SUPREME COURT OF QUEENSLAND

CITATION:	*R v Patel (No 6)* [2013] QSC 64
PARTIES:	**THE QUEEN** **v** **JAYANT MUKUNDRAY PATEL** **(Defendant)**
FILE NO/S:	Indictment No 387 of 2009
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	19 February 2013
DELIVERED AT:	Brisbane
HEARING DATE:	12, 18-19 February 2013
JUDGE:	Fryberg J
ORDERS:	**The relevant passage of a scientific article tendered by the defence is admissible in written form.**
CATCHWORDS:	EVIDENCE – DOCUMENTARY EVIDENCE – OTHER MATTERS – Document on which witness cross-examined – Books, etc., of authority – Scientific journals – Admissibility EVIDENCE – ADMISSIBILITY AND RELEVANCY – OPINION EVIDENCE – EXPERT OPINION – IN GENERAL – Reference by expert to scientific works – Scientific journals – Explanation and comment by expert *PQ v Australian Red Cross Society* [1992] 1 VR 19, considered *QIW Retailers Ltd & Attorney-General (Cth) v Davids Holdings Pty Ltd (No 3)* (1993) 42 FCR 255, considered *R v Karger* (2001) 83 SASR 1, considered
COUNSEL:	P Davis SC with D Meredith for the Crown K Fleming QC with P Smith and K Hillard for the defendant
SOLICITORS:	Director of Public Prosecutions (Qld) for the Crown Raniga Lawyers for the defendant

[1] **FRYBERG J:** These are reasons for a summary ruling on evidence made on 12 February 2013. Senior counsel for the Crown first requested reasons on 18 February 2013.

[2] The accused is before the court on trial for manslaughter by negligence as a medical practitioner. The Crown case against him has as an element an allegation that he misdiagnosed rectal bleeding in the deceased as caused by diverticulosis when in fact it was the result of radiation proctitis. On the fourth day of the trial Dr Pratt, a radiologist who had treated the deceased for prostate cancer by a course of radiation therapy, gave evidence about the effects of the therapy. It was common ground that most people who undergo the therapy have rectal bleeding for six to eight weeks following the course. That happened to the deceased. On one view of the evidence the bleeding then subsided, only to reappear nearly three years later shortly before the deceased was first seen by the accused. Dr Pratt said that this was a known but uncommon phenomenon.

[3] In the course of cross-examination on this issue counsel for the accused placed an article from the journal *Clinical Oncology* before the witness. He drew attention to a passage on two pages of the article dealing with the incidence of transfusion-dependent bleeding. Dr Pratt said that the passage was consistent with his own experience in that the phenomenon was uncommon. He had no statistics of his own but accepted the statements and opinions in the passage to which his attention was drawn. When asked to identify the author of the article, Dr Pratt said:

> "I met the author who's been in Australia giving lectures. He's from the UK's leading cancer institution and specialises in late

> rectal injury. He's a gastroenterologist, a bowel specialist who specialises in that and goes around beating doctors over the head about how they should approach this problem.
>
> And what's your opinion of Dr Andreyev?-- I'm very impressed. He's widely regarded as an expert, yes."

Counsel for the accused then tendered that part of the article. Counsel for the Crown objected.

[4] At first I misunderstood the ground of the objection: I thought it was to the tender of part rather than the whole of the article. Counsel soon corrected that error:

> "HIS HONOUR: I'm sorry, I thought you would want the whole article in. If you don't we'll limit the tender to the bits that were read out.
>
> MR DAVIS: Well, there's no point in limiting the tender to that. There's no point in tendering it because he's adopted the very words of the article and that is the end of it, in my submission."

No distinction was drawn between data and opinion in the article, no authority was cited and the submission was not further developed.

[5] I accepted the tender and made the article an exhibit without providing any reasons. I did so because it seemed to me that the part of the article which had been adopted had been proved and was admissible as an authoritative source to support the answers given by the witness in cross-examination. I understood that Mr Davis was drawing no distinction of substance between part of the article and the whole article.

[6] At my request, Mr Davis has, since requesting reasons, provided written submissions in support of his objection. After considering those submissions I remain of the view that the relevant part of the article is admissible.

[7] Mr Davis submitted that because there will be further articles which it is expected that the defence will tender, it was important to identify the basis of the admission of the article and the use to which the jury may put it. He referred at length to one of the more frequently cited cases in relation to expert evidence, *PQ v Australian Red Cross Society* [1992] 1 VR 19. In that case McGarvie J said:

> "When an expert witness bases evidence on data in an authoritative scientific publication it is the evidence of the witness which is thus put before the court. The publication itself is not evidence of the truth of statements it makes as to data. If the witness refers to or quotes from an authoritative publication as correctly stating a fact, what is referred to or quoted is part of the testimony of the witness."

[8] Mr Davis had no objection to the witness giving evidence on that basis, including accepting orally the relevant passage when read out by the cross-examiner. It is therefore unnecessary for me to examine whether it is correct that the publication itself can never become evidence. His objection was to the tender of the document. On that point, McGarvie J wrote:

> "I referred to the fact that no Australian or English case had been drawn to my attention where articles such as those tendered had been

> admitted as exhibits. I added that both my examination of reported cases and my recollection of practice in this State indicated that while such articles were referred to in evidence and discussed and analysed they were not admitted as exhibits."

[9] It is not surprising that there is little in reported cases identifying whether articles so used may be admitted as exhibits. I too have found no case discussing the matter. If the substance of the evidence is admissible, the question of whether its form should be oral or written is not one of law but practice, and His Honour so treated it.

[10] Whatever may be the practice in Victoria, in my experience the practice in Queensland is for the document to be admitted. That would also appear to be the practice in South Australia. In *R v Karger* (2001) 83 SASR 1; [2001] SASC 64, Mullighan J said:

> "[68] … In the present case the purpose for which the articles were admitted was to establish the nature, development and general acceptance of STR fluorescence technology by the forensic science community, including the use of particular instruments and software. That is a question of fact. The purpose of admitting the articles was not to prove some particular data not accepted by a witness at the hearing, but to assist in the matters which I have mentioned. Once such articles and publications have been proved and verified and accepted as forming part of the body of knowledge of the relevant scientific community as they were in the present case by Mr

> Pearman, they may be used for that purpose. Furthermore, they may be used as evidence supporting the evidence of witnesses about such matters and as a basis for the opinions of such witnesses.
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> ...
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> [71] In my view, the Crown was … entitled to rely upon the articles and publications to establish various problems which have arisen in the use of STR fluorescence technology and how they have been resolved by the forensic science community and all of the other matters to which I refer.
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> [72] In the present case the articles and publications were admitted into evidence and their contents were shown to be part of a reliable body of scientific knowledge or experience relating to matters in issue: *R v Bonython* (1984) 38 SASR 45. The matters in issue were the subject of testimony by Mr Pearman and he confirmed the conclusions mentioned in them."

In this respect I see no difference between civil and criminal cases.

[11] I note that in *QIW Retailers Ltd & Attorney-General (Cth) v Davids Holdings Pty Ltd (No 3)* (1993) 42 FCR 255, Spender J seems to have taken the Queensland practice even further. His Honour referred to articles by economists which were cited by the parties in submissions, but apparently were not even tendered. Again it is unnecessary to comment on that step.

[12] The relevant passage of the article was admissible in written form and may be used by the jury as evidence of the truth of what was written. The balance of the article may be excised if that is required, and an appropriate direction will be given to the jury.