

1. HEARSAY EVIDENCE

General Rule:

Write: '[X] is an out of court statement. Therefore, if evidence of [X] is tendered to prove the truth of the statement (or anything in it) it is inadmissible hearsay (*Subramanian v Public Prosecutor* [1956] 1 WLR 965; UEA s 59(1) where the asserted fact was intended)

Check if the evidence is an admission or character evidence:

Write: 'An out of court voluntary admission or confession is an exception to the hearsay rule (*McDermott v The King* (1948) 76 CLR 501; *Lee v The Queen* (1998) 195 CLR 594), as a party can admit part of their case, a statement against a party's interest is more likely to be true.

It could have been an unintended or implied assertion: under the CL the hearsay rule extends to this (*Wright v Doe d Tatham* [1831] 39 ER 295) for example:

- 'Its all right my mother is just feeling sick' contains an express assertion (the other woman is sick) but also an implied assertion (the other woman is the mother of the statement-maker) – *R v Benz*
- A child answers the phone and says "hello daddy". The implied assertion conveyed by those words is: 'the caller is the father of the child'. (*R v Walton*)
 - see below – if you can prove it was unintended then can potentially get it in as a non-hearsay use.

Out of court statements cannot be admitted into evidence for the purpose of proving the truth of the statement (hearsay use).

'The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross examination, and the light which his demeanour would throw on this testimony is lost.' (*Teper v The Queen* [1952 AC 480])

UEA s 59: 'Evidence of a previous representation made by a person is not admissible to prove the existence of a fact it can reasonably be supposed that the person intended to assert by the representation.'

Exceptions to Hearsay

Write: 'However, a non-hearsay use of the evidence may be to show: [one of the following]

Admissible Non Hearsay uses:

- Circumstantial use of out-of-court statements & using such statements as "original" evidence
- Prior consistent statements used to support credibility or rebutting accusation of "recent" fabrication
- Prior inconsistent statements used to show lack of credibility
- Statements with a mix of hearsay and non-hearsay uses
- Implied or unintended assertions & conduct

Circumstantial use of out-of-court statements & using such statements as "original" evidence

- State of mind (*R v Hendrie*)

- State of knowledge (if the accused knew something about the crime before an innocent person could (*R v Mathews*))
- Establishing actual elements of the offence directly, i.e. where speaking of the words was legally significant.
 - E.g. proving that the statement was actually made.
- Evidence led to prove basis for expert's opinion i.e. what was said to a Doctor to invoke a diagnosis.
- Proving statements or warning were actually made (*Subramaniam*)
- Comments tended to show a 'threat' regardless of the truth of those threats – *Subramaniam v Public Prosecutor* [1956] 1 WLR 965
- Comments tended to show the victims intention to meet the accused at the Elizabeth town Centre – *Walton v R* (1989) 166 CLR 283
- To show a piece of paper at a crime scene "Sean Rules" was likely to be written by the accused and therefore go towards proving that he was at the scene. – *R v Sean Lydon* (1987) 85 Cr App R 221

Prior consistent statements used to support credibility or rebutting accusation of "recent" fabrication

- S 34M EA: Evidence can be given by any person about the contents of a complaint in sexual cases; judge must direct the jury it is admitted to inform them how the allegation first came to light & the dress of consistency of conduct of the complainant but is not admitted for the truth of what is alleged. (unless child is 14 Years or under, then it will go in for the truth of it via s 34LA (4) EA)
- If alleged to be a "recent" fabrication, evidence that same statement said earlier can be admitted; not for the truth of it but to show consistency (*Nominal Defendant v Clements* (1960) 104 CLR 476)
 - Before allowing proof of prior consistent statement to rebut an imputation of recent fabrication, a judge must see:
 - Be sure the witness statement is attacked positively on the ground of 'recent fabrication.'
 - Be sure the prior consistent statement will tend to answer this attack.
 - *Nom defendant* stated that the prior consistent statement is not admissible as evidence of the truth of the facts stated, but rather act as credibility evidence to support the submission that the witness is telling the truth. (cf with UEA – once its admitted for a non-hearsay purpose can be used for any purpose).
- Prior consistent statements are not usually admissible because the court does not want witnesses 'bolstering' their credibility out of court.
 - See UEA s 108(3)(b) – where there is an exception to s 102 (evidence of credibility of a witness is inadmissible).
- Evidence of an earlier consistent act of identification of the accused – this is the witness testifying to the state of his/her own recollection on a prior occasion. It is not evidence of a previous representation.

Prior inconsistent statements used to show lack of credibility

- Can use a witness' own prior inconsistent statements to damage their credibility (e.g. suggest that they are lying, wrong or unsure about material issues)
- Again does not go in for the truth of its contents but to show inconsistency and damage their credibility.
- Prior statements are not usually admissible because the court does not want witnesses 'bolstering' their credibility out of court.

Statements with a mix of hearsay and non-hearsay uses

- If you can show the non-hearsay use, it will generally be admissible (especially if you can 'separate' the uses with direction from the judge). If there is a jury, they will be directed by the judge of the use they can make of that evidence and told specifically not to use it for the hearsay purpose.
- E.g. "You heard evidence from the police officer that he said to the defendant 'I have been told that you killed X'. That was lead only to provide you with the context for the defendant's answers. You cannot use it for the hearsay purpose of the truth of the officer's comments." (*R v Fairbairn* [2011] ACTSC 78)

Implied or unintended assertions & conduct

- Under common law, an implied assertion may be used if it can be shown to truly have been unintended. Implied assertions in conduct are more likely to be admissible as non-hearsay as these are often unintended.
 - E.g. 'Daddy is on the phone' is an implied assertion of who is on the phone.
 - failure of hotel patrons to order a particular beer is an implied assertion by conduct of the beer being 'off'.
- SA Law: is it an implied assertion in a statement or in conduct?

UEA s 59 differentiates between assertions of fact which can be reasonably supposed to be intended and those which are not (uses the word 'representation', not statements so it automatically captures conduct.) - UEA – is it an implied or intended assertion?

UEA s 60 '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.'

UEA s 60 – If evidence is admitted for a non-hearsay purpose, then it will also be admitted for a hearsay purpose (s 60(3) this only applies to **civil cases** as evidence of an admission – although might be admitted under s 81 admission exception)

Admissible Hearsay Exceptions

- Res gestae
- Dying declarations
- Admissions
- First hand hearsay (UEA only)
- Statements in documents in civil cases only (s 34C EA)
- Business documents (s52 & s 53 EA)
- Statements of protected witnesses (s 34LA EA)

Write: If you want the piece of evidence in for the truth of its contents, one of the hearsay exceptions will need to apply; such as [one of the following].

If an exception does not apply, you still may be able to get the statement in for a non-hearsay use; but only if the uses are easy to separate when the judge issues a direction to the jury. If the judge thinks that the jury will not be able to separate the uses, they may not allow it in for either purpose.

Res Gestae (part of the story)

- Encompasses:
 - Incidents in the transaction;
 - Spontaneous statements made by participants in or observers to an event in question; or
 - Statements by a person as to his/her contemporaneous physical sensations or general state of health