ADMISSIBILITY OF EVIDENCE – OPINION

- An opinion is an inference drawn from data: *Lithgow City Council*; but it is not defined in the Dictionary.
- Overview:
  - Opinion evidence exclusionary rule: s 76
  - Exceptions:
    - Evidence otherwise admissible: s 77
    - Lay opinion evidence: s 78
    - Expert opinion evidence: s 79

1. The Opinion Evidence Exclusionary Rules: s 76

- The starting point is that opinion evidence is NOT admissible.

Section 76: The Opinion Rule

(1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

(2) Subsection (1) does not apply to evidence of an opinion contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.

- Opinion' = an inference drawn or to be drawn from observed and communicable data: Lithgow City Council v Jackson [2011] HCA 36
- Rationale: Opinion is more likely to be disputable and be of limited assistance in deciding the facts of the case. There is debate about the distinction between evidence of fact and evidence of opinion: the general approach (from ALRC 26, Vol 1, [738] is to ask the primary question'whether the evidence, be it ‗fact' or ‗opinion', is based on the witness's personal perception. If it is, lay opinion evidence may be admissible. If it is not, the evidence of opinion will not be admitted unless it is expert testimony.'
- Examples (from the EA notes):
  - P sues D, her doctor, for the negligent performance of a surgery. Unless an exception to the opinion rule applies, P's neighbour, W, who had the same operation, cannot give evidence of his opinion that D had not performed the operation as well as his own.
  - P considers that the electrical work of D, an electrician, has done for her is unsatisfactory. Unless an exception to the opinion rule applies, P cannot give evidence of her opinion that D did not have the necessary skills to do electrical work.
  - "In my opinion, the light was green" cannot be used to prove the light was in fact green.
  - "In my opinion, A killed B" cannot be used to prove that A in fact killed B.
  - "In my opinion, V was consenting" cannot be used to prove that V was in fact consenting.
  - More commonly, these statements will be expressed as "I believe X", e.g. "I believe she had a knife" cannot be used to prove she in fact had a knife.
- Note that these examples make it clear that there is a very fine line between testimony about facts and testimony of evidence.
- The general exclusion of opinion evidence is justified on the basis that the **evidence of a witness should only be the facts, observations and immediate sensory perceptions of the witness**, ***not*** their opinions, judgments and interpretations of what actually occurred. This should be a job for the fact-finder.

2. Exceptions

Exceptions:

- Summaries of voluminous or complex documents: **s 50(3)**
- Evidence relevant otherwise than as opinion evidence: **s 77**
- Lay opinion: **s 78**
- Aboriginal and TSI traditional law and customs: **s 78A**
- Expert opinion**: s 79**
- Admissions: **s 81**
- Exceptions to the rule excluding evidence of judgments and conviction: **s 92(3)**
- Character of and expert opinion about accused persons: **s 110 and 111**

a. Where Opinion Evidence is Relevant for some other Purpose: s 77

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

Section 77 does not apply when the evidence of the opinion is used for some *other* purpose (other than just being used to prove the facts upon which it is based)

- Examples

- Thus, in a case where the D is charged with assault with intent to rob, the D may testify "I believed the backpack was mine" NOT (only) to prove that the backpack was in fact his (this would fall under the exclusionary rule), but rather to prove that D held that opinion at the time, because an element of the offence is a particular subjective belief of the defendant – intent to rob (thus the evidence is being used for some *other* purpose – to prove the intent). In other words, the evidence is not used to prove the truth of facts upon which the opinion is based, but rather merely the existence of the opinion.
- In a sexual assault case, the D may testify "I believed she was consenting" *not* only to prove she was in fact consenting, but merely to prove that the D had this opinion, because an element of the offence is that D had a particular subjective belief – that she was not consenting.

- A similar exception applies for hearsay evidence used for some other purpose (s 60) and credibility evidence used for some other purpose (s 101A).
- Note that by s 136 the Court retains the power to limit the use of evidence to particular uses (so that evidence falling under the s 77 exception may be precluded from being used as opinion evidence to prove the existence of the facts upon which the opinion is based).

***R v Whyte* [2006] NSWCCA 75**
Facts:
- Shortly after event, V said to her mother "D tried to rape me." This statement was admissible for credibility purposes (as a *prior consistent statement*: s 108(3)(b)) and was also admissible for hearsay purposes (to prove that the D did in fact try to rape V) because it was made "fresh in the memory": s 66.

Issue: Could it also be used as opinion evidence?
Held:
- CJ held that it was an opinion, but that s 78 applied. However, Odgers SC comments that s 77 would apply: prior consistent statement is relevant to enhance credibility and of the complainant and being admitted on the basis, s 77 applies (opinion rule therefore does not apply) and evidence can be used to prove the opinion.

b. Lay Opinion: s78

Section 78 provides a two-part exception to the exclusionary rule – opinion evidence will be admissible where:
- **(a) it is based on what the person saw, heard or otherwise perceived**, ***and*** so long as it is
- **(b) necessary to obtain an adequate account of understanding of the person's perception** of the matter or event

- Examples of lay opinion:
  - Identity of individuals
  - Apparent age of a person
  - Speed at which something is moving, e.g. *"It was raining, the car was doing about 50, the child ran out on the road, I slammed on the brakes but the car just skidded."*
  - State of weather, a road or the floor of a factory
  - Whether someone was under the influence of intoxicating liquor
- From the example above, it is obvious that the line between fact and opinion is very fine. To deal with this, the law provides a very broad exception to the opinion evidence rule for lay opinion evidence.
  - In *Lithgow City Council v Jackson* [2011] it was observed that this lay opinion exception is necessary because fact and opinion is often impossible to separate and artificial separation would inhibit the witness's testimony.

***Lithgow City Council v Jackson* (2011) 281 ALR 223**
Facts:
- A civil claim where P sued the Council after suffering injuries from falling into a drain whilst walking his dog at night. P was found by ambulance officers at the bottom of the drain ditch (1.5m below ground level). P couldn't remember how he fell.
- If it could be shown that the P fell into the drain from one particular side (the vertical drop), the Council would be held liable.
- An attending ambulance officer's notes provided: "Found by bystanders – parkland fall from 1.5 m onto concrete; no other history?"
- Although adducing this evidence raised a hearsay issue – it was previous representation used to prove existence of the facts it asserts – it was admissible under the business records exception s 69.
- Plaintiff relied on this evidence to show that the Council was negligent in failing to erect a fence.

Issue: Can an opinion as to the existence of a fact fall within the definition of an 'asserted fact' in s 69(2) (business document rule exception).

Held:

- The majority noted that there were decisions in the affirmative. The construction of asserted fact to include an opinion in relation to a matter of fact though convenient is a little strained.
- BUT it was not argued in this Court that the authorities which state that asserted fact includes an opinion in relation to a matter of fact are wrong. It is not necessary further to deal with this point, which the parties did not debate.
    - And in *ACCC v Air New Zealand Ltd (No 1)* [2012] FCA 1355 (KOP [7.270]), Perram J said that although in *Lithgow* the High Court said that this was "*a little strained*", this was not binding *obiter dicta* and therefore he did not follow this. Therefore opinion can = asserted fact
- But even so, **<u>just because the medical records fall within the hearsay exception in s 69 does not mean that they escape the opinion rule. A statement of lay opinion in a business record, which is admissible under s 69, still must comply with the opinion rule (say, s 78).</u>**
    - Perram in *ACCC v Air New Zealand Ltd* accepts this.
    - Here the **High Court held that the note did not comply with s 78(a) or (b).**

Applying s 78:

- **Was this evidence relevant?** (As it did not go to the *nature* of the fall – which was the fact in issue).
    - NO. the representation contained the note was so ambiguous that it could not rationally affect the assessment of the probability the existence of a fact about a fall from the exposed vertical face. As *obiter*, the Court continued on the assumption that it was relevant.
- **If we assume it *is* relevant, was it admissible as opinion evidence?**
    - NO. The records are shrouded in such obscurity about what data they observed - not possible to find on the balance of probabilities what the impugned representation was stating. It therefore did not state an opinion.
- **If it did state an opinion, did it satisfy s 78(a)?**
    - No. It must be possible to extract from the form of what the person stating the opinion said (construed in context) that the opinion is about a 'matter or event and that it is "based" on what the person stating the **opinion saw, heard or otherwise perceived'** about the matter or event. Section 78 only applies to opinions given by those who actually witnessed the event about which the opinion was given Here, the ambulance officers did not hear or see the fall, so their opinion could not have been based on it.
- **If it did state an opinion, did it satisfy s 78(b)?**
    - No. The function of s 78 is to permit the reception of an opinion where 'the primary facts on which it is based are too evanescent to remember or too complicated to be separately narrated.' [46].
    - Where the evidence is that the person appeared to be drunk or middle-aged or angry, it is impossible in practice for the observer to separately identify, remember and narrate all of the particular indications which led to the conclusion of drunkenness, middle age or anger. Here, not too evanescent - location of body etc. could have been measured and detailed.
    - "Necessary" meant that - opinion could not be admitted unless it was the only way to obtain an account of the ambulance officers' perceptions. True the record was the only evidence tendered bearing on the nature of what the ambulance officers saw. But if they had been called they might have been able to give more evidence. Exclusion of that possibility was a pre-condition to admissibility.

c. Expert Opinion: s 79

Section 79: Exception: opinions based on specialised knowledge

(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) 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

(b) A reference in that subsection to specialised knowledge includes a reference to specialised knowledge of the kind referred to in paragraph (a), a reference to an opinion relating to either or both of the following:

i. the development and behaviour of children generally,

ii. the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.

- **There are two elements to s 79 (*Dasreef v Hawchar*)**
    - 1. The witness has **specialised knowledge based on a person's training, study or experience in a field of expertise**; and

- 2. The opinion is based **wholly or substantially** on purported expert's specialised knowledge or that field of expertise.
- No definition in the Act of 'specialised knowledge' – at common law, it is accepted that the opinion must derive from a field of expertise', but what that means has itself not been completely resolved.
  - There is the test of 'general acceptance' in science (USA *Frye* test); the test of 'reliability'; both; and the test in *Daubert*.
- **Note**: s 177 allows expert evidence to be given by certificate.
- **Note also**: The connection between the specialised knowledge and opinion applies to **each opinion**. An expert may be able to give an opinion on some issues but not others.

1. Specialised Knowledge

- ***Honeysett v The Queen [2014] HCA 29:***
  - '**Specialised knowledge is knowledge which is outside that of persons who have not by training, study or experience acquired an understanding of the subject matter.** It may be of matters that are not of a scientific or technical kind and a person without any formal qualifications may acquire specialised knowledge by experience.
  - However, the person's training, study or experience must result in the acquisition of knowledge... The concept is captured in Blackmun J's formulation in *Daubert v Merrell Dow Pharmaceuticals Inc*: "the **word 'knowledge' connotes more than subjective belief or unsupported speculation**. **... [It] applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds**"
- Recent discussion in ***Tuite v The Queen [2015] VSCA 148:*** It follows that a person's knowledge may qualify as specialized knowledge even if area of knowledge is novel or inferences drawn from the facts have not been tested, or accepted by others.
- Section 177 allows expert evidence to be given by certificate
- In ***Dasreef Pty Ltd v Hawchar* [2011],** the HCA expressed a number of concerns with expert opinion evidence:
  - There can be a 'bias' toward the party with the purse (giving opinion evidence for the party who pays them most);
  - Experts may be expressing an opinion beyond their expertise (whether by carelessness, arrogance, or deliberate tactic);
  - The difficulty of the Court assessing expert testimony; and
  - The disproportionate volume of expert evidence may cause delay and cost and thereby impair accessibility of justice.

2. Based wholly or substantially on specialised knowledge: *HG v The Queen* [1999] HCA

***HG v The Queen* [1999] HCA**

Facts:

- D charged with having sex with his de facto's child (under 10 years old). The acts were alleged to have occurred 6 years before trial. D called an expert child psychologist M who had interviewed the child and held the opinion that the child had mistakenly accused the D when she was really abused by her natural father.

Issue: Was this expert opinion evidence admissible?

Held per Gleeson CJ: *Some* of the opinion evidence given by M was admissible under s 79 but not *all* of it.

- The opinions of the expert were never expressed in admissible form, since the opinion was not expressed in a form which showed the facts the psychologist had taken into account in forming his decision:
- By directing attention to whether opinion is wholly/substantially based on knowledge, the section **requires the opinion to be presented in a form which makes it possible to answer that question.** Not in doubt that psychology is a field of specialised knowledge - but witness had to identify how that knowledge was brought to bear - opinions had to be related the to expertise.
  - Here, there were conclusions in the expert's report that were ***not*** based "wholly or substantially" on the specialised knowledge of the expert. Rather, they appeared to be based on a combination of speculation, inference, views about the credibility of the child and a process of reasoning beyond the expertise of a psychologist
  - What was the opinion based on? Took into account what he was told by complainant, mother, GP, training, experience, knowledge of patterns of behaviour of abused children.
- Instead, M should have just said: "in my expert opinion, the child was abused in this certain time period". Then the Court could have inferred it was by the natural father (as the time period was *before* the stepfather came into the picture).

On whether psychology study amounts to specialized knowledge:

- Gaudron J at expressed when something is specialised knowledge: when it "is sufficiently organized or recognised to be accepted as a reliable body of knowledge or experience."
- Note: Section 79(2) was recently inserted to provide that specialised knowledge includes specialised knowledge of child development and behaviour (generally, or relating to children who have been victim to sexual offences).

Honeysett v The Queen [2014] HCA 29

Facts:

- Convicted of armed robbery. CCTV showed three disguised robbers carrying weapons. Prosecution called expert anatomist (Prof Henneberg) who gave evidence of similarities of anatomical characteristics between appellant and a robber in the TV footage. Evidence based on viewing the footage and viewing the appellant in custody.
- CCA dismissed the appeal on the basis that the expert evidence was properly admitted, based on his study, training and experience as an anatomist. In the alternative, it said that he was an 'ad hoc' expert due to repeated viewings of the footage. (*R v Tang* [2006] NSWCCA 167)

High Court:

- The Court concluded that his opinion was not based on his specialised knowledge of anatomy, but merely his observations → the jury could have ascertained these facts themselves
    - His knowledge as an anatomist that some people have round heads and some have long heads, was not the basis of the conclusion that the person in each video had a round head. That was based on his subjective impression of looking at the images.
    - His expertise was 'biological anthropology and anatomy'. He gives evidence of comparison of body shape, head shape, handedness, etc.
    - His opinion was not based upon actual measurement (photos not good enough) but visual assessment. His observations were therefore the same as a lay observer save for his understanding of anatomy. Jury could have ascertained these facts themselves
- Previous cases had criticized 'body mapping' as an area of expertise (*R v Tang* and *Morgan v The Queen* – which actually had involved the same expert as this case) on the basis of the lack of research into the method of assessing it.
    - Mindful of this, the Crown did not rely on part of the expert opinion which said there was a 'high degree of anatomical similarity'. It confined the expert opinion evidence to
        - (a) characteristics of the D;
        - (b) characteristics of the taped person;
        - (c) lack of dissimilarities between the two.
    - The Crown did not argue 'body mapping' as the area of expertise – they stuck to 'anatomy'. It said that he was only giving 'an account of the characteristics of the body of the person depicted in each set of images' i.e. **circumstantial evidence**.
- Ad hoc expert argument:
    - In *Butera v DPP* (1987) 164 CLR 180, the Court accepted that a person could be a 'temporary expert' by watching a tape over and over – thereby qualifying herself ad hoc. But that was a common law case, but also dealing the admissibility of tapes under s 48.
    - In *R v Tang* [2006] NSWCCA 176, NSW CCA said that this was OK. The High Court just said that the issue did not arise here. This was because the respondent admitted that the expert did not look at the tape over a long period of time before forming his opinion, so the issue of 'ad hoc' expertise was abandoned. The issue remains open

3. The Basis Rule

***Dasreef Pty Ltd v Hawchar* [2011] HCA**

Facts:

- P sued employer after developing an industrial lung disease after exposure to dust, claiming he had to cut stone in inappropriate areas (not sufficiently ventilated).
- The expert witness testified: (i) the *estimated* amount of dust in the air was 1000 times more than the standard; (ii) and there were protective technologies available (e.g. wet-cutting, suction technologies, air purifiers).
- The trial judge used this ball-park figure to estimate that the employer had exceeded the industry standard.

Issue: Was this expert opinion evidence admissible under s 79?

Held per French CJ, Gummow, Crennan & Kiefel JJ, with Heydon J dissenting on the basis rule:

- Testimony on (ii) was based upon his specialised knowledge obtained through study and experience ***but*** testimony on (i) was ***not*** based upon his specialised knowledge.

- **In considering the operation of s 79(1) it is thus necessary to identify why the evidence is relevant**: why it is 'evidence that, if it were accepted, could rationally affect (directly or indirectly) the

assessment of the probability of the existence of a fact in issue in the proceeding': s 55(1) *Evidence Act*. That requires identification of the fact in issue that the party tendering the evidence asserts the opinion proves or assists in proving.'

- Accepting that to be so, it remains useful to record that it is ordinarily the case, as Heydon JA said in Makita [(2001) 52 NSWLR 705 at 744 [85]], that —**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**
- a specialist medical practitioner expressing a diagnostic opinion in his or her relevant field of specialisation is applying —specialised knowledge‖ based on his or her —training, study or experience‖, being an opinion —wholly or substantially based‖ on that —specialised knowledge‖, will require little explicit articulation or amplification once the witness has described his or her qualifications and experience, and has identified the subject matter about which the opinion is proffered.'
- The quantitative level of exposure was not based on training or specialised knowledge. It was his estimation. Court held: his training could only give him a ball park figure. He was not able to give precise calculations. A **failure to demonstrate** that his opinion was based on his specialised knowledge went to its **admissibility**, not to its weight.
- The terms of s 76 direct attention to the fact that is sought to be proven by use of opinion evidence – you must identify why the evidence is relevant. This requires **identification of the fact in issue** that the party tendering the evidence asserts the opinion proved or assists in proving. The same two limbs as Spigelman CJ in *Tang*:
    - At [36]: Cited *HG* – the opinion must be presented in a form that makes it possible to tell whether it is based on specialised knowledge.
    - At [37]: Cited *Makita* – must explain how the field of specialised knowledge applies to the acts assumed or observed so as to produce the opinion propounded.

Issue: Does the second element of s 79 (that the opinion be based wholly or substantially on the XW's specialised knowledge) incorporate a "basis rule"?

- The plurality was unwilling to depart from the language of the Act, i.e. the Act merely says the opinion must be "based wholly or substantially" on the specialised knowledge. However, they accepted that something like a basis rule needed to be satisfied for the second element of s 79 (it must be explained *how* the opinion evidence is based wholly or substantially on the specialised knowledge).
- Two limbs:
    - *HG* – opinion must be presented in a form that makes it possible to tell whether it is based on specialised knowledge.
    - *Makita* - must explain how the field of specialised knowledge applies to the facts assumed or observed so as to produce the opinion propounded.
- However, Heydon J argued that the rule was not expressly abolished by the legislation, continued to be applied and was a requirement for admissibility, not weight.
- **Treat the basis rule as a requirement but note the uncertainty**, and that it is relevant for admissibility, not really for the weight the expert evidence is given.

Heydon J's formulation of the basis rule: *Dasreef*

There are three aspects to the basis rule:

(1) Assumption (as to primary facts) must be *identified*;

(2) Proof of the assumption must be shown (proof of primary facts): Plurality seemed to accept this was the thrust of the basis rule.

(3) Statement of reasoning (from assumption to opinion) is required.

- Explain (2) Proof of the assumption must be shown (proof of primary facts)
    - The primary facts upon which assumptions are based should be proved in order to validate the assumption made. That is, if an assumption was made that A would move B at C speed in D conditions, the primary facts underneath this assumption should be proved by admissible evidence.
        - Note that evidence needs to be *admissible*, not necessarily admitted.
    - A hypothesis can be made, with adequate proviso (recall in *Tang*) where primary facts haven't been tested or can't be tested.
    - However, a Court will be reluctant to accept proof of primary facts based solely on unsupported research or mere conversations with expert colleagues.
        - For example, proof of a patient's medical history for diagnosis should be proved by patient's testimony prior to putting on XW evidence: *Ramsay v Watson* (1961)
- Explain (3) Statement of reasoning (from assumption to opinion) is required

- Expert must state how he has reached his conclusion from the facts and assumptions (his reasoning).
  - Heydon JA: "the Court does not have to be satisfied that the reasoning is correct... But the reasoning must be stated".
- Must state criteria to enable a trier of fact to evaluate whether the expert's conclusions were valid.
- Although the majority accepted (2) was the thrust of the rule, it also indicated that reasoning should be stated. However, it observed that this might not always be *demanding* (e.g. diagnosis of cancer from a cancer specialist need not explicitly state his reasoning).

***Kyluk Pty Ltd v Chief Executive, Office of Environment and Heritage* [2013] NSWCCA 114**

Facts:

- Kyluk pleaded guilty to picking endangered plants. At sentencing objected to expert evidence regarding soil analysis at location of offence and relied on a particle size analysis from a laboratory. It was not allowed in. The report did not reveal who did the testing, or what was done, or the chain of facts giving rise to testing.

Issue: Was it admissible? Lack of proved factual basis to support opinion. Defendant relied on Heydon in *Dasreef* (i.e. argued that basis rule is adopted by UEL)

Held:

- **The majority of the Court applied *Dasreef* – that the two s 79 criteria must be applied and be presented in a form which reveals the facts and the reasoning upon which it rests.**
- There is no rule that precludes the admissibility of a report that does not comply with the Expert Witness Code (in the procedure rules), but the code remains relevant when considering ss 135 – 137.
- **Even if an opinion based on assumed but unproven facts is admissible, it may be given little or no weight if the assumption is not made good by the evidence.**
- **Here no evidence of what went on in the laboratory, so could not be tested. Defendant unfairly disadvantaged – probative value was substantially outweighed by unfair prejudice to the defendant – s 135.**

Comment on *Dasreef:*

- An expert opinion which meets those **requirements need not be excluded if all of the factual bases upon which the opinion is proffered are not established** by the expert's own evidence. Even if facts which the expert "assumes" or "accepts" in reaching the opinion expressed are not proved in some other way, then the opinion may still be admissible.
- That **will depend on the nature of those facts and what bearing they have on the opinion**. If they provide but a small part of the basis upon which the opinion rests, then the failure to prove those facts may have but little impact, and not render the opinion inadmissible. The failure to prove facts which provide a significant basis for the opinion might, by way of contrast, be such as to render the opinion no longer relevant to a fact in issue, no foundation for the opinion having been established. Such an opinion, even if it were admitted, would be of no value.
- Where an opinion is admitted, the failure to establish a fact which is not of such significance, may **nevertheless have an impact on the weight given to the opinion**.

Tuite v The Queen [2015] VSCA 148

Facts:

- The defendant was charged with aggravated burglary, rape, indecent assault and intentionally causing injury.
- Expert opinion evidence was to be called about the analysis of DNA samples from the crime scene and a DNA sample provided by the applicant following an unrelated conviction. The DNA evidence was presented in the usual form of a 'likelihood ratio'. That is, for each DNA sample where the suspect cannot be excluded as a contributor, a ratio is calculated which shows how much more likely it is that the suspect was the source of the DNA than that some other person chosen at random from the population was the source. Here, the ratios were calculated using a new software package, known as STRmix.
- At a pre-trial hearing, the applicant challenged the admissibility of the DNA evidence on the ground that the new methodology was not — or had not been shown to be — sufficiently reliable for use in criminal trials: the methodology was largely untested, it was said, and had not been generally accepted by the forensic science community.

Argument by D:

- The opinions were not based on 'specialised knowledge' within the meaning of s 79(1) of the Act, and the evidence was therefore inadmissible; or
- Even if the evidence were admissible under s 79(1), its probative value was outweighed by the danger of unfair prejudice and the evidence must therefore be excluded under s 137 of the Act.
- The trial judge refused to exclude – the D sought leave to appeal.

Two questions for the VSCA:

- (a) Is the **reliability** of evidence a criterion of admissibility of opinion evidence under s 79(1), or is reliability to be assessed in deciding whether the evidence should be excluded under s 135 or s 137; and
    - 'The language of s 79(1) leaves no room for reading in a test of evidential reliability as a condition of admissibility.' The question of the reliability of opinion evidence falls to be determined as part of the assessment which the Court undertakes for the purposes of s 135/137.
        - **Remember**: Victoria held this principle to be based on *Dupas v R*, but that decision has been distinguished/overturned by *IMM v The Queen*.
- (b) By what criteria is the reliability of expert scientific evidence to be assessed?
    - 's 79(1) contains its own specification of the requisite foundation of the witness's knowledge', namely, that the knowledge must be based on the person's training, study or experience...It follows, in our view, that a person's knowledge may qualify as specialised knowledge' for the purposes of s 79(1) **even if the area of knowledge is novel or the inferences drawn from the facts have not been tested, or accepted, by others**.'
    - It follows, in our view, that a person's knowledge may qualify as 'specialised knowledge' for the purposes of s 79(1) even if the area of knowledge is novel or the inferences drawn from the facts have not been tested, or accepted, by others.

80 - Ultimate issue and common knowledge rules abolished
Evidence of an opinion is not inadmissible only because it is about: (a) a fact in issue or an ultimate issue, or (b) a matter of common knowledge.

3. Summary for Opinion Evidence Question

- The starting point: opinion evidence used to prove the facts upon which it is based is NOT admissible: s 76
- Look for exceptions:
    - If used for some *other* purpose, can be also used for opinion evidence purpose: s 77
    - Lay opinion evidence: s 78 (two-part test – see, heard or perceived AND necessary for adequate account/understanding of perception)
        - See *Smith*
        - See *Lithgow CC v Jackson* (witness must OBSERVE the fact – be at the event)
    - Expert opinion evidence: s 79
        - (1) Must have specialised knowledge based on training, study or experience
            - See *Tang*
        - (2) Opinion must be based wholly or substantially on specialised knowledge
            - See *HG* (psychologist's conclusions went beyond her expertise)
            - See *Tang* ('science' of facial mapping questioned)
            - AS PART OF THIS, must satisfy the basis rule:
                - See *Makita* o See Heydon JA in *Dasreef*
                - (1) indicate assumptions
                - (2) prove primary facts underneath assumptions

ADMISSIBILITY OF EVIDENCE – CHARACTER OF THE ACCUSED

- The law has long allowed a ***defendant*** to give **positive** character evidence (which relies on tendency reasoning – saying D's past good behavior indicates he couldn't be guilty of the present offence). However, providing this kind of evidence, at common law, also **opens the door** to **negative** character evidence being adduced by the prosecution as **rebuttal** evidence.
- Note that under the Act, this all-or-nothing position has been modified: good character evidence/ rebuttal evidence can be limited to supporting/rebutting good character *in a particular respect*: s 110(3).
- Good character evidence can go to both:
    - *Credibility*: I am an honest person, so you should believe my story.
    - *Guilt*: I am a good person, so it's unlikely that I committed the offence. (and vice versa if adduced as rebuttal evidence for the prosecution)
- **Note that this exception only applies to criminal proceedings: s 109** (hence, character evidence of the accused).

1. Good Character Evidence is Admissible and Rebuttal: s110

Section 110: Evidence about character of accused persons
(1) The hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced by a defendant to prove (directly or by implication) that the defendant is, either generally or in