

## Answering Evidence Exam Questions

1. Is the evidence **relevant**?

s55, fact in issue... [One or two sentences on this point]

2. Is the evidence caught by an **exclusionary** rule (e.g. hearsay?)

OR the question may relate to something else, like 'Do any privileges apply?'

3. Do any **exceptions** to the rule apply? [even if some do not apply, if you have words to spare you could quickly explain why the other exceptions do not apply - e.g. why a non-hearsay use exception is not applicable here because we want to prove the truth of the statement, but the first-hand hearsay exception will apply because the person who said it told you directly such that you have 'personal knowledge']

HERE, MAKE A TENTATIVE CONCLUSION AS TO THE ADMISSIBILITY OF THE EVIDENCE (one or two sentences)... then

4. Does the judge have **discretion** to exclude the evidence (ss135-138)?

Consider whether the evidence is unreliable under s165...

OR May the judge make a **comment or direction** to the jury regarding the evidence?

Criminal: Azzopardi or Weissensteiner direction

Civil: Jones v Dunkel

5. **CONCLUSION**

6. If you have words to spare, consider whether, **if certain facts were different**, perhaps a piece of evidence would or would not be admissible (this will show your knowledge).

### The admissibility of evidence

#### 1) Is the evidence relevant?

The fundamental rule governing the admissibility of evidence is that it must be relevant (Wilson v R). Section 56 of the Uniform Evidence Act states that only where evidence is relevant in the proceeding shall it be admissible unless otherwise provided. Therefore irrelevant evidence is not admissible s 56(2). Relevance is defined in s 55(1) of the UEA as evidence, if it were to be accepted, could rationally affect, either directly or indirectly, the assessment of the probability of the existence of a fact in issue.

Smith v R: evidence is only relevant if it affects the jury's assessment of the facts because it adds to evidence already before it.

s 55(2): Where evidence only relates to the credibility of a witness, it can be relevant.

S 57: provisional evidence

S 58: reasonable inferences from document/thing

S 135 UEA provides that even where evidence is admissible, it may be excluded under the general discretion of the court where the probative value of admitting the evidence is substantially outweighed because the evidence may be unfairly prejudicial to a party, be misleading or confusing or cause a result in undue waste of time.

This results in a judge being able to exclude evidence with a tenuous connection to the fact in issue.

## 2) Does the Hearsay rule apply?

Hearsay evidence is where there is a prohibition of witnesses repeating out-of-court statements made by others in order to establish the truth of those statements (Subramaniam v Public Prosecutor). Section 59 UEA states the hearsay rule is where a previous representation is made by a person, will not be admissible to prove the existence of a fact that it can reasonably be supposed that a person intended to assert by the representation.

This is where a statement made by another person is used to prove that what they said is true (the fact). Example: "Andrew started the fire!" said to a witness, this statement couldn't be used to assert the fact that Andrew in fact started the fire.

**Implied hearsay:** This is where statements and conduct of a person other than the witness, which were not intended to be assertive of the fact they are tendered to prove, are still inadmissible as hearsay. *Walton v The Queen, R v Benz*.

In the law of evidence, an implied assertion is a statement or conduct that implies some fact.

Was it a previous representation?

A previous representation is a representation made otherwise than in the course of giving evidence in the proceeding. This can be something that was said (statement) or done (conduct) *Lee v The Queen*. This can include silence or failure to respond to a question: *R v Rose*

Was that previous representation made by a 'person'?

Person includes an individual, corporation, body corporate or politic: s21(1) *Interpretation Act 1987*

The person here must not be a witness in the case: *Subramanian*

The representation asserts a fact:

- It is not admissible to prove the existence of a fact asserted by the representation.

IT WILL BE HEARSAY (AND THEREFORE EXCLUDED) IF you are adducing the evidence of the previous representation in order to prove the truth of what was said or done? i.e. testimonial use?

IT WILL NOT BE HEARSAY AND MAY BE ADMITTED AS EVIDENCE (BUT MAY BE SUBJECT TO JURY DIRECTION) IF you are adducing the evidence of the previous representation in order to show something else, other than the truth of the statement i.e. 'original use'

It can reasonably be supposed that the person who made the representation intended to assert the existence of that fact:

The court must have regard to all the circumstances in determining for what purpose the representation was made s 59(2A), creating an objective test. The court need not inquire into what the speaker actually intended but determine whether the speaker could reasonably be supposed to have intended to assert the particular fact.

Where the evidence falls within the scope of the Hearsay rule it will be prima facie inadmissible unless an exception applies.

### **The Exceptions to the Rule (i.e. where the evidence may be admitted):**

Hearsay exceptions are set out in sections 60 – 75 of the UEA.

S 60: Non-hearsay purpose, Evidence of a non-hearsay purpose is one to prove the fact that the representation was made, to challenge/defend the witnesses credibility or to show the basis for experts' opinion. It does not matter if the person who made the representation had actual knowledge of the asserted fact s 60(2). It also does not apply to admissions in criminal proceedings s 60(3).

The significance of admitting evidence for its non-hearsay purpose is that once admitted for that reason it may then be used for its hearsay purpose, to prove the fact asserted in it.

Note s60(2) which allows some remote forms of hearsay to be used as evidence of truth of what is contained in the statement if there is an original use.

S 62 - First Hand Hearsay: this is where a person who had personal knowledge of an asserted fact made the previous representation and it was 'based on something that the person saw, heard or otherwise perceived other than a previous representation made by another person about that fact.'

1. First-hand hearsay is evidence of a previous representation made by a person who has personal knowledge of an asserted fact (s62(1)).