

TOPIC 6: OPINION EVIDENCE

Introduction

- Section 76 puts limits upon expressions of opinions by witnesses during their testimony
- The Act does not offer a definition of the term “opinion” – however, there are numerous common law versions and interpretations
- **Common Law Definition of “opinion”**
 - ‘an inference drawn or to be drawn from observed and communicable data’: *Allstate Life Insurance v ANZ*
 - ‘an inference drawn from facts’: *Harrington-Smith v WA*
 - ‘a conclusion usually judgmental or debatable’, reasoned with facts’: *RW Miller v Krupp*

Rationale

- It is the **jury that must make inferences** which ultimately lead to a verdict and it is this role that courts “jealously” guard: *R v Runjanji*
- Reasons:
 - Opinion of witness is not based on the complete awareness of all facts and evidence through the trial
 - Opinion of witness usurps role of jury and judge
 - If allowed, opinions replace the role of the jury

Distinction between facts and opinion

- **McCormick**: “the different between so-called fact then, and opinion is not a difference between opposites or contrasting absolutes, but a mere difference in a degree with no recognisable line to mark the boundary”
- Problem recognised by **ALRC Report 26**: ‘**continuum between evidence in the form of fact and evidence in the form of opinion, the one at times passing imperceptibly into the other**’
- **Example: identification evidence**
 - If witness knew the accused before the crime – identification is more fact than opinion: *R v Marsh [2005]*
- Issue also extends to where witness struggles to exclusively confine a statement to fact

Opinion rule: section 76

Section 76: Opinion Rule

Evidence of an opinion is not admissible to **prove the existence of a fact** about the existence of which the opinion was expressed

- **Depends on how the opinion evidence is used**
- If the opinion rule is used to prove the accused was fearful of the victim then this falls beyond **section 76**
 - Opinion that the accused was violent in an assault charge cannot be used

Section 77: Exception – evidence relevant otherwise than as opinion evidence

The opinion rule does not apply to evidence of an opinion that is admitted because it is relevant for a purpose other than proof of the existence of a fact about the existence of which the opinion was expressed.

Key Case: *Bank of Valletta PLC v National Crime Authority (1999)*

Facts:

- Issue was whether or not a statement made by a member of the National Crime Authority should be deemed fact or opinion
- Federal court deemed it was fact and thus not excluded by **section 76**
- Reason because his statement was not an inference from an observation or communicable data

Exception - lay witness opinions: section 78

- Prohibiting witnesses expressing their opinions can lead to difficulties for many witnesses as it is impossible to eliminate inferences from their observations
- **Example of implications on strict opinion rule observation: *R v Whitby (1957)***
 - Concerned a conviction of drink driving
 - Before use of breath analysis devices – it was necessary to rely on observation to prove that an accused was under the influence
 - Evidence of the accused’s condition given by three witnesses – 2 who were police officers
 - All held opinion that accused was under the influence

- Expressing a series of observation that lead to an inference that the accused under the influence of alcohol without stating so is impossible
- Thus, **section 78** follows common law tradition of permitted exceptions to the opinion rule for lay witnesses
- Lay witnesses are different from expert witnesses (**section 79**)

Section 78: Exception – law opinions

The opinion rule does not apply to evidence of an opinion expressed by a person if –

- The opinion is **based on what the person saw, heard or otherwise perceived** about matter or event; and
- Evidence of the opinion is **necessary to obtain an adequate account or understanding** of the person's perception of the matter or event

Two criteria:

- Opinion based on what witness saw
- Necessary to understand the witness's testimony

"The ultimate criterion for the admission of opinion evidence should be whether it will assist the trier of fact in understanding the testimony or determining a fact in issue: ALRC Report 26"

Number of examples deemed necessary to understand witness testimony: **Hardy v Merrill; Sherrad v Jacob**

- Identity of individuals, handwriting or things
- The apparent age of a person
- The speed at which an object was moving
- The condition or state of something such as the weather or a road
- A person's emotional state such as anger
- A person's physical condition
- Character evidence which is exempted from the opinion rule under **s110** is itself a form of opinion evidence

Ask: is it necessary and of assistance in understanding a testimony?

- Where it is difficult or impractical to separate a witness's observation from their opinion then it will necessary to obtain an adequate account of their perception: **Connex Group Australia**

Key Case: **R v Van Dyk [2000]**

Facts:

- Evidence from victim's mother sought to be adduced

- Evidence that victim always seemed to be around girls and "I used to see the look in his face when he looked at any of the girls"
- Described as a "look of wanting"
- Deemed to satisfy the requirement of **section 78** as it was **necessary to obtain an understanding of a witness's perception**
 - However, on appeal it was held that the probative value of the opinion was outweighed by the danger of unfair prejudice to the accused under **s137**

Exceptions – expert witness opinions: **section 79**

- Testimony of expert witnesses confronts judges, lawyers and juries with unique challenges
- Experts have been received with gratitude and skepticism:
 - *A Treatise on the Law of Evidence, P Taylor*
 - "Perhaps the testimony which least deserves credit with a jury is that of skilled witnesses"
 - **Reflects a number of concerns that expert opinions raise:**
 - **Partiality:** since experts are called by parties in an adversarial context and paid for services – concern that opinion will be influenced by a desire to offer that accords with the wishes of the Counsel
 - **Probative Value:** the weight accorded to the opinion of an expert may be more than it deserves since the trier of fact could be unduly influenced by the qualification or status of the expert
 - **Reliability:** expert may be mistaken or dishonest. Their reliability must be tested

Section 79: Expert Witness Opinions

(1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

(2) To avoid doubt, and without limiting subsection (1)—

- a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse); and
- a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of the kind referred to in paragraph (a), a reference to an opinion relating to either or both of the following—
 - the development and behaviour of children generally;
 - the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.