

Evidence exam notes

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Opinion Rule & Exceptions

the opinion rule: s76

EVIDENCE ACT 2008 - SECT 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.
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.

what is an opinion?

Although 'opinion' is not defined in the uniform evidence legislation, 'in the general law of evidence [it] has been defined as " an inference from observed and communicable data ". ¹
There is long-standing acknowledgement of the difficulty of distinguishing 'fact' and 'opinion' . <ul style="list-style-type: none">• In a sense all testimony to matter of fact is opinion evidence.²The distinction, however, is useful and is unavoidable.³• It seems that, evidence of a direct observation will usually be considered to be evidence of fact and not evidence of an opinion. This occurs even if it requires a certain level of summary and abstraction.⁴• Ultimately, the question is one of degree. However, this distinction might be seen as resting, at least in part, on the reliability of the inferences that are drawn by a witness who expresses the opinion, and the extent to which reasonable minds may differ (UE 187).<ul style="list-style-type: none">○ One particular difficulty is the evidence of physical identification: The line between opinion evidence and evidence of fact is not always clearly defined. Evidence of physical identification illustrates the point. On the one hand such evidence may be characterised as evidence of fact; but, depending on the circumstances, it may more properly be characterised as evidence of opinion. The ordinary observer would regard evidence given by a man identifying his wife of thirty years as evidence of fact; but a witness who identifies a suspect in a police lineup would be perceived as giving

¹ UE 186, citing Allstate Life Insurance Co v Australasia & New Zealand Banking Group (No 32) (1996) 64 FCR 73; (1996) 136 ALR 627, [9] (Lindgren J).

² UE 186, citing J B Thayer, A Preliminary Treatise on Evidence at the Common Law, first published 1898, reprinted 1969, New York: Augustus Kelly, 524.

³ UE 187, citing Australian Law Reform Commission, Evidence (Interim), Report No 26 (1985), [738].

⁴ UE 187, citing La Trobe Capital & Mortgage Corporation Limited v Hay Property Consultants Pty Ltd [2011] FCAFC 4; (2011) 190 FCR 299.

evidence more closely allied to opinion evidence.⁵

Exceptions to the opinion rule

overview

Exceptions: The opinion rule does not apply to the following:

- evidence of summaries of voluminous or complex documents (s50(3))
- evidence relevant otherwise than as opinion evidence (s77)
- lay opinions (s78)
- evidence expressed by a member of an Aboriginal or Torres Strait Islander group about the traditional laws and customs of the group (s78A)
- opinions based on specialised knowledge (s79)
- evidence of admissions (s81)
- 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.

exception: evidence relevant otherwise than as opinion (s77)

EVIDENCE ACT 2008 - SECT 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.

It operates in a similar way to s60 (non-hearsay purpose). Consider following possibilities:

1. Do the words themselves appear to have **legal significance**?

e.g. used to prove someone's motives, emotion, reactions, bias, knowledge etc.

2. Is this used to prove prior inconsistencies i.e. **credibility** issues?

exception: lay opinion (s78)

EVIDENCE ACT 2008 - SECT 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.

⁵ UE 188, citing R v Leung [1999] NSWCCA 287.

<p>Rationale:</p> <p>Human perception and memory both rely on a process of interpretation and classification. Also, the communication of recalled events in ordinary language necessitates the formation of additional inferences. If all such opinions were inadmissible, that would deny the courts an important category of evidence: the complex perceptions of eyewitnesses.</p>
<p>The common law long list (UE 191):</p> <p>questions of identity, handwriting, quantity, value, weight, measure, time, distance, speed, form, size, age, strength, heat, cold, sickness and health; questions also concerning various mental and moral aspects of humanity, such as disposition, and temper, anger, fear, excitement, intoxication, veracity, general character, and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention.</p>
<p>s78 deals with the same problem without resorting to the CL list. It appears that courts often take a more liberal approach to reception of evidence under the exception for lay witnesses (UE 192).</p>

<p>s78: approach</p>
<p>(a) based on what the person saw, heard or otherwise perceived</p>
<p>Like the earlier common law, section 78 ‘only applies to opinions given by those who actually witnessed the event about which the opinion is given’.</p> <p>In <i>Lithgow City Council v Jackson</i>, the High Court held that a statement in an ambulance report expressed to be about the cause of a patient’s injuries failed that test, because the maker wasn’t present when the injuries were caused.⁶</p>
<p>(b) necessary to obtain an adequate account or understanding of the person’s perception</p>
<p>EXAMPLES OF “UNNECESSARY”</p> <p>In <i>Lithgow City Council v Jackson</i>, the High Court held:⁷</p> <p>It would be possible for an observer to list his or her perceptions of specifically identifiable medical circumstances of someone found in a drain, perceptions of specifically measurable distances between limbs and other objects and perceptions of specifically describable angles of limbs. Professional investigators like police officers, for example, commonly make precise measurements of that kind and compose diagrams to illustrate what they have measured. Those persons can often remember what they have measured even without recourse to their notes. The process is not one where component observations are made which are incapable of meaningful expression without stating the composite opinion to which they led. It is not necessary, in order to obtain an adequate account or understanding of perceptions of that kind, that the opinion be received.</p>
<p>EXAMPLES OF “NECESSARY”</p> <p>For example, in <i>R v Van Dyk</i>, evidence that a rape defendant often displayed a ‘look of wanting’ when he was near the complainant and others was held to be within section 78.⁸</p>

⁶ UE 192, citing *Lithgow City Council v Jackson* [2011] HCA 36; (2011) 244 CLR 352, [41].

⁷ UE 192–3, citing *Lithgow City Council v Jackson* [2011] HCA 36; (2011) 244 CLR 352, [48].

⁸ UE 193, citing *R v Van Dyk* [2000] NSWCCA 67.

exception: expert opinion (s79)

EVIDENCE ACT 2008 - SECT 79	
Exception—opinions based on specialised knowledge	
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.
79(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.

The High Court has stated that for evidence to be admissible under section 79(1) it must satisfy two criteria. First, the witness who gives the evidence must have ‘specialised knowledge based on the person’s training, study or experience.’ The second is that the opinion expressed in evidence by the witness must be ‘wholly or substantially based on that specialised knowledge.’

1st limb: “specialised” knowledge based on the person’s “training, study or experience”

(1) is it “knowledge”?
<ul style="list-style-type: none">• Knowledge is any body of “known” facts or any body of ideas inferred from such facts or accepted as truths. It is more than subjective belief or unsupported speculation.⁹• However, there is no test of reliability or credibility built in s 79.<ul style="list-style-type: none">○ The Court noted that reliability could be taken into account neither in determining the admissibility of expert evidence under section 79, nor in assessing its probative value when considering the application of the exclusionary provisions, sections 135 and 137 (UE 206). Because such matters have traditionally been regarded as questions for the fact-finder (assisted by cross-examination by the party opposing the expert witness), rather than for a trial judge deciding admissibility.
(2) is it “specialised knowledge”?
<ul style="list-style-type: none">• Specialised knowledge = not “common knowledge”.<ul style="list-style-type: none">○ Knowledge will be ‘specialised’ if it is beyond the knowledge (‘common knowledge’) that those who have not undertaken relevant training or study or who lack experience are assumed to possess (UE 202).• Expert opinions can be difficult, technical and even conflicting. Although the difficulty for

⁹ UE 204, citing R v Tang [2006] NSWCCA 167, [138]; (2006) 161 A Crim R 377.