Identification Evidence

Section 113 – ID Evidence

- This part only applies in a criminal proceeding.
- Dictionary: ‘identification evidence’ means an assertion by a W that the A was or resembles (based on what the W saw, heard or perceived using any of the five senses) a person who was present at the commission of the offence or an act connected to the commission of the offence at the time that the offence or act was committed.
- Can include in court or out of court identification (hearsay applies to assertions out of court)
- Does not include non-human evidence (security camera footage or by an animal), identification of something other than the A, or exculpatory evidence.

Section 114 – Visual ID Evidence (ID Parades)

- This definition is limited by section 114 and provides for the exclusion of ‘visual identification evidence’ (“VIE”).
- VIE means identification evidence based wholly or partly on what a person saw (eg. solely hearing is excluded), but does not include picture identification evidence.
- VIE is not admissible unless the A participated in an ID parade, it was not practicable to participate in an ID parade or the A refused to participate in an ID parade, and the W was not influenced to identify A.
- In determining whether it was reasonable to conduct an ID parade, the court may take into account a number of factors, including **(1)** the kind of offence and the gravity of the offence, **(2)** the importance of the evidence, **(3)** the practicality of conducting a parade (including if the A failed to cooperate in the conduct of the parade and if the identification was made at the time of the commission of the offence), **(4)** and the appropriateness of conducting a parade having regard, among other things, to the relationship between the A and the W.

Section 114 (cont.)

- Presumed not to have been practicable to conduct an ID parade if it would have been unfair on the A to do so (e.g. if the A had obvious injuries at the time of the ID parade).
- Presumed not to have been practicable to conduct an ID parade if a lawyer had to be present for A, and there were reasonable grounds to believe that it was not reasonably practicable for the lawyer to be present.
- In determining reasonableness of holding an ID parade, court can't take in to account availability of photo ID evidence (eg. Evidence that a W picked out the A from Facebook).

Section 115 – Picture ID Evidence (Photoboards)

- ‘Picture identification evidence’ (“PIE”) means an identification made wholly or partly by the person who made the identification examining pictures kept for use by police officers.
- PIE is not admissible if the pictures examined suggest that they are pictures of persons in police custody.
- PIE not admissible if A in custody and police showed W an old photo of A.
  - Does not apply if A’s appearance changed significantly between the time when the offence was committed and the time the accused was taken into custody or it was not reasonably practicable to make a new picture of the A after A was taken into custody.
- PIE is not admissible if A in police custody, unless:
  - A refused to take part in an ID parade; or
  - A’s appearance changed significantly between the commission of the offence and being taken into custody; or
  - it would not have been reasonable to have held an ID parade that included A.(see slides 3&4)
- If PIE is admitted, the trial judge must, at the request of the A, inform the jury that the picture was taken after A was taken into custody re: this matter (if applicable), or warn the jury that they must not assume that A has a criminal record or has previously been charged with an offence

Jury Directions – ID Evidence definition

- ‘Identification evidence’ is defined in the Jury Directions Act (“JDA”) as an assertion by a person, or a report of an assertion by a person, that:
  - he or she recognises, or does not recognise, a person or object that they saw, heard, perceived on the relevant occasion; or
  - the general appearance or characteristics of a person or object are similar to the general appearance or characteristics of the person or object that he or she saw, heard or perceived on the relevant occasion; and includes
  - VIE within the meaning of s.114 of the *Evidence Act 2008*; and
  - PIE within the meaning of s.114 of the *Evidence Act 2008*.

JDA – When is a direction required?

- Upon request of defence or prosecution, a judge must warn a jury about ID evidence, unless good reasons for not doing so. (s.36(1) JDA)
- In requesting the direction, the party must specify the significant matters that make the ID evidence unreliable. (s. 36(2) JDA)
- If no request is made, judge has residual obligation to give warning if there are substantial and compelling reasons. (s. 16 JDA)
- Substantial and compelling reasons can include:
  - It is open on the evidence, ID is in issue at the trial (in the view of the judge or the parties), and the reasons for giving the direction substantially outweigh the reasons for not giving it.

JDA – Content of the charge

- Section 36 JDA – In giving the direction the trial judge must:
  - warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it; and
  - inform the jury of the significant matters (see slide 9) that may make the evidence unreliable (as specified by counsel requesting the direction);
  - inform the jury that the witness may honestly believe that their evidence is accurate when they are mistaken; and
  - the mistaken evidence of a witness may be convincing; and
  - if relevant, inform the jury that a number of witnesses may all be mistaken; and
  - if relevant, inform the jury that mistaken ID evidence has resulted in innocent people being convicted.

JDA – What is a significant matter?

- The JDA does not define what amounts to a significant matter for the purposes of ID directions. These depend on the facts of the case and may include:
  - Circumstances of the sighting;
  - Whether the person was known to the witness;
  - The time that elapsed between sighting and reporting to police; and
  - The difference between the description and their actual appearance.

ID evidence – Case law (general)

- Bass v R [2016] VSCA 110
  - [39]-[40] Evidence that describes A but doesn't assert that the person is A is not ID or VIE evidence. Evidence of hearing A's name or evidence of the clothing of A is not ID or VIE evidence.
- Smith v R (2001) 206 CLR 650
  - HC ruled that positive ID of A adduced as opinion evidence was not admissible due to lack of relevance. A was identified from surveillance footage and jury was equally well placed to make this observation themselves.

Case law - reliability of ID evidence

- The following highlight issues that may be relevant to assessing the reliability of the initial observation:
  - The length of opportunity for making the observation, the position of the W and A, the lighting and weather, the exposure of W to stress and fear, and whether the circumstances were such as to cause W to be left with an impression of A's features. (R v Clune [1982] VR 1)
  - The distance of W from A, and any impairments to the observations, such as passing people or traffic. (R v Turnbull [1977] QB 224)
  - Whether W was affected by drugs, alcohol, or fatigue. (Peck v Western Australia [2005] WASCA 20)

Case law - reliability of ID evidence

- Factors relevant to nature of relationship with W and A:
  - Whether W was previously acquainted to A. (Domican v R (1992) 173 CLR 555)
  - How well W knew A, and the circumstances of any previous acquaintance. (R v Carr (2000) 117 A Crim R 272)
- Factors relevant to the ID process (eg. parade or photoboard):
  - Length of time between incident and ID, any imbalance in the identification process (such as only one of the suspects having a moustache), and the absence of an identification parade and the general conduct of the ID process. (R v Clune [1982] VR 1)
  - Whether W had heard a description of A before attempting ID (R v Ryan 1995 CA Vic)
  - Whether W was encouraged to ID a particular person in any way. (R v Davies (2005) 11 VR 314)
  - Whether there was a witness to the ID process. (Alexander v R (1981) 145 CLR 395

Case law – reliability of ID evidence

- Other factors that may be relevant:
  - The perceptiveness of W. (R v Clune [1982] VR 1)
  - The dangers of cross-racial ID. (R v Dodd (2002) 135 A Crim R 32)
  - Errors in description of A prior to ID. (R v Turnbull [1977] QB 224)
  - Evidence that points to person other than A being the offender. (R v Fahad [2004] VSCA 28)
  - Incentives to cooperate with police, and in the case of object ID, the commonness of the object identified. (R v Theos (1996) 90 A Crim R 486)

Opinion and Expert Evidence

Examinable parts of the Evidence Act:

- Part 3.3 – Opinion
- Sections 76 – 80

The opinion rule

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.

Background – JCV Uniform Evidence Manual

- **Section 76 is *purposive***
- The provision is the source of the general rule that evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.
- The rule is expressed in this way to direct attention to the question – how does the party tendering the evidence submit that it is relevant? (*Dasreef Pty Limited v Hawchar* (2011) 243 CLR 588; [2011] HCA 21 at [31] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

Background – JCV Uniform Evidence Manual

- **Definition of opinion**
- ‘Opinion’ is not defined in the Uniform Evidence Act. But consistently with the policies underlying the Acts, courts have adopted a working definition of ‘opinion’. This defines it as ‘an inference from observed and communicable data’
- In *Lithgow City Council v Jackson* (2011) 244 CLR 352; [2011] HCA 36, the Court proceeded on the assumption that this was the meaning of an ‘opinion’

Distinction between evidence of fact and evidence of opinion – JCV Uniform Evidence Manual

- It can be difficult to distinguish between factual and opinion evidence. One relevant consideration is 'the extent to which the evidence goes beyond the witness' direct observations or perceptions' (*La Trobe Capital & Mortgage Corporation Limited v Hay Property Consultants Pty Ltd* (2011) 190 FCR 299; [2011] FCAFC 4 at [46].
- For example, a statement that the witness observed an identified person performing an act will usually be evidence of fact, rather than evidence of the witness' opinion about the identity of the person. However, if the witness attempts to identify a person from video footage of an event he or she did not personally observe, then the evidence will be opinion evidence (see *Haidari v R* [2015] NSWCCA 126, [73]-[74]; *R v Drollet* [2005] NSWCCA 356; *Smith v R* (2001) 206 CLR 650; [2001] HCA 50).

Assessing probative value of opinion evidence - JCV Uniform Evidence Manual

- In *IMM v R* (2016) 257 CLR 300; [2016] HCA 14, the High Court stated that when assessing the probative value of evidence, the judge must assume that the evidence is accepted and taken at its highest [50]. That is, that the evidence is both credible and reliable (at [39] and [48]).

Exceptions to the opinion rule

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.

Opinion rule exception – evidence otherwise relevant

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.

Opinion rule exception: lay opinions

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.

Opinion rule exception: expert opinions

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.

Background – JCV Uniform Evidence Manual

- Section 79 represents a moderate change to the common law
- This provision reflects common law principles, but also recognises specialised knowledge based on experience. The court must be satisfied the witness' opinion is wholly or substantially based on specialised knowledge acquired through training, study or experience.
- Subsection (2) expressly clarifies that, for the purposes of s79, specialised knowledge of child development and behaviour comes within the concept of specialised knowledge.
- Note: s388 of the *Criminal Procedure Act 2009* expressly provides that in criminal proceedings that include a charge for a sexual offence, the court may receive opinion based on specialised knowledge related to the nature of sexual offences and the potential impacts upon a victim of a sexual offence.

Section 79 – summary of applicable principles

Summarised in *Nicholls & Ors v Michael Wilson & Partners Ltd* [2012] NSWCA 383

- s79 assumes that opinion evidence is tendered to prove the existence of a fact in issue. Therefore, before considering whether an opinion falls within s79, it is necessary to identify why the evidence is relevant;
- evidence must satisfy two criteria to be admissible under s79(1). First, the witness must have specialised knowledge based on his or her training, study or experience. Second, his or her opinion must be wholly or substantially based on that knowledge;
- thus, the party tendering an expert's report must demonstrate that the author has specialised knowledge based on training, study or experience, which enables him or her to express an opinion on a matter relevant to an issue in the proceeding. The party tendering the report must also be able to show that the opinion was wholly or substantially based on the expert's specialised knowledge;
- this explains why the opinion should be expressed in a manner which makes it possible to determine whether the opinion is wholly or substantially based on specialised knowledge;
- generally, expert evidence must explain how the field of specialised knowledge in which he or she is expert and on which the opinion is substantially based applies to facts which are assumed or observed in order to produce the opinion given;
- failure to demonstrate that an opinion is based on a witness's specialised knowledge based on his or her training study or experience goes to the admissibility of the evidence, not its weight.

Meaning of ‘specialised knowledge’ – JCV Uniform Evidence Manual

- The Act does not:
  - define ‘specialised knowledge’;
  - require the specialised knowledge to be derived from a ‘field of expertise’ established according to certain criteria; or
  - incorporate a ‘basis rule’
- The Act does require the demonstration of specialised knowledge before expert opinion can be given in evidence.

‘Training, study or experience’

- Section 79 encompasses ‘ad hoc’ experts, who are people who have: acquired expertise in a narrow subject matter that would not ordinarily call for or warrant or be susceptible to specialised training, a course of study or experience (*Chen v R* [2011] NSWCCA 145 at [70]; see also *R v Leung* (1999) 47 NSWLR 405; [1999] NSWCCA 287).
- A common example of such ‘ad hoc’ expertise is where a person listens to an otherwise indecipherable tape recording repeatedly and can transcribe its contents through that process (*Butera v DPP* (1987) 164 CLR 180; [1987] HCA 58; *Li v R* [2003] NSWCCA 290).
- Such ad hoc expertise does not extend to voice identification in Victoria, where identity evidence has never been treated as a matter of expertise (*Kheir v R* (2014) 43 VR 308; [2014] VSCA 200 at [62]).
- This contrasts with the position in New South Wales, where voice identification has been recognised as a kind of ‘ad hoc’ expertise (*R v Leung* (1999) 47 NSWLR 405; [1999] NSWCCA 287; *R v Madigan* [2005] NSWCCA 170; *Chen v R* [2011] NSWCCA 145 at [70]; *Nguyen v R* [2017] NSWCCA 4).

‘Wholly or substantially based on that knowledge’

- An opinion which is outside an expert’s specialised knowledge, which may be no more than the expert’s own factual inferences, can be invested with a spurious appearance of authority and should not be admitted due to risk of subverting legitimate fact-finding processes.

Proof of logical and factual basis for the opinion

(i) Proof of the factual basis not necessary

- Section 79 does not incorporate a common law 'basis rule' as a prerequisite to the admissibility of expert opinion evidence. Such a rule has been described as requiring opinion evidence to be excluded unless the factual bases on which the opinion is given are established by other evidence.

(ii) Proof of link between specialised knowledge and opinion

- To establish admissibility under s79, the witness' evidence must show how the field of 'specialised knowledge' which the witness is expert in applies to the facts assumed or observed so as to produce the opinion given
- Thus, for example, in *Morgan v R* [2011] NSWCCA 257, Hidden J held that it was 'never satisfactorily explained' how an expert in anatomy 'could perform an anatomical comparison between relatively poor quality CCTV images of a person covered by clothing from head to foot with images of the appellant'. In those circumstances, it had not been established that his evidence of similarity in body shape 'could be said to be based upon his specialised knowledge of anatomy'
- Expert must identify their reasoning process

Role of the discretionary and mandatory exclusions

- Section 79 is still subject to the discretionary and mandatory exclusions (ss 135 – 137)
- If evidence is more prejudicial than probative or could mislead or confuse the tribunal of fact, it can be excluded
- Odgers sets out several considerations when exercising the discretion in respect of expert opinion. Some include:
  - whether the particular field of expertise is reliable and if so, to what extent;
  - whether any 'assumed' facts which the opinion is based on are identified and proved or evidence capable of proving those facts is proposed to be tendered;
  - whether the expert has failed to consider relevant facts and, if so, whether it is difficult to correct that failure;
  - whether the reasoning process underpinning the formation of the opinion is clear and valid;
  - whether any legal assumptions on which the opinion is based are correct;
  - whether the opponent can test alleged or assumed facts that form the basis of the opinion;
  - whether the evidence is led against a defendant in a criminal trial;
  - whether it is trial by jury and, if so, whether appropriate directions would be effective

[For more considerations, see JCV Uniform Evidence Manual and Odgers, [1.3.4340]].

Ultimate issue and common knowledge rules abolished

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.

Background to s 80

- Section 80 represents a major change to the common law
- At common law, the common knowledge rule prohibited expert evidence about matters thought to be within common human experience. Under the Evidence Act, matters within common experience may be admissible, provided the evidence passes through the other admissibility gateways. For example, in the case of evidence about the behaviour of children, such evidence may be admissible under section 79, provided it is based on the witness' specialized knowledge.
- The role played by the ultimate issue and common knowledge rules at common law is, under the UEA, played by s135 - s137.

Criminal Procedure Act – relevant provisions (summary hearing)

Part 3.2 Procedure before summary hearing

50 Expert Evidence

(1) If the accused intends to call a person as an expert witness at the hearing of the charge, the accused must serve on the informant in accordance with section 392 and file in court a copy of the statement of the expert witness in accordance with subsection (2)—

(a) at least 7 days before the day on which the contest mention hearing is to be held; or

(b) if there is no contest mention hearing, at least 7 days before the summary hearing; or

(c) if the statement is not then in existence, as soon as possible after it comes into existence.

(2) The statement must—

(a) contain the name and business address of the witness; and

(b) describe the qualifications of the witness to give evidence as an expert; and

(c) set out the substance of the evidence it is proposed to adduce from the witness as an expert, including the opinion of the witness and the acts, facts, matters and circumstances on which the opinion is formed.

Criminal Procedure Act – relevant provisions (trial on indictment)

Chapter 5 Trial on indictment

189 Expert Evidence

(1) If the accused intends to call a person as an expert witness at the trial, the accused must serve on the prosecution in accordance with section 392 and file in court a copy of the statement of the expert witness in accordance with subsection (2)—

(a) at least 14 days before the day on which the trial of the accused is listed to commence; or

(b) if the statement is not then in existence, as soon as possible after it comes into existence.

(2) The statement must—

(a) contain the name and business address of the witness;

(b) describe the qualifications of the witness to give evidence as an expert;

(c) set out the substance of the evidence it is proposed to adduce from the witness as an expert, including the opinion of the witness and the acts, facts, matters and circumstances on which the opinion is formed.

Prosecution disclosure before trial

- If the prosecution has served a forensic report on the accused, the accused may ask the prosecution to obtain an expert report in relation to a matter (or matters) that will be contested at trial *(‘responding expert report’)*

Defence disclosure before trial

- The defence must give disclosure of expert evidence and alibi evidence before trial
- Disclosure of expert evidence is covered by s 189 of the Criminal Procedure Act (extracted above)
- For proceedings in the County Court, the party calling the witness must provide the witness with a copy of the ‘Expert Witness Code of Conduct’ at the time of engaging the witness. The expert’s report must contain an acknowledgment that the expert has read and complied with the code in preparing the report.