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WEEK 10 LECTURE – OPINION EVIDENCE

- Opinion – Admissibility Exclusion
 - Evidence Act Chapter 3.3: ss76-81.
 - Like Hearsay, it is a prima facie exclusion from admissibility with exceptions to the exclusion.
 - **S76(1)**: “Evidence of an opinion is **not admissible to prove the existence of a fact** about the existence of which the opinion was expressed.”
 - **S76(1)**: makes opinion evidence inadmissible
 - **SS77-80**: Put it back in again.
- Opinion – Admissibility Exceptions to the Exclusion: Notes to s 76
 - Some exceptions to opinion evidence rule are in prior sections
 - summaries of **voluminous** or complex documents ([section 50 \(3\)](#))
 - evidence **relevant otherwise** than as opinion evidence ([section 77](#))
 - lay opinion ([section 78](#))
 - Aboriginal and Torres Strait Islander traditional laws and customs ([section 78A](#))
 - expert opinion ([section 79](#))
 - admissions ([section 81](#))
 - exceptions to the rule excluding evidence of judgments and convictions ([section 92 \(3\)](#))
 - character of and expert opinion about accused persons ([sections 110 and 111](#)).
- Opinion Evidence
 - **Rationale for the opinion rule**
 - It is the fact **finder’s role to draw inferences** and conclusions from facts
 - For a witness to draw an inference or conclusion could subvert the fact finder’s function
 - Opinions have the potential to confuse fact finders about their ultimate purpose, which is to make findings of fact.
 - **Ss76-79A is not confined to evidence of opinions given by witnesses in court: [Lithgow City Council v Jackson \(2011\)](#) HC decision.** Opinion evidence rules apply to **previous representations**.
 - Opinions could potentially usurp role of jury, where jury rely on the opinion of witness. Draw inference or conclusion from fact can influence jury to believe and determine
- Definition of Opinion
 - Opinion **not defined in Act**
 - Facts are reliable but opinions are problematic. Argue as many things as possible are facts.
 - An opinion is ‘an **inference drawn from observed and communicable data**’
 - Facts and opinions lie along a continuum
 - **[Allstate Life Insurance v ANZ \(1996\)](#)**:
 - opinion and facts lie on a continuum, statement more relies on inferences.

- Investment advisor was giving evidence and asked what you would do if...this was treated as fact not opinion, this is what he would've done not what he thinks he would have done. The hypothetical scenario allowed him to say 'this is what I would have done'
 - **Bank of Valletta PLC v National Crime Authority (1999)**: court accepted reasoning of *Allstate*.
 - **Quick v Stoland Pty Ltd (1998)**:
 - gave evidence that corporation was insolvent, had to consider whether decision of insolvency was fact or opinion, **except where clear and obvious, determining insolvency is matter of opinion** according to judge.
 - **La Trobe Capital & Mortgage Corporation Limited v Hay Property Consultants Pty Ltd [2011]**:
 - Concerned over-valuation of property in which loan was secured, La Trobe said they would not have entered into loan if valuation was done properly. They also said there was also another one they would have entered into. Would have invested in something else
 - La Trobe tendered witness statement, concerns what he said what LT would have done if they had appropriate valuation. Objection was that no one provided direct evidence, they made **unsubstantiated assertions**. Depends on circs. If he could have given evidence that there were previous ones they didn't give loans on similar grounds. Mr G is lay witness.
 - Formal grounds objection: opinion evidence *s 76*.
 - *S 78* is lay witness exception and was trying to be argued.
- **The opinion rule *s 76***
 - (1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.
 - **Limitations of *s 76***
 - The rule applies only where evidence of an opinion is **adduced to prove** the fact upon which it is based.
 - The rule applies to **oral testimony** as well as **previous representations** that contain an opinion.
 - If evidence of an opinion is admitted for a **non-opinion purpose**, it may be admissible for its opinion purpose (*s 77*).
- Exclusions to Opinion Exclusion
 - It is relevant therefore its in – *s 55 /56*
 - It is an opinion therefore it is out – *s 76*
 - It is an exception to the opinion exclusion it is back in:
 - Non hearsay purpose (multiple relevancy) *s77*
 - The lay opinion exception *s78*
 - The specialist knowledge exception *s79*
- **Exception: evidence relevant otherwise than as opinion evidence (purpose) *s 77***
 - 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.

- **R v Whyte [2006]:**
 - detaining for purpose of sexual intercourse, evidence was complainant **told mother he tried to rape me**. Whether can use evidence to prove his intention was to rape. Prima facie excluded. Could be used for **credibility purpose**. If admitted for this, could also be admitted for **opinion purpose**
- **Lakatoi Universal Pty Ltd v Walker [1999]:**
 - knowingly transferring HIV virus. Proving he believed he was HIV neg:
- **Jadwan Pty Ltd v Rae & Partners (A Firm) (No 3) [2017]:**
 - **S69** business records hearsay exception to hearsay exclusion (confirms very broad).
 - Opinion in business record **must also comply with opinion provisions** (per **LCC v Jackson [2011]**).
 - Kerr J: Concludes documents **do not relevantly include opinions** but, in the **alternative, that s 77** disapplies application of opinion exclusion because multiple relevancies (and **s135-6 N/A**).
 - Business emails had quote for business services
 - Whether admissible for **s 77** multiple relevancy to also deal with opinion nature
 - Court held business records exception applied but that opinion and business records had to also comply with opinion provision, **if the doc has opinion, must go through s 76-79**.
 - It's not actually opinion evidence, writing was not to express opinion, they were justifying and making themselves look good to prospective customer for building.
 - He distinguishes decision
 - Even if things are not opinions, they are there for another purpose – to show business strategy of company, then can admit under multiple relevancy of **s 77**
 - Primary argument is to say they are not opinions
- **Exception: lay opinions s 78**
 - The opinion rule does not apply to evidence of an opinion expressed by a person if:
 - (a) the opinion is based on what the person **saw, heard or otherwise perceived** about a matter or event, **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.
 - Must be about what **directly was perceived** and necessary to obtain account of person's perception
 - Opinion may be subject to **cross-examination**
 - a AND b
 - Must still be relevant under **ss 55-56**
 - Can also be excluded under **ss 135-139**. Can limit its weight or issue or warning
 - E.g. lady across road looked about 80 years old
 - You directly perceived her
 - Difficult to explain without saying she looked very old and looked about 80

business doc. Not enough to deal only with hearsay exception.
Does opinion also fall into exception to opinion evidence?

- **Jadwan Pty Ltd v Rae & Partners (A Firm) (No 3) [2017]**
- Opinion evidence is subject to the statutory discretions
 - **Sections 135, 136 and 137**
 - **R v Van Dyk [2000]**
 - Mother of complainant in sex assault case said he was already hanging around with certain look on fact, look of wanting', said evidence should have been excluded as it was highly prejudicial. Court said it was **relevant and admissible** under **s 78**, but probative value so low and **prejudicial value so high** it should have been excluded
 - **Patrick v The Queen [2014]**
 - Too complex
- **Exception: Aboriginal and Torres Strait Islander traditional laws and customs s 78A**
 - The opinion rule does not apply to evidence of an opinion expressed by a **member of an Aboriginal** or Torres Strait Islander group about the existence or non-existence, or the content, of the **traditional laws and customs of the group**.
 - **Dudley & Ors V Department of Primary Industries and Regions (PIRSA) & Anor [2016]**
 - Group of indigenous men abalone fishing
 - 88 undersized samples
 - Strict liability provision, you must prove you didn't breach
 - Argued they allowed to **fish using traditional methods**
 - PIRSA was of view that that wasn't what they were fishing for i.e. had 88.
 - Led evidence of Wanganeen → objection about whether it would be opinion evidence. Counsel said purpose was to show purpose of fishing...Seeking to include observations of Narunga people
 - No miscarriage of justice
 - Too little too late to think about **s 78A**, i.e. **during trial or early during appeal**
- Specialised Knowledge Exception
 - Expert Opinion at common law.
 - Evidence from someone with specialised knowledge is often vital because their evidence would be admissible for its opinion purpose – that is **to prove the existence of the fact upon which their opinion is based**.
 - **Exception: opinions based on specialised knowledges s 79**
 - 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**.
- Expert opinion
 - The **rationale** for the expert opinion exception is that:
 - an expert **provides** the fact finder (judge or jury)
 - with an **inference** that the fact finder is **unable to arrive at**

- because of the specialised or technical nature of the facts
 - or because of the high degree of knowledge that is required to draw such an inference.
 - **Dasreef Pty Ltd v Hawchar (2011):**
 - The applicable law is always the actual provision itself (s 79) and each case is to be decided on the basis of the provision not prior decisions.
 - decide based on provision, important to emphasise that admissible is determined by application of Evidence Act not statements form cases
 - Expert has to explain what their expertise is and this is mostly very simple.
 - Often basing their opinion on different set of facts
- Duties of expert witnesses
 - **Wood v R (2012)**
 - Summarises **Ikarian UK case**. Makes clear that rules also apply in Australia.
 - Requirements of experts:
 - Should be and seen to be independent opinion of expert
 - Should provide **objective unbiased** opinion assisting court, never role of advocate.
 - Should **state facts or assumptions** on which opinion is based
 - Should make it clear when particular question is **outside his expertise**
 - If expert opinion is not properly researched because of not enough data, state opinion is **provisional**. Need qualification re this is truth and nothing but the truth.
 - If after exchange of reports, **changes view** on material matter, change of view should be communicated by legal reps without delay
 - Where expert evidence refers to survey, measurements etc, must be **provided to other party** at same time of expert report exchange
 - **National Justice Cia Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) [1993]**
 - **James v Keogh (2008)**
 - **ASIC v Rich (2005)**
 - For Civil: Uniform Civil Procedure Rules Pt 31 governs includes Sch 7 Expert witness code of conduct including duties to court etc
 - **Makita (Australia) Pty Ltd v Sprowles (2001)**
 - woman slipped on stairs at work, physicist gave evidence on slipping on staircase, said staircase was unsafe. Expert had expertise but **did not consider all the lay evidence**. No doubt about his expertise. However given that no need to take opinion as exclusive, did it furnish trial judge with necessary scientific criteria and form independent judgment. **Expert was partisan.**
 - **Dasreef Pty Ltd v Hawchar (2011)**

- suffered from silicosis. Stone masonry work, exposed to silicon dust. Did it cause his illness?
 - Whether erred in relying on expert evidence.
 - No footing that his numerical analysis was wholly or substantially based on his knowledge. Dr went **beyond his knowledge** in producing the numerical analysis.
- An expert witness'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** that are observed or assumed in the particular case so as to produce the opinion of the expert witness.
- Facts Underlying Opinion – Proof
 - **Taub v R [2017]**
 - Commercial quantity of methylamphetamine manufacture but not more than 1kg proven.
 - Appellant found guilty of manufacturing meth. Had he manufactured so much that they could get him on the large commercial quantity 1kg provision.
 - Haven't got over a kg, we have sufficient waste product that looks like they cooked up batches for long time and that they would have made over 1kg
 - Contended expert evidence not admissible.
 - Only one expert on one side saw the evidence of the waste at the time
 - **1 Expert opinion was admissible**, don't have to prove truth of assumptions that you are basing opinion on
 - **2 Expert should not have to assess truth of the fact they are basing opinion on**, don't have to prove facts underlying opinion
 - Failed to prove large commercial quantity
 - **3 evidence establish he had manufactured at least 250g**
 - 4 remitted to district court for sentencing
 - Proof of assumption or basis rule: **got to base opinions on facts that you are told**. Make it clear what facts you have based opinion on and how they affect your opinion.
 - Held: It is **not a condition** of admissibility of expert opinion evidence that the tendering party **prove the truth of the assumptions on which the opinion is based**, and, therefore, the expert opinion evidence of Mr Ballard was admissible. (Simpson JA) but appeal allowed due to expert concession on quantity.
- Expert Opinion
 - It is not necessary that the **factual basis of the opinion** be established or proved
 - The expert does not have to be solely responsible for all the factual data on which the opinion is based
 - The trial judge must decide whether the opinion is substantially or wholly based on the expert's knowledge and/or experience (on the civil standard)
 - **Specialised knowledge**

- It will depend on the facts of each case and it is ultimately up to the fact finder to accept or reject the evidence as based on a reliably specialised body of knowledge.
- Does a specialised field exist?
 - The witness must have a peculiar or particular skill that is not ordinarily shared by others
 - Experts are required if inexperienced persons are **unlikely to prove capable of forming a correct judgment and the subject matter requires** study or experience
 - In some cases experience may be a sounder basis for opinion than study. Experience can count for more than study
 - **Howard Smith & Patrick Travel Pty Ltd v Comcare [2014]**
 - expressed opinion that exposed to asbestos, admitted as lay and expert
 - **Adler v ASIC (2003)**
 - **business ethics** was specialised knowledge
 - New areas constantly e.g. data scientists
- Expert Opinion- Requirements
 - Opinions are **not admissible** if they are based on **subjective interpretations of fact**
 - The **reasoning process** must be made clear to enable an objective evaluation about how the expert used their expertise to arrive at the opinion
 - The opinion of the expert witness must be **clearly identified and linked to the witness's training, study** or experience
 - **Beckett v State of NSW [2014]**
 - evidence divorced from any **independent means of validation, subjective and not admissible.**
 - **Honeysett v The Queen (2014)**
 - HC. CCTV footage of hotel robbed by three people. H convicted. Anatomy prof gave evidence of physical feature on one of accused. Identification. Usually robbers are far away from camera, not clear. Held it was based on **subjective opinion on what he saw on the footage**. What his opinion is based on is subjective. Wrongly admitted. Jury influenced. Very prejudicial, new trial ordered.
 - **Verryt v Schoupp [2015]**
 - 12 year old boy injured towed on skateboard on back of car, from rope attached to back of car. Psychiatrist, gave evidence of boys and how they think but **not evidence because did not even ask child**
 - **HG v The Queen (1999)**
 - sex assault of de facto step child, refused to allow evidence of psych who interviewed child. Psychologist said abused by natural father. **Child said nothing about father**. Report of psychologist based on **speculation**, properly excluded.
 - **R v Tang (2006)**
 - CCTV evidence robbing convenience store, facial anatomy and body mapping expert, concluded Tang was guy in footage.

Could not explain field because of patent application. Court **could not confirm if specialisation** under s 69, excluded.

- Expert witnesses should not venture outside of their field of specialised knowledge
- The **process** by which the expert has formed their opinion goes to **probative value or weight**, not to its admissibility
 - **The Queen v Anderson [2000]**
 - Doctors only knew how to treat wounds not about cause of wounds
 - **Velevski v The Queen (2002)**
- Expert's evidence is admissible only where the evidence **identifies the facts and the reasoning process** by which the opinion is formed and where the opinion is capable of being based on those facts
- Training, Study or Experience
 - A person's TSE does include **knowledge of everyday events** and affairs
 - Expert evidence is still admissible even though the issue to be determined remains within the experience and knowledge of the fact finder
 - **Section 79** specifically allows evidence of knowledge relating to **child behaviour and development in sub-s 2**
- Ad hoc experts
 - Issue about what happens when you know things about what everyone knows about. Even though knowledge is not necessarily needing to be given as evidence. But could still have expert knowledge more than common person on that subject, no longer exception that if it's in common knowledge cannot give expert evidence.
 - **Allstate Life Insurance v ANZ (1996)**
 - **Morgan v R [2016]**
 - Break, enter, steal. Ad hoc experts. Policeman spent huge amount of time listening to voices from phone tap. Huge amount of time identifying voices of the 3 individuals. Appeal dismissed, **evidence accepted**
- **Ultimate issue and common knowledge rules abolished s 80**
 - **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.
 - **Allstate Life Insurance Co v ANZ Banking Group Ltd (No 6) (1996)**
 - **Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd [2007]**
 - DL sued by C because they dared to use purple in advertising. Called expert to give evidence about **marketing and consumer behaviour** on what influences to buy choc. It was admissible evidence even if behaviour within common knowledge. **S 80** makes it clear that allowed matters in common knowledge.
- Conflicting Expert Evidence

WEEK 10 READINGS

CHAPTER 9 – OPINION EVIDENCE

- EA Section 76
 - Witnesses may only give evidence of that which they have **observed, inferences from observed facts, or opinions** are not ordinarily receivable in evidence
- **The opinion rule s 76**
 - (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
 - Note: Specific exceptions to the opinion rule are as follows:
 - summaries of voluminous or complex documents (subsection 50(3));
 - evidence relevant otherwise than as opinion evidence (section 77);
 - lay opinion (section 78);
 - and Torres Strait Islander traditional laws and customs (section 78A);
 - expert opinion (section 79);
 - admissions (section 81);
 - exceptions to the rule excluding evidence of judgments and convictions (subsection 92(3));
 - character of and expert opinion about accused persons (sections 110 and 111).
 - Other provisions of this Act, or of other laws, may operate as further exceptions.
- 2 issues
 - whether evidence to be **adduced is in nature of opinion** as against statement of fact
 - whether evidence of opinion is being adduced for the **proscribed purpose**
- Four exceptions to opinion rule
 - s 77: displace opinion rule where in any case evidence of the opinion although **not adduced as relevant to proof of the fact** about which the opinion is expressed, is also relevant (and thus may be used) for that purpose (**multiple relevancy**)
 - s 78: **lay opinion** operates where W evidence cannot be given except in form of opinion
 - s 78A: operates where W is member of **ATSI** group and seeks to give evidence of W's opinion about the existence or non-existence or the content of traditional laws and customs of that particular group
 - s 79: displaces opinion rule where
 - W has **specialised knowledge**
 - that knowledge is based on the person's training, study or experience and;

- the opinion given is wholly or substantially based on that knowledge
 - Regard must be paid at outset to s 55 relevance test and then whether it should be excluded under ss 135/137.
 - Other exceptions to s 76 are found in
 - s 50(3) summary of **voluminous** or complex documents
 - s 81(1) party's **admission** of adverse fact may be in the form of an opinion that that fact exists
 - s 92(3) certain evidence judgments and convictions in s 92 may include a statement of opinion
 - s 110 evidence as to **good character** of Defendant in criminal trial, and evidence to the contrary, may be in the form of an opinion
 - s 111 evidence about **character of co-accused** adduced by another defendant from a person which specialised knowledge
- Fact or opinion?
 - evidence that a fact exists vs evidence of opinion that a fact exists
 - distinction is one of **degree**
 - **no absolute boundary** marked between fact and opinion
 - **R v Smith**
 - opinion can be described as evidence of a conclusions, usually **judgmental or debatable, reasoned from fact**. Typically a person of skill or training will give evidence based on e.g. history, examination etc. Opinion based on factual material.
 - **Allstate:**
 - opinion is **not defined in the Act**. General law, defined as **inference from observed and communicable data**.
 - If distinction must be made it can only be **one of degree**
 - evidence of what the witness would have done in a **hypothetical situation**
 - applying as a guide the principle that opinion is an inference from observed and communicable data, Justice held that the evidence to be given does not state an inference to be drawn from observed and communicable data. It purports to be direct evidence from the person uniquely placed to give it of what the person would have done in the hypothetical situation. This is not opinion of the kind not admissible under EA.
 - **Smith v The Queen**
 - distinction is one of degree
 - evidence at the extreme of the continuum which most would classify as evidence of opinion will generally be **open to more dispute** than material at the opposite end, which most would classify as evidence of fact. For accuracy of fact finding etc., necessary to exercise some control upon material at the opinion end of the continuum
 - **R v Drollett**
 - attack by 11 prisoners on another prisoner in space known as 6 yard at Goulburn CC. Drollett was only accused who maintained a plea of not guilty and at trial prosecution led evidence from Officer who identified Drollett as one of the

men involved from video footage. On appeal, admission of evidence challenged as being **opinion formed from security camera images rather than direct eye-witness**. Judges agreed, opinion rule required careful consideration.

- Mr Stephens was not giving evidence that the footage represented an even which he had observed and therefore illustrated his account of the event. When he purported to identify appellant, he was not doing so by reference to something he had observed. Primary evidence was film footage. Officer's evidence was **interpretation of what was depicted in the footage**. It was opinion evidence
- Extent of prohibition in s 76 (Fact in issue, credibility)
 - applies only where evidence of opinion is adduced to prove **existence of act** about the existence of which the opinion was expressed
 - s 76 has no application where evidence that person **held an opinion is itself a fact in issue** or is a fact relevant to assessment of credibility of a witness
 - E.g. parted with property because V believed some representation of D to be true, evidence of opinion is fact in issue
 - if W called by D through D had previously cheated W, D could cross-examine W to show W held this belief, biased and that W evidence lacks credibility
- **Exception: evidence relevant otherwise than as opinion evidence (multiple relevance) s 77**
 - 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.
 - evidence of opinion although not adduced as relevant to proof of fact about which opinion is expressed, is also relevant in terms of s 55 for that purpose. Admissible in proof of fact about which opinion is expressed subject to other rules.
- **Lakatoi Universal v Langley Alexander Walker**
 - evidence relevant for purpose other than
 - e.g. relevant
 - if the conveying of the opinion was a fact in issue
 - to a person's state of knowledge
 - to show the basis of other opinion evidence given by expert
 - if admitted for one of these purposes it can also be used as evidence of the facts about which it is expressed
- **Exception: lay opinions s 78**
 - The opinion rule does not apply to evidence of an opinion expressed by a person if:
 - (a) the opinion is based on what the **person saw, heard or otherwise perceived** about a matter or event; 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.

- Rationale for s 78
 - **W cannot sensibly relate** what saw, heard or perceived without expressing an opinion
 - where this is convenient in the interests of a **reasonably normal prose** during giving of testimony
 - list of circs for no-expert evidence is **lengthy but not closed**: **South Sydney Junior Rugby Leagues Club v Gioia**
 - witness permitted to give evidence of opinion as to the identity of a person or thing. E.g. accused is the person who assaulted.
- **Lithgow City Council v Jackson: s 78(b)**
 - questioned as to whether subs satisfied in relation to opinion allegedly expressed by two ambulance officers in doc as to location where respondent had fallen and the nature of the injuries occasioned to him without any evidence as to the sources of the statements made in the document
 - majority concluded **not possible to positively find that it stated an opinion**, they considered whether **s 78(b)** would be satisfied if it were assumed an opinion was expressed in the impugned representation
 - function is to permit opinion where primary facts on which it is based are **too evanescent to remember or too complicated** to be separately narrated. E.g. appear drunk or middle-aged or angry, impossible for observer to separately identify, remember and narrate all indications which led to conclusion
 - without **s 78**, cannot convey adequate account or understanding of the witness' perception of what was being observed
 - it would be **possible for observer to list perceptions of specifically identifiable medical circumstances** of someone found in drain, perceptions of specifically measurable distances between limbs and other objects and perceptions of specifically describable angles of limbs. **Investigators commonly make precise measurements** of that kind. Those persons can often remember what they have measures. Not a case of component observations being made which are incapable of meaningful expression without stating the composite opinion to which they led. **Not necessary to obtain adequate account of perceptions of that kind that opinion be received.**
 - No reason to doubt that similar evidence in suitable form, from suitably qualified experts about causation is admissible under **s 79**. Had ambulance officers given evidence of **medical and physical details they observed**, it would be admissible. But statement of conclusion that respondent fell from place would be opinion evidence banned by **s 76**. It **would not have passed through s 79** gateway because they are not experts. It **would not have passed through s 78** because it failed to satisfy **s 78(b)**.
 - Function of **s 78(b)** is to make up for incapacity to perceive the primary aspects of events and conditions, or to remember the perception or express memory of perception. Ambulance officers where not shown to be suffering from incapacity in perception, memory or expression. They said nothing about what they perceived about position of body. Does not follow that there was any **incapacity to perceive, remember or say** what they had perceived.

- **Partington v The Queen (2009)**
 - s 78(b) **was not satisfied** and opinion was not necessary to ensure witness account was understood by jury
 - could give evidence of **seeing the door and hearing noises**, opinion that someone was pushed against it is excluded and not necessary
- The opinion must have probative value
 - s 55 requires rational basis for expression of the opinion: 2 factors
 - where element of experience must underpin the formation of the opinion, **W lack of relevant experience** may affect probative value to point where it has none at all. E.g. that car travelling over 100km based on perception and child may not have sufficient experience.
 - probative value may be affected by matters such as W's **opportunity for perception** of event the character of which is the subject of the opinion
 - **R v Panetta**
 - evidence of opinion that appellant was **travelling at roughly 100km** or more. She would have had the appellant's vehicle in her direct line of sight for at more 25 metres. Estimate of speed based on rear vision mirror. She had never before been in similar situation. Objection to her giving opinion evidence as to speed. She had driver license for about 14 years **No rational basis** (rational required under s 55 and s 78) for opinion
- No need for evidence of the primary facts
 - s 78 permits opinion to be admitted **without evidence of the primary facts upon which opinion is based**, although absence of such evidence may affect weight: **R v Harvey**
- Discretion to exclude
 - If evidence has some weight, it is admissible under s 55 but may be basis to excluded under s 135(a).
 - **Guide Dog Owners (1998)**:
 - evidence given s 78(b) is of slight probative value
 - s 78 does not require expression of opinion to be supported by recitation of primary facts on which it is based, but in absence of some attempt, it is **difficult to give much weight** to the opinion
 - absence of details of the **content and context of any of the conversations that form W's opinion** creates danger that evidence of opinion would be unfairly prejudicial
 - **R v Van Dyk**
 - evidence in issue was that of mother of complainant where D charged with sexual offences
 - described a **look of wanting**
 - held that this evidence was admissible under s 78(b) but should have been excluded under s 137
 - **highly prejudicial** but of minimal probative value. Look is transitory and depends on **subjective assessment**.
- **Exception: Aboriginal and Torres Strait Islander traditional laws and customs s 78A**

- The opinion rule does not apply to evidence of an opinion expressed by a member of an Aboriginal or Torres Strait Islander group about the existence or non-existence, or the content, of the traditional laws and customs of the group.
- permit some relaxation of opinion rule
- does not cover person who is not ATSI but has specialised knowledge of traditional laws and customs e.g. anthropologist
- still must pass s 55 and ss 135-7
- **Exception: opinions based on specialised knowledge s 79**
 - (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 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:
 - (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
- Rationale of s 79
 - **Quick v Stockland**: function is to provide trier of fact, judge or jury with inference which judge or jury due to **technical nature of fact is unable to formulate**. Furnish with scientific information likely to be outside the experience of a jury or judge
- Where the expert evidence is not in the form of an opinion
 - s 76 and s 79 does not apply where person employs some expertise they possess to give **evidence of the existence of fact** in contrast to giving evidence of an **opinion as to existence of fact**
 - nor does s 76 apply where W gives **evidence of their observations and experience over a period of time**. **Clark v Ryan**, person experienced in actual use might give evidence not of opinion but of actual fact about how semi-trailers of that kind behave when making turns.
 - **R v Barker**: Witness police officer gave evidence that certain items including bongs found in shop were commonly used for smoking cannabis. Constable was **relating her observations and experiences** over years of contact with Indian help and appliances used for smoking it. None was opinion evidence. Merely **recounted her actual observations**.
- General approach to s 79

- must be given in certain form to ensure requirements of s 79(1) have been met
- **Makita v Sprowles**
 - action in negligence where respondent sued appellant after she slipped and fell down set of stairs leading from rooftop car park. She relied heavily on physicist specialising in investigation of slipping accidents.
 - must be **agreed or demonstrated there is a field** of specialised knowledge
 - there must be an **identified aspect of that field** in which witness demonstrates the witness has become an expert
 - the opinion proffered must be **wholly or substantially based** on the expert knowledge
 - so far as the opinion is based on **facts observed, they must be identified**. So far as opinion is based on **assumed or accepted facts, they must be identified and proved** in some other way
 - if all not made explicit, cannot be sure where opinion wholly or substantially based on expert specialised knowledge. If court cannot be sure of that, the evidence strictly speaking is not admissible and if it is, is of diminished weight.
- Making clear the factual substratum of the opinion
 - witness expert giving opinion assumes that a certain state of facts exists and on that basis opines that another fact exists
 - expert should **differentiate between assumed facts** upon which opinion is based, and the **opinion in question: HG v Queen**
 - expert's function is to **express an opinion based on assumed facts**, not to express view on whether assumptions are justified
 - witness may be asked to express an opinion by way of a hypothetical on a state of facts W is asked to assume to exist
 - opponent party may put to W a state of affairs O hopes to establish as the factual substratum
 - value of opinion will turn in part on degree to which assumptions made by W correspond to facts as found by jury: **Makita**
 - another concern is that expert might under guise of giving opinion make an unstated assumption about facts that are in dispute, or which might be disputed. This is objectionable because W's specialised knowledge does not extend to fact-finding.
 - E.g. orthopaedic surgeon giving opinion that broken arm caused by fight no workplace injury would be outside specialised knowledge. Has nothing to do with his expertise.
- Establishing the factual substratum
 - the substratum of facts upon which opinion is founded must be proved, by admissible evidence to the satisfaction of the jury to the requisite standard. Whether that is done does not appear to be condition of admissibility. ALRC noted no formal rule requiring proof of factual basis of expert opinion before opinion will be admissible.
- Requirements of s 79(1)
 - party relying on s 79(1) to justify admissibility of opinion of W must show there is an
 - **agreed field** of specialised knowledge

- **identified aspect** of that field in which witness demonstrates by reason of training, study or experience, the witness has become expert
 - opinion proffered is **wholly or substantially based on** witness's expert knowledge
 - these three issues of fact are **preliminary questions** and if challenged, will be resolved on voir dire under [s 189](#).
- Knowledge in a field of specialised knowledge [s 79\(1\)](#)
 - evidence to W's training, study or experience will be relevant to weight of evidence and should tactically be adduced before the jury
 - specialised knowledge imports knowledge of matters which are outside the knowledge or experience of **ordinary persons**: [Velevski](#)
 - may be question of whether there is no such field of expertise
 - TSE include in all areas of expertise, observations and knowledge of **everyday affairs and events**, and departures from them.
 - W's specialised knowledge can be based on W's training, study or experience. The fact that the specialised knowledge is in addition based on W's observations and knowledge of everyday affairs and events, and departures from them does not mean that the knowledge is not such as to fall under [s 79\(1\)](#). Similarly, W's opinion may be based on the opinions of other experts, such as might be expressed in publications.
 - **W cannot rely on common knowledge or opinions of others** to express opinions beyond their range of specialised knowledge: [Velevski](#)
 - Medical doctors and pathologists well capable of processing specialised knowledge enabling them to offer informed **opinions as to the infliction, self or otherwise, of injuries**. Their experienced knowledge of the pathology qualify them to express opinion on the matter: [Velevski](#)
 - [R v Tang \(2006\)](#): contrast, expert opinion evidence of forensic anatomist was held to have been wrongly admitted because expert evidence of identification of points of resemblance between videotaped surveillance images of robbery offender and photographs of appellant through use of facial mapping and body mapping technique was not based on specialised knowledge. **Body mapping was not found to be an area of specialised knowledge**.
 - [Meade v The Queen](#): requirement of specialised knowledge satisfied. Opinion evidence of marketing and product manager, shoe footprints and the type of shoe worn, expertise of boot manufacture.
 - Courts do not accept that a **witness can express opinion whether a person is telling lies**.
 - Includes expertise about children behaviour and child development.
- Specialised knowledge as reliable basis for the opinion [s 79\(1\)](#)
 - must be some assessment of whether the theory is reliable in that its application to assumed facts can produce an opinion of some value to jury as to whether fact in issue exists
 - W has specialised knowledge about subject but that knowledge cannot be **rational basis for formation of the opinion**. This derives from [ss 55-6](#).

- Must be a scientifically accepted body of knowledge: **R v C**
- **Tang**: treating questions of reliability as extraneous should be followed unless persuaded that it was plainly wrong, **s 79(1)** leaves no room for reading in a test of evidentiary reliability as a condition of admissibility.
- Specialised knowledge based on the person's training, study or experience s 79(1)
 - **disposes of common law notion** that expert knowledge must be based to some extent on **formal training**
 - ad hoc expert
 - specialised knowledge may be such as to justify expression of opinion as to existence of fact in a **particular situation only**
 - e.g. listened to **voices on tape recordings** may acquire specialised knowledge enable them to give opinion that a voice on tape matched that of person. Person who has acquired expertise in narrow subject matter that would not ordinarily call for or warrant or be susceptible to specialised TSE: **Chen v The Queen**.
- An opinion based on specialised knowledge s 79(1)
 - common objection is that W has expressed an opinion not within the range of those opinions W might express on basis of their specialised knowledge
 - **HG v The Queen**: Psychology is field and he is expert, question is whether the opinion was on that he was able to give as an expert.
 - Enough that expert opinion is at least substantially based on expert knowledge. Witness may have regard to matters that are within the knowledge of ordinary persons in formulating opinion: **s 80(b)**.
 - **R v Davis**: doctor opinion, question about what happened to alleged victim of sexual assault should not have been asked as **doctor did not detect injury to private parts** so opinion substantially based on history given and **not upon any specialised knowledge**
- Demonstrating that the specialised knowledge is a basis of the opinion
 - witness must explain **how the learning** that makes up the field of specialised knowledge and on which opinion is wholly or substantially based, **applies to facts assumed or observed** so as to produce opinion: **Makita**.
 - jury must be in position to test validity of the process by which opinion has been formed so as to be in a position to adjudicate upon the value and cogency of the opinion evidence. Where **explanation is not given**, evidence may be excluded under **s 79** or under **s 135**.
 - point is to place jury in position where it may determine for itself whether to draw inferences of fact that the opinion-giver says should be drawn.
 - Where specialised knowledge and methods of its application are not well known, trial judge may require more detailed explanation of what opinion is based on.
- **Keller v The Queen**
 - evidence of police officer on meaning of various words uttered in intercepted conversations

- does not appear witness identified the matters which led him to conclude that in the conversations intercepted the subject matter was drugs
- **Ultimate issue and common knowledge rules abolished s 80(a)**
 - 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.
 - Note: *Admission* is defined in the Dictionary.
 - effect is to remove the fact that the evidence **goes to an ultimate issue** from the reasons for which a court must or could exclude the evidence
- Where opinion is about matter of common knowledge: s 80(b)
 - evidence is not inadmissible only because it is about matter of common knowledge
 - *Cadbury Schweppes v Darrell Lea*: Opinion evidence from marketing and consumer behaviour expert. Evidence went to a matter that is within the knowledge and experience of the ordinary person. If the matter about which expert evidence is to be given is patent to all, court time would normally be wasted by such evidence. Nevertheless evidence may still be admissible. **Expert may still be of assistance** so long as s 79 satisfied.
 - *Murphy v The Queen*: judges differed on value of the expert evidence.
 - ALRC stated evidence previously of doubtful admissibility because of common knowledge rule, for example evidence from psychologists or psychiatrists about **human behaviour or child development, is admissible** subject to ss135-137.
- Unchallenged evidence of expert opinion
 - jury not obliged to take opinion of expert as conclusive even if unchallenged: *Makita*
- Resolving conflicts between experts
 - *R v Lisoff*: court approved *R v Jarret* which said that resolution of conflicts in expert testimony and weight attached to it is **function of the jury**. If no reason to exclude evidence, it should be admitted and appropriate directions given to jury as to how any conflicts in evidence should be approached and what use can be made of evidence
 - matters that might be taken into account as factors **suggesting acceptance of an opinion**:
 - extent of **direct experience** of witness with facts e.g. having treat a person
 - **nature of qualification** and experience of witness
 - degree of confidence the jury may feel about validity of principles of specialised knowledge employed by witness as **basis for derivation of opinion**
 - extent to which **facts the witness assumed** to exist correspond with facts as found by jury
 - negative factor is degree to which witness appears as an **advocate for a party**, a matter often assessed by their demeanour
- Ethical obligations of witness giving evidence under s 79

- **Collins Thomson v Clayton**: issue of whether person who was a **party to the litigation** should be permitted to give evidence under s 79 of opinion he held as to existence of facts in issue
 - expert evidence presented to court should be and should be seen to be independent product of expert uninfluenced as to form or content
 - expert witness should provide independent assistance to court by way of objective unbiased opinion in relation to matters within expertise
 - expert witness should state facts or assumptions upon which opinion is based. Should not omit to consider material facts which could detract from his concluded opinion
 - should make it clear when question or issue falls outside his expertise
 - if opinion is not properly researched because he considers independent data is available, this must be stated with an indication that the opinion is no more than provisional one
 - if after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated to other side without delay
 - where expert evidence refers to photographs, plans, calculations, analyses or similar docs, these must be provided to opposite party at the same time as the exchange of reports
- weighty considerations which may lead court to exercise discretion under ss 135-6 or may lead court to attach little weight to evidence
- Form in which experts may testify
 - may give evidence in the form that something **was or is likely, or probable or improbable or possible or certain**
 - if qualified to give **statistical basis**, chance may be expressed in percentage terms: **R v Van Beelen**
- Expert witnesses and leading questions
 - may be asked **leading questions** by party calling W, but trial judge might prefer opinion evidence to be elicited in non-leading way.
 - s 37(1)(e) permits only a **limited kind of leading** question to be put to an expert, but under s 37(1)(a) the trial judge might permit a broader range
- Expert witnesses and the rule against hearsay
 - s 60 where evidence is admitted for **non-hearsay purpose** of indicating the factual substratum, then hearsay rule has no application
 - however the person who made hearsay statement will not be witnesses, cannot be cross-examined, judge might give limiting direction under s 136.