, the field of expertise may be wider (to assist the court to come to a conclusion on the value to the employee objectively and reasonably assessed). The quote relied on by counsel from Clark v Ryan (1960) 103 CLR 486 at 491 to argue that there is not a legitimate area of expertise is as follows:

> "...the opinion of witnesses possessing peculiar skill is admissible whenever the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to obtain knowledge of it".

Suffice to say, valuation evidence is not a "science" as such (bearing in mind that Clark v Ryan concerned the rejection of an engineer's evidence when he was found to possess no higher knowledge of the tendency of a trailer to slew than the trier of fact). The quote in Clark v Ryan needs also to be seen accommodating the later High Court decision of Weal v Bottom (1966) 40 ALJR 463 that also concerned the question of establishing the tendency of a trailer to slew outwards to the centre of the road during cornering. In Weal v Bottom the plaintiff called testimony from experienced drivers of similar vehicles to explain the slewing tendency and the conditions under which it might occur. The testimony, being knowledge outside of the general experience of the jurors was admitted as of assistance to it in inferring whether, given the conditions established by the admissible evidence it was likely that the accident was caused through the slewing of the trailer towards the centre of the road: (As discussed in Ligertwood, Australian Evidence 4th Edition Butterworths at 485-488). The context of Weal v Bottom involved the acceptance of experience of the witness as providing particular expertise concerning the particular problem in that case. In my view Mr Linkson, through his experience and qualifications and his study of the particular area and associated areas under enquiry by the Court should be allowed to give that testimony as an expert. Mr Linkson is clearly experienced in an area of knowledge beyond that possessed by the Court and it is of apparent assistance as it will assist the Court to make an objective assessment of the value of the benefits. This is similar to the approach taken in Weal v Bottom and does not detract from the dictum in Clark v Ryan.

Kastelein v Newmont Australia Limited [2006] NTMC 81 -
Mouritz v The State of Western Australia [2006] WASCA 165 -

Young v Henry Walker Eltin Contracting Pty Ltd (in Administration) [2006] NTMC 63 -
Keller v R [2006] NSWCCA 204 -
VBN and Ors and Australian Prudential Regulation Authority and Anor [2006] AATA 710 -
VBN and Ors and Australian Prudential Regulation Authority and Anor [2006] AATA 710 -
VBN and Ors and Australian Prudential Regulation Authority and Anor [2006] AATA 710 -
R v Liu, Liu, Abbas, Shao, Zhao [2006] QDC 247 -
WorkCover Authority of NSW (Inspector Simpson) v CNH Australia Pty Limited (formerly Case Corporation Pty Limited), Davibray Pty Ltd as Trustee for B & S Carruthers Trust trading as Carruthers Machinery Co. and.. [2006] NSWIRComm 220 -
WorkCover Authority of NSW (Inspector Simpson) v CNH Australia Pty Limited (formerly Case Corporation Pty Limited), Davibray Pty Ltd as Trustee for B & S Carruthers Trust trading as Carruthers Machinery Co. and.. [2006] NSWIRComm 220 -
WorkCover Authority of NSW (Inspector Simpson) v CNH Australia Pty Limited (formerly Case Corporation Pty Limited), Davibray Pty Ltd as Trustee for B & S Carruthers Trust trading as Carruthers Machinery Co. and.. [2006] NSWIRComm 220 -
WorkCover Authority of NSW (Inspector Simpson) v CNH Australia Pty Limited (formerly Case Corporation Pty Limited), Davibray Pty Ltd as Trustee for B & S Carruthers Trust trading as Carruthers Machinery Co. and.. [2006] NSWIRComm 220 -
Wall v Cooper [2006] WADC 81 -
Wall v Cooper [2006] WADC 81 -
White v The Queen [2006] WASCA 62 (07 April 2006) (Wheeler JA)

Clark v Ryan (1960) 103 CLR 486

The State of Western Australia v Martinez [2006] WASC 98 (20 March 2006) (Em Heenan J)

11. So I must come to the question of whether or not, as asserted expert evidence, it may be admitted in these proceedings. A convenient summary of the tests for the recognition and admissibility of expert evidence in Australia can be found in the recent judgment of the Court of Criminal Appeal in the case of ***Mallard v The Queen*** (2003) 28 WAR 1 - the particular passages commence at 54, [251] . I will not cite all these passages but my observations can be taken to include and to adopt the observations of the Court of Criminal Appeal at [251] [252], where reference is made to the judgment of Dixon CJ in ***Clark v Ryan*** (1960) 103 CLR 486 at 491 and to the decision of King CJ in the Full Court of the Supreme Court of South Australia in ***R v Bonython*** (1984) 38 SASR 45 and through to [254] of ***Mallard*** .

The State of Western Australia v Martinez [2006] WASC 98 (20 March 2006) (Em Heenan J)

45. The learned trial judge excluded the socalled expert evidence at trial on the grounds that it did not constitute scientific evidence. His decision was overturned on appeal when a retrial was ordered but, on a further appeal to the High Court of Australia, the decision of the trial judge was confirmed and the appeal by the prosecution was allowed. At [43] in the judgment of Gleeson CJ there is the passage:

> "To paraphrase what was said by Dixon CJ in *Clark v Ryan* [(1960) 103 CLR 486] about the expert witness in that case, the evidence the defence sought to lead from Mr McCombie [the expert] really amounted to putting from the witness box the inferences and hypotheses on which the defence case wished to rely."

And at [44]:

> "This was not a trial by jury, but in trials before judges alone, as well as in trials by jury, it is important that the opinions of expert witnesses be confined, in accordance with s 79, to opinions which are wholly or substantially based on their specialised knowledge. Experts who venture 'opinions', (sometimes merely their own inference of fact), outside their field of specialised knowledge may invest those opinions with a spurious appearance of authority, and legitimate

processes of factfinding may be subverted. The opinions which Mr McCombie was to be invited to express appear to provide a good example of the mischief which is to be avoided."

The State of Western Australia v Martinez [2006] WASC 98 -
The State of Western Australia v Martinez [2006] WASC 98 -
District Council of Mallala v Livestock Markets Ltd [2006] SASC 80 (17 March 2006) (White J)

35. The *Magistrates Court (Civil) Rules* do not include any definition of the word "expert" or of the expression " report from an expert". It is reasonable to infer that the expression "report from an expert" is used with the same meaning as the expression "expert reports" contained in s 49 (1)(ca) of the *Magistrates Court Act 1991* . That is the provision pursuant to which the rule has been promulgated. It is also reasonable to infer that each expression is used to refer to a document prepared by a person who could, in accordance with the rules of evidence, give expert opinion evidence at the trial of the action. A witness with expertise may give evidence on matters which are not, or not wholly, within the knowledge and experience of ordinary persons. [12] The circumstances in which expert opinion evidence may be received in a trial were discussed in *R v Bonython* :

> Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts:
>
> (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and
>
> (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court.
>
> The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court. [13]

via

[12] *Clark v Ryan* (1961) 103 CLR 486 .

District Council of Mallala v Livestock Markets Ltd [2006] SASC 80 -
Angelo Ferella v Otvosi [2006] FMCA 231 (10 March 2006) (Barnes FM)
Clarke v Ryan (1960) 103 CLR 486
Switz Pty Ltd v Glowbind

G. Ferella v Otvosi [2006] FMCA 334 (10 March 2006) (Barnes FM)

49. More pertinently, an opinion is not admissible under s. 79 unless the Court is satisfied, on the balance of possibilities (s.142), that the opinion is based wholly or substantially on the expert' s specialised knowledge. In *Quick v Stoland* Emmett J at 381 expressed doubt as to whether the expression of opinion as to solvency in issue was substantially based on specialised knowledge or merely on matters such as examination and analysis of specific material and the inferences drawn from that material. Finkelstein J suggested (at 382 – 383) that if an accountant *"seeks to do no more than state what is obvious"* from certain books and records made available for his inspection *"his evidence is not receivable"*, although Branson J at 375 considered the better view was that *"other than in obvious cases a statement of a qualified*

accountant and insolvency practitioner, made on the basis of an examination of financial accounts and other company records, that a particular company is, or is not, insolvent is an expression of opinion." However her Honour went on to refer to the complexity of corporate accounts and corporate accounting practices suggesting that *"persons with the training, study and experience of the kind enjoyed by [the expert in question] possess peculiar skills in an area which 'inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance'"* (see Dixon CJ in *Clarke v Ryan* (1960) 103 CLR 486 at 491).

G. Ferella v Otvosi [2006] FMCA 334 -
Angelo Ferella v Otvosi [2006] FMCA 231 -
Doric Building Pty Ltd v Marine & Civil Construction Co Pty Ltd [2006] WASC 12 -
Abdulla v Berkeley on Hindley Street P/L [2005] SAEOT 2 -
Abdulla v Berkeley on Hindley Street P/L [2005] SAEOT 2 -
Abdulla v Berkeley on Hindley Street P/L [2005] SAEOT 2 -
Pratt v Hismelt Corporation Pty Limited [2005] WADC 225 -
Pratt v Hismelt Corporation Pty Limited [2005] WADC 225 -
Rapid Metal Developments (Australia) Pty Ltd v Anderson Formrite Pty Ltd [2005] WASC 255 -
Hunter Holdings Pty Ltd v Shire of Corrigin [2005] WADC 211 -
Hunter Holdings Pty Ltd v Shire of Corrigin [2005] WADC 211 -
Hunter Holdings Pty Ltd v Shire of Corrigin [2005] WADC 211 -
Hunter Holdings Pty Ltd v Shire of Corrigin [2005] WADC 211 -
R v Bjordal [2005] SASC 422 (10 November 2005) (Debelle, Besanko and Vanstone JJ)

Australian Securities Commission and Investments Commission v Rich (2005) 218 ALR 764; *Clark v Ryan* (1960) 103 CLR 486 ; *Cooper v Bech (No 2)* (1975) 12 SASR 151; *Frye v United States* 293 F 1013 (1923); *Murphy v The Queen* (1989) 167 CLR 94; *Paric v John Holland (Constructions) Pty Ltd* (1985) 59 ALJR 844; *R v Howard* (2005) 152 A Crim R 7; *R v Perry* (1990) 49 A Crim R 243; *Sydneyside Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 55 IPR 354; *Trade Practices Commission v Arnotts Ltd (No 5)* (1990) 21 FCR 324; *Transport Publishing Co Pty Ltd v Literature Board of Review* (1956) 99 CLR 111; *Wolper & Poole* (1972) 2 SASR 419, considered.

R v Bjordal [2005] SASC 422 -
R v Bjordal [2005] SASC 422 -
Whitsed v The Queen [2005] WASCA 208 (07 November 2005) (Roberts-Smith and Pullin JJA; Miller AJA)

130 The evidence of Dr Margolius at trial was expert evidence. She expressed opinions which were clearly admissible. As early as 1911 in ***Mason v The Queen*** (1912) 7 Crim App R 67, Lord Alverstone CJ said that evidence of an expert is admissible in a criminal trial notwithstanding that the expert may not have seen the body, but had only heard evidence of those who had seen it. That was the situation in the present case, where the appellant in his statement to investigating police had given descriptions of the appearance of the deceased, Avril and Alahna Croft, after, or in the case of Mrs Croft immediately before, their deaths. In ***R v Middleton*** (2000) 114 A Crim R 258, Anderson J (with whom Kennedy and Wheeler JJ agreed) said of expert evidence given by Dr Margolius in another trial, at [19] and [21] :

> "I would have thought that a forensic pathologist who is allowed to give and gives uncontested evidence that she is skilled in examining and interpreting wounds has qualified herself - *prima facie* , at any rate - to express an opinion as to how the wounds came to be made by reference to the nature of the wounds, their severity, their juxtaposition, their location on the body of the victim and their pattern. The reception of this type of opinion evidence is not without precedent. In *Mason* (1911) 7 Cr App R [*sic*] 67 a surgeon was allowed to give evidence that a fatal stab wound was not self-inflicted.
>
> ...

> On the face of it, therefore, Dr Margolius was an expert called to give evidence on a matter calling for her expertise and within the field of her expertise. The qualification and competency of witnesses to give opinion evidence as an expert is primarily for the court of trial as a question of fact. A court of appeal will be slow to reverse the decision to admit the evidence: *Bratt v Western Airlines* 166 ALR 1061 (1946) [*sic*] at 1067; *Clark v Ryan* (1960) 103 CLR 486 at 503 [*sic*] per Menzies J."

Rodgers and Australian Postal Corporation [2005] AATA 1007 -
Rodgers and Australian Postal Corporation [2005] AATA 1007 -
Lynch v Kinney Shoes (Australia) Ltd [2005] QCA 326 -
Combet & Anor v Commonwealth of Australia & Ors [2005] HCATrans 633 -
Apelt and Telstra Corporation Limited [2005] AATA 602 -
R v Cox (No 2) [2005] VSC 224 -
R v Cox (No 1) [2005] VSC 157 (16 May 2005) (Kaye J)

14. The second and related principle is that, where the opinion evidence is in a realm of enquiry in which inexperienced persons would be unlikely to prove capable of forming a correct judgment, a witness may only give opinion evidence as to that matter if the witness is suitably qualified as an "expert". In other words the profession or course of study undertaken by the witness, including the witness's particular experience in that profession, must give the witness "more opportunity of judging than other people"; see *R v Silverlock*. [13] In considering this issue, it is not sufficient to determine that, in a general sense, the witness is qualified to give opinion evidence on a particular subjectmatter. What is critical is that the witness is appropriately qualified to give expert evidence in the form of the particular opinion which is sought to be adduced. [14] As a corollary to that, and returning to the first principle to which I have referred, if the witness is qualified as an "expert", the witness is, nonetheless, not entitled to express opinions on matters which the jury could determine for themselves without the evidence of the expert.

via

[13] [1894] 2 QB 766 at 769 (per Vaughan Williams J), quoted with approval by Dixon CJ in *Clark v Ryan* (above) at 491 – 2 ; see also *Bugg v Day* (1949) 79 CLR 442 at 462-3 (per Dixon J).

R v Cox (No 1) [2005] VSC 157 -
R v Cox (No 1) [2005] VSC 157 -
Deputy Commissioner of Taxation for the Commonwealth of Australia v Robinswood Pty Ltd [2005] WASC 67 -
Pratt v Hismelt Corporation Pty Limited [2005] WADC 80 (28 April 2005) (REGISTRAR WALLACE)

25. ***Clark v Ryan*** (cited earlier) is authority for the proposition that it must be established that the expert witness has, by reason of his calling or course of study the appropriate area and level of expertise.

Pratt v Hismelt Corporation Pty Limited [2005] WADC 80 (28 April 2005) (REGISTRAR WALLACE)

22. Expert evidence is not admissible for the purpose of providing guidance to a trial judge in respect of matters within his or her own ordinary capacity. Rather, the evidence of an expert is admissible in cases where the subject-matter of inquiry is such that inexperienced persons are unlikely to be capable of forming a correct judgment on it without assistance ***Clark v Ryan*** (1960) 103 CLR 486 .

Pratt v Hismelt Corporation Pty Limited [2005] WADC 80 -
Pratt v Hismelt Corporation Pty Limited [2005] WADC 80 -
R v Choi (Pong Su) (No 19) [2005] VSC 66 -
R v Choi (Pong Su) (No 19) [2005] VSC 66 -

ASIC v Rich [2005] NSWSC 149 -
ASIC v Rich [2005] NSWSC 149 -
ASIC v Rich [2005] NSWSC 149 -
Van Der Wegen v O'Callaghan [2005] WADC 26 -
Van Der Wegen v O'Callaghan [2005] WADC 26 -
Anikin v Sierra [2004] HCA 64 -
James v Launceston City Council [2004] TASSC 69 (02 July 2004) (Slicer J)

8. That opinion might require factual underpinning, eg, whether the account of pain is real or illusory, but the opinion of suitability for or difficulty in a particular form of work remains appropriate evidence within s 79 (*Bar bosa v Di Meglio* [1999] NSWCA 307, *HG v R* (supra), *Clark v Ryan* (1960) 103 CLR 486). The next passage related to general experience, namely the inter-relationship between chronic pain and the choice or decisions about work related activity. It is within the province of the witness. Counsel for the defendant assumed that the addition of the words "such as Gerald James" has an import which deprived the opinion of its proper characteristics. The objection sought to elevate the particular to a significance which it does not possess. The addition of the words adds no weight to the general statement. The question in issue is whether the plaintiff, as a matter of fact, comes within the general statement of opinion.

James v Launceston City Council [2004] TASSC 69 -
James v Launceston City Council [2004] TASSC 69 -
Jager v Medical Complaints Tribunal [2004] TASSC 58 -
Carley v Sheppard [2004] WASCA 80 -
Carley v Sheppard [2004] WASCA 80 -
Carley v Sheppard [2004] WASCA 80 -
Carley v Sheppard [2004] WASCA 80 -
Carley v Sheppard [2004] WASCA 80 -
Stockland (Constructors) Pty Limited v Darryl I Coombs [2004] NSWSC 323 -
Stockland (Constructors) Pty Limited v Darryl I Coombs [2004] NSWSC 323 -
Jones v PUTLEY [2004] WADC 49 -
R v Court [2003] WASCA 308 (10 December 2003) (Miller J, McKechnie J, Wallwork AJ)

Clarke v Ryan (1960) 103 CLR 486

R v Court [2003] WASCA 308 -
R v Court [2003] WASCA 308 -
Mallard v The Queen [2003] WASCA 296 (03 December 2003) (Parker, Wheeler and Roberts-Smith JJ)

251. In Australia, the starting point for the admissibility of expert evidence is usually taken to be the judgment of Dixon CJ in ***Clark v Ryan*** (1960) 103 CLR 486 at 491 :

> "The rule of evidence relating to the admissibility of expert testimony as it affects the case cannot be put better than it was by *J.W. Smith* in the notes to *Cart er v. Boehm*, 1 Smith L.C., 7th ed. (1876) p. 577. 'On the one hand' that author wrote, 'it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible whenever the subjectmatter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it'."

Mallard v The Queen [2003] WASCA 296 (03 December 2003) (Parker, Wheeler and Roberts-Smith JJ)

Clark v Ryan (1960) 103 CLR 486

Grubb v Toomey [2003] TASSC 131 -
Mallard v The Queen [2003] WASCA 296 -
Mallard v The Queen [2003] WASCA 296 -
R v Evans No. Sccrm-03-220 [2003] SASC 396 -
ASIC v Vines [2003] NSWSC 1095 -

ASIC v Vines [2003] NSWSC 1095 -
Seven Network (Operations) Ltd v Media Entertainment and Arts Alliance [2003] FCA 1366 -
Stephen McMartin v Newcastle Wallsend Coal Company Pty Ltd [2003] NSWIRComm 292 -
R v Scott-Wallace [2003] QCA 358 -
Murphy v Stevens [2003] SASC 238 (01 August 2003)

519. I do not think this evidence was admissible. Mr Wishart was expressing opinions which are only admissible if they relate to a subject matter which is not, or not wholly, within the knowledge of ordinary persons: *Clark v Ryan* (1960) 103 CLR 486 . In my view Mr Wishart's opinions were largely about matters within the knowledge of ordinary persons and in particular the learned Trial Judge. If I am wrong about that matter, to be admissible it must be shown that the subject matter "forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court": *The Queen v Bonython* (1984) 38 SASR 45 per King CJ at 47. It was not established that the opinions of Mr Wishart related to such a body of knowledge. It appears that his opinions were based upon his understanding of the claims of the appellant Edwards, his doubts about those claims and his belief about how persons might act in certain circumstances. If relevant, these were all matters for the learned Trial Judge.

Pearce v Burke [2003] WASCA 109 (28 May 2003) (Murray J, Wheeler J, Hasluck J)

Clark v Ryan (1960) 103 CLR 486

Pearce v Burke [2003] WASCA 109 -
Thompson v City of South Perth [2003] WASCA 106 -
FGT Custodians Pty Ltd v Fagenblat [2003] VSCA 33 -
FGT Custodians Pty Ltd v Fagenblat [2003] VSCA 33 -
Godfrey v New South Wales (No 1) [2003] NSWSC 160 -
Godfrey v New South Wales (No 1) [2003] NSWSC 160 -
Godfrey v New South Wales (No 1) [2003] NSWSC 160 -
Godfrey v New South Wales (No 1) [2003] NSWSC 160 -
NAB v Garry [2003] NSWSC 22 -
NAB v Garry [2003] NSWSC 22 -
Amalgamated Television Services Pty Ltd v Marsden [2002] NSWCA 419 -
Amalgamated Television Services Pty Ltd v Marsden [2002] NSWCA 419 -
Edith Cowan University v Czatryko [2002] WASCA 334 (09 December 2002) (Wallwork J, Murray J, Templeman J)
Clark v Ryan (1960) 103 CLR 486
Commissioner of Railways v Ruprecht

Edith Cowan University v Czatryko [2002] WASCA 334 -
Director of Public Prosecutions v Bandali Michael Debs and Jason Joseph Roberts [2002] VSC 513 -
Director of Public Prosecutions v Bandali Michael Debs and Jason Joseph Roberts [2002] VSC 513 -
Hillmarl Pty Ltd v DOVEBEACH Pty Ltd t/as Mandurah Combined Tyre and Battery Service [2002] WADC 234 -
Hillmarl Pty Ltd v DOVEBEACH Pty Ltd t/as Mandurah Combined Tyre and Battery Service [2002] WADC 234 -
Hillmarl Pty Ltd v DOVEBEACH Pty Ltd t/as Mandurah Combined Tyre and Battery Service [2002] WADC 234 -
Hillmarl Pty Ltd v DOVEBEACH Pty Ltd t/as Mandurah Combined Tyre and Battery Service [2002] WADC 234 -
Van Muyen v Nominal Defendant (Qld) [2002] QSC 344 -
Van Muyen v Nominal Defendant (Qld) [2002] QSC 344 -
Van Muyen v Nominal Defendant (Qld) [2002] QSC 344 -
Brechin v Shire of Brookton [2002] WASC 228 -
Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd [2002] WASCA 231 -

Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd [2002] WASCA 231 -
NAB v Garry [2002] NSWSC 1265 -
NAB v Garry [2002] NSWSC 1265 -
Kamal v Minister for Immigration [2002] FCA 818 -
Kamal v Minister for Immigration [2002] FCA 818 -
Nguyen v The Queen [2002] WASCA 181 -
Nguyen v The Queen [2002] WASCA 181 -
Nguyen v The Queen [2002] WASCA 181 -
Beverley ELLSBETH Fox and Damien Alexander Fox by his next friend and mother Beverley ELLSBETH Fox v Acatincai [2002] WADC 82 -
Beverley ELLSBETH Fox and Damien Alexander Fox by his next friend and mother Beverley ELLSBETH Fox v Acatincai [2002] WADC 82 -
Beverley ELLSBETH Fox and Damien Alexander Fox by his next friend and mother Beverley ELLSBETH Fox v Acatincai [2002] WADC 82 -
Uzabeaga v Town of Cottesloe [2002] WADC 71 (12 April 2002) (Yeats DCJ)

118. The defendant has challenged aspects of the plaintiff's expert evidence on the basis that the experts have given opinions outside the area of the expertise in which they are qualified to give opinions. It is well settled that expert evidence is admissible "to furnish scientific information which is likely to be outside the experience and knowledge of a judge or jury" (***R v Turner*** (1975) QB 834 at 841 : approved in ***Murphy v R*** (1989) 167 CLR 94 at 111 : ***Farrell v R*** [1998] HCA 50). In considering the admissibility of expert evidence I am required to consider whether it deals with a subject that an inexperienced person in the position of the court would be "unlikely to prove capable of forming a correct judgment upon without assistance" (***Clark v Ryan*** (1960) 103 CLR 486). The test is whether the testimony is "relevant and given by a qualified expert upon a subject which was properly susceptible of expert evidence and on which expert evidence could be of assistance ..." (***Murphy v R*** (*supra*) per Deane J).

Uzabeaga v Town of Cottesloe [2002] WADC 71 -
Uzabeaga v Town of Cottesloe [2002] WADC 71 -
Velevski v The Queen [2002] HCA 4 -
Velevski v The Queen [2002] HCA 4 -
R v O'Neill [2001] VSCA 227 -
R v O'Neill [2001] VSCA 227 -
Matheson v Commissioner of Main Roads [2001] WASCA 402 -
Matheson v Commissioner of Main Roads [2001] WASCA 402 -
Cerini v The Minister for Transport [2001] WASC 309 -
Cerini v The Minister for Transport [2001] WASC 309 -
Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305 (14 September 2001) (Priestley, Powell and Heydon JJA)

84. In *HG v R* (1999) 197 CLR 414 at [39]-[44] Gleeson CJ construed these provisions as enacting some of the central elements of the common law just discussed.

"[39] An expert whose opinion is sought to be tendered should differentiate between the assumed facts upon which the opinion is based, and the opinion in question [*Ramsay v Watson* (1961) 108 CLR 642; *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313 at 347-348]. Argument in this Court proceeded upon the basis that it was possible to identify from Mr McCombie's written report some facts which he either observed or accepted, and which could be distinguished from his expressions of expert opinion. Even so, the provisions of s 79 will often have the practical effect of emphasising the need for attention to requirements of form. By directing attention to whether an opinion is wholly or substantially based on specialised knowledge based on training, study or experience, the section requires that the opinion is presented in a form which makes it possible to answer that question.

[40] Mr McCombie's report referred to a number of matters he took into account in reaching the conclusions he expressed: things he was told by the complainant, by her mother, and by

the general practitioner who referred the complainant for assessment; his training as a psychologist; his experience in counselling victims of sexual abuse; and his knowledge of patterns of behaviour of disturbed children. It is not in dispute that psychology is a field of specialised knowledge, and that a psychologist may be in a position to express an opinion based on his or her specialised knowledge as a psychologist. However, the witness had to identify the expertise he could bring to bear, and as *Clark v Ryan* [(1960) 103 CLR 486] illustrates, his opinions had to be related to his expertise.

[41] If all that Mr McCombie had said was that, based on his study, training and experience, he considered that the behaviour of the complainant during 1992 and 1993, as recounted to him by others, appeared to be inconsistent with her having been sexually abused during that time ... , then that might have been one thing. It would have required identification of the facts he was assuming to be true, so that they could be measured against the evidence; and it would have required or invited demonstration or examination of the scientific basis of the conclusion. ... What defence counsel wanted was evidence of his opinion that, although the complainant had been abused, the abuse had occurred back in 1987 when, for a period of a month, she was in the custody of her father, and that it was the father who was the abuser. That opinion was not shown to have been based, either wholly or substantially, on Mr McCombie's specialised knowledge as a psychologist. On the contrary, a reading of his report, and his evidence at the committal, reveals that it was based 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 of a psychologist. He did not put to the complainant, for her comment, the suggestion that she had been abused by her father; the complainant told him she could not remember her father. He does not appear to have considered or investigated the possibility of abuse by some third party. He appears to have inferred, for no apparent reason, that the words 'stop it daddy', attributed to the complainant by her mother, referred to sexual as distinct from some other form of abuse.

[42] Logically, there were a number of competing possibilities. The complainant may have been sexually abused by nobody; she may have been abused as she claimed, by the appellant; she may have been abused by her father; she may have been abused by both her father and the appellant; she may have been abused by some person or persons unknown. It was not demonstrated, and it is unlikely, that it is within the field of expertise of a psychologist to form and express an opinion as to which of those alternatives was to be preferred.

[43] To paraphrase what was said by Dixon CJ in *Clark v Ryan* [(1960) 103 CLR 486 at 492] about the expert witness in that case, the evidence the defence sought to lead from Mr McCombie really amounted to putting from the witness box the inferences and hypotheses on which the defence case wished to rely.

[44] This was not a trial by jury, but in trials before judges alone, as well as in trials by jury, it is important that the opinions of expert witnesses be confined, in accordance with s 79 , to opinions which are wholly or substantially based on their specialised knowledge. Experts who venture 'opinions' (sometimes merely their own inference of fact), outside their field of specialised knowledge may invest those opinions with a spurious appearance of authority, and legitimate processes of fact-finding may be subverted. The opinions which Mr McCombie was to be invited to express appear to provide a good example of the mischief which is to be avoided."

Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305 -
Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305 -
Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305 -
Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305 -
Czatyrko v Edith Cowan University [2001] WADC 164 -
Subramaniam v Minister for Immigration and Multicultural Affairs [2001] FCA 891 -

Marsden v Amalgamated Television Services Pty Ltd [2001] NSWSC 510 (27 June 2001) (Levine J)

Clark v Ryan (1960) 103 CLR 486

Clark v Taylor (1836) 3 Scott 95

McMillen v Brambles Security Services Limited [2001] QSC 271 -
McMillen v Brambles Security Services Limited [2001] QSC 271 -
R v Karger [2001] SASC 64 -
Sharp v Stephen Guinery t/as Port Kembla Hotel & Port Kembla RSL Club [2001] NSWSC 338 -
Sharp v Stephen Guinery t/as Port Kembla Hotel & Port Kembla RSL Club [2001] NSWSC 338 -
Idoport Pty Ltd v National Australia Bank Ltd [2001] NSWSC 123 -
Idoport Pty Ltd v National Australia Bank Ltd [2001] NSWSC 123 -
Idoport Pty Ltd v National Australia Bank Ltd [2001] NSWSC 123 -
Idoport Pty Ltd v National Australia Bank Ltd [2001] NSWSC 123 -
Carlton and United Breweries Limited v Royal Crown Company, Inc [2001] ATMO 7 (23 January 2001) (Ian Forno)

> To the extent that the experts express an opinion of the likelihood of an association being made by the relevant section of the wine purchasing public (see below) in consequence of the shared words in the brand names of the two wines, I am not satisfied that, save possibly for Mr Forrestal, they have been shown to possess a specialised knowledge based on experience that would allow them to venture that opinion. In saying this I am not in any way doubting the particular respective experience of each in aspects of the wine industry. What I am questioning is their demonstrated possession of such specialised knowledge of consumer decision-making processes in this market as would admit of their expressing the particular opinion they have. Their experience would, at least in some cases, indicate a knowledge of the fact of actual mistake or confusion arising where there has been a particularly close similarity in brand names (eg Moss Wood and Moss Brothers; Karrivale and Karriview; Wyndham Estate Bin 555 and Eden Valley TR 222). What it does not adequately suggest is a knowledge based on an experience of the factors that may be causative of, and the conditions that create the likelihood of, mistake or confusion in the decision-making of uninvolved wine purchasers as could found the opinion ventured: cf *Clark v Ryan* (1960) 103 CLR 486. At best some number of the opinions on mistake and confusion seem based on no more than conjecture or intuition. These experts in my view are being used to argue the applicants' case: *Clark v Ryan* , at 491.

Carlton and United Breweries Limited v Royal Crown Company, Inc [2001] ATMO 7 -
Rayner v The Western Australian Government Railways Commission [2000] WADC 332 (19 December 2000) (Kennedy DCJ)

> Clark v Ryan (1960) 103 CLR 486

Takhar v Animal Liberation SA Inc No. Scgrg-00-754 [2000] SASC 400 (24 November 2000)

> 63. An expert is entitled to give evidence by way of an opinion where such opinion is necessary because the court could not be expected to be informed of the matter without the assistance of expert evidence. There must be an organised branch of knowledge or a field of expertise in which the witness is an; *Clark v Ryan* (1960) 103 CLR 486 .

Idoport Pty Ltd v National Australia Bank Ltd [2000] NSWSC 1077 -
Idoport Pty Ltd v National Australia Bank Ltd [2000] NSWSC 1077 -
Qld Gymnastics Assoc Inc v Wight [2000] QCA 466 (17 November 2000) (Pincus and Thomas JJA, Muir J,)

> *Clark v Ryan* (1960) 103 CLR 486 , referred to
> *Commissioner for Government Transportation v Amacik* (1961) 106 CLR 292, referred to
> *Da Costa v Australian Iron & Steel* (1978) 20 ALR 257, referred to
> *Neill v NSW Fresh Food & Ice* (1963) 108 CLR 362, referred to
> *Wyong City Council v Shirt* (1979-80) 146 CLR 40, referred to

Qld Gymnastics Assoc Inc v Wight [2000] QCA 466 -
Ta v Lucky Import and Export Co Pty Ltd [2000] WADC 283 -
Caratti v The Queen [2000] WASCA 279 (28 September 2000) (Malcolm CJ; Kennedy and Anderson JJ)
Clark v Ryan (1960) 103 CLR 486
Commissioner for Government Transport v Adamcik

Caratti v The Queen [2000] WASCA 279 -
R v Carroll [2000] QSC 308 (06 September 2000) (Muir J)
Clark v Ryan (1960) 103 CLR 486 , referred to

R v Carroll [2000] QSC 308 -
R v Carroll [2000] QSC 308 -
Marchesano v The Queen [2000] WASCA 225 -
Marchesano v The Queen [2000] WASCA 225 -
Middleton v The Queen [2000] WASCA 213 -
Middleton v The Queen [2000] WASCA 213 -
Sims Garage & Bodyworks v Automotive Supplies Pty Ltd trading as Colourworld Paint [2000] TASSC 98 -
Noseda Petroleum P/L v City of Mt Gambier & Anor No. Scgrg-99-1557 [2000] SASC 225 -
Hardy v Your Tabs Pty Ltd (in liq) [2000] NSWCA 150 -
Hardy v Your Tabs Pty Ltd (in liq) [2000] NSWCA 150 -
Hardy v Your Tabs Pty Ltd (in liq) [2000] NSWCA 150 -
Hardy v Your Tabs Pty Ltd (in liq) [2000] NSWCA 150 -
R v Rees [2000] NSWSC 544 (16 June 2000) (Bell J)
Clark v Ryan (1960) 103 CLR 486
R v Pantoja

R v Rees [2000] NSWSC 544 -
R v Dowding & Grollo [2000] VSC 222 (31 May 2000) (Teague, J)
(1960) 103 CLR 486

Eggins v Robinson [2000] NSWCA 61 (28 April 2000)

55. The appellants made no direct attack on the quality of Dr Walton's evidence. From this I would assume that neither Mr Westwood nor the appellants' legal advisers were able to find in her evidence anything to suggest that she was incompetent to give it. The question of whether Dr Walton had specialised knowledge and gave an opinion that was wholly or substantially based on that knowledge within the meaning of s 79 of the *Evidence Act* , was a matter for the trial Judge to determine as a question of fact; *Clark v Ryan* (1960) 103 CLR 486 at 503. His Honour heard Dr Walton give evidence in the witness box under attack by cross-examination and clearly came to the conclusion not only that she was appropriately qualified but that her evidence should be preferred to that of Mr Westwood. With due respect, no basis at all has been shown for this Court to reject his Honour's conclusion or come to any other conclusion. Mr Whittle referred to what Sir George Jessel MR said in *Abinger v Ashton* (1873) LR 17Eq 358 at 373-4 about experts' being the paid agents of the person who employs them. To the extent to which this criticism could be made of Dr Walton, it could also be made of Mr Westwood. I do not regard it as fairly made of either expert. The trial Judge did not think so. The parties called expert evidence and asked the trial Judge to consider it. I do not think the appellants can be heard to say that he was not entitled to act on it. In my opinion, the trial Judge's analysis and reasoning on this aspect of the case were compelling.

Cox v Crooks (No 2) [2000] TASSC 34 (17 April 2000) (Underwood J)

15. In this case, no evidence was led to satisfy the second question. The only evidence led was that Mr Phillips has often estimated costs in the circumstances that he described. There was no evidence that the estimation of legal costs and an expression of opinion with respect to

the amount of those costs is the subject of an organised branch of knowledge in which those who are trained or experienced share generally accepted principles and techniques. See *Clark v Ryan* (supra) at 508.

Cox v Crooks (No 2) [2000] TASSC 34 (17 April 2000) (Underwood J)

14. With respect to the second question, Dixon CJ, Kitto and Taylor JJ said in *Transport Publishing Co Pty Ltd v The Literature Board of Review* (1956) 99 CLR 111 at 119 that before opinion evidence may be given about the issue under consideration in that case, "it must be shown that [it] form[s] a subject of special study or knowledge ...". In *Clark v Ryan* (supra), Menzies J said, at 501 - 502 :

> "Opinion evidence to account for a happening that is described to a witness is admissible only when the happening can be explained by reference to an organized branch of knowledge in which the witness is an expert."

Cox v Crooks (No 2) [2000] TASSC 34 (17 April 2000) (Underwood J)
H G v R (1999) 160 ALR 554; *Clark v Ryan* (1960) 103 CLR 486 , applied.

Cox v Crooks (No 2) [2000] TASSC 34 -
R v Anderson [2000] VSCA 16 (25 February 2000) (Winneke, P., Phillips and Chernov, Jj.A)

72. In my view, therefore, the totality of the relevant evidence showed that neither Dr. Castle nor Mr. Campbell had sufficient expertise to proffer an opinion as to whether the applicant's wounds were self-inflicted. In my opinion, what Menzies, J. said in *Clark* at 502 about the qualifications of the expert called in that case, is applicable to the two doctors in question. His Honour said:

> "This is not a case where a witness has some qualifications and it is in question whether they are sufficient to give his opinions the authority of an expert. If such were the case, any appellate court would give great weight to a decision of the trial judge admitting his opinion evidence and would but rarely form an independent opinion of its own upon the sufficiency of those qualifications. This, however, is a case where a review of his evidence reveals that the [witness in question] had no expert qualifications in the branch of knowledge upon which he was allowed to speak as an authority."

R v Anderson [2000] VSCA 16 (25 February 2000) (Winneke, P., Phillips and Chernov, Jj.A)

55. Against the background of the material to which I have referred, Mr. Salek has submitted to this Court that the trial judge was in error in admitting the opinions of Mr. Campbell and Dr. Castle into evidence or, alternatively, ought have directed the jury that they should disregard their opinions on the basis that their evidence disclosed that they were not experts in the field in which they purported to express opinions or, if they were, no evidential foundation had been given for the opinions which they gave. Counsel was prepared to accept, and asked the Court to accept, that there is an organized body of knowledge and experience, based on the observation of wounds alone, which will entitle a person, skilled in the knowledge, to express an expert opinion upon the question of whether particular wounds observed are self-inflicted (cf. *Clark v. Ryan* (1960) 103 C.L.R. 486 at 490-1 per Dixon , C.J. and at 501-2 per Menzies, J.; *R. v. Bonython* [1984] 38 S.A.S.R. 45 at 46-7 per King, C.J.). I must confess to some difficulty in comprehending how a person, medically qualified or not, by merely observing wounds, can express an opinion that they have been "self-inflicted". However, I am prepared to accept that such a body of knowledge exists. The evidence of

> Wells and Collins tends to lend some support to its existence. What is clear, however, is that such body of knowledge does not derive from recognized principles of medical science, but rather from the study of characteristics and patterns of wounds from which one may infer, by comparison with recognized standards, that the wounds being studied are themselves self-inflicted. Such an expertise would not necessarily be limited to medical practitioners although, by dint of their practice, they would be the more likely possessors of it. In a real sense, as I understand it, the claimed expertise is derived from empirical data in much the same way as those who claim an expertise in analysing and interpreting blood stains to determine their source of origin, whence they emanate and the force of impact required to produce them. However the field of expertise, which we are asked to assume in this case, would seem to me to be necessarily an imprecise one simply by reason of the infinite variety of circumstances in which wounds are produced and can be suffered. In general terms, the law's own experience suggests that expressions of opinions that a wound or wounds are self-inflicted are those expressed with full knowledge of surrounding circumstances; for example the history given by the victim or the knowledge that the victim was found in circumstances suggesting self-harm, et cetera. It is, perhaps, instructive that counsel have not been able to cite to the Court any case where opinion evidence of this type, given in circumstances where the accused denies self-infliction and asserts infliction by a third party, has been recognized or received in evidence.

R v Anderson [2000] VSCA 16 -
R v Stephenson [1999] QCA 519 -
R v Dowding & Grollo [1999] VSC 497 -
C A Henschke & Co v Rosemount Estates Pty Ltd [1999] FCA 1561 -
C A Henschke & Co v Rosemount Estates Pty Ltd [1999] FCA 1561 -
C A Henschke & Co v Rosemount Estates Pty Ltd [1999] FCA 1561 -
Barbosa v Di Meglio [1999] NSWCA 307 -
Kimbers Pty Ltd v Commissioner for Main Roads [1999] WADC 49 -
Kimbers Pty Ltd v Commissioner for Main Roads [1999] WADC 49 -
Hortis v Manly Council [1999] NSWLEC 151 -
Westchester Financial Services Pty Ltd v Acclaim Exploration NL [1999] WASC 87 -
Macleod v Australian Securities Commission [1999] WASCA 35 -
Regina v Velevski [1999] NSWCCA 96 -
R v Kotzmann [1999] VSCA 27 -
HG v the Queen [1999] HCA 2 -
HG v the Queen [1999] HCA 2 -
HG v the Queen [1999] HCA 2 -
HG v the Queen [1999] HCA 2 -
HG v the Queen [1999] HCA 2 -
Osland v The Queen [1998] HCA 75 -
Randwick City Council v Minister for the Environment [1998] FCA 1376 -
Randwick City Council v Minister for the Environment [1998] FCA 1376 -
Quick v Stoland Pty Ltd [1998] FCA 1200 (25 September 1998) (Branson and Emmett & Finkelstein JJ)
Clark v Ryan (1960) 103 CLR 486 at 491 , mentioned

Quick v Stoland Pty Ltd [1998] FCA 1200 -
Quick v Stoland Pty Ltd [1998] FCA 1200 -
Penney v The Queen [1998] HCA 51 (13 August 1998) (McHugh, Gummow, Kirby, Hayne and Callinan JJ)

9. Both the appellant and the respondent called experts at the trial who were unable to assign a definite cause for the ignition of the rag. Various possible causes were discussed, including innocent and accidental ones. These latter the appellant relied on in the Court of Criminal Appeal for a proposition that the respondent had failed to negative hypotheses consistent with innocence. With respect to this, Duggan J, with whom Doyle CJ and Perry J agreed, said [1]:

"The principal proposition which Mr Borick [counsel for the appellant] put to the court in relation to the evidence of the expert witnesses was that, of itself, it gave rise to a reasonable possibility that the fire started accidentally. Accordingly, so it was said, the prosecution had failed to prove beyond reasonable doubt that the accused performed the acts which the prosecution relied upon as the actus reus of the offence. This submission seems to proceed on a basic misunderstanding as to the nature of circumstantial evidence and the way in which it is to be approached by a jury. The process of reasoning advanced by the appellant involves isolating the expert evidence and considering whether, on that evidence, a reasonable possibility exists that the incident was accidental.

The role of an expert witness is to express opinions on matters which are not, or are not wholly, within the knowledge and experience of ordinary persons [2]. Opinion evidence in a case such as the present is based on a restricted collection of facts relevant to the expression of the opinion. However, the jury's function when considering the issue to which the opinion evidence is relevant may well involve, as it did in the present case, consideration of a large number of proved circumstances which, for obvious reasons, were not put to the experts. The opinions of the experts are relevant in the ultimate assessment, but they cannot pre-empt the duty of the jury to consider the combined effect of all the circumstances which they find proved.

The prosecution case was that proof of the appellant's deliberate involvement was to be found in other evidence and the jury was entitled to act on that evidence if satisfied that the inference sought by the prosecution was established beyond reasonable doubt. Furthermore the finding for which the prosecution contended was not inconsistent with the views of the experts in the sense that they could not rule out the possibility of human intervention."

via

[2] *Clark v Ryan* (1960) 103 CLR 486 ; *R v Bonython* (1984) 38 SASR 45 at 46.

Farrell v The Queen [1998] HCA 50 -
Farrell v The Queen [1998] HCA 50 -
POLICE v KENNEDY No. SCGRG-98-23 Judgment No. S6638 [1998] SASC 6638 -
National Mutual Life Association of Australasia Limited v Chris Poulson Insurance Agencies Pty Ltd (No 4) [1998] TASSC 11 -
John Fazio v R No. Sccrm-97-29 Judgment No. 6196 Number of Pages 13 Criminal Law (1997) 69 Sasr 54 [1997] SASC 6196 -
John Fazio v R No. Sccrm-97-29 Judgment No. 6196 Number of Pages 13 Criminal Law (1997) 69 Sasr 54 [1997] SASC 6196 -
R v Michael Ross Penney No. SCCRM 96/374 Judgment No. 6071 Number of Pages 17 Criminal Law Evidence [1997] SASC 6071 -
R v Tillott 38 NSWLR 1 -
R v Tillott 38 NSWLR 1 -
Standard Chartered Bank of Australia Ltd v Antico [1995] NSWSC 31 -
Trustees of the Christian Brothers v Cardone [1995] FCA 407 -
Trustees of the Christian Brothers v Cardone [1995] FCA 407 -
R v David Peter Jarrett No. SCCRM 92/819 Judgment No. 4596 Number of Pages 30 Criminal Law and Procedure Evidence (1994) 62 Sasr 443 [1994] SASC 4596 (10 June 1994)
(1984) 153 CLR 521 at 598 ; The Queen v Duke (1979) 22 SASR 46 ; Comm. for Govt. Transport v Adamcik (1961) 106 CLR 292 ; The Queen v Bonython (1984) 38 SASR 45 at 47 ; Clark v Ryan (1960) 103 CLR 486 ; MacPherson v The Queen (1981) 147 CLR

R v Norman John Rose No. 4249 Judgment No. SCCRM 93/192 Number of Pages 19 Criminal Law and Procedure Evidence (1993) 69 a Crim R 1 [1993] SASC 4249 (05 November 1993)

the accused with the crimes." 16. As Mr Tilmouth wrote in his Outline the leading authority on admission of expert evidence in Australia is Clark v Ryan (1960) 103 CLR 486. In the quoted passage from his Outline Mr Tilmouth recites a passage from the reasons of Dixon CJ. But I do not think that Dixon CJ was contemplating a "course of habit or study" only in class room or lecture theatre or from books. There is a place for the evidence of what I call "the practical expert". An engineer, both from practical observation or work and study from books or lectures will understand the workings of an internal combustion engine. So will a mechanic who has worked on engines man and boy for (say) these 30 years. I do not stay to cite passage from the evidence before the jury and on the voir dire given by the two podiatrists. I mention that Miss Robinson had a Diploma in Podiatry received in 1951 from the London Foot Hospital. Note, a hospital for feet. She had worked at and taught podiatry ever since that time. Her evidence about the vocation of podiatry and of her qualifications entirely justified the reasoning of the learned trial Judge in support of his decision to admit her evidence. So did the evidence of Miss Jones. She had less but sufficient experience. She received her Diploma of Applied Science (note "science") in podiatry from the South Australian Institute of Technology in 1986. She had worked at podiatry extensively ever since. 17. The evidence of the podiatrists answered the "test" stated by Dixon CJ in Clark v Ryan. It answered to the test so far as the subject matter of the proposed evidence was concerned. Podiatry is something in the nature of a science which requires a course of study in order to obtain knowledge of it. Each witness had embarked on and completed a course in podiatry. Each podiatrist had applied her knowledge to the practice of podiatry. The absence of much "literature" in this respect (Outline of Mr Tilmouth para 1.3) is not to the point. In lecture rooms, from such notes or books as there were on the subject and from practice each witness was qualified to offer the opinions which she did offer. They added up to evidence that the shoes could have been worn by the appellant. 18. Mr Tilmouth complained not only of the admission of the "opinion evidence" but that it went further than showing that the appellant could have worn the shoes. He said (I omit our interjections):-

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knowledge of it': Clark v Ryan (1960) 103 CLR 486 at 491 per

R v Norman John Rose No. 4249 Judgment No. SCCRM 93/192 Number of Pages 19 Criminal Law and Procedure Evidence (1993) 69 a Crim R 1 [1993] SASC 4249 -
R v C [1993] SASC 4095 (18 August 1993)

JUDGE3 DUGGAN J I agree that the appeal should be allowed, the convictions set aside and a new trial ordered on counts 2 and 4 in the Information. 2. I agree with the Chief Justice's views on the argument concerning the failure to proceed in accordance with s. 21 (5) of the Evidence Act and I am in general agreement with the views he has expressed as to the evidence given by Dr Powrie. 3. In order to qualify this witness it was necessary for the prosecution to establish that the information which she was to provide was outside the ordinary experience and knowledge of a jury and that the witness was skilled in an area of scientific knowledge which enabled her to express an opinion on the behaviour of the complainant. These requirements were referred to by Dixon CJ in Clark v Ryan (1960) 103 CLR 486 at 491 when he said:

PD v Australian Red Cross Society (New South Wales Division) 30 NSWLR 376 -
Groves v Queensland Independent Wholesalers Ltd [1992] QCA 432 -
Trevor John Goldsworthy v the Corporation of the City of Burnside, Judge Anderson File No. SCGRG 89/2160 Judgment No. 3668 Number of Pages 17 Negligence Evidence [1992] SASC 3668 -
R v Runjanjic [1991] SASC 2951 -
E v Australian Red Cross Society [1991] FCA 20 -
R v Aldridge 20 NSWLR 737 -
R v Aldridge 20 NSWLR 737 -
ULV Pty Ltd v Scott 19 NSWLR 190 (01 March 1990) (Kirby P, Samuels and Priestley JJA)

Clark v Ryan (1960) 103 CLR 486 Ancher, Mortlock, Murray & Woolley Pty Ltd v Hooker Homes Pty Ltd [1971] 2 NSWLR 278 Clark v Ryan (1960) 103 CLR 486 Ancher, Mortlock, Murray & Woolley Pty Ltd v Hooker Homes Pty Ltd [1971] 2 NSWLR 278

ULV Pty Ltd v Scott 19 NSWLR 190 (01 March 1990) (Kirby P, Samuels and Priestley JJA)
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ULV Pty Ltd v Scott 19 NSWLR 190 (01 March 1990) (Kirby P, Samuels and Priestley JJA)
Clark v Ryan (1960) 103 CLR 486 Ancher, Mortlock, Murray & Woolley Pty Ltd v Hooker Homes Pty Ltd [1971] 2 NSWLR 278 Clark v Ryan (1960) 103 CLR 486 Ancher, Mortlock, Murray & Woolley Pty Ltd v Hooker Homes Pty Ltd [1971] 2 NSWLR 278

ULV Pty Ltd v Scott 19 NSWLR 190 -
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McGinniss v the Southern Regional Cemetery Trust [1989] TASSC 43 -
Murphy v The Queen [1989] HCA 28 (30 May 1989) (Mason C.j., Brennan, Deane, Dawson and Toohey JJ)
8. Taking the approach which he did, Maxwell J. did not direct his attention to Mr Sharpe's qualifications to express an opinion on the particular question which his evidence was to be tendered to prove. Had he decided that Mr Sharpe did not possess the relevant expertise, his decision would not have been readily reviewed: see Clark v. Ryan (1960) 103 CLR 486 , at p 503. But Maxwell J. did not identify the particular expertise which was relevant to the admission of Mr Sharpe's opinion evidence. The admissibility of that evidence now falls to be decided on the written report. Since there is no general rule that psychological opinion evidence is admissible in cases where the issue is whether a confessional statement was in fact made and as it does not appear that the foundation to establish the relevant expertise was laid in this case, I would not allow the appeal on the ground of wrongful rejection of evidence.

Murphy v The Queen [1989] HCA 28 -
Huish v The Queen [1988] HCATrans 222 -
Commonwealth of Australia v Flynn, C.J [1988] FCA 397 -
Commonwealth of Australia v Flynn, C.J [1988] FCA 397 -
Pankelis v Frankcombe [1988] TASSC 20 -
Butera v Director of Public Prosecutions (Vic) [1987] HCA 58 -
Ritz Hotel Ltd v Charles of the Ritz Ltd (No 7) 14 NSWLR 104 -
Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd 10 NSWLR 86 -
R v Smith [1987] VR 907 -
Prestige Sunglasses Pty Ltd v Bernhaut Nominees Pty Ltd [1985] FCA 431 (03 September 1985) (Jenkinson J)

Clarke v. Ryan (1960) 103 C.L.R. 486

Prestige Sunglasses Pty Ltd v Bernhaut Nominees Pty Ltd [1985] FCA 431 -
Smith v Craig Mostyn & Co Pty Ltd [1984] AR (NSW) 565 -
R v Haidley and Alford [1984] VR 229 (19 August 1983) (Young CJ; Kaye and Brooking JJ)

It was suggested in argument that the present case was not on all fours with Darrington's Case because what was sought to be shown was that a person in the condition the applicant was said to be in might act without knowing what he was doing. No doubt a person might act without knowing what he was doing but it was now shown in this case, nor has it been shown in any case of which we are aware, that a psychologist has any expertise which would have enabled him to say whether in a given situation a person acted without knowing what he was doing. Before the evidence sought to be adduced could have been received it would have been necessary first of all to establish to the satisfaction of the trial Judge that the witness had such expert knowledge that he was able to express an opinion upon the question whether the assumed condition of the accused would have

had any bearing upon his capacity to do the alleged acts voluntarily or upon his capacity to form the mental state requisite for the crime charged: cf. Clark v Ryan (1960) 103 CLR 486 . Next, it would have been necessary to prove by admissible evidence the facts upon which such an expert may base his opinion before the opinion can be received. An expert could not, for instance, take a history from an accused person and then give evidence of his opinion upon that history unless the history had first been proved by admissible evidence. In the present case the application had not proceeded far enough to reveal precisely upon what basis Mr. Joblin was to be asked to express an opinion. It was said to be upon the basis of the "consumption of alcohol to this degree" although the last phrase was not precisely explained. It is, however, unnecessary to pursue this matter, for the absence of expertise was a sufficient reason for rejection of Mr. Joblin's evidence. Further, it would have been necessary for the expert to explain the basis of theory or experience upon which the expert conclusions are said to rest: see R v Jenkins; Ex parte Morrison [1949] VLR 277, at p. 303, per Fullagar J

Chamberlain v The Queen [1983] FCA 74 (29 April 1983) (Bowen C.j.(1), Forster(1) and Jenkinson(2) JJ)

48. Ground of the appeals numbered 17 reads:

'That His Honour erred in law in admitting the evidence of F.B. Cocks.'

The submissions of counsel for the appellants on the hearing of the appeal in support of this ground did not go to the whole of the evidence of the witness Cocks.

Frank Barry Cocks was a sergeant of the South Australian police force. He had received some instruction in technical and scientific subjects relevant to criminal investigation, but not at a level higher in any instance than that of a first year University undergraduate. He had been taught to use a microscope and had been awarded 'a Science Technician's Certificate in Forensic Science' from the South Australian Institute of Technology. The course of study he had pursued in order to obtain that Certificate had extended over three years 'part-time'. Over many years he had studied and practised techniques of scientific criminal investigation in the course of his police service. He had taken a particular interest in the study of the marks made by different tools and instruments on materials such as wood, metal, plastic and fabrics. He had not matriculated and had made no formal academic study in any of the scientific disciplines upon which knowledge of the physical properties of the natural and artifical fibres of fabric is based.

Sergeant Cocks examined the clothing of Azaria which was found near Ayers Rock, on several occasions on and after 16 September 1980. He gave evidence of what he observed about the clothing and what he did to separate from the clothing vegetable matter and hairs and soil which he observed to be adhering to it. He described those adherent substances and their distribution on the clothing. He gave evidence that certain vegetable matter was embedded into the fabric of the jumpsuit and into the fabric of the singlet and expressed the opinion that the embedded material had become so embedded when the fabric was being rubbed directly on to vegetation. When the trial commenced the clothing had been handled many times and foreign matter had been vacuumed from the clothes, so that it was not possible for the jury to examine the 'embedded' material on the clothing. The opinion that direct rubbing had been the cause of the embedding was a product of the witness's inference of a kind which in my opinion a person not qualified to give expert evidence may give in evidence. That opinion falls, I think, into the same class as evidence of the opinion of a witness as to a person's age, the speed of a car or identity of persons. See Cross on Evidence (2nd Aust. ed.) para. 16.14.

Some of the embedded material was on the inner surface of the upper back of the jumpsuit. Sergeant Cocks expressed the opinion that the embedding of the material on that inner surface could not have occurred 'with the baby in the jumpsuit'. In the context of other uncontested evidence as to the size of Azaria and of the jumpsuit, the expression of that opinion was no more than a statement of the obvious, if it be assumed that the expression 'with the baby in the jumpsuit' was understood as a reference to the normal arrangement of that article of clothing on the baby's body. There is nothing in the transcript to suggest that any other assumption was contemplated.

Sergeant Cocks gave evidence that he observed under a microscope the edges of severances of the fabric of the jumpsuit and found the appearance of the fibres at those edges 'consistent with having been cut'. He was in my opinion qualified by his long experience and his study to make that statement of opinion. His attention was then directed to an irregularly shaped hole in the left sleeve of the jumpsuit and he was asked his opinion as to 'what made that hole'. He replied, 'a pair of scissors'. Subsequent questioning in examination and cross-examination made it appear clearly enough that the witness was not by his answer expressing an opinion in favour of scissors rather than canine teeth, as to the effect of which he did not profess any knowledge in evidence. He was expressing an opinion in favour of scissors rather than a single bladed cutting instrument such as a razor-blade or a scalpel. He justified his preference for scissors by explaining that he had been unable to cut a similarly shaped hole in a similar jumpsuit with a single-bladed instrument, whereas he had been able to cut a similarly shaped hole with a pair of curved scissors by using the scissors on the fabric when it was folded in a particular way, so that the blades of the scissors severed 4 thicknesses of the fabric at one cut. The scissors the witness used and the jumpsuit, similar to Azaria's, which he cut with those scissors were received in evidence and were thus available for the jury's inspection.

Sergeant Cocks also expressed the opinion that Azaria had not been in the jumpsuit when either the cuts in the neck of the garment or the cut in the left sleeve had been made. His stated reasons in respect of the neck were that 'it would be extremely difficult to perform that cut with a head above the collar-around the collar-and the manner in which I just performed the test cut necessitates a hand being inside to hold the jumpsuit while the cut is made ..... And, further I observed that the area of double thickness on the second cut area was clean. There was no blood. The blood was already on the collar and dry or reasonably dry before those cuts were made'. His stated reason in respect of the sleeve was that 'if an arm had been present then I cannot see how the cut could have been made without piercing the flesh, which should have produced traces of flesh and blood.' No such traces were found. This opinion, which is formulated on the assumption that scissors caused the fabric severances, is no more than the product of inferences, to the drawing of which no contribution was made, so far as I can tell from the transcript of evidence, by any expertise or practical experience of the witness. The expression of the opinion in evidence is evocative of the observation Dixon C.J. made about the evidence under consideration in Clark v. Ryan (1960) 103 C. L.R. 486 at 492 : 'His evidence really amounted to putting from the witness box inferences upon which the plaintiff's case rested.'

No objection was taken at trial to the admission of any of Sergeant Cocks' evidence. The learned trial judge dealt with that evidence in his charge to the jury, if I may respectfully say, very wisely in these terms:

'Before I conclude my remarks as to expert witnesses, I refer only generally to the evidence of Sergeant Barry Cocks. You may think he was a very experienced police officer, employed for years in the forensic section of the South Australian police force, and no doubt, ladies and gentlemen, he has experience in many fields of forensic investigation into crime; he may be regarded as a most experienced crime scene investigator. He has been trained as to what to look for and what to do with the materials he finds. Primarily, his evidence was called to prove the receipt of the clothing on 16 September 1980, the vacuuming of soil, the presence of soil in the booties, the removal of apparent plant fragments and vegetation, the general appearance of the damage to the jumpsuit, his microscopic examination of fibres, which he said _ and I'll mention this in a moment _ were consistent with being cut. He also gave evidence that in September 1981 he received the scissors from the family car. He described their condition, and he proffered an opinion that the garment had been cut at a time when there was no body in them.

He demonstrated to you on a Bonds garment how it was possible to simulate the damage to Azaria's jump suit by cutting with scissors. The residue of tiny fragments he demonstrated, matters such as that. He told you how on 16 October 1981 he received vacuumings from the front and rear components of the car and from its mats. He found white dust tufts and loops from the driver's front compartment. He told you also how he sent to Professor Chaikin as he did with the little particles of tufts and loops he vacuumed from the camera case which he received from Doctor

Scott on 20 September 1981, some of which he said were similar in appearance to the fragments of his experiments in cutting a similar jump suit in his laboratory. He gave evidence of removing apparent insect cocoons from blankets and the like with Doctor Scott.

Ladies and gentlemen, it is for you to decide how much weight you place on the evidence of Sergeant Cocks, but I wish to say to you that he is not scientifically qualified as an expert in fabrics or pathology. He may have a good working knowledge. The main function of his evidence was to show his lay observations, his collection of material and his dispatch of same. I would merely suggest to you in your consideration of his evidence, particularly when we get to the highly difficult area of fibres and the like, that you should not regard him as a scientific expert in this field. Your attention must on such issues, be directed to the evidence of Professor Chaikin. I suggest to you that in considering Sergeant Barry Cocks' evidence you should be hesitant to act on opinions which you know fall into scientific fields. You certainly may act on his evidence to observations, collections and his action."

When the jurors retired to consider their verdicts they had heard a great deal of expert evidence on the questions to which Sergeant Cocks' opinions were relevant. There is no reason to fear, in my opinion, that they might not have accepted the learned trial judge's advice. The admission of so much of Sergeant Cocks' evidence as was inadmissible _ and it was not much that was inadmissible _ could not, in my opinion, reasonably be supposed to have influenced the result of the trial.

Church of the New Faith v Commissioner for Pay Roll Tax [1983] 1 VR 97 -
Bickel v John Fairfax & Sons Ltd [1981] 2 NSWLR 474 (23 October 1981) (Hunt J)

In so far as the question which has been objected to is one of the very questions which the jury itself must decide, the jury is not, in my view, unable through inexperience to form a correct judgment on that issue without expert assistance: Clark v Ryan (1960) 103 CLR 486, at p 491 , Dixon CJ; the jury is, again in my view, equally qualified to form that judgment based upon its own general knowledge: Burger King Corp v Registrar of Trade Marks (1973) 128 CLR 417, at pp 421, 422, Gibbs J. As Cross on Evidence, 2nd Aust ed (1979) par 16.6, at p 424, says:

“the reception of evidence of opinion on this kind of question is always liable to prevent a jury from troubling to make up its own mind. Even when they are receiving expert evidence, it is in general the practice of the judges to prevent a witness from stating his opinion on an ultimate issue, such as ... the construction of a document.”

Bickel v John Fairfax & Sons Ltd [1981] 2 NSWLR 474 -
R v Wright [1980] VR 593 -
R v Wright [1980] VR 593 -
R v Wright [1980] VR 593 -
R v Wright [1980] VR 593 -
R v Darrington and McGauley [1980] VR 353 -
R v Darrington and McGauley [1980] VR 353 -
Gipps v Gipps [1978] 1 NSWLR 454 -
R v Gilmore [1977] 2 NSWLR 935 (16 December 1977) (Street C.J, Lee and Ash JJ)
Clark v. Ryan (1960) 103 C.L.R. 486 Eagles v. Orth [1976] Qd. R. 313 Clark v. Ryan (1960) 103 C.L.R. 486 Eagles v. Orth [1976] Qd. R. 313

R v Gilmore [1977] 2 NSWLR 935 (16 December 1977) (Street C.J, Lee and Ash JJ)

(1960) 103 C.L.R. 486 .

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Grace v Southern [1978] VR 75 -
Grace v Southern [1978] VR 75 -
Kalil v Bray [1977] 1 NSWLR 256 (17 March 1977) (Street C.J, Moffitt P. and Glass J.A)

> It would be unreal to expect the members of the tribunal, being professionally qualified veterinary surgeons and occupying seats on the tribunal by virtue of that very qualification, to fail to use their expert knowledge in resolving any matter of veterinary science arising in proceedings before the tribunal. The tribunal is in truth an expert panel, and as such it needs no expert evidence on matters within its particular field of expertise, that is to say, the field of veterinary science. Its function is to determine in the light of factual evidence, with or without supplementation by expert evidence, the proper veterinary conclusion to be drawn from such objective facts as may be established by the evidence, bearing in mind at all times that its function is essentially, as its name imports, disciplinary. It provides a veterinary surgeon facing a charge with a forum constituted in the majority by his professional peers and supplemented, in the interests of natural justice, with judicial chair- manship. As such, there seems to me to be no greater warrant for requiring the tendering to it of evidence of matters of veterinary science than there is before an ordinary lay tribunal for requiring the tendering of evidence on matters of common human experience. I should add, however, that I do not go so far as to suggest that expert evidence on matters of veterinary science is inadmissible before the tribunal in the same way that proof of common human experience is inadmissible in proceedings before the ordinary courts of the land: Clark v. Ryan
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> (1960) 103 C.L.R. 486 .
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> . It may, indeed, be that, in fairness to a defendant veterinary surgeon, he should be afforded an opportunity of comprehending fully and attempting to answer such adverse conclusions on matters of veterinary science as might be drawn against him by the tribunal by being able to engage in contest with an expert witness, and to call on his own behalf his own expert evidence. Although some protest to this effect was made on the present appeal, I see no basis for disquiet at the appellant not having had a fair opportunity of appreciating the significance of the case being made against him as the evidence unfolded.

Kalil v Bray [1977] 1 NSWLR 256 -
Kalil v Bray [1977] 1 NSWLR 256 -
Steele v Mirror Newspapers Ltd [1974] 2 NSWLR 348 -
Burger King Corporation v Registrar of Trade Marks [1973] HCA 15 -
Cohen v Mirror Newspapers Ltd [1971] 1 NSWLR 623 -
Cowie v Sec Pryse v Sec [1964] VR 788 -
Thatcher v Charles [1961] HCA 5 -