

# MLL334 – Evidence Law

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## Topic 5 - Hearsay p50

- \*determine whether first-hand or second-hand hearsay evidence\*
- \* different sections / requirements apply if criminal or civil proceeding\*
- \* determine whether defence or prosecution calling witness\*

**3 Possibilities:** (1) it's hearsay evidence and it doesn't fall within an exception; (2) it's hearsay but falls within an exception → admissible;  
(3) it's hearsay but admitted for non-hearsay purpose s60 (e.g. challenging credibility/reliability of witness/matter p.54)

### If evidence sought to be adduced is first-hand hearsay

The issue is whether X's representation can be classified as hearsay evidence. Here, X's previous representation that (STATE THE FACTS) concerns proving the existence of the fact that (STATE FACT). It can be reasonably be assumed that X intended to assert to this fact by representation **s59(1)**. Therefore, X's testimony will violate **s59** as it is first-hand hearsay evidence (s62).

Thus, it will be excluded unless it falls within an exception to the hearsay rule. Further, this evidence is relevant because it attempts to establish a fact in issue in the proceeding and could therefore, rationally affect the assessment of the probability of the existence of that fact **s55**

### If the maker of the representation not available in crim proceeding s65 p61

- Here, the maker of the representation is not available.
- If the **defence** calls a first-hand hearsay witness where the maker is unavailable, the hearsay testimony will be admissible under **s65(8)**. However, may be excluded by judge in the exercise of their discretion **s137**.
- If the **prosecution** calls a first-hand hearsay witness where maker is unavailable, the prosecution must rely upon **s65(2)** or **s65(3)**. **S65(2), (a), (b), (c), (d)** apply whichever one is relevant, if use **(b)** always use **(c)**
- Under **s65(3)** the prosecution may argue that the hearsay rule does not apply to the evidence given
- (b) representation made shortly after & unlikely rep is a fabrication; (c) highly probable that rep is reliable; (d) against the interests of rep maker  
\*If maker not available in civil proceedings s63... p68\*

### If the maker of the representation is available s66 p.66

Here, the maker of the representation is available. X's first-hand hearsay will be admissible if the previous representation was made while 'fresh in the memory'. When determining whether the asserted facts were fresh in the memory of X, the court will take into account the nature of the events, the age and health of X and the period time between the occurrence of the asserted facts and the making of the representation **s62A**.

However, the court may exclude this evidence under their discretionary power in **s137** if the evidence if its probative value is outweighed by the danger of unfair prejudice to X.

If arguing that evidence is admissible, look at discretions If Defence **s135** and If Prosecution **s137** ..... in civil proceedings s64 ...p68

**s66A: if contemporaneous statements about person's health etc. p69**

Hearsay rule does not apply to evidence of a previous representation made by a person if the representation was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind.

**Second-hand Hearsay**

The issue is whether X's representation can be classified as hearsay evidence. Here, X's previous representation that (STATE THE FACTS) concerns proving the existence of the fact that (STATE FACT). It can be reasonably be assumed that X intended to assert to this fact by representation **s59(1)**. Whilst X is intending to assert the fact that (STATE FACT) through XxX's representation that (state representation), they don't have personal knowledge of the fact as they have been told by (YYY) who did have personal knowledge. This is therefore, second-hand hearsay and will be excluded, unless it falls within one of the exceptions ..... → Look at **ss69-75**

Further, this evidence is relevant because it attempts to establish a fact in issue in the proceeding and could therefore, rationally affect the assessment of the probability of the existence of that fact **s55**

**Other Exceptions to hearsay p70**

**If hearsay contained in business records s69**

Here, the business records in question belong to (RELATE TO FACTS) for the purpose of business that recorded representations that were made for the business **s69(1)**

For the purpose of **s69(2)** inferences may be drawn from the form of the document and nature of the in the information that is contained in the impugned representation **Lin v Tasmania**

**If hearsay contained in tags, label and writing s70**

Hearsay rule does not apply if the tag or label or library may reasonably be supposed to have been so attached or placed (a) in the court of a business; and (b) for the purpose of describing or stating the identity, nature, ownership, destination, origin or weight of the object.

**If electronic communication as evidence s71**

Hearsay rule does not apply to representation contained in a document recording an electronic communication as for as the representation is a representation 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) the destination of the communication or the identity of the person to whom the communication was addressed

If the representation about the existence of the traditional laws and customs of a Aboriginal s72 → If so hearsay rule does not apply

Reputation as to relationship and age: s 73

Hearsay rules does not apply to evidence of reputation concerning;

- a) whether a person was, at a particular time or at any time, a married person; or
- b) whether a man and a woman cohabiting at a particular time were married to each other at that time; or
- c) a person's age; or
- d) family history or a family relationship

Reputation of public or general rights s74

Hearsay rule does not apply to evidence of reputation concerning the existence, nature or extent of a public or general right;

A 'public right' is a right that affects the whole population (i.e. the general public)

A 'general right' is a right that affects a class of people **Mardsen**

## Topic 7 Opinion Evidence p83

Is the evidence sought to be adduced based on a witness's opinion?

The issue here is whether X's evidence that (STATE OPINION) is admissible as opinion evidence. Pursuant s76 EA, opinion evidence is not admissible to prove the existence of a fact, about the existence of which the opinion was expressed.

However, the prosecution/defence would argue that X's statement falls within one of the exceptions to the opinion rule. Further, this evidence is relevant as it attempts to establish a fact in issue in the proceeding and could thus, rationally affect the assessment of the probability of the existence of that fact **s55**

If Summary of voluminous or complex documents s50(3)

The opinion rule does not apply to statements summarising complex documents.

Evidence relevant for a purpose other than as opinion evidence s77

In contrast to the common law, this provision permits opinion evidence which is admitted for a non-opinion purpose also to be used to prove the existence of a fact asserted by the opinion. The evidence use is subject to the **s135, s136, 137**

### **Lay opinion s78**

X's opinion will be deemed a lay opinion if it comes within **s78** exception if it:

- is based on what the person saw, heard or otherwise perceived about a matter or event **s78(a)**; AND
- is necessary to obtain an adequate account or understanding of the person's perception of the matter or event **s78(b)**
  - Like the common law, **s78** does not require X to fully state their perceptions and observations, although any gaps may affect the weight given to evidence  
***Lithgow City Council v Jackson***

\*APPLY BOTH AND RELATE TO FACTS\*

### **Evidence by an Aboriginal s78A**

The opinion rule does not apply to evidence of an opinion expressed by a member of an Aboriginal or Torres Strait Islander group about the existence or non-existence, or the content, of the traditional laws and customs of the group

### **Specialised Knowledge (expert opinion) s79..... p88**

The prosecution/defence may argue that X's statement was based on specialised knowledge and thus, should be exempt from the opinion rule **s79**.

- Here X's statement was based on specialised knowledge because (STATE X'S SPECIALISED KNOWLEDGE). This is therefore, beyond 'mere common knowledge' (*Honeysett v the Queen*)
- This 'specialised knowledge of X is derived from his/her training, study or experience (RELATE TO FACTS).
- Furthermore, X's opinion was wholly or substantially based on his specialised knowledge because (RELATE TO FACTS) ***R v Tang***. Therefore, there is a connection between the expert's opinion and their specialised knowledge in (apply facts), hence the exception of s79 is applicable to this opinion evidence.

\*DISCRETIONARY powers of court can nevertheless can invoked s135-137\*

### **Exceptions to the rule excluding evidence of judgment and convictions s92**

- The opinion rule does not apply to evidence relating to judgments and convictions

### **Evidence adduced about the character of an accused or the character of a co-accused ss110 & 111**

- Evidence adduced by an accused to prove that he or she is, either generally or in a particular respect, a person of good character is not subject to the opinion rule **s110(1)**
- **S111** permits the defence to adduce expert opinion evidence about another accused in the proceeding **s111(1)**
  - If such evidence is admitted, the other accused may adduce opinion evidence to prove that that evidence should not be accepted **s111(2)**

IF ARGUING THAT EVIDENCE IS ADMISSIBLE SHOULD JUDGE EXCLUDE IT SS135, 136, 137 → If Defence **s135**.... If Prosecution **s137**