

# Hearsay

Rule against hearsay prohibits witnesses from repeating out of court statements made by others in order to establish the truth of the statements.

**UEA s59:** 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

Hearsay evidence is not allowed because:

*Teper v The Queen [1952]*: not the best evidence, not delivered on oath, cannot be cross examined, light that demeanour would throw on testimony is lost.

*Pollitt v The Queen (1992)*: unreliable because declarant cannot be XN, powers of memory, recall, perception, and narration cannot be tested.

First ask: is it relevant to the fact in issue whether that statement was true or not?

**UEA s60:** 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.

*Subramaniam v Public Prosecutor [1956]*:

hearsay= inadmissible for *proving the truth of the content*  
non-hearsay= admissible for the *proving the fact that it was made*

Under common law, hearsay purpose and non-hearsay purpose determined independently

UEA does not distinguish - **s60 UEA**: if goes in for non-hearsay, also goes in for hearsay purpose.

except - evidence of an admission (or confession) in a criminal trial: **s60(3)**.

**Admissible Non-Hearsay Uses:** does not go in for the truth of it.

- **Out of Court Statements as Original Evidence:**

- Is it relevant to the fact in issue whether the statement was true or not? Is the statement original evidence of facts forming part of circumstantial evidence from which inferences may be drawn?

*R v Sean Lyndon (1987)*: piece of paper saying "Sean Rules" was likely to be written by the accused. regardless of the truth of those threats.

*Kamleh v The Queen [2005]*: Co-accused (but separate trials) ROI with Police was admissible, not for its testimonial value, but to show the two had concocted a false alibi

*Subramaniam*: Comments tended to show a "threat"

- Is the statement original evidence of conduct forming part of circumstantial evidence from which inferences may be drawn?

*R v Hytch [2000]*: evidence that a victim intended to meet the appellant AND evidence she intended to falsely claim she was pregnant in order to extract money were both *admissible* as to her state of mind and intention of her proposed conduct.

*Ratten v The Queen*: shouting "get me the police please" shows victim's state of mind just before fatal shooting.

*R v Wilson (1970)*: Nature of relationship between husband and wife showed whether she was shot accidentally or murdered.

*Walton v R (1989)*: Victim's comments to witness showed that the victim believed that the person she was arranging to meet was the accused so admissible BUT son saying "hello Daddy" on the phone only goes to his state of mind which was irrelevant, can't use the statement that it was Dad in the phone for the truth of it.

- **Prior Consistent Statement used to support credibility or rebutting accusation of recent fabrication:**

**s34M EA** – Evidence 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 *degree of consistency of conduct of the complaint* but is not admitted for the truth of what is alleged (but if young child or mentally incapable, then will go in for the truth of it under **s34LA(4)**)

*Nominal Defendant v Clement (1960)*: if alleged to be recent fabrication, then to show consistency NOT for the truth of it, evidence of the same statement said earlier may be admitted.

- **Prior inconsistent statements to show lack of credibility**

Can use a witness own previous *inconsistent* statement to attack their credibility - does not go in for the truth of it but can damage their credibility

- **Statements with a mix of hearsay and non-hearsay:**  
Can you separate the issues with a with a jury direction?  
Example:

*R v Fairbairn [2011]*: 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*."

**s60(3) UEA** - as mentioned above.

### - Implied or Unintended Assertions and Conduct

an implied assertion may be used if it can be shown to truly have been unintended. Implied assertions in conduct (not statement) are more likely to be admissible as non-hearsay as these are often unintended

Examples:

*Walton*: Daddy on the phone, and *Pollitt* spontaneous identification of a caller are statements and inadmissible BUT *Manchester Brewery v Coombs (1900)*: mere failure to drink the beer was not intended as a communicative statement about the quality of the beer so any assertion implied from that conduct did not attract the hearsay rule.

**UEA s59**: differentiates between intended and implied (but says representation to capture conduct and statements) so only need to consider whether the statement/conduct was intended or implied.

### Admissible Hearsay Exceptions - go in for the truth of it.

#### - Res Gestae "Part of the Story"

Spontaneous statements made by participants in or observers to an event in question; or Incidents in the transaction

Needs to be so close in time that it is included in the transaction of the event - the continuing pressure of events

*R v Andrews [1987]*: wounded stabbing victim comments to police so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded.

*R v Ratten [1972]*: statements by a victim over the phone just before she was killed implying the accused was attacking her was admissible (esp since it went against his defence of accident)

*Bull v The Queen (2000)*: so close in time or space to the matter being proved as to be inseparable from it.

*Lyons & Lyons v The Queen (1992)*: prior violence to other drinkers at the bar was relevant to purpose and intention when assaulting the deceased.

\*\*Some ambiguity as to "res gestae" or circumstantial evidence - needs to be so closely connected\*\*

#### - Statements by a person as to his/her contemporaneous physical sensations or general state of health:

If relevant to work out person's state of health, then statements they have made about their own health are admissible: *Ramsay v Watson (1961)*, *Evans v Hartigan*. Doctor can give evidence about what a patient says was hurting on various occasions: *Smart v Avon Products Pty Ltd*.

(evidence of lay persons - in opinions notes)

### - Certain Statements by deceased persons:

Will admit *first-hand hearsay* statements by deceased persons if *necessary* & there is some guarantee of *reliability* (they cannot give original evidence because they are deceased)

Examples:

declarations against own interest: *Higham v Ridgway*, **UEA s 65(2)(d)(i)**.

declarations in the course of duty: *R v O'Meally*, **UEA s65 (2)(a)**.

declarations made where highly probable that the declaration is reliable: *WA v Montani* - on their death bed, not likely to make it up, **UEA s 65(2)(c)**.

### - Business Documents

Lots of things count as business documents, not just commercial undertakings i.e. hospital records etc.

**s 52, 53 EA**: apparently genuine documents to be admissible without further proof unless the court thinks the maker should be called.

### - Statements of Protected Witnesses: Sex offence cases

An out-of-court statement of a young person who is a victim in a sexual offence is admissible: **s 34LA EA** (covered in unreliable testimony) goes in for the *truth of it*.

### - Admissions (admitting to certain facts/events happening)

Can be whole or part admissions

Is it reliable? depends on the circumstances it was made i.e. do they have *esoteric knowledge* (knowledge only someone who was there/involved would know?), statement is *against their own interest* (self-serving statements can be admitted only if contained in a statement against a party's interest and is necessary to put the whole statement in for context): *Parkes v The Queen*, vicarious admissions made on behalf of someone else (employees etc).

### Court discretion to dispense with formal proof: s 59J

the court may at any point in civil or crime matter, may dispense with the rules of evidence if:

(1)(a) matter that needs proving is not genuinely in dispute

(b) might involve unreasonable expense or delay.

(2) examples of this: a document or execution of a document, handwriting, the identity of a party, the conferral of an authority to do a particular act.