

8 Hearsay

Hearsay Rule → per s 59 EA, evidence of a *previous rep* made by a person is not admissible to prove the *existence of an asserted fact*.

- *Maker*: person making the representation // *Witness*: person giving evidence

TWO STEPS IN A HEARSAY PROBLEM

1. Is it hearsay? If no, admissible subject to other exclusionary rules.
2. If yes, does it fall within an exception to the rule?

#1 Previous Representation made by a person

- = a representation made otherwise than during the proceeding (**Dictionary**)
- May be express/implied; oral/written (**Dictionary**)
- Includes a representation not intended to be communicated, and one not communicated (**Dictionary**)
- A rep in a doc taken to be made by the person if (**Dictionary**):
 - doc was written/made by the person; OR
 - the rep was recognized by the person as his rep by signing/initialing/markings the doc

#2 Intended Asserted Fact – hearsay

Per s 59(2A) EA, can look at circ in which rep was made to determine if intended/unintended

- **Unintended representations fall outside the hearsay rule**
- **Rep contains assertion?** Salutations are not assertions (**Walton**)
- **Assertion intended?** Spontaneous assertion insufficient – no calculated intention to convey (**Benz**)

Cases:

- In **Walton**, courts considered 2 representations:
 - Representation to son that 'daddy's on the phone'
 - Held – express + intended rep
 - Was making a statement that daddy was on the phone, thereby breaching the hearsay rule
 - Representation by son on the phone of 'hello daddy'
 - Held – implied + unintended
 - Would only be express if it was more affirmative; ie 'its daddy on the phone' / 'oh that's you daddy'
 - Was unintended as boy was simply answering the phone, thereby falling out of the hearsay rule
- In **Ratten**, courts considered rep of phone exchange operator to 'get the police':
 - Arguably, asserted fact is that wife was in danger
 - Held to be an implied **intended** assertion
- In **Benz**, courts considered rep by daughter's of 'my mother is just feeling sick'
 - Held that there was an express rep of 'mother is sick' VS and implied rep of 'woman is my mother'
 - IF proven that it is **UNINTENDED** representation that it is her mother, then may be tendered as evidence of that fact
 - We are adducing it to prove the implied part

- IF **INTENDED**, then it is **excluded, subject to any of the exceptions**
- In *Kamleh*, held that rep adduced not for the purpose of proving the truth but to prove statements that are made in concert → fall outside the hearsay rule

#3 Was the 'rep' adduced to prove assertion is true? – if yes, hearsay

- **s 60 EA**: Not hearsay if it is **adduced for a purpose other than proof of an asserted fact**.
 - In *Subramaniam*, was hearsay and inadmissible. But, was relevant to prove defence of duress. Therefore, was admissible for non-hearsay purpose.
 - Therefore, per s 60, can circumvent the hearsay rule
 - E.g: to show a person's intention (*Walton; Kamleh*)
 - E.g: to prove the accused possessed esoteric knowledge (*Kamleh*)
 - E.g.: to prove co-accused concocted a false story (*Kamleh*)

MINI CONCLUSION: If it is hearsay, it is prima facie inadmissible. (s 59)

#4 First Hand Hearsay v Second Hand Hearsay

Per **s 62(1)**, FFH is where the maker has **personal knowledge of an asserted fact**

- Per **s 62(2)** – a person will have **personal knowledge of the asserted fact** if his knowledge was/might reasonably be supposed to have been based on something the person saw, heard or otherwise perceived (SHOP), other than someone else's prev representation

Per **s 62(2)**, SHH is where representation is based on someone else's previous representation.

#5 Miscellaneous Exception

Non-hearsay purpose

- **Representation relevant for a non-hearsay purpose is admissible for the hearsay purpose (s 60)**
 - if previous representation is a PCS + recent invention exception applies, NHP is to re-establish W's credit
 - if previous rep is a PIS, NHP is to attack W's credit (*Lee*)
 - **applies to second-hand hearsay (s 60(2))**, but **not evidence of admissions in crim proceedings (s 60(3))**
 - In *Lee*, if evidence would be allowed in regardless of where there had been intention of making the asserted fact, it would be too broad

Competency issues

Per **s 61**, prev reps **cannot** be used to prove existence of asserted fact if the person who made the rep was **not competent to give evidence under s 13**.

- But, the hearsay rule does not apply to a contemporaneous rep made by a person about his health, feelings, sensations, intention, knowledge or state of mind (s66A)
 - **s.62(3)**: A person has **personal knowledge of the asserted fact if it is a fact about** his health, feelings, sensations, intention, knowledge or state of mind at the time the rep referred to in **s66A** was made
 - NOTE: s66A is not interpreted to allow someone's knowledge/belief/memory to fall within the section
 - **Someone saying 'I rmb he threatened to kill me', doesn't allow the person to bring in the truth of the statement which would otherwise be prohibited – still have to go through the exceptions of hearsay rule**

- 'I believe he is going to kill me' – it is not the belief that is relevant
- **Accepted situation: 'I am frightened he will carry out his threat to kill me' – state of mind + why they are frightened**

- **Possible to reject admissibility through s137 – unduly prejudicial**

- In *Walton*, assuming that child fell under the hearsay rule, the child would be held incompetent
 - Refer back to *competence and compellability!!!*
- Per s 61(3), presumed that a person making rep is competent

#6 Does it fall within an exception?

- Will depend on whether it was civil/criminal AND maker available/unavailable
- Available / unavailable
 - Per s 4, maker is not available if:
 - (a) dead;
 - (b) incompetent;
 - (c) would be unlawful for person to give evidence about fact
 - (d) provision in act prevents evidence being given, i.e. privilege;
 - (e/f) all reasonable steps have been taken to find person/compel attendance without success;
 - (g) mentally or physically unable to give evidence and it is not reasonably practicable to overcome that inability.
- If rep is adduced but wants to kick it out, 2 options:
 - For crim proceedings, request an unreliability warning under s 32 JDA
 - Basis of hearsay evidence being unreliable per s 31(a)
 - Refer to discretionary exclusions per s 135 – s 137
- Note – notice requirements in s 67
 - Notice is to be given if using exceptions in s 63, s 64, s 65

CIVIL + MAKER NOT AVAILABLE (documents)

Per s 63(2), the hearsay rule does not apply to:

- (a) a rep given by a person who saw, heard or otherwise perceived (SHOP) the rep being made; or
- (b) a document containing the rep, or another rep which is reasonably necessary to refer in order to understand the rep
 - Eg. 'the letter' – what is the letter?

CIVIL + MAKER AVAILABLE (documents)

Per s 64(2), hearsay rule does not apply to

- (a) person who SHOP rep being made or
- (b) doc which contains the rep, or another rep reasonably necessary to refer to understand the rep

IF it would cause **undue expense or undue delay**, or **would not be reasonably practicable** to call the maker to come.

Per s 64(3) – if the **maker has been called to give ev**, hearsay rule doesn't apply to evidence of the rep that is given by:

- (a) the person; or
- (b) a person who SHOP the rep being made

10 Illegally Obtained Evidence

A discretionary exclusion to exclude illegally obtained evidence; for purpose of public policy – sends message to law enforcement that taking unlawful steps may result in exclusion of evidence

Illegality / Impropriety

Per **s 138(1) EA**, evidence will not be admitted if it was:

- (a) obtained improperly or in contravention of Aus law; or
- (b) in consequence of an impropriety or of a contravention of an Aus law;

unless the **desirability of admitting the evidence** outweighs the **undesirability of admitting evidence** that has been obtained in the way in which the evidence was obtained

1. Was the ev obtained illegally/in consequence of something illegal?

- **Contravention of Rights in Police Custody? (Crimes Act)**
 - Reasonable time in detention before release/bail/bail justice (**s 464A(1)**)
 - Cautioned before questioning with investigating official (**s 464A(3)**)
 - Right to communicate with friend/relative and lawyer (**s 464C**)
 - Right to communicate with interpreter if insufficient knowledge of English (**s 464D**)
 - Right to parent/guardian/independent person present if a child (**s 464E**)
 - Theft (**s 74**)
 - Stealing evidence
 - Trespass
 - Internet offences
 - Illegally obtaining dna etc
 - Illegal arrest (**s458-9**) that leads to evidence
 - Illegal search/seizure (**s459A**)
 - Comes up fairly often in exams !
- Per **Ridgeway**, will be illegal if police themselves have engaged in the charged offence OR if police have procured the commission of the offence

2. Was the ev improperly obtained?

General Rule

- Police conduct must be “quite inconsistent with the minimum standards which a society such as ours... should expect of law enforcement” (**Ridgeway per Mason CJ, Deane and Dawson JJ in obiter**)
- Mere doubts re appropriateness of conduct not enough (**Robinson**)

Where admissions made during questioning deemed to be improperly obtained...

- Questioner **did or omitted to do an act**, and knew or ought reasonably to have known it was likely **substantially to impair D’s ability to respond rationally** to the questioning (**s 138(2)(a)**)
- Questioner made a **false statement**, and knew or ought reasonably to have known it was false and that it was **likely to cause D to make an admission** (**s 138(2)(b); Foster**)
 - Eg **Foster** – telling the suspect that his brothers have dogged him in – ie telling the suspect that someone else was involved which is false.
 - Might be statements relating to leniency – eg you’re not going to jail
 - NOTE: could also arg that a lie even if it wasn’t likely to cause admission, is still improper bec this is WITHOUT limitation

- **Questioner failed to caution (s 139 EA)**
 - **s 139(1)**: admission made during questioning is taken to be obtained improperly if:
 - (a) person was under arrest; and
 - (b) questioning was by an IO empowered to make arrest; and
 - (c) **no caution was made** - that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.
 - Note – **s 139(3)** must be translated to language the other person can understand with reasonable fluency

Entrapment cases

- Per **Ridgeway**, evidence obtained will be EXCLUDED if police were engaged in the offence they were seeking to prevent (**IMPROPRIETY!**).
 - Note diff between **procuring evidence of the offending** eg unlawful search warrant AND **procuring the very offence itself; police were involved in the importation**
 - **Ridgeway**: *Although not corrupt in this case, there is potential for corruption which this legislation is intended to guard against; cannot simply allow agreements to allow importations to come in without oversight.*
- In **Robinson**, there is **no unlawfulness on the part of officer. Conduct merely provided an opportunity for offending, it did not procure it** – only gave an opportunity for offending but did not procure sale of cigars to minors!
 - Here, not dealing with mens rea type offence – but strict liability offence!
 - Diff to when you're trying to persuade someone to engage in a mens rea type crime.
 - Seen to be proportionate way of enforcing a relatively low level offence (non mens rea) + no minors harmed.

3. Inadmissible unless the desirability of admitting ev > the undesirability of admitting ev in the way it was obtained (s 138(3))

Per **Marijancevic**, there are 3 categories the impropriety/illegality can come under:

- **Least serious impropriety**: No knowledge of illegality and no advantage gained
- **'Middle of the range'**: knowledge but not done in order to gain advantage
 - In **Marijancevi**, had knowledge (knew there were filling in affidavits wrongly)
- **Most serious**: knowledge and done to gain advantage
 - In **Ridgeway**, there was an advantage – crime would not otherwise have been committed

Consider **s 138(3)** factors:

- (a) **The probative value of the evidence**
 - P seeking to admit this will argue highly probative, hence the higher the public interest in admitting it
- (b) **The importance of the evidence in the proceeding (Marijancevic)**
 - Considers if there are any substitutes / alternative means
 - BUT if it is highly imp't then it will lend itself to a public interest to a permissibility of evidence
- (c) **The nature of offence, cause of action or defence and nature of subj matter of proceeding**
 - Consider of criminal / civil offence
 - Murder/armed robbery/etc? Stronger public interest in prosecution of serious criminal offences