

VI: HEARSAY

Evidence Act 1995 (NSW) Part 3.2: Hearsay

The hearsay rule is an **exclusionary rule** which will make relevant evidence inadmissible.

Hearsay evidence is evidence of an out of court statement (that is, not witness testimony) which is adduced as true. While much hearsay may be reliable (e.g. authoritative documents), hearsay is akin to rumour and innuendo.

- E.g. if A testifies that B said to him 'I saw C shoot D', B's statement to A (a previous representation) cannot be used to prove that C shot D, which is the truth of the fact that the PR intends to assert

While hearsay generally is subject to exclusion, the exclusionary rule is subject to exceptions

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](#)

Rationale for exclusion

- Public policy argument (criminal cases): wrong to deny accused opportunity of cross-examining the maker of the statement,
 - D has a 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
- Admission 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
- Epistemic concerns concerning hearsay's probative value
 - 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
 - Since hearsay prevents cross-examination, jurors would over-estimate the probative significance of the evidence.
 - *'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'* (per Lord Normand, at 486 in *Teper v The Queen* (1952))

The exclusionary rule

Part 3.2 Division 1, s 59

Hearsay evidence is evidence of a previous statement other than one made by a person giving oral evidence in the proceedings which is adduced to prove the existence of a fact within the statement

- **The exclusionary rule:** hearsay evidence is **inadmissible** to prove the existence of a fact that it can reasonably supposed that the person intended to assert: [s 59 \(1\)](#)
- **Process:**
 - (1) Identify the previous representation
 - (2) What is the intended asserted fact in the previous representation i.e. what fact is the maker of the PR intending to assert by making the representation?

(3) Is the PR being adduced to prove that asserted fact in the previous representation?

- There must be a nexus between what the representor intends to assert and what the person adducing the representation intends to use it for

○ **Elements to be proved**

(1) Evidence is a **previous representation**;

- '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*': Dictionary
- Includes express and implied representations
- Includes representations inferred from conduct
- Includes representations not intended to be seen or communicated
- Includes representations made in previous court proceedings
- Includes previous statements made by the witness who is testifying in court where they are being adduced to prove the facts they assert rather than to support or impeach credibility (though see s 60(1) providing an exception)
- Includes statements made in interlocutory phase of the same proceedings
- Doesn't include statements made on affidavit in relation to current proceedings

(2) That previous representation was **made by a person**;

- Excludes representations made by machines and animals
- Human-machine composite statements: lab experiments - computer print outs admissible to prove results, but technicians would have to be called to testify as to origin of the data (c.f. *R v Wood*). But excluded if original statement made by a person and then fed into a computer

(3) The **representation contains** what can reasonably be supposed to be **an intended assertion of fact**

- Objective test, court may have regard to the circumstances in which the representation was made: s 59(2A)
- No requirement for a subjective intention to communicate a fact, although subjective intention will be evidence of intention

(4) Representation is **adduced to prove the actual existence of, or the truth of, the fact** it asserts

○ **Burden of proof:**

- Party claiming the evidence should be excluded must prove elements (1) & (2)
- Party claiming the evidence should be admitted must prove elements (3) & (4)
 - Must prove on the balance of probabilities that it cannot be reasonably supposed that the person intended the fact to be communicated

Statutory exceptions to the exclusionary rule

Note: even if a statement satisfies an exception, it may still be inadmissible –still subject to all other rules of evidence and the discretionary powers of the court (e.g. to limit the use of evidence under s 136)

Non-hearsay

Part 3.2 Division 1, s 60

Pre-requisite: person who made the representation **must have been competent** to give evidence about the fact under s 13(1) when it was made: s 61(1)

- (1) Representation is being adduced **merely to prove the fact that it was made**: *Subramaniam v PP*
- (2) Statement is being adduced **to prove a state of mind**: *Subramaniam v PP*
- (3) The evidence is **relevant for a non-hearsay purpose**: s 60 ["original evidence"]

→ Effect: in this case, the evidence can also be used to prove the truth of the facts it asserts, however, the court can limit its use e.g. to only a non-hearsay purpose under s 136: *Jango v Northern Territory of Australia (No 4)*

(a) **To prove the factual basis of an expert's opinion**: *Lawson [2002]*; *Jango*

Division 1: The hearsay rule

Evidence Act 1995 (NSW) s 59: The hearsay rule – exclusion of hearsay evidence

- (1) 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
- (2) Such a fact is in this Part referred to as an **asserted fact**.
- (2A) For the purposes of determining under subsection (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the **court may have regard to the circumstances in which the representation was made**
 - Note: Subsection (2A) was inserted as a response to the decision of the Supreme Court of NSW in *R v Hannes* (2000)
- (3) Subsection (1) does not apply to evidence of a representation contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.

R v Hannes (2000): uncertainty about whether the rule excluded ‘implied assertions’

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 were 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 adduce 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 the relevant events and that D did not purchase the options
 - Inferring the existence of the fact from a document, and so this should not be captured by the hearsay rule
- Document (‘Pro and Cons’) contained the following words: ‘SHOULD I VISIT ASC OR NOT’
 - CONS Reveal Macquarie wrongdoing (breach of Chinese walls, cover up) MBL will grab my \$1m DRP as penalty Mark not guilty of insider trading but may have committed other offences...

Evidence Act 1995 (NSW) s 61: Exceptions to the hearsay rule dependent on competency

- (1) This Part does not enable use of a *previous representation* to prove the existence of an asserted fact if, when the representation was made, the person who made it was not competent to give evidence about the fact because of section 13 (1).
- (2) This section does not apply to a contemporaneous representation made by a person about his or her health, feelings, sensations, intention, knowledge or state of mind
- (3) For the purposes of this section, it is presumed, unless the contrary is proved, that when the representation was made the person who made it was competent to give evidence about the asserted fact

Statutory exceptions to the exclusionary rule

First-hand hearsay

Part 3.2 Division 2

Pre-requisites to exception

- (1) The previous representation must be **‘firsthand’** i.e. **made by a person who had personal knowledge of an asserted fact**: s 62
 - i. **Personal knowledge**: person’s knowledge of the fact was (or might reasonably be supposed to have been) **based on something that the person saw, heard or otherwise perceived**, BUT *other than a previous representation made by another person* about fact
 - **Objective test**: PK inferred by court from circumstances in which statement made

ii. For civil proceedings and criminal proceedings where the maker is unavailable - includes **document containing the representation** or another representation which is reasonably necessary to refer to in order to understand the PR

(2) 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: s 67

Civil proceedings

Hearsay evidence can be admitted where:

- (1) Maker of PR **testifies**: s 64(3)
- (2) Maker of PR **not available** to give evidence about an asserted fact: s 63
- (3) Maker of PR **available** to give evidence about an asserted fact: s 64(2)
→ NB: **party may object** by giving written notice of the grounds on which the objection is made to each other party within 21 days after receiving notice under s 67: s 68

Requirements

- (a) Party wanting to adduce evidence has shown that all ‘**reasonable steps**’ have been made to **secure attendance** of declarant: *Caterpillar v John Deere (No 2)*
- (b) it would **cause undue expense or undue delay or would not be reasonably practicable to call the person** who made the PR to give evidence: s 64(2)
 - **Undue expense**: consider what the actual cost of seeking the PR’s attendance would be; compare cost with actual value of the litigation at stake; assess importance of the witness to the issues in the trial: *Caterpillar v John Deere (No 2)*

Criminal proceedings

Hearsay evidence can be admitted where:

- (1) PR **made in the course of giving evidence in a proceeding** where the **defendant cross-examined**, or had a reasonable opportunity to cross-examine, the maker in that proceeding: s 65(3)
- (2) **Defendant adduces** the PR evidence and it is **given by a person who perceived the PR being made** where its **original maker is unavailable to testify**: s 65(8)
 - (a) **Pre-requisite**: must establish that all reasonable steps have been taken to secure maker’s attendance (see above): *Caterpillar v John Deere*

(3) Maker of PR **not available** to give evidence about asserted fact: s 65(2)

Unavailability of persons: EA Dictionary Part 2(4)

- (1) For the purposes of this Act, a **person is taken not to be available to give evidence** about a fact if –
 - (a) The person is **dead**; or
 - (b) The person is, for any reason other than the application of s 16 (Competencies and compellability: judges and jurors), **not competent to give the evidence**, or
 - Lack of memory doesn’t mean incompetence and thus unavailability: *Brown v The Queen*
 - (c) The person is **mentally or physically unable to give the evidence** and it is **not reasonably practicable to overcome that inability**, or
 - Where mental health condition is such that W will suffer significant adverse mental consequences if they testify: *R v Nona [2015]*
 - (d) It would be **unlawful for the person to give the evidence**, or
 - (e) A **provision of this Act prohibits** the evidence being given, or
 - (f) **All reasonable steps have been taken**, by the party seeking to prove the person is not available, **to find the person or to secure his or her attendance**, but **without success**, or
 - (g) **All reasonable steps have been taken**, by the party seeking to prove the person is not available, **to compel the person to give the evidence**, but **without success**
- (2) In all other case the person is taken to be available to give evidence about the fact

Have all reasonable steps been taken to secure the declarant’s attendance?

- **Relevant factors include**: (i) actual cost of securing W; (ii) a comparison of that cost with the value at stake in the litigation; (iii) assessment of importance of W’s evidence: *Caterpillar v John Deere (No 2)*
- **‘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

VIII: TENDENCY & COINCIDENCE EVIDENCE

Evidence Act 1995 (NSW) Part 3.6: Tendency & Coincidence

The next **exclusionary rule** relates to ‘tendency evidence’ (propensity evidence e.g. prior convictions) and ‘coincidence evidence’ (similar fact evidence e.g. other allegations). The exclusion is invoked most commonly in criminal cases where the prosecution seeks to adduce evidence of the defendant’s other misconduct to prove that the defendant committed the charged offence. The (alleged) other misconduct may be prior convictions, or uncharged misconduct, or it may be the subject of other charges, in which case the admissibility issue gets tie up with the question of whether the charges should be joined. Evidence that the defendant has committed other misconduct (and is a bad person) clearly carries the risk of prejudice. Despite the exclusion, the **evidence may be admitted if it satisfies admissibility tests which turn primarily on the probative value of the evidence.**

This exclusion was the subject of consideration by the Royal Commission into Institutional Child Sexual Abuse, which saw it as a major obstacle to the effective prosecution of child sex offenders. Reforms are in the process of being introduced around Australia.

Whilst the two types of evidence are quite similar, recent reforms have maintained the distinction

Tendency reasoning	Coincidence reasoning
<ul style="list-style-type: none"> → Evidence of conduct, reputation or character that X has a tendency to act or think in a particular way → We infer the particular from the general about a specific person 	Evidence adduced that two or more events that occurred to prove X did a particular act/had a particular state of mind on the grounds of the similarities between both events or the circumstances in which they occurred and the improbability of those events being a coincidence
Supports a narrow range of inferences – draws conclusions only about a known person	Can support conclusions about what happened on particular occasions, the causes of an event, the identity of the perpetrator and the tendencies that he may have
Uses evidence about a particular person to predict a pattern of future behaviour	Uses evidence of a particular pattern of behaviour to prove a particular person was behind it

- **The admissibility test:** tendency evidence (s 97) and coincidence evidence (s 98) is inadmissible unless:
 - (a) the party seeking to adduce the evidence gave **reasonable notice in writing** to each other party of the party’s intention to adduce the evidence, AND
 - No notice required to explain or contradict evidence adduced by the opposing party
 - However, notice can be dispensed with on application by a party: s 100
 - (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have **significant probative value.**
- **Additional requirement for criminal proceedings:** tendency evidence and coincidence evidence adduced by the prosecution against the defendant will be admissible if the **probative value** of the evidence **outweighs the danger of unfair prejudice** to the defendant: s 101(2)
 - However, the court **must refuse** to admit evidence produced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant: s 137
 - **Exception:** evidence is **adduced to explain or contradict** tendency/coincidence evidence adduced by the **defendant**: s 101(3), (4)

- **Exceptions to inadmissibility:**
 - Evidence is adduced in accordance with any **directions made by the court** under s 100: ss 97 & 98
 - Evidence is adduced to **explain or contradict tendency/coincidence evidence adduced by another party**: ss 97 & 98
 - The evidence relates only to the **credibility of a witness**: s 94
 - If the proceeding relates to **bail or sentencing**: s 94
 - If the **character, reputation, conduct or tendency** of a person is a **fact in issue**: s 94
 - The evidence is adduced not to prove the existence of some tendency to act or think in a particular way, but **adduced for some other purpose**
 - Won't be sufficient to assert that the evidence is relevant to prove something other than "tendency" (e.g. system, habit, relationship, context) – must demonstrate that the evidence is relevant to a fact in issue by a process of reasoning which doesn't involve the drawing of an inference from evidence of "tendency" to conforming behaviour
 - However, evidence which is not admissible under these rules to prove a particular matter cannot be used to prove that matter **even if it is relevant for another purpose**: s 95
 - Evidence that should be viewed as **merely circumstantial evidence**: *R v Falzon*
 - C.f.: merely to label evidence of previous conduct as circumstantial evidence does not demonstrate that it is tendered for a purpose other than to prove that a person had a tendency to act in a particular way. Any TE is likely to be circumstantial evidence: *Jacara*
 - Where evidence of misconduct is closely related to the charged offences ("**integral part of connected series of events**") (*O'Leary* test): *LJW [2010]*
- Even if the admissibility test is met, note the **(discretionary) balancing test**: court may refuse to admit evidence if its **probative value** is **substantially outweighed** by the danger it might (a) be **unfairly prejudicial** to a party; (b) be **misleading or confusing**, or (c) cause or result in **undue waste of time**: s 135

Assessing probative value

Starting point: identify with some precision the **tendency and the fact or facts in issue which it is adduced to prove** (in a criminal proceeding, the facts in issue are those which establish the elements of the offence): *Hughes*

1. The **extent to which the evidence** (by itself or together with other evidence) **supports the tendency**
2. The **extent to which the tendency makes more likely the facts** making up the charged offence

→ This involves an '**evaluative judgment**': *Ellis (2003)*, turning on the 'facts and circumstances of the particular case': *Hughes [2015]*

- Since this is discretionary, the appeal court won't intervene unless the TJ made an unreasonable determination: *House v The King (1936)*

Significant probative value test: TE will have SPV if it **could rationally affect the assessment of the probability of the existence of a fact in issue** to a significant extent: *Hughes*

- **Qualification:** unnecessary that the disputed evidence has this effect by itself – **sufficient if the evidence, together with other evidence**, makes significance more likely any facts making up the elements of the offence charged
- **More than mere relevance** but something less than a 'substantial' degree of relevance: *R v Lockyer*; **important, of consequence**
- Whilst a tendency expressed at a high level of generality cannot establish anything more than relevance, a **tendency expressed at a level of particularity** will be **more likely to be significant**
- Likely insufficient if the evidence '*does no more than prove a disposition to commit crimes of the kind in question*'