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Developing a case theory

OVERVIEW OF THIS SEMINAR (PROOF: CHAPTERS 3 - 5)

Understand the question: 'What do we have to prove in order to succeed?'

What is a case theory?

- It is a narrative with legal consequences. It's a story about what happened, that is legally significant. If accepted, the story has legal consequences - conviction or acquittal. Comprises 2 criteria - the case and the theory - the legal and the factual. How the factual theory leads us to the conclusion of guilt? Factual theory has to be a concise account of what happened.

ANALYSING THE OPENING SPEECH OF THE PROSECUTOR - HARDIN - STATE V PETERSON

- His opportunity to give his case theory to the jury. Here is what Hardin's thinks happened, and what happened is enough to constitute a conviction.

What is Hardin's case theory?

- **His legal case:** Murder.
- He says: "And we say, on the other hand, that she died a horrible, painful death at the hands of her husband..." - is this a good way to state the legal case?
 - No, this is not very well-defined from a legal perspective. This statement gives way to other ways that she could have been murdered, e.g., manslaughter.
 - **Tip:** You need to have in mind what is it that you are intending to prove. When you construct your factual theory, it needs to be obvious - if you can prove everything in your factual theory - why that leads to legal consequences.
 - In this case, Hardin needs to have a factual theory that will justify the elements of murder. E.g. Mike Peterson killed her and he did it intentionally.
- **His factual theory:** According to James Parker - "On December 9th 2001, at some point significantly before 2.40 am, Mike Peterson beat his wife on her head several times with, possibly, a blow poke, and also might have fell down the steps, we do not know exactly how that happened and he tried to disguise this as an accident. He did this intentionally and with premeditation, because he wanted Kathleen's insurance money, as they were facing financial issues and the family was dependent on her financially, because Mike was not earning any income."
- **How does Hardin intend to prove his case theory?** What evidence does he intend to bring?
 - **Eye witnesses:** E.g. The paramedics who first arrived on the scene and saw the dried up blood.
 - The 911 recordings - very crucial
 - The luminol testing
 - **Documentary evidence**
 - **Real/Physical evidence**
- **What else does he do in his opening statement?**
 - Characterisation of Kathleen - portrays her as genteel and warm (trying to warm up the jury to Kathleen)

- previous representation is for a **non-hearsay** purpose. If we are using the evidence not to prove the very thing being asserted, then it is not hearsay. Then it is **not presumptively caught** and you do not have to go through the exclusions.
 - ♥ As the prosecutor or the defence, you need to be attempting to use the previous representation to attempt to prove the existence of a fact and that the person who asserted the fact needs to have intentionally asserted the fact with the previous representation.
- **Example 2:** *“Oh hi Ian. How’re things? Did you ever make up with Cheryl after that row you had the other day?”* - Brad Jessup.
- **Common law** would make unintended assertions of fact inadmissible too. The legislation rectified that by making the rule narrower. It is limited to assertion of facts actually intended. (Remember *Umbrella* and *Hello Daddy* example). However, the case *Hannes*, read it down to go back to the umbrella situation, going back to encompassing any fact which a necessary assumption is underlying the fact that the asserter does subjectively advert to. Then Section 59 was amended to include subsection 2A. This section is meant to rule out the Spigelman’s (*Hannes*) reasoning.
- **Example 1 from the lecture slides (Slide 80):**
K is being tried for possession of a controlled drug with intent to supply. The police executed a search warrant at his home address but found only a small amount of drugs which K claimed was for personal use. To establish a case of possession with intent to supply, prosecution intends to call one of the police officers who executed the search warrant. He will testify that he answered a succession of phone calls made to K’s phone, & that the callers all asked if Kearley could supply them with their usual gear.
 - ♥ **Step 1:** Is there a previous representation? Yes.
 - ♥ **Step 2:** Is it made by a person? Yes.
 - ♥ **Step 3:** Is there an intentional assertion of fact? The ALRC would say there is no intentional assertion of fact and hence is not hearsay. There are implied assertions from which it can be inferred that the speaker believes that the person to whom they are addressing is their drug dealer. And the ALRC’s intention in recommending section 59 was to exclude these types of non-assertive statements. Following *Hannes*, subsection 2A was introduced to shift attention from the actual subjective intentions and thought processes of the person making the representation, to a consideration of the representation itself, & the circumstances in which it was made.
- **Example 2 from the lecture slides (Slide 81):**
Tamsyn is on trial for arson. The Crown’s case is that he set fire to his own house and by so doing was reckless as to whether life would be endangered. His defence is that he was elsewhere when the fire started. The Crown intends to call a police officer who will testify that he made his way to Tamsyn’s house where a crowd had gathered. As he approached he heard someone from the crowd shout ‘Tamsyn, wait, don’t run! It’s your house on fire!’
 - ♥ Step 1 & 2: Yes, there is a previous representation made by a person.
 - ♥ Step 3: If we think of the rationale of the rule, this would be untestable and hence should be excluded.

Hearsay exceptions

Textbook Notes

FIRST-HAND HEARSAY	
<p>General requirements Division 2</p>	<p>For evidence to be hearsay, it must satisfy 2 conditions:</p> <p>First condition is in section 62:</p> <ol style="list-style-type: none"> 1. A reference in this Division (other than in subsection (2)) to a previous representation is a reference to a previous representation that was made by a person who had personal knowledge of an asserted fact. 2. A person has personal knowledge of the asserted fact <i>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, other than a previous representation made by another person about the fact.</i> <p>NOTES:</p> <ul style="list-style-type: none"> • Maker might not be in court, hence judge will have to make an inference about personal knowledge. • E.g. Trial of David Eastman – Seller said buyer was a ‘man from Canberra’. This was not first-hand hearsay because he could not have known this unless told by the buyer himself or someone else. • E.g. Lithgow City Council v Jackson (HCA) – concerning whether the requirement of personal knowledge is satisfied where the source of information did not perceive the matter directly, but rather drew an inference about it from other things he or she saw – disputed evidence: a statement written by paramedic at scene of accident suggesting that the plaintiff fell into a concrete drain – not first-hand hearsay because paramedic and no one else actually saw what happened. <p>Second condition concerns how the previous representation is evidenced and this varies from section to section within Division 2.</p> <p>Procedural requirement Section 67 – Imposes a notice requirement – for exceptions whereby the hearsay is from a person absent in words & testimony from trial. Courts have discretion to decide what form should ‘reasonable notice’ take.</p>
<p>Representation of <u>testifying witnesses</u> (<i>maker available</i>) in criminal proceedings</p>	<p>Section 66 (2) – Applies to both prosecution and defence evidence</p> <p>If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by—</p> <ol style="list-style-type: none"> a) That person; or b) A person who saw, heard or otherwise perceived the representation being made— if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation. <p>The test of freshness is applied to the person who made the representation at the time they made it. The length of time between the representation & court proceedings does not matter, rather the relevant period of time is between the event that the maker was talking or writing about the moment when he or she spoke or wrote the words.</p> <p>Section 66 (2A) lists down some factors that would be taken into consideration – indicates that temporal relationship is a relevant consideration but by no means determinative.</p> <p>Section 66 (2) is qualified by Section 66 (3):</p>

	<p><i>If a representation was made for the purpose of indicating the evidence that the person who made it would be able to give in an Australian or overseas proceeding, subsection (2) does not apply to evidence adduced by the prosecutor of the representation unless the representation concerns the identity of a person, place or thing.</i></p> <p>Its effect: Prosecution cannot use section 66 (2) to enter accounts given by witnesses to the police, even if they were made when the events were fresh in the witnesses' memories unless they fall within the narrow exception for identification statements. The defence, by contrast, can put witness statements on the record, including exculpatory remarks made by the defendant when questioned by the police so long as the statements satisfy the freshness requirement & the witness in question testifies.</p> <p>Note:</p> <ul style="list-style-type: none"> • All these requirements can be circumvented if the witness' previous statement is adduced for an admissible non-hearsay purpose via s 60. • As well, if the witness is not available to testify, then both sides may be able to adduce that person's witness statements (fresh or not) under s 65.
<p>Other first-hand hearsay adduced by the defence</p>	<p>Section 65 (8) The hearsay rule does not apply to:</p> <ol style="list-style-type: none"> a) Evidence of a previous representation adduced by a defendant if the evidence is given by a person who saw, heard or otherwise perceived the representation being made, or b) A document tendered as evidence by a defendant so far as it contains a previous representation, or another representation to which it is reasonably necessary to refer in order to understand the representation. <p>Note: Section 67 imposes notice requirements relating to this subsection.</p> <p>Its role:</p> <ul style="list-style-type: none"> • It involves a recognition of the fact that a witness may confess to a crime and the defendant did not do it, and the witness refuses to come to the proceedings or is dead or went underground for a period of time. <p>This section will apply only if the court is satisfied that the maker is not available as per Clause 4 (Dictionary) & defence gives notice to prosecution and any co-accused. (See page 117).</p>