B. COMPETENCE AND COMPELLABILITY

Competent: Witness who may give evidence (either generally or about a particular fact). ALRC: *ability of witness to function as a witness.*

Compellable: Witness who may be required by order of the court to give evidence (either generally or about a particular fact)

ss 12-20 COMPETENCE AND COMPELLABILITY

➢**s 12 EA codifies competence and compellability**

"**except as otherwise provided by the Act**", **every person is competent to give evidence and compellable to give it**.

COMPETENT TO GIVE EVIDENCE ABOUT A FACT?

s 13(6): competence is presumed

MAINSECTION

s 13(1): not competent to give evidence about a fact, if for any reason (including mental, intellectual or physical disability)

a) does not have capacity to **understand a question** about the fact; **OR** b) person does not have the capacity to **give an answer than can be understood** to a question about the fact.

AND that **incapacity cannot be overcome**

✓ **IF COMPETENT UNDER s 13(1)**

SWORN EVIDENCE

(under oath/affirmation - see next section)

s 13(3) Not competent to give sworn evidence if the person does not have capacity to understand he/she is **under an obligation to give truthful evidence.**

✓ **BUT PERSON MAY BE ABLE TO GIVE UNSWORN EVIDENCE UNDER s 13(4) IF:**

UNSWORN EVIDENCE

s 13(5): Witness is competent to give unsworn evidence if the court has told them:

a) It is **important to tell the truth**

b) he or she may be asked **questions that he or she does not know, or cannot remember, the answer to**, and that he or she should tell the court if this occurs, and

c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel **no pressure to agree with statements that he or she believes are untrue.**

★**SH v R [2012] NSWCCA**: **Strict compliance with words of s 13(5)(c) is required**. Judge must refer to statement that witness "should feel no pressure to agree".

RESULT: This meant the **trial was not conducted according to law**, as was the appellant's entitlement, and accordingly the **conviction was set aside**

(but consider **R v GW** above where trial was conducted according to law, despite lack of compliance with terms of **s 13(3)**).

OTHERS

s 16: Judge and jury not competent to give evidence in current proceeding.

But juror is competent to give evidence about conduct of the proceeding.

s 17(2): Defendant in criminal proceedings is **not competent** to give evidence as a witness for the prosecution *(this is for the purposes of hearsay exceptions → someone who is not competent is not available)*

✓ **s 13(2):** Despite s 13(1), a witness may still be competent to give evidence about **other facts.**

★**R v GW [2016] HCA**: Trial judge said he was "not satisfied" witness had capacity, whereas s 13(3) requires positive satisfaction the witness does not have capacity. Court considered whether this reversed the statutory test. HCA held **failure to express conclusion in the terms of s 13(3) did not support finding the trial judge was not satisfied** OBP witness lacked requisite capacity.

★**ACC v Stoddart (2011) HCA: no common law spousal privilege exists**. Can't be claimed in civil proceedings or in non-UEL statute.

COMPELLABLE TO GIVE EVIDENCE ABOUT A FACT??

s 14: Reduced capacity: a person is not compellable if there is **substantial cost or delay in ensuring capacity**, and **adequate evidence will be given by other witnesses**

s 15: Sovereign: Cannot compel head of state, Governor, Governor-General or Parliamentarian (if conflicts with sitting or committee meeting)

s 16: Judge cannot be compelled to give evidence about another proceeding **unless the court gives leave**

s 17(3): Associated defendant is not compellable to give evidence about another defendant **unless being tried separately.**

s17(4): Court must satisfy itself associated defendant giving evidence in joint trial is aware of effect of s17(3)

In a criminal proceeding, judge and other party (not prosecution) can comment on:

s 20(2): defendant's failure to give evidence

s20(3): failure of a spouse/parent/ child to give evidence

s20(4): but **only defendant can suggest failure was because defendant was guilty** or spouse/ parent/child believe they're guilty.

s 18(2): spouse, de facto, child or parent can object to being required to **a)** give evidence or **b)** give evidence of communication with defendant for prosecution's case.

(1): criminal proceedings only.

(3): when to object – before gives evidence or as soon as practicable after aware of right to object.

(4): court must satisfy itself person is aware of their right

(5): objection to be heard in absence of jury

(6): must not be required to give evidence if court finds:

a) likelihood of harm (directly or indirectly) to person or relationship if they gave evidence; AND

b) nature and extent of harm outweighs desirability of having evidence given.

(7): Without limiting matters court may take into account:

a) nature and gravity of offence

b) substance, importance and weight attached to evidence

c) any other evidence concerning same matters is available

d) nature of relationship between defendant and person

e) whether in giving evidence would have to disclose it was received in confidence from the defendant

✖**s 19:** s 18 does not apply to **offences relating to domestic violence and child offences** (not all jurisdiction, e.g. Cth)

★**R v Khan (1995) NSWSC: Example application s18(6)-(7)** Man murdered friend after catching him in bed with wife. Wife not required to give evidence for prosecution because:

-Husband and wife were living together
-Evidence would be of little weight
-Significant matters could be proved by other evidence

Held: Wife giving evidence likely to cause harm to extent that it outweighs desirability.

REASONING: JUDGE MUST BE AFFIRMATIVELY SATISFIED OF LACK OF CAPACITY

★R v GW [2016] HCA

Court of Appeal: Held that his Honour had reversed the statutory test

Burns J said he was "**not satisfied** that [R] has the [requisite] capacity" (Court of Appeal's emphasis) when s 13(3) required **satisfaction** that R did not have that capacity.

The Court of Appeal inferred that Burns J wrongly treated competence to give unsworn evidence as the "default" position under the Evidence Act.

The assumed failure to apply s 13 meant that the respondent's trial had not been conducted according to law, a conclusion that the Court of Appeal said required that the appeal be allowed and the respondent's conviction set aside.

High Court: It was necessary for Burns J to be affirmatively satisfied that R did not have the requisite capacity before instructing her pursuant to s 13(5) and admitting her evidence unsworn. [28]

There are many ways to explore whether a child understands what it means to give evidence in a court and the concept of being morally or legally bound to be truthful in so doing.

Here, it would seem the prosecutor questioned R about her understanding of swearing an oath on the Bible or making an affirmation. Her lack of understanding of either was not determinative but it was not irrelevant to the formation of the opinion that she did not possess the capacity to understand the obligation.

COMPETENCY AND COMPELLABILITY AND FACTS

★ SH v R [2012] NSWCCA: Sexual assault of child under 10. Complainant was main witness. Gave unsworn evidence. Appeal on basis of lack of correct instruction to complainant. The instruction by the judge did not refer to statement that witness "should feel no pressure to agree." Judge instead said "Now do you also understand that if someone suggests to you that something is untrue, when you say that it's true, that you should tell us that what they've said to you is wrong?" Court held this was a misdirection: trial was not conducted according to law.

★ R v GW [2016] HCA: Charged with committing an act of indecency in the presence of his daughter, a child under the age of 10. The daughter's evidence was taken pre-trial. Following a voir dire, Burns J held that the evidence should be received unsworn. The defendant was convicted and appealed. The grounds included: the judge did not apply the presumption of competence to give sworn evidence in determining that the daughter's evidence should be given unsworn. This was *'despite the fact that the witness has indicated that she understands … the difference between the truth and what is not the truth, and says that she understands that she has an obligation to tell the truth'* (Burns J)

Court of Appeal held statutory test had been reversed. Burns J said he was "not satisfied that [R] has the [requisite] capacity" (Court of Appeal's emphasis) when s 13(3) required satisfaction that R did not have that capacity. High Court said the failure to express his conclusion in terms of the statute did not support the finding that he was not satisfied OBP of capacity.

★ R v Khan (1995) NSWSC: Tried for murder of friend, whom he caught in bed with his wife. Prosecution wanted to call wife to testify. She successfully objected.

★ACC v Stoddart (2011) HCA: Wife summoned by ACC to give evidence of husband's business dealings at private examination. She invoked spousal privilege. Court held no common law spousal privilege.

The failure to express the conclusion in the terms of the statute did not support a finding that Burns J was not satisfied on the balance of probabilities that R lacked the requisite capacity.

The Evidence Act does not treat unsworn evidence as of a kind that may be unreliable. Had a direction been requested under s 165(2), there was no requirement to warn the jury that R's evidence may be unreliable because it was unsworn. Nor was there a requirement under the common law to warn the jury of the need for caution in accepting R's evidence and in assessing the weight to be given to it because it was unsworn. Nor was there a requirement under common law, falling short of a warning of that kind, to direct the jury to take into account the differences between sworn and unsworn evidence in assessing the reliability of R's evidence.

It is *possible that different considerations would apply where a witness other than a young child* is capable of giving evidence about a fact but incapable of giving sworn evidence because the witness does not have the capacity to understand that, in giving evidence about the fact, he or she would be under an obligation to give truthful evidence.

REASONING: PARTIAL OBJECTION UNDER s 18(2)

Odgers suggests that in s 18(2) an objection to give evidence cannot be partial (subject to 2(b)). If aware of the right to object (see 18(4)), the witness cannot then give some evidence and then refuse to answer further questions (subject to s 18(2)(b)).

But given s 18(2)(b), this idea seems odd.

D. EXAMINATION OF WITNESSES

EXAMINATION-IN-CHIEF

s 28: order of examination, unless court directs otherwise

1) Examination by party who called witness | **2) Cross-examination** by other party | **3) Re-examination** by original party to call witness

s 27: Party may question witness, subject to this Act.

➢ *Under common law principles, as a general rule it is for the parties to question witnesses and the Judge's role is generally limited to asking questions only to remove apparent ambiguities*: "questions designed to clear up answers that may be equivocal or uncertain, or within reason, to identify matters that may be of concern to himself".

s 26: Court has control over questioning of witnesses and may make orders as it considers just .

s 29: Manner and form of questioning: (1) **Party may question any way it thinks fit**, except as provided by this Chapter or as directed by court.

Court can direct evidence to be given in narrative, [(2),(3)] or charts, summaries or other explanatory material to aid comprehension [(4)].

DICTIONARY

"**leading question**" is a question asked of a witness that:

(a) **directly or indirectly suggests a particular answer** to the question, or

(b) **assumes the existence of a fact** the existence of which is **in dispute** in the proceeding and as to the existence of which the witness has not given evidence before the question

➢Adversarial assumption

Your witness is on your side; Opponent's witness is not.

	Your Witness	Opp Witness
Can ask leading questions	×	✓
Can challenge evidence	×	✓
Can bolster or challenge credibility	×	✓

RIGHT TO A FAIR TRIAL

➢NO RIGHT TO CROSS EXAMINE

★GPI (1990) NSWSC

Guidelines to ensuring a fair trial.

Principles:

1. **The only actual right was to a fair trial**
2. Duty of judge to ensure that all parties have a fair trial
3. Must exercise discretion so that examination and cross-examination are conducted in a way that a fair trial is assured
4. Ordinarily a judge will adopt usual procedure: Exam. Cross. Re-exam.
5. **Where more than one counsel per party, the judge will ordinarily not allow more than one to cross-examine a witness**
6. Where the parties have the same interest, the same applies as in 5
7. **Where complex issues and no overlap, it may be proper to allow parties with similar interest to each cross-examine**
8. Court may fix amount of cross-examination in interest of time or witness
9. It is proper to warn at the outset how long cross-examination will go for, subject to an application for more. Can curtail time
10. Group cross-examination should not be permitted
11. Court should not allow cross-examination for a collateral purpose or to torture witness
12. interlocutory proceedings: collateral purpose should be looked at closely
13. Ordinarily judge should permit cross-examination of all witness by all counsel unless rules above apply

➢ ARE JUDGE'S QUESTIONS UNFAIR?

★Esposito (1998) NSWSC:

✓ '**Elucidating an area of evidence that has been overlooked or left in an uncertain/equivocal state**'

✖ '**Establishing a point that is favourable/adverse to interests of a party**.'

Judge's asking questions are "**walking a narrow line**" so as to appear bias.

"absence of experience or competence of, or attention by, counsel for one party (does not) provide any special justification for an intervention by trial judge in order to carry out counsel's task." Wilson (1995)

EXAMPLE:

★Ryland [2013] NSWCA number of questions as such is of little, if any, relevance.

Trial judge's questions were directed to understanding the evidence (rather than challenging it), and the relationship between testimony and documentary evidence.

s 37(1): A **leading question** can only be put to a witness in examination-in-chief or re-examination if:

a) court gives **leave** (s 192 considerations apply – see below)

b) the question relates to a matter **introductory** to the witness's evidence; or

(c) **no objection** is made to the question and ... each other party to the proceeding is represented by ... legal counsel ...; or

(d) the question relates to a matter that is **not in dispute**; or

(e) if the witness has **specialised knowledge** based on the witness's training, study or experience--the question is asked for the purpose of obtaining the witness's opinion about a hypothetical statement of facts, being facts in respect of which evidence has been, or is intended to be, given. …"

considerations to grant leave

s 192: leave may be given on such terms as the court thinks fit.

(2) Without limiting… court is to take into account:

(a) the extent to which ... likely to add unduly to, or to shorten, the **length of the hearing**, and

(b) the extent to which ...**unfair** to a party or to a witness, and

(c) the **importance of the evidence** ..., and

(d) the **nature of the proceeding**, and

(e) the **power (if any) of the court** to adjourn the hearing or **to make another order** or to give a direction in relation to the evidence.

➢ALRC example of when the court may give leave to ask leading questions:

*necessary to obtain whole of the witness's evidence where the **witness has forgotten or to direct W's attention** to some topic;

*or to **expedite trial without being unfair** to other party

FACTS

★GPI (1990) NSWSC: Plaintiff and bank (mortgagee) both resisting defendant's cross-claim for rectification of a contract that would require plaintiff to transfer units at a price purportedly below market value.

★Esposito (1998) NSWSC: Judge asked defendant long series of Q's in murder trial that raised new issues and amounted to cross-examination.

★Ryland [2013] NSWCA: Judge asked questions (lots) to understand evidence, specifically on relationship of testimony & documentary evidence.

CROSS- EXAMINATION OF WITNESSES (Pt 3)

Rule in Browne v Dunn

RULE in Browne v Dunn (1894) HoL

If you intend to lead evidence that is contrary to what a witness has said you must put it to them and challenge in cross-examination.

Gives notice to the witness, a chance to explain, defend character or call corroborating evidence. Essentially a rule about fairness.

CONSEQUENCES OF BREACH
Five options from Khamis [2011] NSWCCA

1. Cross-examiner **cannot reference contradiction in address**

Khamis at [43] *"…cross-examining counsel is taken to accept [the point] and may not be permitted to address in a fashion which asks the court not to accept it"*

MJW: Defendant **entitled to refer to inconsistencies between prosecution's witnesses**, even if not raised in D's cross-examination. Only has to raise inconsistencies they are leading: it is not up to the defence to assist the plaintiff in presenting a coherent case.

2. Witness evidence **accepted as true** (unless incredible)

Khamis at [44] Witness is not "*cross-examined on a particular matter, that may be, depending on the circumstances, a good reason for accepting that witness's evidence, **particularly if it is contradicted by other evidence**"*

EXAMPLE

Precision Plastics: *Defendant tried to cast doubt on jury's acceptance of plaintiff's working capacity in appeal, but this was not contradicted anywhere in the trial. SC majority held jury was bound to accept evidence of working capacity, because it was not contradicted.*

LIMIT

Khamis at [44] But where a witness's evidence.. appeared to be **incredible or unconvincing**, or if it were contradicted by other evidence which appeared worthy of belief, the fact the witness had not been cross-examined **might be of little importance in deciding whether to accept his evidence.**

3. Witness is recalled for further cross-examination so contrary evidence can be put or so they can lead evidence rebutting it.

Khamis at [44] *"quite apart from the ability to grant leave under s 46, a trial judge may require the relevant witness to be called for further cross-examination or grant an application for the recall of the witness*

MJW: Breach can **almost always be cured by seeking or offering the recall** of the witness to enable the matter to be put.

4. LAST RESORT: Evidence adduced in breach of the rule is excluded: trial judge directs jury to disregard defendant's evidence to the contrary.

Khamis at [45] *"This option, should, (in this situation) generally speaking, be a **last option and not one of first resort**)*

Payless: Refusal to admit evidence an 'extreme' and unusual step. But not apparent that discretion exercised erroneously in this civil case.

Khamis: Exclusion was erroneous in criminal trial where judge seemed to think the only option available was to exclude the evidence: **there was no consideration for whether the witness should be recalled**.

Conviction quashed and new trial ordered, because the evidence was important (went to witness's credibility) and should have been permitted, not excluded, provided unfairness to either party could be prevented. Witness should have been recalled.

5. Appropriate direction made to jury if contradictory evidence allowed.

Khamis at [46] *"…care and caution needed"*

Birks: *It may be legitimate to draw appropriate conclusions from failure, but fraught with peril and should be used with circumspection*

May be many reasons why failed to cross-examine on the issue other than the credibility of witness

If direction made to jury of **possibility of adverse inference**, **they should be given reference to other possible reasons for failure to cross-examine.**

SWC: Directions cannot always cure miscarriage of justice flowing from the failure to cross-examine: *"so adverse was its inevitable impact on the jury's view of the defendant".*

Here, appeal held ***even recalling the plaintiff witnesses would not have remedied the breach***: would only have exacerbated the problem.

GENERAL CONSIDERATIONS

- **Payless**: **No universal rule as to consequences of breach**: Different breaches call for different remedies and lie within judge's discretion and can only be overturned if in error.
- Browne v Dunn rule **applies in criminal cases**, but *fairness has a different practical content* in a criminal trial. Consider applicability of rule with regard to accusatory context.
- **Not a breach** if the witness has been given **prior notice** of the contradictory evidence e.g. service of pleadings/particulars, contrary witness statements (has to be given to witness).
- **Prior v Mole Cannot raise a matter on appeal that was not put to the relevant witness at trial**: "*In those circumstances, it was not open to the appellant to allege racial prejudice for the first time on appeal*"

PT 3.3: OPINION

PROCESS

1. Opinion must be relevant to a fact in issue. **Dasreef**
2. What is the specialised knowledge? Is it accepted? apply **HG** [or maybe **Honeysett**]?
3. Witness who gives the evidence has specialised knowledge based on training, study or experience.
    - Is it **outside specialised area of knowledge**? e.g **Da Silva**: Child sex assault expert did not confine evidence to area of expertise. Talked about behaviour of child sex assault victims, but then talked about Catholic beliefs and Sri Lankan culture (context of the assaults).
    - Reasoning requirements:
        - **Dasreef** settled that s 79 requires:
            - Expert must identify the assumptions relied upon
            - Expert must explain the reasoning to arrive at his or her opinion.
                - Distinction must be drawn between facts and opinion
        - Not settled:
            - Basis rule: proof of factual basis for the opinion (tender medical reports, medical history, etc)
                - Heydon J in **Dasreef** thinks requirement exists in the common law and was not abolished by s 79
                - Plurality in **Dasreef** didn't directly deal with application of the common law basis rule to s 79. Looked purely at the Act. So technically unsettled.
                → But consider **Kyluk:** if you don't prove basis on which opinion is expressed and it's a significant matter, might not be relevant or it could be unfair to let it in because other side can't challenge the opinion (under ss 135, 137).
4. Discretionary exclusions (generally and as per Kyluk)

NB: Admissible hearsay must still satisfy opinion requirements:

- Hearsay evidence which comes within an exception to the hearsay rule, and which can also be characterised as evidence of an opinion, must also come within an exception to the opinion rule before it can be admitted: **Lithgow City Council** **(see below for broader discussion re: distinction)**

Scope: ss 76-79 are not confined to evidence of opinions given by witnesses in court: **Lithgow**

RULE 76 : Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed

1. **Identify the fact in issue**
    - **Dasreef** Distinction between fact and issue requires identification of the fact in issue that the party tendering the evidence asserts the opinion proves or assists in proving'
    - **Lithgow**: Opinion = **inference drawn from observed and communicable data**.
    - Distinction between evidence of a fact and opinion can be difficult
        R v Drollett:
        EVIDENCE OF OPINION: identification evidence where the photographs are of poor quality, or provide only an unusual angle or obscure part of the person in question,
        EVIDENCE OF FACT (HEARSAY): Where there has been no process of deduction rather than recognition, and no real risk of the recognition being wrong — because, for example, the familiarity the witness has with the person in question
            c.f. Smith: Kirby J (alone in considering issue) held that identification evidence is best considered as opinion, given great risks of wrongful conviction and dangers inherent in identification process.

EXCEPTION #1 77: dual purpose:

- s 76 does not apply to evidence of an opinion that is admitted because it is relevant for purpose other than proof of the existence of a fact about the existence of which the opinion was expressed.

EXCEPTION #2 78: lay opinion

- s 76 does not apply to opinion evidence if opinion
  - (a) based on what the person **saw, heard or otherwise perceived** [first-hand]; and
  - (b) evidence of the opinion is **necessary to obtain an adequate account** or understanding of the person's perception of the matter or event.

Illustrations:

- **Whyte**: V gave evidence that "D tried to rape me". Prima facie hearsay, if adduced to prove that D had mens rea for rape. But held to be admissible hearsay. Prima facie opinion, if adduced to prove the truth of the opinion. Excluded under s 76, but exception under s 78, for it was an 'indescribable impression' of V's experience, hence necessary to obtain an adequate account of V's direct perception of the event.
- **Lithgow City Council**: Assuming hearsay evidence (59) of W (paramedics) was admissible (69(2) – document), it must still satisfy opinion rules. This was not opinion: too ambiguous to have any probative value and hence irrelevant (55,56). But, assuming opinion: W had no personal knowledge of the matter or event (78(a)) and it was not 'necessary' (78(b)).

Reasons opinion was not necessary:

- Not shown that any primary facts observed by W were too evanescent to remember, or too complicated to be narrated separately from impression.
- 'Necessary' does not mean merely 'helpful'/'conducive'/'convenient. It is directed to relationship between W's evidence and W's opinion, where the only way W's perceptions can be understood is by also admitting their opinion.
  - **Not necessary if W perception can be understood without their opinion**

EXCEPTION #3 79: expert opinion

s 76 does not apply if person has 'specialised knowledge' based on their 'training, study or experience' and opinion is 'wholly or substantially based' on their specialised knowledge.

1. Does W have **specialised knowledge**?
   - **A.** On the balance of probabilities, does W have 'specialised knowledge'? **142**
   - **B.** **Makita:** It must be demonstrated there is a field of 'specialised knowledge' that 'by reason of specific training, study or experience, the W has become an expert'
   - **C.** **s 79(2)(a):** to avoid doubt, specialised knowledge includes child development and child behaviour, including impact of child sexual abuse.
2. Is it **based on their training study or experience**?
   - **A.** Usually formal training or qualifications, but can based purely on experience.
   - ***B.*** **Honeysett:** *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*
3. Is there opinion **wholly or substantially based** on their specialised knowledge?
   - **A. Outside specialised area of knowledge?**
     - i. No distinction between opinion and facts: **HG**: W (psychologist) expressed an opinion that V had been sexually assaulted by her natural father, not by D; i.e., conflation of events. W based opinions on interviews with V's mother; W inferred that 'stop, daddy' referred to V's actual father. W's evidence was based on speculation, inference, and personal views. The process of reasoning went beyond expertise. If W had only said that, based on his study/training/expertise, W considered that V's behaviour appeared to be inconsistent with her having been abused at the relevant time, that may have been permissible
     - ii. Expert not basing opinion on specialised knowledge: **Honeysett:** W (anatomist) compared anatomical characteristics of image with recorded images of D (taken while in custody). Opinion evidence based purely on his subjective impression of what he saw when he looked at the images of the offender and D; specialised knowledge did not form the basis of W's conclusions.
   - **B. Is the expert's reasoning sufficient?**
     - i. **Dasreef** **settled** that s 79 requires:
       1. Expert must identify the assumptions relied upon
       2. Expert must explain the reasoning to arrive at his or her opinion.
     - ii. **Dasreef** **unsettled** whether s 79 requires proof of factual basis of opinion (basis rule)
       3. Expert must prove factual basis for opinion (tendering medical reports,

research, history, etc). Heydon J argued basis rule goes to admissibility. Plurality seemed to think it went to weight, but didn't actually decide issue.

→ Better view in **Kyluk**: if you **don't prove basis on which opinion is expressed and it's a significant part of the reasoning**:

- Opinion with no factual basis on crucial point might not be relevant; or
- It could be unfair to let it in because other side can't challenge the opinion (under ss 135, 137).

80: Evidence is **not inadmissible** as opinion, simply because it is about

- (a) a **fact in issue**, or an ultimate issue; or
- (b) a **matter of common knowledge.**

Further exceptions to the opinion rule:

- Summaries of voluminous or complex documents (**s 50 (3)**)
- Aboriginal and Torres Strait Islander traditional laws and customs (**78A**)
- **Admissions** (**s 81**)
- **Character of and expert character opinion about accused persons** (**ss 110** and **111**).

Distinction between hearsay and opinion evidence

A nebulous distinction? The Act requires a dichotomy that is not always easy to draw.

***Seltsam v McNeil*:** the state of a person's mind is a fact and remains a fact whether what is under discussion is an actual state of mind, or the state in which a person's mind would be in some contingency which has not happened, and thus it does not fall within s 76.

***La Trobe Capital*:** One relevant consideration is the extent to which the evidence goes beyond the witness' direct observations or perceptions.

Smith v The Queen: **Identification evidence – hearsay or opinion?**

CCA: Sheller JA said that an identification of a person from a photograph by another person who knows the first person well enough to recognise that person on sight involves no more inference than seeing that person and recognising him in the street.

HCA: Kirby J

(i) Police identification evidence was better viewed as opinion evidence. This was because of the 'dangers of mistakes inherent in the process of identification and recognition'.

(ii) Kirby J accepted that a statement identifying a person, clearly depicted in a studio photograph, as one's spouse or partner, would normally be a statement of fact. Conversely, the experience of the law is that very great risks of wrongful conviction and miscarriage of justice can attend identification and recognition evidence generally.

***R v Drollett*:**

(i) Where the recognition evidence becomes relevant and thus admissible, but **where the photographs are of poor quality, or provide only an unusual angle or obscure part of the person in question, it is more appropriate to classify evidence of recognition as opinion evidence rather than evidence of fact.**

(ii) Where there has been no process of deduction rather than recognition, and no real risk of the recognition being wrong — because, for example, the familiarity the witness has with the person in question — it may still be appropriate to accept the evidence of recognition as evidence of fact rather than opinion [obvious danger is that s 76 and other exclusionary rules would not apply]