

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