

# Topic 12: Opinion Evidence

## Rule

- ❖ Evidence of an opinion is not admissible to prove the existence of a fact about which the opinion was expressed: [Evidence Act section 76](#)
- ❖ 'Opinion' not defined, generally means "an inference drawn from observable and communicable data": [Lithgow](#)
- ❖ Rationale:
  - Witnesses should have personal knowledge of information communicated to jury
  - Mere opinions do not give jury information, just inferences and conclusions

## Test

1. What is the fact asserted in the opinion?
2. What is its relevance, or what is it being offered to prove?
3. Are 1 and 2 the same?
  - YES: inadmissible unless an exception applies
  - NO: [section 77](#) allows reception

## Exceptions

- ❖ Opinion offered for another purpose: [section 77](#)
  - Accused adducing good character evidence: [section 110](#), see page 83
  - Expert opinion about character of co-accused: [section 111](#), see page 85
  - See [Whyte](#) and [Hoyle](#)
- ❖ Lay opinions: [section 78](#)
  - Allowed where opinion is based on what witness saw, heard or perceived and evidence of the opinion is necessary to obtain an adequate account or understanding of their perception of the matter or event
  - Eg person's age, state of intoxication, speed, mood, weather, road conditions, authorship
  - Does not include thoughts, conjecture or conclusions not based in observation, must be grounded in what person actually saw or heard
  - See [Lithgow](#)
- ❖ Expert opinions: [section 79](#)
  - Where person has specialised knowledge based on training, study or experience and their opinion is wholly or substantially based on that knowledge
  - 'Specialist knowledge' not defined but meant to be broad, beyond common knowledge
  - Encompasses child development and behaviour, including impact of sexual abuse
  - Consider whether the common person would be able to develop such an opinion without the specialised knowledge

- Opinion must be grounded in knowledge, not speculative (*HG v R*) or a matter which the jury could form an opinion on based on the material available (*Honeysett*)
- Reliability is not part of [section 79](#), instead should be determined under [sections 135](#) and [137](#) – this may be relevant where there is an underlying science or method involved in reaching opinion: *Tuite*
- If opinion is partially based on assumed facts, these must be stated but need not be proven – this also does not mean the opinion is not still substantially based on specialised knowledge: *Langford*

## **Evidence Act 2008 (Vic)**

### Section 76: The opinion rule

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

*Note: Specific exceptions to the opinion rule are as follows—*

- *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 an accused (sections 110 and 111).*

*Other provisions of this Act, or of other laws, may operate as further exceptions.*

*Examples: 1. P sues D, her doctor, for the negligent performance of a surgical operation. Unless an exception to the opinion rule applies, P's neighbour, W, who had the same operation, cannot give evidence of his opinion that D had not performed the operation as well as his own.*

*2. P considers that electrical work that D, an electrician, has done for her is unsatisfactory. Unless an exception to the opinion rule applies, P cannot give evidence of her opinion that D does not have the necessary skills to do electrical work.*

### Section 77: Exception—evidence relevant otherwise 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.

### Section 78: Exception—lay opinions

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.

#### Section 78A: Exception—Aboriginal and Torres Strait Islander traditional laws and customs

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.

#### Section 79: Exception—opinions based on specialised knowledge

(1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

(2) To avoid doubt, and without limiting subsection (1)—

- (a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse); and
- (b) a reference in that subsection to 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.

#### Section 80: Ultimate issue and common knowledge rules abolished

Evidence of an opinion is not inadmissible only because it is about—

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

#### ***Lithgow City Council v Jackson (2011) 281 ALR 223***

- Section 78 lay opinions
- ‘? Fall from 1.5m onto concrete’
- Presence of question mark made this unclear if there even was an opinion
- Likely speculating rather than drawing inference
- Unclear what was observed in order to form an opinion, witness must have actually perceived something happen
- Was not ‘necessary’ to understand events, added nothing as too speculative

#### ***HG v R (1999) 197 CLR 414***

- Section 79 expert opinions
- *HG charged with sexual offence against stepdaughter*
- *Called psychologist to examine complainant who concluded it was the biological father responsible*

- This opinion was not substantially based on specialised knowledge, went beyond expertise to mere speculation
- **Gleeson CJ**: “experts who venture ‘opinions’... outside their field of specialised knowledge may invest those opinions with a spurious appearance of authority [so] legitimate processes of fact-finding may be subverted”

#### ***Honeysett v The Queen [2014] HCA 29***

- Section 79 expert opinions
- *H convicted of armed robbery*
- *Anatomist was called to give evidence of similarity of physical characteristics between H and CCTV footage*
- This opinion was based on subjective impression of what expert saw, not on specialised knowledge
- No measurements taken, just based on perception
- This gave an unwarranted impression of science to prosecution’s case – jargon such as ‘ectomorphic’ which just means skinny

#### ***Dasreef Pty Ltd v Hawchar [2011] HCA 21***

- Section 79 expert opinions
- *D convicted by Dust Diseases Tribunal*
- *Expert had given evidence that dust in the breathing zone exceeded limit*
- Evidence was properly admitted
- Party adducing evidence must explain what it seeks to prove
- Expert must explain how the specialised knowledge applies to the facts observed in order to reach the opinion
- Expert reasoning should be transparent
- Factual basis of opinion need not be established

#### ***Langford v Tasmania [2018] TASCCA 1***

- Section 79 expert opinions
- *L convicted of setting fire to a taxi, prosecution relied on evidence of a fire investigator*
- *Expert said fire started on outside of car, likely on rear bumper*
- *Defence appealed as Toyota dealership had provided expert with information on the car’s battery to help him determine whether battery was the source*
- *Expert still carried out proper inspection of whole car – inspected battery, noted lack of soot inside windows, fire language indicators*
- Assumed facts do need to be stated, but not proven – this is relevant to weight evidence carries though