

## LIST OF TOPICS

**Week 4** – Adducing Evidence II

**Week 5** – Proof; Relevance

**Week 6** – Hearsay Evidence I

**Week 7** – Hearsay Evidence II

**Week 8** – Hearsay Evidence III; Admissions

**Week 9** – Opinion Evidence

**Week 10** – Tendency & Coincidence Evidence

**Week 11** – Credibility & Character Evidence

→ **Hypothetical Workflows**

## HEARSAY

### Elements of hearsay evidence

1. A past, out-of-court statement (oral, written or by conduct) made by a person who may or may not be called as a witness
2. Tendered by a party during proceedings (either through the person who made the statement, through another witness or through a document)
3. For the purpose of establishing that what is contained in the statement is true

### Hearsay rule: s 59

(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.

(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.

### Dictionary – meaning of “representation”

- (a) an express or implied representation (whether oral or in writing), or
- (b) a representation to be inferred from conduct [non-verbal], 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.
  - E.g. a photo of Annie pointing at the car while it goes through the red light

→ Previous representations include those made in evidence in earlier proceedings, such as interlocutory stages

### *R v Rose (2002)*

- Silence or inactivity can qualify as hearsay
- Facts:
  - 300 university students asked by police if they had ever seen the victim in the company of a person who drove a white Ford Falcon
  - There were no positive responses
- Held:
  - The evidence of nil positive responses was hearsay because the defendant tried to adduce it for its hearsay purpose – proving that the victim had never been seen in the company of a person driving a white Ford Falcon

### Does the hearsay rule apply? → Purpose

- Evidence can be adduced for:
  - Hearsay purpose
  - Non-hearsay purpose

- Direct evidence

**Purpose example 1:** Joe made an out-of-court statement to Lucy: “I am afraid of Bill”

- **Non-hearsay purpose:** proving Joe could speak English (if this was an issue in contention) – admissible
- **Direct evidence:** Joe gives evidence in court “I am afraid of Bill” – admissible
- **Hearsay purpose:** Joe wants to adduce his previous statement in conjunction with his direct evidence, to prove the truth of his previous statement (perhaps to increase probative value or credibility) – inadmissible

**Purpose example 2:** Bob says to Mary: ‘I saw Charlie selling drugs’

- Charlie sues Bob for defamation
- It is essential for Charlie to adduce evidence that Bob uttered those words to Mary
- **Non-hearsay purpose:** Charlie wants Bob’s previous statement admitted through Mary to prove simply that Bob said them publically
- **Hearsay purpose:** The defense wanted those words admitted for the purpose of proving that Charlie was selling drugs (i.e. ‘truth’ defense to defamation)

## EXAMPLE OF A HYPOTHETICAL WORKFLOW – HEARSAY

### 1. Is the evidence relevant?

- Section 55
- If yes = prima facie admissible (s 56), THEN:
- Go to exclusionary rules

### 2. Exclusionary Rules – hearsay

#### Is the evidence hearsay?

- S 59(1) – hearsay is prima facie inadmissible
  - *Purpose*: non-hearsay or direct evidence? → Admissible
- If hearsay purpose, THEN:
- S 59(2A) – court may have regard to circumstances
  - *Intention*: unintended implied assertion? → Admissible
- If intended implied assertion or express assertion, THEN:
- Go to hearsay exceptions

#### Does an exception apply? (Process) – steps are expanded below

1. Check whether there are competency issues before applying exceptions
2. Check facilitative exceptions
3. Check if s 66A applies
4. First-hand hearsay
  - a. Must consider *type of proceeding* AND *whether maker available*
5. Check if s 60 applies – if admitted for a non-hearsay purpose, we can admit for hearsay

#### S 61: Exceptions to the hearsay rule are dependent on competency

- Lacking competence whilst making a previous representation = cannot be used to prove the truth of that asserted fact
- Competent at time of statement, although LATER incompetent = representation still admissible
- *Do exceptions to the exception apply? \*\**

#### Facilitative exceptions – pages 19-21 of notes:

- Business records
- Contents of tags, labels and writing
- Electronic communications e.g. faxes
- ATSI traditional laws and customs
- Reputation as to relationships and age
- Reputation of public or general rights

#### S 66A: Contemporaneous mental and physical state exception

- Previous representation → infer mental or bodily state → can infer future actions (as a result of their state) or intentions (assumed that people follow through)
- Must be relevant to a fact in issue e.g. motive, temperament, intoxication
- Must be contemporaneous (statement and state occur together) AND

- Must only be about state of mind or body (e.g. cannot be used for a hearsay purpose of proving they were doing what they said they were – phone example)
- Cannot be used to prove the occurrence of an event that *created* the state of mind

### First-hand hearsay exception

- S 62: personal knowledge requirement
- Civil or criminal proceedings?
- Maker available?
  - If not, notice is required

	Civil	Criminal
Maker available	s 64(3)	s 66(2)
Maker available (but it is not reasonably practicable)	s 64(2)	
Maker not available	s 63(2)	s 65(8) (Defence) s 65(2) (Prosecution)

- **Civil: s 64(3) and s 63(2)** – first-hand hearsay automatically admissible – no hurdles
- **Criminal:**
  - S 66 – freshness of memory required – consider s 66(2A) factors
  - S 65(8) – no hurdles required
  - S 65(2) – must fit into one (or more) of the four categories to be considered reliable