***Makita (Australia) Pty Ltd v Sprowles*** **[2001] NSWCA 305 (14 September 2001) – New South Wales Court of Appeal**

'Expert evidence' – 'General principles' – 'Negligence' – 'Opinion'

Appeal Type: General civil appeal.

Facts: This decision was not concerned with domestic and family violence but is relevant in relation to the admission of expert evidence in cases involving domestic and family violence. The plaintiff was injured after falling down the stairs at work and sued her employer for negligence. At trial, her employer was found to have breached their duty of care because the stairs were slippery and this was the reason the plaintiff fell. This finding of fact made at trial was largely based on expert evidence adduced by the plaintiff. The expert attested to the slipperiness of the stairs. The plaintiff was awarded damages. But for the expert's report, 'a conclusion that the stairs were not slippery would have been inevitable' (see at [56]). The defendant appealed on the basis that, *inter alia,* the trial judge erred in accepting the expert evidence.

Issues: Whether the trial judge erred in accepting the opinion of the expert regarding the slipperiness of the stairs.

Decision and Reasoning: The appeal was upheld. All members of the Court of Appeal agreed that the trial judge ought not to have accepted the evidence. Importantly, this appeal was concerned with whether the evidence ought to have been accepted by the trial judge, not with its admissibility. Heydon JA firstly considered whether the expert's testimony '(complied) with a prime duty of experts in giving opinion evidence: to furnish the trier of fact with criteria enabling evaluation of the validity of the expert's conclusions' ([59]). It was in this context that his Honour engaged in general discussion about the admissibility of expert evidence. Expert evidence cannot usurp the role of the trial judge (or jury if present) in making findings of fact. The task of the tribunal of fact is to make an independent assessment of expert evidence in forming its own conclusion. It cannot do this, 'if the expert does not fully expose the reasoning relied on' (see at [67]). The Court is not obliged to accept the opinion of an expert, even if no other evidence is called to contradict it (see at [87]). This is important especially where the evidence goes to the ultimate issue in the case. Evidence which goes to the ultimate issue is not inadmissible for that reason (see s 80 of the *Evidence Act 1995* (NSW)). Essentially, an expert gives opinion based on facts, and as such must prove 'by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based' (see at [64]).

See at [85] where his Honour summarises the general principles of the admissibility of expert evidence –

*‘In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of "specialised knowledge"; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be "wholly or substantially based on the witness's expert knowledge"; so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but, to use Gleeson CJ's characterisation of the evidence in HG v R [1999] HCA 2; (1999) 197 CLR 414, on "a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise" (at [41]).’*