

Hearsay

Part 3.2

59 The hearsay rule-exclusion of hearsay evidence

Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.

ALL OUT OF COURT STATEMENTS = HEARSAY

- whether or not evidence of a statement made out of court is hearsay depends on the use that is sought to be made of the evidence - ***Papakosmas v The Queen (1999) 196 CLR 297***
- The evidence is hearsay and inadmissible when the **object of evidence is to establish the truth of what is contained in the statement**. The evidence is not hearsay and it is admissible when it is proposed **to establish by evidence**, not the truth of the statement **but the fact that it was made** (relevant?) - ***Subramaniam v Public Prosecutor [1956] 1 WLR 965***
- the hearsay rule applies **only to out-of-court statements** tendered for the purpose of **directly proving that the facts are as asserted in the statement** – ***Walton v The Queen (1989) 166 CLR 283***

1) IS IT HEARSAY EVIDENCE?

4 components of the rule

- **(a) Evidence must be a previous representation**
 - dictionary meaning = representation made otherwise than in the course of giving evidence in the proceeding including:
 - an express or implied representation
 - a representation to be inferred from conduct
 - a representation not intended by its maker to be communicated to or seen by another person
 - a representation that for any reason is not communicated
 - can be statements and conduct and encompasses all that those statement or conduct would convey to the listener, reader or observer – ***Lee v The Queen (1998) 195 CLR 594***
 - **representation by conduct** – ***R v Ambrosoli (2002) 55 NSWLR***
 - **silence may amount to a representation if it is reasonable to expect that the allegation would be answered** – ***R v Rose (2002) 55 NSWLR***
- **(b) It must be made by a person**

- *Interpretation Act 1987 (NSW) s 21(1)* – applies to a corporation, individual, body corporate or politic but does not apply to machine generated information where there is no human input
- **(c) Identify the purpose or object of the evidence**
 - PURPOSEFUL RULE - therefore they are relying on the statement
 - s59 will apply if the evidence is **adduced to prove the existence of a fact asserted by the representation** – *R v Lee (1998) 195 CLR 594*
 - if you adduce evidence of a representation **for another purpose** then the rule does not apply
- **(d) We can infer that the person who made it intended to assert the existence of that fact**
 - intention = **objective test and takes into account the circumstances in which the representation was made ss59(2A)**
 - What did the witness INTEND to assert?
 - addition of '**it can reasonably be supposed that**' in s59(1) to widen the assertions that can be caught by the rule – *R v Hannes (2000) NSWCCA 503*
 - change the test of intention from a subjective test to a more objective test – new sub-section (2A)
 - shift away from the actual subjective intentions and thought processes of the person making the representation to a consideration of the representation itself
 - therefore look at what is **REASONABLY SUPPOSED**

(2A) For the purposes of determining under subsection (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made. [to determine what the Maker meant]

 - Therefore **UNINTENDED assertions are not excluded by the hearsay rule**

IF HEARSAY

- In a jury trial s 165 requires a judge if requested to warn a jury about evidence that is hearsay

2) ARE THERE ANY EXCEPTIONS TO THE HEARSAY RULE?

Hearsay testimony that violates s. 59 will be excluded unless it falls within one of the exceptions to the hearsay rule.

1. The hearsay testimony violates section 59 and does not fall within an exception = inadmissible.
2. The hearsay testimony violates section 59 but falls within an exception = admissible.
 - I. Exceptions that apply only to first hand hearsay
 - II. Exceptions that apply to remote hearsay
3. The hearsay testimony is used for a non hearsay purpose = admissible for a hearsay purpose under section 60.

- **A - NON HEARSAY PURPOSE**
- **B - ADMISSIONS**
- **C - STATEMENTS OF CONTEMPORANEOUS STATE OF MIND**
- **D - FIRST HAND HEARSAY**
- **E - OTHER EXCEPTIONS**

A – NON HEARSAY PURPOSE S 60

60 Exception—evidence relevant for a non-hearsay purpose

(1) The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact.

(2): This section applies whether or not the person who made the representation had personal knowledge of the asserted fact.

- Significant departure from the CL position – ALRC recommended the inclusion of s 60 on the basis that the CL was too technical and unworkable in its distinctions of evidence
- If hearsay testimony (first hand and remote) is used for a non hearsay purpose, it will be admissible for a hearsay purpose under s60. s60 applies to second hand hearsay s.60(2)

- **2) Is it hearsay testimony used for a non hearsay purpose?**

- testimony will be used for a non hearsay purpose if:
 - **prior inconsistent statements** could be used to challenge the credibility of a witness
 - prior **consistent statements** could be used to defend the credibility of a witness
 - prove **state of mind** of the person who heard it
- therefore if the evidence is being used to **defend his credibility or highlight his lack of credibility, it can also be used to prove the hearsay purpose**
 - E.g. evidence of a prior inconsistent statement relevant to an attack on a witness's credibility, s 60 allows that evidence be admitted for the hearsay purpose – that is evidence of the facts asserted in the prior inconsistent statement.

- (a) **Prior Inconsistent Statements**
 - **prior inconsistent statement** of a witness means a previous representation that is inconsistent with evidence given by the witness:
definition EA
 - **can be admitted under s108**
 - **R v Lee (1998) 195 CLR 594**
- (b) **Prior Consistent Statement**
 - **prior consistent statement** of a witness means a previous representation that is consistent with evidence given by the witness:
definition EA
 - Prior consistent statements relate to the credibility of the witness and evidence of the statement may be admitted where the witness has been accused of fabricating testimony or they have been confronted with a prior inconsistent statement: **Section 108**.
 - Eg. Prior representations to expert by A and his mother that he suffered hallucinations could be used to defend expert's credibility; **Welsh** (A arg diminished responsibility-abnormality of the mind)
- (c) **Prove the state of mind of the person who heard them**
 - Pursuant to **s60**, P's out of court statement will not be excluded by **s59** **IF it is used for non hearsay purpose to prove the state of mind of the person**
 - Eg. proving V feared A or was concerned for safety
 - Eg. proving that A feared for his life to establish the defence of duress
 - eg **D** gave evidence of conversation in which terrorists threatened him with death to prove non hearsay purpose of the effect on his made on his mind which was relevant to defence of duress, Thus, not hearsay bec merely proving that it was said, not whether it was true or not): **Subramaniam** (charged with carrying ammunition in jungle; arg defence of duress)
- **Key Case**
 - **R v Lee (1998) 195 CLR 594**
 - **THEREFORE –** s 60 allows evidence of prior consistent or inconsistent statements admitted for credibility purposes to be used to prove facts intentionally asserted in the statements – **UNLESS THE USE IS LIMITED BY S 136**
 - s 60 operates only on representations that are excluded by s 59
 - The defendant (Lee) was tried for assault with intent to rob. At trial, evidence was led of a statement made about the defendant to the police by a witness, Calin. Calin had seen Lee walking up the street near the scene of the robbery and was told by Lee: '*... leave me alone, cause I'm running because I fired two shots* ... I did a job and the other guy was with me bailed out'.
 - Essentially Lee made an admission of sorts to Calin (first hand hearsay witness) and then Calin relayed the admission to the police officer (second hand hearsay witness). In oral evidence, Calin admitted signing the statement to police but denied that the statements in the signed document were his. The prosecution then called the police

officer who prepared the statement, and evidence of the representation was admitted through that officer

- **Issue:** Could second hand hearsay be adduced for hearsay purpose under s60?
 - **Held:** section 60 did not apply to second hand hearsay that is adduced for a non hearsay purpose in this case hearsay evidence used to show that the witness had made a prior inconsistent statement. ie. Second hand hearsay evidence of the police officer could only be used for a non-hearsay purpose (challenge the credibility of the witness.)
- **2) Does the S 136 Discretion apply?**
 - Under **s136**, TJ may use its discretion to limit use of previous representation for non-hearsay use IF it would be unfairly prejudicial to admit the evidence for its hearsay use: eg.
 - Eg. party could not cross-examine person who made the rep: **Jango v NT (NO. 4)**
 - Eg. expert based opinion on assumptions not assertions: **Roach v Page**
 - Roughly translated this means that section 60 applies to first hand hearsay and more remote forms such as second hand hearsay.
 - The end result is that the use of prior consistent and prior inconsistent statements is no longer limited to credibility. Any out of court statement or representation that is used for a non hearsay purpose can now also be used for a hearsay purpose.

B - ADMISSIONS

- **1) s 60 does not apply to admissions: s 60 (3)**
 - to preserve the result in - **R v Lee (1998) 195 CLR 594**

C – CONTEMPORANEOUS STATEMENTS ABOUT A PERSON'S HEALTH, STATE OF MIND ETC: S 66A

- *The hearsay rule does not apply to evidence if the representation was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind*
 - **Walton v R (1989)**
 - statements about a person's intentions or state of mind are often admitted into evidence, whether described as an exception to the hearsay rule or as original evidence, Wigmore suggests that such statements are an exception to the hearsay rule on the ground that a statement about a person's intentions are direct & testimonial. But the better view is that evidence of such statements is not merely hearsay.
 - first hand hearsay held not admissible as all the statements made were characterised about the deceased's health, feelings, sensations, intention, knowledge or state of mind - **R v Serratore (NSW equivalent of s66A)**

D – RESTRICTION TO FIRST HAND HEARSAY

S62 (1) A reference in this Division (other than in subsection (2)) to a previous representation is a reference to a previous representation that was made by a person who had personal knowledge of an asserted fact.

(2) A person has personal knowledge of the asserted fact if his or her knowledge of the fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact.

- **(i) Is the evidence first hand hearsay witness under s 62?**
 - this is where the previous representation was made by a person who had **personal knowledge** of an asserted fact and it was based on something that **the person saw, heard or otherwise perceived**
 - e.g. Callin made statement that Lee (made admission) said to him "I fired 2 shots" - **R v Lee (1998) 195 CLR 594**
 - **THE TEST FOR FIRST HAND HEARSAY = PERSONAL KNOWLEDGE**
 - **PERSONAL KNOWLEDGE TEST** - it is sufficient if it can be **reasonably supposed** the maker has personal knowledge – **Citibank Ltd v Liu [2003] NSWSC 69**

Eg. Mr Black sees the accused murder the victim

Mr Black tells Mr White that he saw the accused murder the victim.

Mr White is a first hand hearsay witness.

If Mr White tells Mr Red what he was told then Mr Red is a second hand hearsay witness.

- **1. S 63 (CIVIL) IF MAKER IS UNAVAILABLE**
 - LAW: if Maker not available:
 - 1st Hand or document are admissible.
 - BUT must give notice to OS
- **2. S 64 (CIVIL) IF MAKER IS AVAILABLE**
 - LAW: if Maker is available
 - Maker and 1st Hand are admissible
 - But undue expense, delay, not reasonable practical – 1st Hand or document are admissible
 - Must give notice – but court may dispense with this: s 67
- **3. S 65 (CRIMINAL) MAKER IS UNAVAILABLE**
 - Example: D witnesses the accused physically assault his wife. D tells his friend B about the assault that he witnessed. D is called as a witness but dies before the trial. D has made an out of court statement and is no longer available.
 - Important terms: '**criminal proceeding**', '**previous representation**' and '**representation**'
 - **(a) Defence is introducing the first hand hearsay testimony: s 65 (8) applies**
 - If the defence calls a first hand hearsay witness where the maker is unavailable the hearsay testimony will be admissible: **s 65(8)**. However, it may be excluded by trial judge in the exercise of its discretion. Then prosecution can rebut first hand evidence with other first hand evidence under **s65(9)**.

- effect of s65(8) is that most if not all first hand hearsay testimony introduced by the defence under section 65(8) will be admissible. It may however be excluded by the trial judge in the exercise of their discretion.
- **(b) Prosecution is introducing first hand hearsay testimony: s65(2) or s65(3)**