

### **First-hand hearsay in criminal cases**

- Having determined that a previous representation is first-hand, the next question is whether one of the exceptions in s65-66 apply

#### *Maker unavailable – section 65*

- Section 65 allows for first-hand hearsay to be given in criminal cases where the maker of the previous representation is not available to give evidence
- The effect of s65 is that if the previous representation is first-hand and the requirements of the section are satisfied, secondary evidence of the representation will be admissible. The nature of the secondary evidence that is admissible will depend on the section, but includes both oral evidence by either the maker of the representation (if available) or by a witness who heard or otherwise perceived the representation being made, or documentary evidence of the representation.
- **first-hand hearsay will be admissible via a person who perceived the representation being made, but only if at least one of the guarantees of reliability listed in the section is met (ie 65(2)(a)-(d)) (and the maker is unavailable, and notice is given pursuant to s 67 or leave granted)**
- **EA s 65(2)(a):** first-hand hearsay will be admissible if the person who made a previous representation was, at the times of making it, under a duty not to make and he/she is unavailable to give evidence.
  - R v O'Meally [1952] VLR 499
    - the duty in question was the duty of a police officer to do all in his power to bring a felon to justice.
    - The police officer had been mortally wounded and had made oral statements describing the assailant to other police officers of similar rank as himself.
  - **Oral evidence from a person who witnessed the making of the representation may be admitted. However documentary evidence is not sufficient unless the making of the representation was witnessed**
- **EA s 65(2)(b):** first-hand hearsay will be admissible **if made when, or shortly after, the facts asserted occurred and where it is unlikely the fact would have been fabricated, and the maker is unavailable.**
  - **Oral evidence from a person who witnessed the making of the representation may be admitted. However documentary evidence is not sufficient unless the making of the representation was witnessed**
  - **Shortly after**
  - *Harris v R:*
    - whether a statement made by the deceased within 24 hours of the incident should have been admitted under s 65(2)(b)
    - Held
    - the requirement that the representation is made 'when' or 'shortly after' seems to ensure that the matters are either contemporaneous or the narrative of the event is still fresh in the mind of the person recounting it.
    - There need be nothing like to strict contemporaneity required at common law to render such representation admissible.
    - Each case must be considered having regard to its own particular circumstances.
    - The judgment may therefore be influenced by the subject matter of the event and by how long the memory of such an event is likely to have remained clear in the mind
    - Here what the deceased told the police twenty-four hours after the event was conveyed 'shortly after' the incident
  - *R v Kuzmanovic:*
    - held
    - a time frame of two weeks came within the 'shortly after' requirement.

Meaning of circs in determining what is shortly after

- *Conway v The Queen* (see below in s65(2)©)
  - admissibility of representations made by the victim to her neighbours that “I think he put something in my coffee” and “my coffee tasted bitter”.
  - The representations were made the same afternoon as her death.
  - held
  - the representations could not be admitted under s 65(2)(b) because she was under the influence of heroin at the time of making the statement.
  - the requirements of s 65(2)(c) are more onerous than s 65(2)(b).
  - it is legitimate for a trial judge to have regard to evidence of what the maker of the previous representation has said on other occasions, when determining whether or not it is highly probable that a particular statement was reliable (BROADER TEST- CORRECT LAW)
- *Williams v R* [2000]
  - Following the Conway approach
- *R v Mankotia* (TOO NARROW – APPLY CONWAY):
  - ‘shortly after’ must be the actual time that has elapsed and whether that fits within the ordinary usage of the expression ‘shortly after’ in the circumstances of the case
  - held
  - ‘circumstances’ to mean the circumstances in which the representation was made, its factual setting at the time it was made.
  - excluding from consideration events subsequent to the representation being made and other representations made by the same person on other occasions, notwithstanding that such considerations might logically fortify the unlikelihood of concoction or (in the case of inconsistent representations) have the opposite effect
- *R v Ambrosoli*:
  - defendant was convicted of assault and malicious wounding.
  - witness made a statement to the police some months after the event, gave evidence at the committal proceedings and attended to the first day of the trial but failed to appear thereafter
  - held
  - the witness’ statement to police and the transcript of his evidence at the committal proceedings are admissible under s 65(2)(b)
  - the focus when approaching s 65(2) should be on the *circumstances* of the making of the previous representation; **not** the accuracy of the representation.
  - events prior to or subsequent to the making of the representation may be considered insofar as they have a bearing on the circumstances of the making of the representation
  - here the later statements made in cross exam that he didn’t agree with his statement and it was wrong could be taken into account in addressing the high probability of reliability issue presented by s 65(2)(c).
  - the earlier signed statement was not given in circumstances that necessarily made it highly probable that it was reliable.
- *R v Bedingfield*
  - accused was charged with murder by cutting a woman’s throat
  - defence was that she had committed suicide
  - deceased came out of the room in which the accused was subsequently found.
  - Her throat was cut and she immediately cried: ‘See what Bedingfield has done to me’
  - statement would be admissible under s 65(3)(b) because the person who heard the deceased’s statement (being the “previous representation” about the asserted fact of the cause of death) heard that ‘previous representation’ shortly after the asserted fact occurred ‘and in circumstances that made it unlikely that the representation is a fabrication’.

- The evidence would also be admissible under s 65(2)(c) because, absent special facts, the deceased's statement was made in circumstances making it highly probable that the representation was reliable.
- the critical circumstance is the immediacy of the allegation and the unlikelihood that a seriously wounded person would have had the opportunity or interest to make up a lie about the reason for her cut throat.
- Eg Bedingfield, assume a second witness who saw the accused brandishing a razor in the presence of the victim. The witness's evidence would be admissible in the trial, but it would have nothing to say as to the circumstances of the deceased's 'previous representation'. The second witness may not have heard the deceased's exclamation. It would follow that the evidence of what the second witness saw the accused doing would cast no relevant light upon the circumstances of the making of the previous representation by the deceased.

SAMPLE EXTRACT OF NOTES