Opinion evidence

Lay opinion rule narrowed and applied to business records

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The rules applying to the admissibility of lay opinion and business records have been clarified by the High Court.

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The High Court has narrowed the circumstances in which lay opinions will be allowed into evidence after considering in detail the rules of admissibility under s.78 of the *Evidence Act 1995* (NSW) (the Act) in its decision in *Lithgow City Council v Jackson*[1] (*Jackson*).

As such, parties adducing or objecting to lay opinion evidence will need to observe that:

- the person giving the opinion must have witnessed the event about which the opinion is given. It is not permissible to draw an inference about what happened before the subsequent event witnessed. The subject matter of the opinion will usually indicate whether this is the case;
- it must be established that the opinion is necessary for an adequate account or understanding of what the witness saw, heard or otherwise perceived. The test may even require the adducing party show that it is the only way to obtain an account of what was perceived;
- where the opinion is expressed out of court, such as written down in a business record, calling the person who gave or wrote the opinion to give evidence may assist to overcome admissibility problems. A lay opinion expressed from the witness box will carry extra weight if it is supported by a contemporaneous note; and
- the onus is on the party seeking to adduce evidence, or tender a document to demonstrate that it is admissible.[2]

At the same time, the decision in *Jackson* has also widened the application of the opinion rules to apply to opinions contained in business records.

Documents that are defined as business records under s.69 of the Act are not admissible into evidence simply by virtue of that fact alone. Section 69 provides an exception to the hearsay rule only.

Evidence of opinions contained in business records will still be subject to the opinion rules in ss.76-79. An example is the financial records of a corporation such as an opinion stated in a liquidator's report.[3]

Factual background

Mr Jackson had been walking his dogs during darkness in the early morning through a local park. He was later found lying at the bottom of a concrete drain,

unconscious and badly injured in a pool of urine and dried blood.

There was a vertical retaining wall on one side of the drain that projected up into the grass, partially concealed by foliage. Jackson alleged that he had fallen over the concealed wall and approximately 1.5 metres onto the concrete drain. He sued the local council having care and management of the park in the District Court of NSW.

There were no eyewitnesses or other direct evidence of Jackson's fall. Jackson himself suffered loss of memory as a result of his injuries and had no recollection of the fall. The case depended upon drawing inferences of what had happened from Jackson's injuries and where he was found.

Ambulance notes

In the patient history notes made by ambulance officers who attended Jackson at the scene, it was written: "? Fall from 1.5 metres onto concrete" (the representation).

The ambulance officers were not called to give evidence at the trial. The representation was allowed into evidence, but with the limitation that it was not evidence of the truth of what was written. It was not referred to in the trial judge's reasons for judgment.[5]

Court of Appeal

The NSW Court of Appeal reversed the trial judge's decision.[6] It held that the patient history was a "business record" under s.69 of Act and that the representation written in it was a "lay opinion"

EVIDENCE ACT 1995 (NSW)

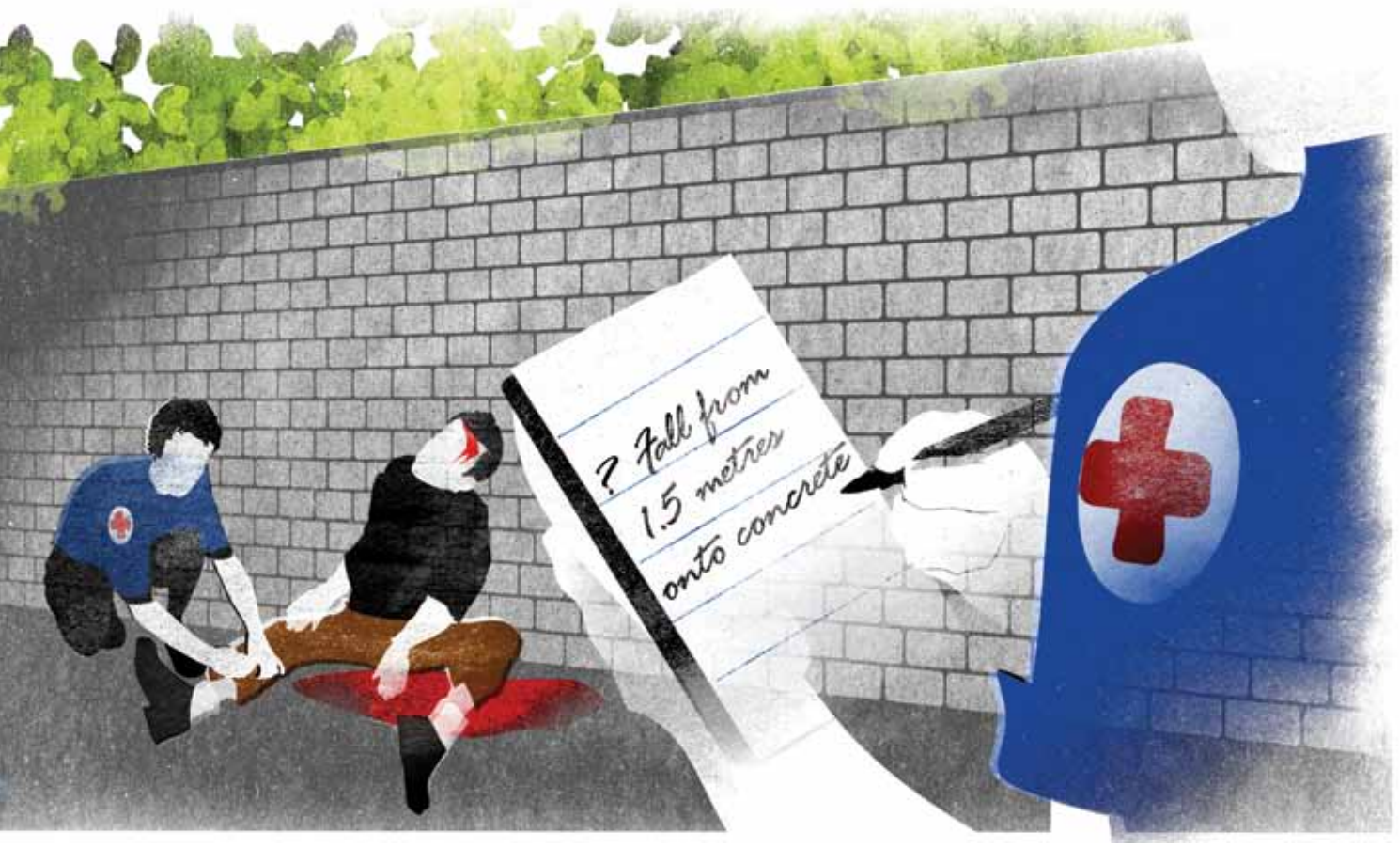
Exception: Lay opinions

Section 78:

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. □



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At trial

The trial judge found a duty of care was owed to Jackson and that it had been breached by the failure to fence off the wall. However, the trial judge went on to find that Jackson had failed to establish that the breach of duty was the cause of his injuries because the evidence did not establish that he had fallen over the wall in the manner alleged, as opposed to stumbling down one of the other sides of the drain, or standing at the top of the wall and losing his balance.[4]

under s.78 which ought to have been allowed into evidence as evidence of the truth of what was written. According to the Court of Appeal, the opinion of the ambulance officers was "reached with the advantage of seeing [Jackson], his state of reduced consciousness, his injuries, his position, the position of blood and urine and the surrounding structures".[7] It found that the representation was an opinion that supported an inference that it was more probable than not that Jackson's injuries had been caused by falling over the protruding wall.[8]

The council appealed to the High Court.

Lay opinion

Section 76 of the Act provides that evidence of an opinion is inadmissible (the opinion rule). There are exceptions to the opinion rule, one of which is for lay opinions under s.78 (see box).

The council argued that the representation contained in the ambulance notes should have been excluded from evidence

because, if it was an opinion, it did not satisfy s.78.

Only once previously had the High Court considered s.78 – *Smith v R*[9] concerned evidence given by police officers that they recognised a bank robber depicted in security camera photographs as the accused. The court held unanimously that the evidence ought to have been rejected, the majority[10] considering the evidence was irrelevant; and Kirby J on the basis it was "nothing more than an opinion upon a subject about which the jury were required to form their own opinion".[11]

Kirby J said in *Smith v R*, the evidence was not lay opinion under s.78: "Neither police officer was present at the 'matter or event' in question in the appellant's trial, namely the robbery. Although the security photographs record the robbery taking place, the opinion of the police officers is 'based on' the photographs and not, as such, 'based on' the robbery itself which they did not see, hear or otherwise perceive."[12]

In *Jackson*, the High Court stated that s.78 is not identical to the lay opinion rule at common law, but it is directed to the same problem, that is, allowing evidence of an inference that a witness drew where the facts underlying that inference may not give an adequate account of the witness's perception of an event.[13] Common instances include a witness's opinion about age, sobriety, identity and distance.[14]

Sections 78(a) and 78(b) contain two cumulative conditions for lay opinions to be admissible. The majority[15] in *Jackson* stated that "it must be possible to extract from the form of what the person stating the opinion said, construed in context, that the opinion is about a 'matter or event', and that it is based on what the person stating the opinion 'saw, heard or otherwise perceived' about that matter or event".[16] Therefore, s.78 requires the person giving the opinion to have witnessed the subject matter about which the opinion is given.[17]

What the ambulance officers had witnessed was Jackson's injuries. The representation was, or was relied upon as, an opinion about the cause of those injuries, an event not witnessed by the ambulance officers and thus outside the scope permitted by s.78(a).[18]

Section 78(b) reflects the purpose of lay opinions. It provides that the section applies when "the opinion is necessary to obtain an adequate account or understanding" of what the person witnessed. The court construed the function of the word "necessary" as a test that it is "the only way" to obtain an adequate account.[19]

The High Court concluded that "the function of s.78(b) is to make up for incapacity to perceive the primary aspects of events and conditions, or to remember the perception, or to express the memory of that perception. But the ambulance officers were not shown to be suffering from incapacity in perception, memory or expression ... if they had been called, they might have been able to give more evidence bearing on the nature of what they saw ... Exclusion of that possibility on the balance of probabilities was an unfulfilled precondition of admissibility".[20]

"Section 78 requires the person giving the opinion to have witnessed the subject matter about which the opinion is given."

The basis of a lay opinion

Section 55 of the Act requires evidence to be relevant and has been interpreted as requiring a rational basis for a lay opinion before the opinion becomes admissible under s.78.[21] The majority in *Jackson* stated that in some circumstances, a witness may not need to state all that they perceived and observed "though gaps of this kind may well go to weight".[22] However, the less that is known about the primary perceptions of the witness, the harder it will be to establish, for the purposes of s.78(a), that the opinion is based on those perceptions, or, for the purposes of s.78(b), that the opinion is necessary.[23]

Opinions in business records

A further question considered and resolved by the High Court in *Jackson* is whether opinions that are contained in business records are subject to the rules governing opinion evidence in ss.76-79 of the Act.

Jackson argued that those sections apply only to in-court testimony, not to hearsay evidence of opinions like those in business records. There is authority for that proposition.[24] Requiring opinions expressed in business records to comply with the rules of opinion evidence presents a practical problem. Such opinions are expressed and records usually created for non-litigious purposes, without regard for the rules of evidence and, unlike testimony, cannot be corrected and put in proper form. In this context, the evidence is unlikely to comply with the hurdles of the rules of admissibility of opinions.

The High Court rejected those arguments in the case,[25] holding that the opinion rule applied to both in-court testimony and prior representations, including those in business records.[26]

The court considered that s.56(1), which provides that relevant evidence is admissible "except as otherwise provided" by the Act, contemplates evidence may be excluded by more than one provision. Section 59 excludes hearsay evidence and s.76 excludes evidence of an opinion. Section 69 provides an exception to the hearsay rule for business records, but does not except such records from the opinion rule in s.76. The court construed s.76 as applying to any "evidence of an opinion", as stated in the section, not limited to "evidence by a witness of an opinion".[27]

Further arguments

The High Court also considered that the representation in the patient history was so ambiguous that it could not be relied upon as supporting any conclusion about how the fall had occurred, and was therefore irrelevant.[28]

The court did not accept that the representation was, in fact, stating an opinion. While an opinion is not defined in the Act, the court said the ambiguity of the representation made it impossible to find on the balance of probabilities what exactly had been observed by the ambulance officers and what, if any, inference the representation was stating.[29]

Result

The High Court held unanimously that the representation in the ambulance note was inadmissible. The majority concluded that the remaining evidence was not sufficient to establish that the negligence of the council had been causative of Jackson's injuries. □

ENDNOTES

1. [2011] HCA 36.
2. Ibid at [17].
3. Compare *ASIC v Rich* [2005] NSWSC 417; 191 FLR 385 at [205]-[222], but note s.1305 of the *Corporations Act 2001* (Cth).
4. Above n.1 at [8].
5. *Jackson v Lithgow City Council* [2010] NSWCA 136 at [51]-[52].
6. Ibid.
7. Ibid at [20].
8. Ibid at [20] and [36].
9. [2001] 206 CLR 650.
10. Ibid per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
11. Ibid at 670.
12. Ibid at 669.
13. Above n.1 at [46] and [48].
14. Ibid at [45].
15. Ibid per French CJ, Heydon and Bell JJ at [1]-[76], Gummow J agreeing at [77], and Crennan J agreeing at [83].
16. Ibid at [39].
17. Ibid at [41].
18. Ibid at [39]-[40].
19. Ibid at [50].
20. Ibid at [51].
21. For example, *R v Panetta* (1997) 26 MVR 332.
22. Above n.1 at [57].
23. Ibid.
24. See for example, *ASIC v Rich* [2005] NSWSC 417; 191 FLR 385 at [205]-[222].
25. Above n.1 at [21].
26. Ibid at [19].
27. Ibid.
28. Ibid at [26].
29. Ibid at [38]. □