

# Class 13: Hearsay

Introduction to Hearsay, defining the hearsay rule & the purpose test, intended assertions; non-hearsay assertions, s 59: Ch 8, pp306 – 327

The optimal way to understand the hearsay rule and its exceptions is to:

- Read the provisions
- Do some examples.

Finish this class knowing when a representation is not hearsay evidence

## Introduction to Hearsay

“The blue car went through the red traffic light”

- 3 factual assertions
  - blue car
  - red traffic light
  - the blue car went through the red traffic light
- Dissect the sentences into component parts
  - Identify and assess the factual assertions from those rules
- Figure out what the rule of a particular representation is
  - if the use or reason they want to admit into evidence, is to prove some fact in that representation → that is issue for hearsay rule
- How do you break the representation apart?
  - break it into factual assertions
- First understand – there is previous representation
- Once you recognise this prev representation
  - Have to ask is this prev representation classified as hearsay the way the evidence act defines it as
  - The concept of exceptions – won’t start talking about them until next class

## What is Hearsay?

The prohibition on the use of a person’s out of court assertions as equivalent to or in place of their in-court testimony

- Hearsay is evidence of a previous representation adduced to prove the existence of a fact that was intended to be asserted by the maker of that previous representation;
- A previous representation is defined in the UEA Dictionary as, “a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced.”
  - Something happened outside of court/proceeding
  - What they said in day 1 is not prev representation, it is part of Day 1 Testimony
- s59 of the **UEA excludes** hearsay evidence: i.e. it excludes evidence of oral or written statements, where the (initial) purpose of adducing those statements is to prove the existence of a fact intended to be asserted in that statement;
  - if intended to assert that blue car, and red traffic light, and it went thru it, if statement is being used to prove any of those things it will be inadmissible bcos it is hearsay
  - if it is being used to prove facts – it is hearsay

- Previous representations may be admissible if relevant for another purpose (for example a prior inconsistent statement relevant to the credibility of a witness and admissible through s 103), but s 59 **will prevent** those previous representations being used to prove the existence of a fact asserted in that representation;
  - If piece of evidence, like PIS, that is inadmissible bcos under hearsay rules, but relevant for credibility, then EA will still work like the way we've been talking about
  - The rules do not mutually exclude each other
  - Simultaneously inadmissible for hearsay, but some other example like credibility
  - PIS
  - There are a host of exceptions to the hearsay rule that allow evidence of a prev representation to be used for its 'truth' value in certain circumstances
  - Absolutely have to make sure that it applies before hearsay exceptions are discussed
- Like all exclusionary rules, there are **exceptions** to the hearsay rule that allow evidence of a previous representation to be used for its "truth" value in certain circumstances.

## Why Have a Rule Prohibiting Hearsay?

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What are some of the reasons for having a rule barring hearsay representations?

- If its made out of court, it cannot be C-X'd
  - Witness giving direct evidence can be C-X'd and their demeanour observed
  - A statement made outside of court cannot be C-X'd bcos it exists in the air – someone said at some prev time
  - Something they can refer to, but not something they can testify about
- Don't know if someone made the statement was lying
  - Witness on stand can be prosecuted for perjury
  - Said a lie overheard by someone else, no way to determine whether that other person was lying
- There is a right, fairness principles, A should be able to confront the witnesses against them
  - Too many hearsay statements, that much more difficult for an A to do that → fighting against shadows or the air of what is out there rather than examining a witness who is testifying directly

### Rationale

The desire for reliable evidence lies at the foundation of the hearsay rule

- Shift to oral testimony of witnesses' own observations rather than accounts of others observations
- There is concern of rhte reception of what might be judged as the best evidence, direct eviedence tha the jury could assess by observing the manner and behaviour of the witness whose observations they were being asked to credit
- The impetus was the desire fo rhte best possible evidence judged by the yardstick of reliability
- No oath for affirmation – which helps promote the sincerity
- The direct witness is giving the 'best' evidence
- The hearsay witness can only be C-X'd on what he claims he heard the direct witness say

### The right to confrontation

- Curial justifications for hearsay exclusions have given flesh to the right o confrontation
- This right exists independently of the right oto C-X

- A witness 'may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts' as per Scalia J in *Coy v Iowa*
  - It may 'upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult'
  - 'it is a truism that constitutional protections have costs'

#### **ALRC, Evidence (Interim) (Report No 26, 1985) Vol 1, [130]-[131]**

- Hearsay statements made out of court where maker is free from pressures that court env may exert in favour of truth telling eg. oath or perjury prospects
- Makers of hearsay maybe not avai for C-X
- Hearsay statements are not usually in made in circumstances when triers of fact can observe declarants' demeanour
- Reporters of hearsay statements may not have firsthand knowledge of the events in question → evidence may not be best evidence about the facts in issue
- Hearsay can be fabricated
- Reporters of hearsay evidence may have misunderstood it
- Admission of hearsay adds time + cost to litigation

#### **Counterarguments**

- Some hearsay evidence not affected by C-X → documents prepared for purpose of/in course of business operations are unlikely to suffer from hearsay
  - *Myers v DPP* – reliability and accuracy of records not disputed, but still excluded on a formal/rigid application of the hearsay rule
- Oath – irrelevant in secular society
- Cannot judge demeanour – places too much faith on ppl's ability to judge creditworthiness on this basis – *State Rail Authority of NSW v Earthline Constructions Pty Ltd [1999] HCA 3*
- Misreporting evidence – this Q goes to weight over the admissibility
- Too much weight for hearsay – can be countered by expedient use of judicial warnings in relation to its frailties
- Cost v. place as much relevant info before court as possible

### **s 59 The hearsay rule – exclusion of hearsay evidence**

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(1) 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.

(2) Such a fact is in this Part referred to as an asserted fact.

(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.

Note : Subsection (2A) was inserted as a response to the decision of the Supreme Court of NSW in *R v Hannes* (2000) 158 FLR 359 .

#### **Analysis**

- What s59 describes is that
  - 1. Prev representation

- Element 1 – u have evidence of a prev rep
  - Out of Court statement
- 2. Made by a person
  - The prev representation is made by a person
- 3. Containing what can reasonably be supposed to an intended assertion of fact
  - Intent to assert fact
  - If the statement is being used to prove car is blue, or traffic light was red, then hearsay problem AND person reasonably be supposed that person intended to assert
  - Did they intend to assert that the traffic light was red
  - That is last element u have to deal with
  - That is the test, for every single prev representation
  - Is this hearsay – those 4 elements, are going to have to be found, each time you are looking at that prev representation
  - Only where all 4 of those elements are present, that it is hearsay
  - Is this hearsay or not – and apply s59 or not
  - If u assume it is hearsay, or isn't hearsay, if practitioner it will blow up ur trial
- 4. Representation must be adduced to prove the actual existence of that fact
- The critical aspect is the purpose for which the evidence is tendered – non-hearsay prev reps may satisfy dot points 1/2/3
  - Generally
  - Whether the declarant intended to assert a fact and what precisely the intended assertion of fact is
  - Whether the forensic purpose in adducing the prev rep is to prove the actual existence of that intentionally asserted fact

For every prev representation

- Ask urself
- Is this hearsay? Bcos s59 tells u how to find that answer

Ss2A

- Person must have intended
- Attempts to give clarity for intent element
- Intend to provide, that intent is to be inferred from objective circumstances from making of representation
  - Don't get inside the head, to figure out what they were thinking
  - Circumstances surrounding representation is the way that intent is meant to be inferred

## Specific Exceptions to the Hearsay Rule

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- evidence relevant for a non-hearsay purpose (section 60),
- first-hand hearsay: - civil proceedings, if the maker of the representation is unavailable (section 63) or available (section 64) - criminal proceedings, if the maker of the representation is unavailable (section 65) or available (section 66)
- contemporaneous statements about a person's health, feelings, sensations, intention, knowledge or state of mind (section 66A)
- business records (section 69)

- tags and labels (section 70)
- electronic communications (section 71)
- Aboriginal and Torres Strait Islander traditional laws and customs (section 72)
- marriage, family history or family relationships (section 73)
- public or general rights (section 74)
- use of evidence in interlocutory proceedings (section 75)
- admissions (section 81)
- representations about employment or authority (section 87(2))
- exceptions to the rule excluding evidence of judgments and convictions (s 92(3))
- character of and expert opinion about accused persons (sections 110 and 111).

## Analysis

- These exceptions can be more important to rule
- But first u must apply the rule
- S60 – credibility rule double backs into hearsay
- S72 + s110/111
- This gives idea of how many exceptions there are

## **Previous Representation**

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**“previous representation”** means a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced.

**“representation”** includes:

- (a) an express or implied representation (whether oral or in writing), or
- (b) a representation to be inferred from conduct, or
- (c) a representation not intended by its maker to be communicated to or seen by another person, or
- (d) a representation that for any reason is not communicated.

## Analysis

- Prev rep – has to be outside of court, something before the day they take the stand

(a) an express or implied representation

- Express representations – the car is blue
- Implied representations
  - Someone picking up the phone
  - *Oh hi joe*
  - That is implied representation that the person on other side is Joe
  - *Hi Joe*
    - A. joe is on other end of line, person is speaking to Joe

- B. the person knows joe, can identify him in such a way that knows him

(b) a representation to be inferred from conduct

- Rose → failure of 300 students to respond to a PO's request for info about the deceased in a murder case was an implied representation that the students had no info of the kind requested
  - Had anyone seen the V get into the suspect's car
  - No response, silence.
  - Inferred no one has
  - Inferred from that conduct
- If someone on trial for drink spiking, evidence that A is at the bar, ignoring mugs of beer, schooners of bar
- Representation that they knew beers were spiked

(c) a representation not intended by its maker to be communicated to or seen by another person

- A diary entry

(d) a representation that for any reason is not communicated.

- If u seen given middle finger to person walking away.
- U don't intend to be communicated
- Though they don't see, could still be representation

### Statutory Example of a Hearsay Representation

**Example 2:** P had told W that the handbrake on W's car did not work.

- **Witness (W):** "P told me that the handbrake on my car didn't work"
- **Witness (P):** "I told W that the handbrake on his car didn't work."
- **Witness (W2):** "I heard P tell W that the handbrake on W's car didn't work".
- Unless an exception to the hearsay rule applies, evidence of P's representation **cannot be given by P, W or anyone else** to prove that the handbrake didn't work

### Analysis

- P, plaintiff, told W
- The evidence that they might give evidence in proceeding
  - If P were to give evidence ^ he would say the above
- Each of those, no matter either W, P, unless exception to hearsay rule, evidence of P's representation cannot be given
- ISSUE: did W's handbrake work
  - And that representation is being used to prove
  - That is hearsay
  - It is being used to prove the fact that is contained in the prev representation → that's what makes it hearsay
- P
  - W's handbrake does not work. and I know that, I had to park it on a flat part of the street, as handbrake did not work when I pulled the lever
  - **What he experienced and knows**
  - But if he 'told W' bcos he is now referring to his out of court prev statement, if its being adduced

- Distinction btwn direct evidence and prev representations
  - Direct evidence – **I observed this and now im telling u about it**
  - Prev rep – **wants to talk about what he said to W.**
- U can C-X P, but not on his representation.
  - U can C-X about the making of the representation.
  - But not the rep itself, or the facts contained in that rep bcos it is made outside of court
- The rep once it is made, exists in the air. It is not equivalent. That statement bcos it refers to something outside of court
  - Directly testifying outside of that fact
  - Cannot C-X the statement

### Statutory Example of a Hearsay Representation

- W had bought a video cassette recorder and written down its serial number on a document.
- Unless an exception to the hearsay rule applies, the document is inadmissible to prove that a video cassette recorder later found in D's possession was the video cassette recorder bought by W.

### Analysis

- Serial number SNS50242
- The representation that is implied by this document, that has this serial number on it, is W representing this serial number identifies my machine, my VCR
- This serial number identifies this machine → if this number is compared to one on a machine. The matching of a serial number to the machine will demonstrate it belongs to me
- That is the representation that is implied by the document
- That it does not make a diff the prev representation that is something someone said, or contained in the docu
- Test is the same
- Do u have a prev rep?
  - Yes, it is buried in this implication that the serial number provides
  - The test is still the same
  - Made by a person, maker is intending to assert that it is meant to match the one on my machine
  - Being used to prove that the machine is indeed the Plaintiff's bcos the serial numbers match
- Easier way to think about is PIS
  - Person has made recommendations
  - I saw Sako stab the V
  - Express assertion of fact, contained in a docu, the police statement
  - I heard Sako say that or it is in the docu
  - It does not matter, bcos in either case, it is still a prev representation so the hearsay rule still applies

# Hearsay

Hearsay is evidence of the truth of the statement

It is only hearsay when it is being offered ‘testimonially’ – that is as evidence of the truth of the statement’s contents

If its importance is the fact that it was made then = original evidence

## A Hearsay Checklist

- Is the evidence **relevant**? How/Why? Is it relevant at least to a fact in issue? Could the evidence be relevant for more than one purpose?
- Is there a **previous representation**? Was it **made by a person**?
- What did the maker of the representation **intend** to assert?
- Is the representation being used for a **hearsay purpose**? (Consider which party wants to adduce evidence of the previous representation?) Is the representation excluded by the hearsay rule (s 59)?
- Who has **personal knowledge** of the asserted fact? Is the degree of hearsay first hand?
- Is the maker **unavailable** (s 65) or **available** (s 66)?
- Is **notice** required (s 67)?
- Does a more remote hearsay exception apply (s 69; s 72)?
- Is there another admissible relevance, so s 60 applies?
- Should use be limited under s 136?
- Should the evidence be excluded by s 135 or s 137?
- Is a warning required? See s 165(1)(a)

## Steps

Advise the defence on objections it could (or could have) successfully made to these questions and answers.

### 1. relevance

The evidence has a logical relevance to the fact in issue as it establishes a motive/intent for \_\_\_\_\_ to be proved by the P. The evidence is thus relevant: s55 UEA

### 2. is it hearsay: s59

Because there is a prev rep here, must first determine whether it is hearsay evidence.

Under the hearsay rule of s59 of UEA there is a general rule that prohibits the use of ‘previous representations’ to prove facts that the maker intended to assert by the representation.

The elements of hearsay are as per s59 UEA

- 1. Prev representation
- 2. Made by a person
- 3. Containing what can reasonably be supposed to an intended assertion of fact
- 4. Representation must be adduced to prove the actual existence of that fact

## **Element 1 – prev rep**

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First, the form of the evidence must be appropriate. The term previous rep is defined very widely, including all ‘reps’ made otherwise than in the course of giving evidence ie. It has to be made outside of court.

**YES ☺**

Here there is clearly a previous representation made that L said that BB and DD had conversation.

The ‘evidence’ from \_\_\_ is in reality, evidence from \_\_\_, in the form of an implied assertion (i) that the ship was off course (ii) the navigator was drunk). The fact that all this was only implied by what the captain reportedly said does not prevent it from being hearsay in nature, given the definition of ‘representation’ contained in the Dictionary of the UEA includes implied assertions as well as express ones.

**NO ✘**

In this case, this is direct evidence as it is what \_\_\_ observed and he is telling the court about it on the day he takes the stand.

The translator’s words are not hearsay as they are not a previous representation, they are happening in the course of court. Further, the translator becomes the delivery system for W’s evidence. As he is just the translator, it is still the W’s evidence.

## **Is the statement a previous representation?**

“**representation**” includes:

- (a) an express or implied representation (whether oral or in writing), or
  - a. express = the car is blue
  - b. implied = ‘oh hi joe’ → implies Joe is on other end of line + the person knows Joe
- (b) a representation to be inferred from conduct, or
  - a. Rose → failure of 300 students to respond to a PO’s request for info about the deceased in a murder case was an implied representation that the students had no info of the kind requested
    - i. The silence (conduct) allows you to infer that no1 has seen the V get into the suspect’s car
  - b. If someone on trial for drink spiking, evidence that A is at the bar, ignoring mugs of beer, schooners of bar
    - i. Representation that they knew beers were spiked
- (c) a representation not intended by its maker to be communicated to or seen by another person, or
  - a. a diary entry
- (d) a representation that for any reason is not communicated.
  - a. If you are seen giving middle finger to person walking away, tho don’t intend to be communicated, could still be a representation

## Element 2 – person

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Second, the prev representation must be made by a person.

YES ☺

The prev representation is made by \_\_\_ to \_\_\_.

Here, although it may be argued that since it was a machine that produced the data, there was no representation made by a person. However, drawing an analogy to the *Hansen* case, where data entry, even though analysed by computer, the representations may have been held to be made by a person as data entry is made by a person.

- *O'Meara v Dominican Fathers* – s59 had to be tied back to a person. if it was **recorded/interpreted by a person**, then it might be hearsay
- Hansen argued that TV ratings data automatically collected by a system which was avai to a user by pressing a button to register their presence in a room was not hearsay. Middleton J rejected this and said it was, as still made by a person.

NO ☹

This can be distinguished from *Hansen* and *O'Meara* in that machine is machine is operating on its own, without the need for substantive human input. Thus, this element not satisfied and machine's work is NOT HEARSAY.

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Here, the barking of dogs is not made by a person, even if it is a representation.

## Element 3 – intended

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Third, the declarant's purpose in making the representation must be analysed in that it can be reasonably supposed that the person intended to assert the existence of a fact.

S59(2A) clarifies that intent is to be inferred from objective circumstances surrounding the making of the representation.

### Application

YES ☺

Here \_\_\_ intended to assert that 2 days worth of cash. This is evident from the introductory context of the sentence leading up to it.

NO ☹

Here, \_\_\_ may argue that it was an accident.

- Young girl saying hi dad. Is this young girl intending to assert that her father is the identity of the other person on line. Or is it unintended consequence.

## Element 4 – for hearsay purpose

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Finally, the prev rep must be adduced to to prove the existence of the fact asserted by the representation (ie. Adduced for the hearsay purpose)

## Application

YES ☺

Here, the rep is being used to prove the fact that is contained in the prev rep.

- W had bought a video cassette recorder and written down its serial number on a document.
  - W representing this serial number identifies my machine, my VCR
- Like the statutory example, this evidence will be inadmissible to prove that the cassette later found in D's possession was the video cassette recorder bought by W.

Thus, the forensic purpose for adducing the representation is for a hearsay purpose, and not admissible.

NO ✘

Here it is being adduced for OTHER THAN hearsay purpose → some other reason that the statement is being referred to. Not to adduce the blue car, or going through the red traffic light