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Topic 6: Admissibility of evidence – Hearsay

The Hearsay Rule

Definition

An out of court statement, express or implied from words or conduct (previous representation), cannot be used to prove the existence of a fact that it intentionally asserts.

- 'A statement other than one made by a person giving oral evidence in the proceedings is inadmissible as evidence of any fact stated' (Cross on Evidence).
- Hearsay will always be a consideration if it's an out of court statement adduced in court, unless the maker of it is actually testifying; even if transcript or document of that statement.

Evidence Act 1995 (NSW)

Section 59(1)

Previous representations made by a person is inadmissible to prove the existence of a fact that it can reasonably supposed that the person intended to assert.

This is an exclusionary rule that is mandatory.

Ask: What is the purpose for adducing this evidence? Is it to prove the actual existence of the facts stated or for some other purpose?

- 1) To prove the actual existence of the facts stated – hearsay is inadmissible unless specific exception applies
- 2) For some other purpose – not hearsay and prima facie admissible.

Rationale for exclusion

Exclusionary rules of evidence relate to either (a) **public policy**; or (b) **probative value**

A. Public policy argument (criminal cases):

- (+) Wrong to deny accused opportunity of cross-examining the maker of the statement, even if cross exam unlikely to test anything – part of D's right to participate fully in the trial against him.
- (+) D also has right to 'confront' his accuser and should be judged on basis of evidence *presented* before an impartial court rather than on unsubstantiated rumour/gossip.
- (-) Procedural objections – admission of hearsay would lead to numerous adjournments to investigate reliability; admission of hearsay can unfairly catch the other party by surprise.
- (-) Admissibility of hearsay might tempt police to rely on secondary (and therefore less reliable) evidence
- (-) Desperate accused persons might fabricate exculpatory statements that would be difficult to discredit.

B. Questioning hearsay's probative value

Defects in Hearsay evidence:

- Declarant may have wrongly perceived the events in question;
- Dec's memory may be faulty or inaccurate;
- Dec may have lied or deliberately distorted the event;
- Dec's statement may have been misunderstood by the witness now reporting it;
- Defects common to testimony in court, but addressed in cross-examination. Hearsay prevents cross-examination, so jurors (in crim cases) would over-estimate probative significance of the evidence.

Teper v R [1952] AC 480

Held Lord Normand at [486]:
The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested by cross-examination and the light which his demeanour would throw on his testimony is lost.

Possible approaches to hearsay evidence

- 1) Admit all hearsay evidence, where relevant, because tribunal of fact ought to have access to such information to properly determine guilt or liability. However, where jury, judge should provide a warning as to the weight attached to such evidence; **OR**
- 2) Exclude all hearsay evidence, unless such evidence is very reliable or essential to the case. General rule of inadmissibility, but with specific exceptions.

Civil legal systems adopt (1), common law systems adopted (2).

- Uniform evidence legislation retains (2) but with features of (1).

Criticisms of hearsay under common law

- Excluded statements that went beyond its rationale;
 - Excluded relevant evidence of **innocence**: *R v Sparks [1964]*. See also *Blastland*.
 - Excluded relevant evidence of super **reliability**: *Myers v DPP [1964]*.
- Doctrinal indeterminacy: unclear whether the rule excluded 'implied assertions' and if so, what type?
 - Statements containing facts intended to be communicated but not stated expressly;
 - Statements containing facts unintended to be communicated but assumed.

Attacking hearsayStarting point

Section 59 - 'Evidence of a previous representation made by a person is *not admissible* to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation'.

Burden of proof

A previous representation made by a person has been made, it is deemed inadmissible **unless the party wanting it adduced can establish** on a balance of probabilities that it cannot be reasonably supposed that the person intended the fact to be communicated.

Statutory exceptions

- If cannot be established, it will be inadmissible as hearsay unless a particular **statutory exception** applies in Division 2 of Par 3.2. Different rules apply for civil and criminal proceedings:
 - In civil proceedings, hearsay frequently admitted so long as a party complies with notice requirements under **section 67**.

Elements

1. A previous representation
2. Made by a person
3. Containing what can reasonably be supposed to be an intended assertion of fact.
4. **The representation must be adduced to prove the actual existence of the fact (or the truth of the facts asserted)**

All 4 must be established for the statement to be caught by hearsay rule.

Elements(1) 'Representation'

(Dictionary) Very comprehensive and inclusive. Incorporates:

- **Expressed or implied** representations;
 - Representations **inferred from conduct**;
 - Representations **not intended to be seen or communicated** ;
- NB:** Broad definition does not mean all implied assertions can be caught by the hearsay rule.

(1A) 'Previous representation'

- **Dictionary:** 'a representation made otherwise than in the course of giving evidence *in the proceedings in which evidence of the representation is sought to be adduced*'
- (O) Representations made in previous court proceedings would be caught.
- (O) Includes previous statements made by the witness who is testifying in court when they are being adduced to prove the facts they assert *rather than to support or impeach credibility*
 - Though see s 61(1) providing an exception
- (O) Also covers statements made in interlocutory phase of the same proceedings;
- (X) Doesn't include statements made on affidavit in relation to current proceedings.

(2) 'Made by a person'

- Excludes representations made by:
 - Machines (e.g. *cameras at traffic lights*); or
 - Animals (e.g. *dogs barking at time of murder*).
- But would apply if a person yelled 'he just went through a red light' or 'murder'
- Human-machine composite statements:

- Lab experiments – computer printouts admissible to prove results, but technicians would have to be called to testify as to the origin of the data (cf *R v Wood*)

(3 & 4) 'To prove the existence of a fact'

- Ask: **What is this evidence being introduced to prove?**
- Not all uses of a previous representation are for a 'hearsay purpose'.
 - If not, we call this 'original evidence'

Not all previous representations are hearsay

Subramaniam v Public Prosecutor
[1956] 1 WLR 965

Principle:

A statement is only hearsay if it is being adduced to prove the truth of the facts it asserts, not the mere fact that they were made.

In other words, **if it is being introduced to prove a state of mind – it's not a fact – therefore not hearsay.**
What you believe to be true doesn't make it true

Facts

- D found in possession of live ammunition = death penalty offence in Malaya.
- Defence under the penal code if 'compelled to do the offence by threats'.
 - 'Defence of duress'.
- D adduced evidence he'd been forced to wear the ammunition belts under threats.
Trial court prevented D from adducing evidence of what terrorists had said on grounds of hearsay.

Issue *Was this hearsay?*

Held Not hearsay.
PC – D adducing evidence of the threats, not as evidence that the terrorists would kill D, but he *believed* they could.

- Evidence of his **state of mind** was circumstantially relevant to his defence of duress *per minas*.
- A statement is only hearsay if it is being adduced to prove the truth of the facts it asserts, not the mere fact that they were made.

Admissible for non-hearsay purposes

Evidence Act 1995 (NSW)

Section 60

If relevant for a non-hearsay purpose, evidence is admissible

NB: Court can limit the use – s 136

Examples:

(A) Legally significant words

- Formation of a contract:
 - The offer
 - Acceptance
 - Price (consideration)
- Examined objectively from the words used. All **original evidence of a contract** irrespective of their truth.
- If intention to create legal relations, there is a contract even if offeror lied
- Saying of defamatory words in libel claim
 - Plaintiff not claiming they are true – fact they were said relevant to his claim (whether they *are* true relevant only to the defence).
- Incitement
 - If the legal effects of the words are to stimulate others to, for e.g., hatred.

(B) Evidence of a prior consistent or inconsistent statement

Adduced to support or impeach credit of a witness

(C) Previous identification

By the witness where that witness is able to identify D in court

*NB: (B) and (C) are introduced for credibility purposes – *not to prove, independently, any facts.*

(D) Evidence of D's particular state of knowledge

'Reasonably be supposed that the person intended to assert'

- Pre-2008: section required a subjective intention to communicate a fact
 - No longer necessary – the test is now objective, looking at the circumstances and context in which it was made.
- Subjective intention will be evidence of intention – but section not limited to only those facts. Can include facts 'necessarily assumed'.
- Amendment designed to clear up difficulties caused by **R v Hannes** and the re-emergence of 'implied assertions' controversy.

R v Hannes (2000) 158 FLR 359

- Facts**
- D charged with insider trading. Person had identified himself as 'M. Booth'.
 - Key issue whether it was D, Hannes, who had purchased company options in the name of M.Booth on the basis of inside information.
 - Defence wanted to introduce information that some transactions carried out by his sister, 'Mignon Booth' and some others by a syndicate partner in London named 'Mark Booth'.
 - Prosecution argued D had used 'M.Booth' as a pseudonym to purchase the shares himself.
 - D wanted to introduce in evidence a document written by him which he said contained unintended implied assertions, that a person having the name 'Mark' existed, that he met the person in London in relation to relevant events and that D did not purchase the options.
 - Document ('Pros and Cons') contained problematic words.

- Held**
- Statement was caught by **s 59** and excluded.
- Spigelman CJ:
- "...an implied assertion of a fact *necessarily assumed* in an intended express assertion, may be said to be 'contained' within that intention.
 - Statement introduced to prove that Mark existed = a necessary assumption of the words 'after my conversation with Mark in London'. Therefore, hearsay.

Consequences of the judgment

- Put implied assertions, not intended to be communicated back within the framework of s 59.
- **Response: 2008 amendment 'reasonably supposed to have intended' – makes 'intention' an objective test.**
- *Would be open to prosecution, post amendment, to argue in Hannes that the document was an elaborate fabrication from which a TJ could reasonably suppose D intended to assert existence of Mark.*

Section 66A – Non-Hearsay

Evidence Act 1995 (NSW)

Section 66A

'The 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.'

- Reflects a well-known **Common Law exception** - evidence introduced to prove a state of mind, where relevant, is not hearsay.
- *So in a murder trial, evidence D had told the deceased 'I hate you' can be introduced as evidence of motive which is relevant to mens rea.*

Limitations on s 66A

- **Does it include contemporaneous belief?**
- **Does it admit facts which caused the person to have that belief?**
- These are open questions, no case law.

Section 60(1) – Evidence relevant for a non-hearsay purpose

Evidence Act 1995 (NSW)

Section 60(1)

Hearsay rule does not apply to evidence admitted for a non-hearsay purpose – meaning tribunal of fact are permitted to treat the evidence as evidence of the facts it asserts.

- So Previous consistent statements or previous inconsistent statements, though admitted on grounds of credibility, can also be used to prove the facts they assert.
- Also, **factual basis for an expert's opinion** is admissible to explain how the expert came to his opinion.
 - *So a doctor's opinion as to a particular patient can refer to that patient's medical history, and the medical history would be evidence of how the doctor came to his opinion. It would not be initially*

admissible to prove the events stated in the medical history, but s 60(1) permits the med history to be used to prove the truth of the facts stated.

- **Rationale:** it is difficult (if not impossible) for the tribunal of fact to distinguish acceptable and non-acceptable uses for the evidence.

Section 60(3) – Second Hand Hearsay

Evidence Act 1995 (NSW)

Section 60(3)

Law of evidence excludes second-hand and more remote evidence of an admission

This section is a 2008 amendment preserving the rule in **Lee v The Queen** where a witness had given an out of court statement to a police officer (which W denied making in court) that D had made an admission as to the killing. Excluded as hearsay and not incorporated within s 60 (pre-amendment) on basis **s 60** did not apply to second hand hearsay.

- The rationale of the judgment has now been superseded by **s 60(2)** but the actual decision is preserved by a new **s 61(3)**.

Hearsay Exceptions

Rationale

- In the particular circumstances, the representation 'is free enough from the risk of inaccuracy and untrustworthiness' (Wigmore).
- Necessary to receive the representation, notwithstanding it has been untested in cross-examination.
- Relic of the '**Best Evidence**' rule
- Other exceptions drafted to protect a public interest.
 - E.g. *avoid miscarriages of justice and convictions of the innocent.*

Common Law

- Several exceptions, but courts called a halt to further development in late 19th century.
- Re-assertion of the position in **Myers**.
- General unwillingness to extend the exceptions in lines with the rationale.
 - Though see HC decision of **Walton (1989)**.
- **Uniform Evidence** legislation major reform, liberalising the exceptions.

Statutory framework

Evidence Act 1995 (NSW)

Section

3 divisions:

- **Division 1** = exclusionary rule
- **Division 2** = exception – first hand hearsay
- **Division 3** = other exceptions.

NB: Just because a statement comes within an exception does not mean that it will be admitted. It is still subject to all the other rules of evidence and the discretionary powers of the court (e.g. *to limit the use of evidence under s 136*)

First Hand Hearsay

Evidence Act 1995 (NSW)

Section

- Abolishes first-hand hearsay in :
 - Civil proceedings – **ss 63 & 64**
 - For the defence in criminal proceedings – **s 65(8) & s 65(9)**

So long as the hearsay is 'first hand', notice requirements satisfied and the maker of representation is 'unavailable' to testify.

- Dramatic departure from Common Law
- Dispenses with 'reliability' rationale.

'First Hand'

- The person who had made the previous representation must have '**personal knowledge**' of the facts the hearsay evidence is being adduced to prove.
- A person has 'personal knowledge' if based on something the person 'saw, heard, or otherwise perceived'.
- Personal knowledge is inferred by the court from the circumstances in which the statement was made.
- Must have perceived the representation, so **if told by a third party, the hearsay is not first hand.**

'Notice'

Evidence Act 1995 (NSW)

Section 67

- **Exception will not be available unless the party wishing to adduce the hearsay statement has given reasonable notice in writing to each of the other parties of its intention to do so.**
- Form of notice set by regulations.
- Court has a discretion to admit statement even where non-compliance with the notice
 - *E.g. where the other party hasn't been prejudiced thereby.*

'Unavailable'

In **civil cases**, a hearsay evidence is admissible if the maker:

- **Testifies; or**
- Is **unavailable; or**
- It would cause **undue expense**, delay; or
- Not be **reasonably practical.**

Caterpillar Inc v John Deere Limited (No 2)
(2000) 181 ALR 108

- Onus on party wanting to adduce the evidence to show that all 'reasonable steps' have been made to secure attendant of the declarant.
- '**Reasonable steps**' would include:
 - Writing to the witness;
 - Offering to meet all expenses; and
 - Compensate for necessary interruptions.
 - If no response, attempt personal contact and ascertain whether possible change of address.
- '**Undue expense**': what would be the actual cost of seeking the attendance of the witness compared with the actual value of the litigation at stake in the case.
 - Assess importance of the witness to the issues in the trial.

Hearsay exceptions in **CRIMINAL cases**

Evidence Act 1995 (NSW)

Section 66(2): testifying witnesses

- Can refer to their own previous representations if 'the occurrence of the asserted fact was **fresh in the memory** of the person who made the representation' (*i.e. the testifying witness*).
- Context: previous consistent or inconsistent statements.

'Fresh in the memory'

Graham v The Queen
(1998) 195 CLR 606

Principles:

- 1) **The word 'fresh' means 'recent' or 'immediate';**
- 2) **Temporal relationship required likely measured in hours or days.**
- 3) **The court can take into account extended lengths of time for especially traumatic events.**

Facts • D accused of multiple counts of sexual assault against his daughter when aged 9 and 10.
D charged 6 years later after complainant had told a friend.

Issue **Was the complainant's prior complaint to friend admissible under the exception?**

Held Gaudron, Gummow and Hayne JJ:
'The word 'fresh' ... means 'recent or 'immediate' ... Although questions of fact and degree may arise, the temporal relationship required will very likely be measured in hours or days, not, as was the case here, in years'.

Consequences – AMENDMENT to legislation: s 66(2A)

- 'In determining whether the occurrence was fresh in the memory of a person, the court may take into account all matters that it considers are relevant to the question, including:
 - The nature of the event concerned; and
 - The age and health of the person; and