

Hearsay Evidence

- **Consider each statement individually.**
- What is its relevance? Purposive use?
- Ask: is it first hand or second hand.
- **Starting Point: Is it Hearsay Evidence?**
- To constitute hearsay under s 59(1), 4 reqs:
- **1. Previous rep must contain an assertion about a relevant fact.**
- **UEA Dictionary:** "previous rep" = rep made otherwise than in the course of giving E, in which E of the rep is sought to be adduced
- "rep" includes:
 - (a) express/implied rep (oral/writing), **OR**
 - (b) rep to be inferred from conduct, **OR**
 - (c) rep unintended to be communicated **OR**
 - (d) rep that for any reason is not communic.
- Rose: Rep made by = rep; however, that rep must still have been reasonably intended.
- **2. Rep must be made by a person.**
- Bickfords: TV rating data: by person as data required human intervention: pressing button intend to make rep they were present
- O'Meara: if recorded/interpreted by a human, then hearsay, if asserted fact was machine generated it will not be hearsay.
- **3. Assertion of fact that the maker of the rep reasonably intended to make/assert;**
- s 59(2A) To determine intention to assert a particular fact by rep, court may have regard to circumstances in which rep was made (OBJ: would a reasonable person believe that it was intended or unintended).
- *Unintended reps do not satisfy the req.*
- O'Brady: 'He said he couldn't do something like that' = reasonably intended = hearsay.
- **4. Previous rep must be adduced at trial or in hearing for purpose of proving the existence of the fact asserted in the rep.**
- Purposive rule, what is the E being adduced to prove/show? If not adduced to prove existence of fact in statement ≠ hearsay.
- **Papakosmos:** need to distinguish between two purposes: hearsay and non-hearsay p.
- IN EXAM - Crucial to identify how rep is relevant to FII; **Subramaniam:** what it is being adduced to prove & how it will be used
- **Other Purposes You May Use E For (s 60)**
- Makers Credibility (**Papakosmos**)
- **Subramaniam:** to show D under duress.
- Basis of Expert Opinion (**Welsh:** heard voices to attack V, saw snakes/spiders)
- SoM: **Walton:** intending to meet accused; **Matthews:** V tells F she fears D before rape
- If not hearsay purpose: s ss 55, 135 & 137.
- **Words That Have Operative Legal Effect: CONSTITUTE AN ELEMENT OF THE FII**
- Rep that create contracts, trusts, deeds, wills (**Macrailld**) or constitute criminal offence/tort are not hearsay
- **Suteski** No 4: directing killer = elements of conspiracy = FII, Therefore not hearsay.

Step 1: The Rule

- s 59(1): E of a previous rep made by a person is not admissible to prove existence of a fact that it can reasonably be supposed that the person intended to assert by the rep
- W: P who gives E, declarant: P who made rep
- **Step 2: First Hand Hearsay**
- s 62(1): First hand = previous rep is made by person who had personal knowledge of an asserted fact (person who told W the rep)
- (2) personal knowledge = if declarant's knowledge of fact was (or reasonably assumed to be), based on something that person saw/heard/otherwise perceived, other than previous rep made by another person about the fact.
- **Vincent:** Enough to establish that declarant might reasonably be supposed to have had such knowledge.
- **Step 3: Exceptions Require Competence**
- s 61(1): Doesn't enable use of previous rep to prove the existence of an asserted fact if, when the rep was made, the person who made it was not competent to give evidence about the fact because of s 13(1).
- (2) s 61 doesn't apply to contemporaneous rep made by a person about his/her health, feeling/sensations/intention/knowledge/SoM
- (3) pre. competent unless proven otherwise.
- **Step 4a: Is Maker Unavailable?**
- Definition of Unavailability (s 4):
- Person = not available to give E if:
 - (a) person is dead, or
 - (b) person is, for any reason not competent to give the E, or
 - (c) person is mentally/physically unable to give the E and it is not reasonably practicable to overcome that inability, or
 - (d) would be unlawful for person to give E,
 - (e) Act prohibits the evidence being given,
 - (f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or secure his or her attendance, but without success,
 - (g) all reasonable steps have been taken, by party seeking to prove person isn't available to compel person to give E without success.
- **Supporting Case Law:**
- **Suteski:** contract killing where P W involved in killing refused to testify, even after being told he'd be in held contempt of court.
- **Aujla and Singh:** strenuous effort made by P to locate peripatetic W: unavailable.
- **DPP v Nichols:** unavailability in (g) includes exemption under s 18.
- **Mindshare Comms:** (g) applies to privilege.
- Serve notice under s 67(1) if using s 65/66
- **If Unavailable, Notice Requirements**
- 65(2),(3),(8) or request for C to dispense with written notice requirement: 67(4) & 192
- Azizi: not notified = court may not grant leave.

Exceptions Under s 65 for Prosecutors

- Do not use if you are defence, use s 65(8).
- **s 65(2)(a): Reps made under a duty**
- Typically applies to reps made in the course of declarants' employment duties.
- Better use business records in s 69.
- **s 65(2)(b): Reps made in circumstances that make it unlikely they are fabrications**
- Requirement 1: Rep must have been made 'when/shortly after' asserted fact occurred.
- Mankotia: Predominant factor = time.
- Conway: Matters conveyed ought be contemporaneous or still fresh in the mind of the person recounting the narrative.
- Williams: do not overemphasise fresh in memory test: 5 days in Williams = too long.
- Requirement 2: Rep must have been made in circumstances that make it unlikely that the rep was fabricated.
- Ambrosoli: See circs in which p. rep made.

'Fabrication':

- Polkinghorne: Limited to untruths.
- Kuzmanovic: May include reconstruction falling short of a false invention. Something more than a bad memory, but may be fabrication by suggestion.
- **s 65(2)(c): Reps made in circumsta. that make it highly probable they are reliable**
- **Conway:** Test of circumstances that make it highly probable that it is reliable = highly onerous.
 - Courts hesitate to recognise reliability as a means to exclude hearsay alone.
- **s 65(2)(d): Reps made against interest**
- Requirement 1: made an assertion that goes against their own interests, AND
- s 65(7): deemed to be against interest:
 - (a) statements damaging to rep's reputation,
 - (b) that indicate his/her commission of crime they haven't been charged,
 - (c) his/her liability in an action for damages.
- Suteski: Motives of representer irrelevant.
 - Against interest TBD in context of E.
- Sio: Look at specific rep to determine whether particular rep is against interests.
 - Must also consider hearsay purpose.
- It may be incriminating, but vindicating.
- El Marsi: proof that a person told lies earlier would 'tend' to damage reputation when tend refers to possibility, not actuality.
- Requirement 2: made in circumstances that made it likely that the representation that the representation is reliable
- Sio: test is less onerous than (c), no highly probable req, just that rep is reliable.

Exceptions Under s 65 for Both Parties

- s 65(3): Exception if previous rep made in course of giving evidence proceeding if D:
 - (a) XXN person who made rep about it, or
 - (b) had a reasonable ope to XXN the person

Exceptions Under s 65 for Defence

- s 65(8): Rule does not apply to:
 - (a) E of a previous rep adduced by D if (it is first hand), or
 - (b) doc tendered by D that contains previous rep/another rep it is reasonably necessary to refer in order to understand rep.
- **Case Law**
- O'Connor: May still be rejected if unfairly prejudicial to the Crown case (s 135).

Retaliatory Hearsay As a Consequence

- s 65(9): If E of a previous rep about a matter has been adduced by a D and has been admitted, the hearsay rule does not apply to E of another rep about the matter that:
 - (a) is adduced by another party (P), AND
 - (b) is given by a person who saw, heard or otherwise perceived other rep made.
- Eastman: C has discretion to define 'matter'.
- Mrish: Retaliation maybe excluded (s 137)

Step 4b: Is Maker Available?

- s 66(2): If person 1. has been/is to be called to give E, rule doesn't apply to E of rep by:
 - (a) that person, **OR**
 - (b) person who 2. **saw/heard/otherwise perceived rep being made**, if, when rep was made, occurrence of asserted fact was 3. **fresh in memory** of the declarant.

4. 'Fresh in the Memory' Test

- (2A) To determine whether fresh in memory court to consider all matters and:
 - (a) nature of the event concerned, AND
 - (b) age and health of the person, AND
 - (c) period of time between the occurrence of asserted fact and making of the rep.
- **XY:** expression 'fresh in the memory' now to be interpreted more widely than...Graham's case'...the court must now take into account 'the nature of the event concerned'.
- No longer is to be taken as an indication that it means 'recent' or 'immediate'.
- **LMD:** where 7 year delay, 'the events [of sexual abuse] were inherently likely to remain firmly in her mind, if not as to detail, then as to general nature of the behaviour'.
- **Pate** (a Pseudonym): time still relevant.

Step 5: Is Statement Contemporaneous?

- s 66A: Rule doesn't apply to E of previous rep made by person if rep was a **contemporaneous** rep about maker health/feeling/sensation/ intention/knowledge/SoM.
- Applies even when not available to give E.
- **Examples**
- Serratore: V's rep she was intending to breakup with D but he was making it difficult
- Lock: V's rep to others that she feared the D's use of knives.
- Xypolitos: Previous rep V to his art teacher stepfather+ V used to fight a bit had hit him.
- VanDyk: diary entry about V intent to fuck D

NOTICE: s 67: s 65(2),(3), (8) require notice.

Second Hand Hearsay Exceptions

- **Step 1: Is it a Business Record**
- **Requirement 1: Must be a Business**
- **Seeley**: Broad definition of commercial co's.
- Profession/occupation/ undertaking;
- Nye v NSW: Royal commission;
- Activity engaged in by Crown/foreign gov;
- R v Taylor: Solicitor's practice.
- Activity engaged in under legal power;
- Harrington-Smith: religious missions.
- Proceedings of AU and foreign parliaments;
- Non-profit business and a foreign business.
- Government departments and agencies in all their forms: hospitals, educational institutions, police, parliaments and courts.
- **Requirement 2: Must Be A Document**
- s 69(1): Applies to a **document that**:
- (a) either:
- (i) is/forms part of the records belonging to kept by a person, body or organisation in the course of/for the purposes of, a business; **OR**
 - Roach: distinguish from products of a business (books for publisher etc...)
 - Roach: Internal/external conversations
 - Stankopwski: Psychiatrist notes
 - ASIC v Rich: Liquidator's report;
 - Architect plans submitted to local cou.
 - Aromas: property valuers report;
 - Cole: Minutes of meeting
 - Daniels v WA: National park notices.
- (ii) at any time was/form part of record; **AND**
- **Requirement 3: Contain a Previous Rep in Course Of/For Purposes of Business**
- (b) contains a previous rep made or recorded in the document in the course of, or for the purposes of, the business.
- **Requirement 4: Must Have Had Personal Knowledge or Based on Info Supplied By Such a Person**
- (2) Rule does not apply to the document (so far as it contains rep) if the rep was made
- (a) by person who had/might reasonably be supposed to have had personal knowledge (defined in (5)) of asserted fact; **OR**
- (b) on basis of information directly/indirectly supplied by a **person who had/might reasonably be supposed to have had personal knowledge** of the asserted fact.
- **Requirement 5: Must Not Have Been Made in Contemplation of Legal Proceedings or a Criminal Investigation**
- (3): (2) does not apply if the rep:
- (a) prepared/obtained for purpose of conducting, for/in contemplation of or in connection an AU/overseas proceeding **OR**
- (b) was made in connection with an investigation relating/leading to criminal trial.
- **Negative Hearsay**: (4) facilitates proof something didn't occur by absence of record

(4): Note: Failure to produce a record is also E.

General Considerations

- Lin: liberally construed.
- No need to identify the declarant (i.e. source of the info in the doc) (*Guest*) or author of document.

Other Exceptions to Note

Contents of Tags, Labels or Writing

- s 70(1) Rule does not apply to a **tag or label attached to, or writing placed on, an object** (including doc) if tag/label/writing may reasonably be supposed to have been so attached or placed:
- (a) in the course of a business, **AND**
- (b) for the purpose of describing or stating the identity, nature, ownership, destination, origin or weight of the object, or of the contents (if any) of the object.

Electronic Communications

- s 71(1) Rule does not apply to a rep contained in a document **recording an electronic communication** so far as the representation is a rep as to:
- (a) the **identity of the person** from whom or on whose behalf the communication was sent, **OR**
- (b) the **date** on which or **the time** at which the communication was sent, **OR**
- (c) **destination** of communication/identity of person to whom communication was sent.

Non-Hearsay Purpose/Original E (s 60 Rule)

- s 60(1): Hearsay rule does not apply to E of a previous rep that is admitted because it is relevant for a purpose other than proof of an asserted fact.
- (2) Applies whether or not the person who made the rep had personal knowledge of the asserted fact (within the meaning of section 62(2)).
- (3) Does not apply in a criminal proceeding to evidence of an admission.
- **Examples**
- Adam: PIS of Sako; admitted for credibility purpose of proving PIS; s60 applies (can be used to prove the asserted facts -hearsay).
- Welsh: D's statement about auditory hallucinations explained basis of psychiatrist's opinion; s60 applies.
- Lee: at trial Calin was an unfavourable W; after s 38 XXN, Calin's police statement was admitted (credibility E may use for hearsay)
- Subramaniam: not hearsay to argue that threats were made, hearsay to argue the truth of the contents of the threats.

RELIABILITY WARNING UNDER s 165(1)(a) should be granted. Often given instead of s 136 request to limit evidence (Papakosmos).