

WITNESSES

TOPIC 2 – VERBAL EVIDENCE

VERBAL EVIDENCE (VIVA VOCE)

- “Viva Voce”
 - A person physically appearing in the court room and verbalised comments on the matter
- “Subpoena”
 - If individuals refuse to go to court, they can be subpoenas, and can be charged with contempt of court.
 - Being a witness may be compulsory
 - A court order which makes you have to come to court
 - This shows that the system thinks that being a witness is so important
 - Consequence of not attending in court can be jail or fine
- Preliminary interview:
 - Each side may ask witnesses questions to then assist in deciding which witness to call
 - During the preliminary interview there can be a statement made which then in case it is not repeated at trial or repeated differently they have this statement

3 CRITERIA – FOR VERBAL EVIDENCE TO BE ADMITTED

1. **Witness must be competent** (allowed to testify); and
2. **Witness must be compellable** (lawfully obligated to testify); and
3. **Witness must not be able to claim privilege not to answer** (eg privilege against self-incrimination)

COMPETENCE VS COMPELLABILITY

- Competence – Who is qualified to give evidence in the court?
- Compellability – who can be forced to give evidence in court?
- **Evidence Act (Vic) s 12: “Competence and compellability**
 - Except as otherwise provided by this Act—
 - (a) **every person** is competent to give evidence; and
 - (b) a person who is competent to give evidence about a fact is compellable to give that evidence.”

EXCEPTIONS — TO THE OPINION RULE

When evidence of opinion IS considered relevant...

- NOTE: S 76 is to be read in conjunction with s 77
- This section allows opinion evidence to be admitted if it is not being used to prove a fact based on the opinion, but for some other purpose.
 - o EG, to explain why the witness did something: “I ran away because the person I saw had vicious eyes.”

1. Other than opinion

S 77 Evidence Act 2008 (Vic): Evidence relevant for a purpose other than as opinion evidence

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

2. Lay Opinion

S 78 Evidence Act 2008 (Vic): lay opinion

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.

Examples of admissible lay opinions (according to CL) :

- Apparent age, speed of a vehicle, condition of a road or weather.

Smith v The Queen [2001] HCA (opinion of eye-witnesses of the event)

- Bank robbery, video footage was bad quality, so no one could tell who the accused was from the video. But 2 police officers said they knew the person in the footage, as they knew him.
- Majority held: The identification evidence was inadmissible, due to relevance rule s 55.

R v Whyte [2006] NSWCCA (“tried to rape me”)

- Here the accused didn’t do anything of sexual nature, therefore the comment was an opinion

Partington v R [2009] NSWCCA (“somebody’s head was being pushed up against the door”)

- Witness was standing inside a door and outside of the apartment
- Witness said she heard a head pushing up against the door
- Court held: this was a belief

When will s78 be satisfied?

- o Evidence of opinion may be considered ‘necessary’ to understand witness’s testimony if it is difficult or impractical to separate witness’s observations from his/her opinion
- o such as; if observation concerns identity of individual, handwriting or thing, a person’s age, speed of an object, condition or state of something, person’s emotional state or physical condition.