

Week 9 – Opinion Evidence

THE OPINION RULE

Opinion Evidence

- ‘Opinion’ is not defined in EA
- Common law definition – an opinion is *‘an INFERENCE drawn from observed and communicable data’* (Allstate Life Insurance)
 - THE MORE THERE IS AN **INFERENCE**, the more it is an OPINION
- Facts and opinions **lie along a continuum** – they are not strictly separate/clear cut, the difference is often a matter of degree

Allstate Life Insurance v ANZ (1996) 135 ALR 627

Facts

- Investment adviser, giving evidence, was asked what he would do in hypothetical situation

Decision

- Court understood this as a **statement of fact** as to what he would do under those circumstances

Definition of ‘opinion’

- An inference drawn from observed and communicable data

Bank of Valletta PLC v National Crime Authority (1999) 165 ALR 60 – accepted Allstate

Facts

- NCA made statement that it had not obtained any further info identifying a relevant offence of suspect

Decision

- Full Court found this was a **statement of fact** – not an opinion (inference drawn from observed data)

Quick v Stoland Pty Ltd (1998) 175 ALR 615

Facts

- Witness was accountant and auditor
- Witness testified that after examining financial records of company, he thought the company was insolvent from a particular date

Decision

- Branson J held that except where the evidence is very clear and obvious, solvency is a **matter of opinion** given the complexity of corporate accounts and finances

Reasoning

- Most ordinary people would be unable to make determination of solvency without consulting expert, and the expert inevitably would have to draw inferences from that data (opinion)
- Another expert could have formed a different view as to when company became insolvent

76 – The opinion rule

- (1) Evidence of an opinion is **NOT ADMISSIBLE** to prove the existence of a fact about the existence of which the opinion was expressed

Rationale for Opinion Rule

- According to ALRC, rationale for excluding opinions – 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 fact finder's function
- Opinions can confuse fact finders about ultimate purpose – to make findings of fact
- *While it is an exclusionary rule, opinions **CAN BE** reliable and sometimes necessary*
 - Not as adhered to as Hearsay or Tendency rule

Limitations of 76 – the opinion rule

- Rule **applies only** where evidence of an opinion is adduced to prove the fact upon which the opinion is based [i.e. **OPINION PURPOSE**]
 - Does **not apply** where evidence shows someone **HELD** an opinion
 - Whether someone holds opinion – matter of fact
 - Does **not apply** where holding of opinion is fact relevant to **credibility**
- Rule applies to oral testimony and previous representations that contain an opinion
- If evidence of opinion is admitted for a **non-opinion purpose**, it **MAY ALSO** be admissible for its **opinion purpose** [*to prove fact upon which opinion is based*] – 77

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 [i.e. non opinion purpose]

R v Whyte [2006] NSWCCA 75 – where statement admissible for non-opinion purpose, it **CAN ALSO BE USED** for its opinion purpose under **77**

Facts

- Police charged man with intent to have sexual intercourse as victim told mother ‘man tried to rape me’

Issue

- Could her statement be used to prove the facts upon which her opinion was based?

Decision

- Statement could be used for a **non-opinion (credibility) purpose** – words could be used to show she acted consistently to enhance her **credibility**
- As statement admissible for non-opinion purpose, it could then be used for opinion purpose under **77**

Lakatoi Universal Pty Ltd v Walker [1999] NSWSC 1336 – illustrate how **77** can be used

Facts

- Person charged with knowingly transmitting HIV virus

Decision

- Evidence of a diagnosis given by a fraudulent Dr that he was HIV negative **could be admitted**
- **Not** to prove he was HIV negative (i.e. opinion purpose), but to prove the diagnosis/opinion **was given to him** – could then enable fact-finder to draw inferences to explain his actions

LAY OPINION EXCEPTION

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 opinion is necessary to obtain an **adequate account** or understanding of the **person’s perception** of the matter or event.

- Will be admissible for its **opinion purpose** under 78 – necessary to admit the opinion for fact finder to **draw inferences** and understand witness's perception

Lay Opinions

- Age, sobriety, time, distance, weather, physical characteristics, state of health/mind
- No need for evidence of primary facts
- Opinion may be subject to **cross-examination**
- Lay opinion evidence is ascribed **appropriate weight**
- Lay opinion evidence may be relevant for a non-opinion purpose
- Identification of known person from a photo is fact and not opinion – R v Leung (1999) 47 NSWLR 405
- May be relevant to explain actions
- Must objectively have a **RATIONAL BASIS** ('adequate account' – 78(b)) to have any probative value – can assess this by:
 - Witness's opportunity to perceive e.g. child's perception
 - Witness's prior experience in drawing inferences from similar facts
 - Depends on circumstances

R v Panetta (1997) 26 MVR 332 – **rational basis** that opinion requires

Facts

- Witness saw '*oncoming car at night for several seconds*'
- Witness estimated the car travelling at 100KM/hour

Decision

- Hunt CJ held **no rational basis** for opinion – could not be admitted for opinion purpose
 - '*Oncoming car at night for several seconds*' could not rationally lead a person to a reliable opinion about its speed – **could not** rationally affect the probability of existence of facts in issue – could not satisfy 78(b)

AUTHORITY for a lay opinion having an objectively rational basis to be admissible for its opinion purpose

- Opinion evidence subject to **statutory discretions**
 - 135 – **General** discretion to **exclude** evidence

- 136 – **General** discretion to **limit** use of evidence
- 137 – **Exclusion** of prejudicial evidence in criminal proceedings

R v Van Dyk [2000] NSWCCA 67

Facts

- Sexual assault case
- Mother of complainant said accused was always hanging around girls with '*a look of wanting*'
- This was admitted as opinion evidence under lay opinion exception – Appealed

Decision

- NSWCCA held 78(b) exception was satisfied
- Statement was **understood** and admissible as lay opinion without requiring witness to go through primary facts, but had **low probative value** and **highly prejudicial**

78A Exception: ATSI 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

SPECIALISED KNOWLEDGE EXCEPTION

Expert Opinion **Exception**

- 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

79 – Exception: opinions based on specialised knowledge

- (1) If a person has specialised knowledge based on 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

Rationale for Exception

- Expert **provides** 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 required to draw such an inference

Duties of Expert Witnesses

Wood v R (2012) 84 NSWLR 581 – Duties of expert witnesses concerned with independence, objectivity, and transparency

McClennan J, in referring to **National Justice Cia Naviera SA v Prudential Assurance**

- 1. Independence
 - Uninfluenced as to form or content of interests of parties to proceedings
- 2. Objectivity
 - Should provide independent assistance to court by way of unbiased opinions in relation to matters in their expertise
 - Should state facts or assumptions upon which opinion is based
- 3. Transparency
 - Should make clear where a question/issue falls outside expertise
 - If opinion not properly researched, this must be stated ('no more than provisional opinion')
 - Cannot assert their report consists of absolute truth (qualification should be stated in report)
 - If expert changes their view, such change should be communicated without delay, where expert evidence refers to plans, measurements, analyses, these must be provided

- Civil cases – Div 2, Pt 31 **UCPR**, Expert Witness Code of Conduct (**Schedule 7** of UCPR) – procedural
 - E.g. acknowledgment experts advised of Expert Witness Code of Conduct and it must be complied with throughout individual/joint report and any hearing

Makita (Australia) Pty Ltd v Sprowles 52 NSWLR 705 (NSWCA) – primary duty of expert

Facts

- Woman slipped at staircase at work
- Led **expert evidence** from physicist specialising in slipping accidents
- Expert concluded staircase was not safe

Decision

- Appeal Court **held** expert **did not adequately explain basis of conclusions**, and there was ample lay opinion evidence to the contrary

Principle

Heydon J **endorsed** principle that the *primary duty of an expert in giving opinion evidence is to furnish the fact finder with criteria to enable court to evaluate validity of expert's conclusion*

Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588 – applied Makita

Principles

- Applicable law is always the **actual provision itself** (s 79) and each case is to be decided on its **own facts and circumstances** by applying elements of provision
- 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**
- Not necessary the factual basis of opinion be established or proved
- Expert does not have to be solely responsible for all factual data on which opinion is based
- Trial judge must decide whether the opinion is **WHOLLY OR SUBSTANTIALLY BASED** on the expert's knowledge and/or experience (on the civil standard)

Specialised Knowledge

- Not defined by **EA**
- Depends on the **FACTS** of each case and it is ultimately up to fact finder to accept or reject the evidence as **based** on reliably **specialised BODY/FIELD of KNOWLEDGE**
 - Discretion of court – depends on circumstances
- Witness must have a peculiar/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
- Problem – it can be very persuasive/seductive

Howard Smith & Patrick Travel Pty Ltd v Comcare [2014] NSWCA 215

- Workers gave evidence and expressed opinion they were exposed to asbestos dust at work
- Allowed as BOTH lay opinion and specialised knowledge opinion (extensive **experience** working)

Adler v ASIC (2003) 46 ACSR 504

- Court **held** that proper professional conduct involving due care, obedience to professional practice, and ethics in business **WAS** a **field of specialised knowledge**

- Opinions are **not admissible** IF based on **subjective interpretations** of fact

Beckett v State of NSW [2014] NSWSC 1112 – defined subjective interpretations of fact

- Harrison J described subjective interpretations of fact as **evidence** that is **divorced** from any ***independent means of validation***

Honeysett v The Queen (2014) 253 CLR 122 – expert opinion based on **subjective impression** should not be admitted

Decision

- HC **held** expert's opinion was based on his **subjective impression** of what he saw in images
- Evidence did not disclose reasoning capable of independent means of validation
- Wrongly admitted – new trial ordered

Facts

- CCTV caught images of robbery – Honeysett convicted
- During trial, anatomy professor gave evidence of physical characteristics common to both defendant and one other robber

Verryt v Schoupp [2015] NSWCA 128 – expert report not based on any specialised knowledge **in circumstances**

Decision

- Report was **not based** on any specialised knowledge **in the circumstances** of accident
- Report not admissible

Facts

- 12-year-old boy injured after falling off skateboard that was being towed behind car
- Issue of whether there was contributory negligence
- Psychiatrist gave report of how 12-year-old boy was likely to have thought and acted in such situation

- However, psychiatrist gave no psychiatric assessment of boy

- Opinion of expert witness **MUST** be **clearly identified** and **linked** to witness's training **study or experience**
- Reasoning process must be made clear to enable an objective evaluation about how the expert used their expertise to arrive at opinion – **HG v the Queen**

HG v The Queen (1999) 197 CLR 414

Facts

- HG convicted of sexual assault on child of his de facto wife
- HG appealed; argued trial judge mistakenly refused evidence from a psychologist who interviewed child
- Psychologist prepared report – concluded child was not assaulted by HG, but by her natural father
- Child said she had no memory of natural father

Decision

- HC **held** report was based on combination of **speculation, inference**, personal/second hand **views** and process of reasoning that **went well beyond** the **field of expertise** of psychologist
 - NO FACTS upon which psychologist could come to his opinion OTHER THAN his general experience with abuse victims + information obtained about girl from mother

Expert must demonstrate the objective/scientific/technical basis for opinion to validate that the opinion is wholly or substantially based on body of knowledge from training/study/experience under 79

R v Tang (2006) 65 NSWLR 681

Decision

- NSWCA **held** expert's evidence was **NOT BASED** on a clear, objective, and recognised standard by which court could assess its reliability

Facts

- CCTV footage of robbery by 3 people
- Prosecution led evidence from expert of facial anatomy/body mapping expert
- Expert concluded that Tang was one of the robbers
- On questioning, expert revealed area was a new innovative area – refused to explain precise methods

- Expert witnesses **should not venture outside** of field of specialised knowledge

The Queen v Anderson [2000] VSCA 16

Decision

- VSCA **held** Drs were only experienced in **treatment** of wounds, **not** causes of wounds
- They were venturing outside their field of specialised knowledge under **79**

Facts

- Two Dr's examined Anderson's wounds – Experts gave evidence that wounds were self-inflicted

- **Process** by which expert has formed their opinion **goes to probative value** or **weight**, not to its admissibility
- 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 – **Hawkesbury**

Hawkesbury Sports Council v Martin [2019] NSWCA 76

Decision

- NSWCA **overturned** decision – trial judge was wrong to admit evidence
- Expert's report **did not** explain how opinions were based on specialised knowledge that applied to facts

Facts

- Woman sued local council for breach of DOC – she fell over cable suspended between 2 timber posts
- Woman argued concrete blocks gave impression that pedestrians could walk between them; and cable was not visible
- Woman relied on expert who was building consultant, civil engineer, and lawyer
- Expert gave evidence regarding visual perception and vision science
- Expert's opinion was that concrete blocks reduced visibility of cable
- Trial judge found in favour of woman but attributed 30% for contributory negligence

Training, Study or Experience (TSE)

- TSE includes knowledge of everyday events and affairs that can inform an opinion
- Expert evidence is still admissible even though the issue to be determined remains within the experience and knowledge of fact finder

- **79(2)** specifically allows evidence of knowledge relating to child behaviour and development – clarifies the section

Ad Hoc Experts

- Although might not have formal training/qualifications, ad hoc expert has acquired expertise from **EXPERIENCE** in particular area e.g. handwriting

Allstate Life Insurance v ANZ (1996) 64 FCR 79

- Knowledge of investor behaviour and financial markets can be acquired from **employment**
- Funds manager allowed to give expert evidence about investor behaviour (based on **experience**)
- Securities lawyer was **not** allowed to give expert evidence about investor behaviour

R v Leung (1999) 47 NSWLR 405

- Tapes of unintelligible conversation that is listened to repeatedly to decipher words
- This specialised **experience** was **accepted**, although training was not apparent

Barker v R (1988) 34 ACrimR 141

- Police officer had experience with drug equipment and recognising drugs/manufacture – more likely to be specialised knowledge – NOT an opinion

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**
- **Allstate** – May instead be inadmissible because it is irrelevant

Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd [2007] FCAFC 70

Decision

- Overturned decision – the evidence was **not inadmissible JUST** because it was a matter of common knowledge – consistent with **80(b)**

Facts

- Action by Cadbury to stop Darrell Lea using colour purple in its marketing
- Evidence given by academic about consumer behaviour

- Trial judge recognised it was an accepted body of specialised knowledge, but inadmissible because the marketing of chocolate was within **common knowledge**

Conflicting Expert Evidence

- General approach – assessing expert evidence is a **MATTER OF FACT** for factfinder
- Judge may issue **DIRECTIONS** to jury regarding:
 - Direct experience with the relevant facts
 - Degree to which experts' factual substratum relates to relevant facts
 - Qualifications and experience
 - Veracity of evidence
- Cannot be excluded on basis of mere conflicting or complex evidence