

Topic 6: hearsay and exceptions

- **Hearsay:** covers any evidence/ statement that purports to prove a fact that was made outside of the courtroom
- Section 59 states that hearsay is inadmissible
 - (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
- Four elements to show something is hearsay
 1. A previous representation
 2. By a person
 3. Tendered to prove the existence of a fact that
 4. Person intended to assert
- Dictionary definitions:
 - **Previous representation:** representation made otherwise than in the course of giving evidence in the proceeding
 - Essentially out of courtroom for current case
- Previous representations include;
 - Oral
 - Writing
 - Inference from conduct, such as crying and shivering

Proving a Fact:

- Hearsay cannot be used to prove a fact
 - Can however be used to prove that the communication took place
- The difference is
 - Proving that the statement **was made** v proving that the statement is **true**
- *Subramanian v Public Prosecutor*
 - *Was carrying ammunition in jungle*
 - *Claimed terrorists threatened to kill him*
 - *Only did it because of duress*

- *Evidence of what was said could be relevant as to establish duress defence*
- *However was said out of court*
 - *Prove that the terrorists intended to kill him (hearsay)*
 - *Prove that the terrorists told him they would kill him (non-hearsay)*
- *Is to do with were the representations made, not did the terrorists actually intend to kill him*
- *Could admit evidence, just not to prove terrorists threatened to kill him*

Intentional v Unintentional

- At common law, intentional and unintentional hearsay banned
- *Walton v R*
 - *Witness overheard two statements*
 - *1: victim “daddy is on the phone”*
 - *2: child: “hello daddy”*
 - *Statements were used to prove the identify of speaker on other side off the phone line*
 - *Were hearsay, as happened outside the court room*
 - *Statements were unintentional*
 - *Had no reason to lie, as would have to intention to lie/ construct a story*
 - *Were not intending/ deliberately crafting a story*

First hand hearsay v Remote

- **Section 62:** differentiates between first hand and remote
- 62(1): first hand hearsay is where the previous representation must be made by a person with personal knowledge of the fact
- 62(2) defines ‘personal knowledge’
 - 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**

- Does not include previous representation made by another person about the fact
- *R v Vincent*
 - *Representation from mystery woman who told A about car rego plates relating to a robbery*
 - *Didn't leave number, name etc*
 - *A testified as having first hand hearsay*
 - *Although not certain woman was first hand witness, assumed she was from facts such as it was immediately after crime, how she spoke*
 - *Clarified 'might reasonably be supposed'*
- Will apply for the person making the representation with knowledge of the fact, and the person initially receiving the representation
 - First person only first hand hearsay witness if they are testifying about the representation they made out of court

Hearsay Exceptions Summary

Section	Hearsay Exception
60	Evidence relevant for a non-hearsay purpose
63	Civil: if the maker of the representation is unavailable
64	Civil: if the maker of the representation is available
65	Criminal: if the maker of the representation is unavailable
66	Criminal: if the maker of the representation is available
66A	Contemporaneous statements about a person's health etc
69	Business records
70	Tags and Labels
71	Electronic communications
72	Aboriginal and Torres Strait Islander traditional laws and customs
73	Marriage, family history or family relationships
74	Public or general rights
75	Use of evidence in interlocutory proceedings
81	Admissions
87(2)	Representations about employment or authority
92(3)	Exceptions to the rule excluding evidence of judgments and convictions
110	Character of and expert opinion about an accused
111	Character of and expert opinion about a co-accused

Notice Exceptions: s67

- Sections 63(2), 64(2) and 65(2), (3) and (8) do not apply to evidence adduced by a party unless that party has given reasonable notice in writing to each other party of the party's intention to adduce the evidence
- (3): the notice must state
 - Particular provisions