

Sample Evidence Law Notes

Includes credibility, character, admissions, opinion

1. The Credibility of Witnesses

The credibility rule per s 102.

Applies only to evidence that goes solely to credit.

Credibility refers to whether the witness should be believed on oath.

- character evidence is often used to impugn credit
 - o eg prior theft is not relevant to determining aggressive character but may go towards credit
 - o eg holding a position of trust or authority and convicted of theft may go towards both character and credit

Evidence Act ss. 101A-103

s 103 – evidence that goes to credibility is allowed in cross where it substantially affects the credit of the witness

2. The Character of the Complainant in Sexual Offence Cases:

Criminal Procedure Act Part 8.2, Division 2 and s. 377 *Jury Directions Act*, Part 4, Div. 5 and Part 5, Div. 2 and 3

Character of victims is admissible so long as it is relevant to a fact in issue. Generally, evidence as to the bad character of a victim is also admissible.

At common law, the character of the complainant in sexual offence cases was regarded as relevant to the issue of consent or belief in consent. The complainant must have consented or the accused believed that they consented.

Historically, the complainant could be cross examined about sexual activities with persons other than the accused, with the accused on other occasions and their general sexual nature. This made victims reluctant to bring the case it would delve into sexual reputation and past conduct.

The latest iteration of this provisions:

s 338 Criminal Procedure Act 2009 (Vic)

- addresses and acknowledges some of the below factors

It is the intention of Parliament that in interpreting and applying this Part in any criminal proceeding that relates (wholly or partly) to a charge for a sexual offence, courts are to have regard to the fact that—

- (a) there is a high incidence of sexual violence within society; and
- (b) sexual offences are significantly under-reported; and
- (c) a significant number of sexual offences are committed against women, children and other vulnerable persons including persons with a cognitive impairment; and
- (d) offenders are commonly known to their victims; and

It does not matter whether the other co-accused has put their good character in evidence at all. Lowery could have said nothing about his character. The evidence of a co-accused is not subject to hearsay and tendency rules. Allows King to bring evidence of Lowery as adduced by King's opinion.

Sworn evidence by an accused:

Where an accused elect to give sworn evidence, he or she then may be cross-examined. The accused cannot claim privilege in respect of the offence charged (s128(10)).

The accused is protected from cross-examination as to character or credit in two ways:

1. Leave must be sought to cross-examine as to character under s 112 (see Stanoevski)

s 110 where the accused adduces evidence of good character, the prosecution is entitled to adduce evidence in rebuttal; that rebuttal must be to the same level of particularity or generality

Leave must be sought for that rebuttal per s 112; s 192

Stanoevski v R (2001) 202 CLR 115 (KO&P [12.100])

Appellant was a practising solicitor – she put forth evidence of good character. s 110 is enlivened. Prosecution rebutted this and put forth a misconduct document from the Law Society Report investigating her for forging client's signatures.

[Para 40] HCA held that it took up much time in investigating her behaviour in collateral matters – did she actually forge signatures? It would be unfair to go down this path. The jury is distracted by the collateral evidence. This evidence was also highly prejudicial to the appellant.

This report also had very little rapport or weight. This was not a prior conviction or court finding but investigated only.

Leave should not be granted here or use should be restricted to avoid the undue and lengthy investigation.

2. Cross examination as to credit is restricted under s 104

Credit only arises if the person is giving sworn evidence. If the accused remains silent, it will not apply.

Must still substantially affect the credit of the witness – s 103

4. Cross-Examination of the Defendant as to Credit

Evidence Act ss. 104, 108A and 108B

3. Cross examination as to credit is restricted under [s 104](#)

Credit only arises if the person is giving sworn evidence. If the accused remains silent, it will not apply.

Must still substantially affect the credit of the witness – [s 103](#)

TOPIC TEN ADMISSIONS

Admission is defined as a previous representation that is:

- made by a person who is or becomes party to a proceeding (including an accused in a criminal proceeding)
- is adverse the person's interest in the outcome of the proceeding

the fact that it is adverse suggests reliability, however this is not always the case

Admissions may be made by:

- an oral or written statement
- adoption of a statement by the accused; eg in interviews where statement are put to the person

Evidence Act Part 3.4

s 81 hearsay rule and opinion rule do not apply to evidence of an admission

hearsay rule and the opinion rule do not apply to evidence of a previous representation:

- that was made in relation to an admission at the time the admission was made or shortly before or after that time AND
- to which it is reasonably necessary to refer in order to understand the admission

s 82 applies only to first hand hearsay

- statement must be given by a person who saw, heard or otherwise perceived the admission being made
- it is a document in which the admission is made

s 83 admission is not admissible against a third party without the consent of that person

- relevant to associated accused

Conduct as an Implied Admission: Evidence of Consciousness of Guilt

In some cases, the post offence conduct of the accused may give rise to an implied admission of guilt. Post-offence conduct which is not relevant as an implied omission may be relevant to the accused's credibility.

Eg. A statement subsequently revealed to be a lie or certain behaviour – fleeing from the scene of a crime. Use it to imply admission – you are lying because you were involved with

TOPIC TWELVE OPINION EVIDENCE

Evidence Act Part 3.3

s 76 Opinion Rule

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

Lithgow City Council v Jackson (2011) 281 ALR 223 (KO&P [8.40])

- an opinion is an inference drawn from observed and communicable data

eg. opinion of a person being drunk – drawn from observed and communicable data such as slurred words, drunken walking

s 77 evidence relevant for another purpose

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

prior inconsistent evidence of an opinion was adduced to contradict the evidence, not used to prove an opinion, if admissible for the non-opinion purpose, the rule in s 76 does not apply.

s 78 lay opinion

Opinion rule does not apply to evidence of an opinion expressed by a person if:

- (a) 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

eg person was middle aged – better and more effective to convey that information to the jury and give the opinion rather than prove every fact supporting that opinion

Lithgow City Council v Jackson (2011) 281 ALR 223 (KO&P [8.40])

Ambulance officers note attending to scene where person fell: Representation was so ambiguous that it was irrelevant.

Even if it is not ambiguous, the statement was not an opinion as it was unclear what data they observed and what inference they drew from it.

Perceived is given its ordinary meaning. s 78 only applies to opinions given by those who