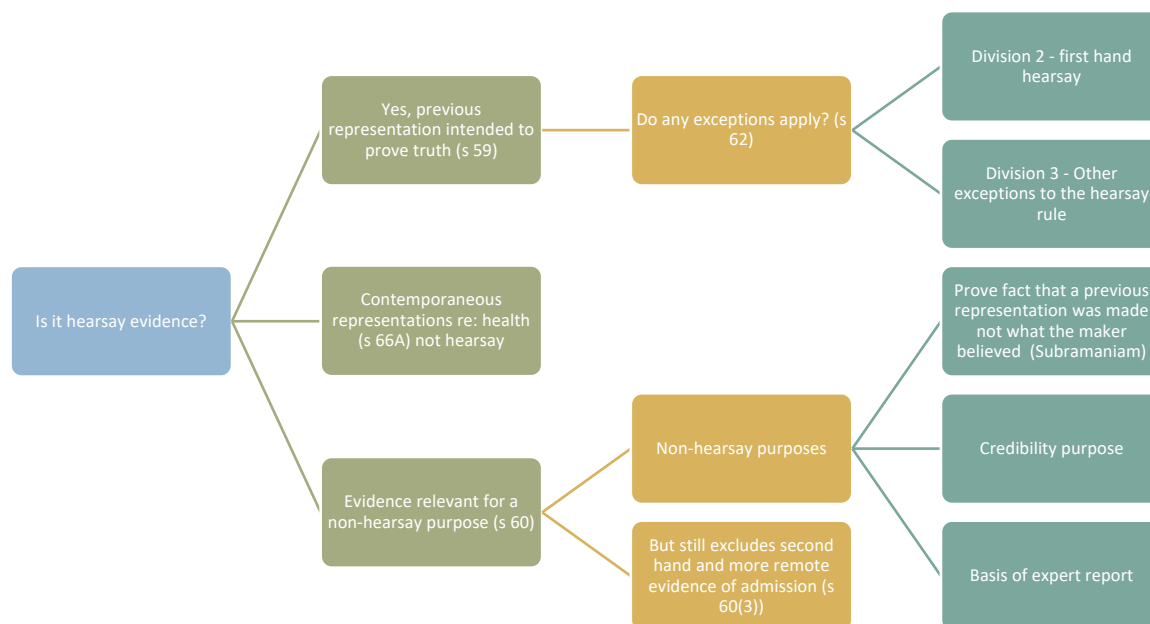


OVERVIEW



THE HEARSAY EXCLUSIONARY RULE

1. General scope of the exclusionary rule

- a. Evidence of a: (s 59(1))
  - i. Previous representation
  - ii. Made by a person
  - iii. Is inadmissible to prove the existence of a fact
  - iv. Which it can be reasonably be supposed that the person intended to assert by the representation
- b. For purposes of determining under (1) the issue of intent Ct may have regard to the circumstances in which the representation was made (s 59(2A))
- c. Different exceptions to the rule are engaged depending on whether it was firsthand or secondhand hearsay
  - i. **Firsthand:** the maker of the representation saw the fact/ opinion they are intended to assert

2. Is the evidence hearsay evidence?

- a. Elements
  - i. A previous representation (can be in document form)
  - ii. Made by a person
  - iii. Containing what can reasonably be supposed to be an intended assertion of fact
  - iv. Representation must be adduced (by P/D) to prove the existence of the asserted fact (or the truth of the facts asserted)
- b. Burden of proof
  - i. For elements 1 and 2, the burden is on the party wishing for inadmissibility. For elements 3 and 4, the burden is on the party wanting the evidence to be admitted
    - 1. BoP on the party arguing for admission to satisfy the Ct on **balance of probabilities** that it cannot be reasonably be supposed that the representation was intended to assert the existence of a fact (s 142)
  - ii. **Lee v The Queen** shows that it is important to identify the intended asserted fact in the previous representation and whether the previous representation is being admitted to prove **that** asserted fact
- c. **Previous representation** – EA Dictionary
  - i. Representation **made otherwise** than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced

- ii. Representation includes
  1. Express or implied representations;
  2. Representations inferred from conduct
  3. Representations not intended to be seen or communicated
  4. Representation that for any reason is not communicated
  5. NB: broad definition of representation does not mean all implied assertions are caught by the hearsay rule
- d. **Made by a person**
  - i. Excludes representations made by machines or animals.
    1. Human machine composite statements – lab experiments, computer print outs are admissible to prove results, but technicians would have to be called to testify as to origin of the data (R v Wood)
  - ii. Representations contained in documents are taken to be made by a person if (**Dictionary**)
    1. Document was written/ made by them
    2. Representation was recognised by the person via signature
  - iii. Competence of the maker of the representation under **s 13 (s 61)**
    1. If not competent, hearsay evidence is inadmissible unless evidence relates to a contemporaneous representation by a person about their own health, emotions etc under **s 66A**
- e. Containing what can reasonably be supposed to be an **intended assertion of fact**
  - i. Evidence is hearsay and inadmissible when the object of the evidence is to **establish the truth of what is contained in the statement**, whereas evidence is not hearsay when it is proposed to establish by evidence, not the truth, but the fact that **it was made (Subramaniam)**
  - ii. The party wanting the evidence to be admitted will need to prove that it is adduced for a non-hearsay purpose
    1. E.g. object of evidence to establish the **fact in issue / existence of a fact / that the statement was said**, rather than its truth (**Subramaniam**)
      - a. In **Subramaniam**, the Privy Council said that the statement made by the terrorists was being introduced to prove the D's state of mind (and establish defence of duress) rather than to prove that the terrorists would kill him.
      - b. Evidence of a state of mind is not evidence of a fact, therefore not hearsay.
  - iii. Examples
    1. Legally significant words: Not necessarily that you'd have gone through with the act, but linguistically, would amount to certain significant words
      - a. E.g. formation of a contract
    2. Saying of defamatory words in libel claim
      - a. Pltf not claiming that they are true – fact they were said is what is relevant to his claim
    3. Incitement
      - a. Evidence of D's particular state of knowledge (**Kamleh [16]**)
- f. **Actual existence of the fact**
  - i. Representation must actually be adduced to **prove the actual existence** of the fact for it to be classified hearsay
    1. **Test:** What did the person reasonably intend to convey by the representation (assessed objectively)
    2. **Distinction:** W saying he heard words spoken by a robber (significance of the ev is the fact that the words were said) vs W intending to assert the statement 'the boys did that stick up' is true (prima facie inadmissible)

## EVIDENCE TO WHICH THE HEARSAY RULE DOES NOT APPLY

1. **Evidence relevant for a non-hearsay purpose (s 60)**
  - a. The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose **other than proof of an asserted fact (s 60(1))**
    - i. Operation of the section
      1. If evidence is relevant and admissible for non-hearsay purpose, then once admitted, can be used for hearsay purpose
    - ii. Non-hearsay purposes
      1. To prove the fact that a previous representation was made (**Subramaniam**)
      2. To prove credibility of the witness (e.g. evidence of PIS) (**Lee**)
      3. To prove factual basis for expert opinion (**Jango**)
  - b. Applies to second-hand evidence / admissions as well
    - i. This section applies whether or not the person who made the representation had **personal knowledge** of the asserted fact (**s 60(2)**)
  - c. However, this section does not apply in a **criminal proceeding** to evidence of an admission (**s 60(3)**)
    - i. Evidence relevant and admissible in a criminal proceeding for non-hearsay purpose cannot be used for its hearsay purpose
      1. **Lee**: 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. The evidence was excluded because it was second-hand admission
2. **Contemporaneous representations about health etc (66A)**
  - a. Applies to both **civil** and **criminal**
  - b. Previous representation made by a person which is a contemporaneous representation about:
    - i. Health
    - ii. Feelings
    - iii. Sensations
    - iv. Intention
    - v. Knowledge
    - vi. State of mind: Evidence used to prove a state of mind where relevant cannot be hearsay as it is relevant to *mens rea*

## EXCEPTIONS TO THE HEARSAY RULE

### Generally

1. NB: Evidence can nonetheless be excluded under **ss 135, 136, 137**
2. All exceptions to the hearsay rule depend on the maker being competent
  - a. Prerequisite to admitting evidence that the maker of the representation was competent (**s 61(1)**)
  - b. But s 61 does not apply to a contemporaneous representation (or admissibility of such representations) pursuant to s 66A (**s 61(2)**)
  - c. 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 (**s 61(3)**)

### Exceptions for firsthand hearsay (Division 2)

1. Division 2 exceptions only apply for firsthand hearsay evidence (**s 62(1)**)
  - a. Categories
    - i. Civil, maker unavailable (**s 63**)
    - ii. Civil, maker available (**s 64**)
    - iii. Criminal, maker unavailable (**s 65**)
    - iv. Criminal, maker available (**s 66**)
  - b. Firsthand
    - i. Person has personal knowledge if his or her knowledge was, or might reasonably be supposed to have been based on something that the **person saw, heard or otherwise perceived**, other than a previous representation made by another person about the fact (**s 62(2)**)
    - ii. **Firsthand**: X represents to M, M is firsthand witness of representation

- iii. **Second hand:** X represents to M, who represents to L, L is 2<sup>nd</sup> hand witness
      - 1. Admissible (with exception) only in civil cases **(s 60(2))**
  - c. Unavailable (**Dictionary EA**)
    - i. Dead
    - ii. **Not competent ...**
    - iii. W refuses to give evidence notwithstanding threat of contempt (**R v Suteski**)
  - d. Rationale for exceptions
    - i. **If maker available**, the maker should be in court to give evidence of the representation and to have their **knowledge of the asserted fact tested**.
    - ii. **If the maker is not available**, evidence of the representation may be permitted to be adduced from other sources to **prove its truth**. But only those who directly perceived the representation i.e. firsthand.
- 2. **Civil proceedings, maker not available (s 63)**
  - a. Hearsay rule does not apply to evidence
    - i. Given by a person who saw, heard or otherwise perceived the representation being made
    - ii. A document containing the representation
  - b. Party seeking to give evidence must give notice **(s 67)**
    - i. Notice of intention to adduce such evidence must be in writing, and given to each other party **(s 67(1))**
    - ii. If notice is not given, Ct may, on application of a party, direct that the exclusion still applies **(s 67(4))**
- 3. **Civil proceedings, maker is available (s 64)**
  - a. Hearsay rule does not apply to evidence of a previous representation given by firsthand witness where:
    - i. It would cause undue expense/ delay or not be reasonably practicable to call the maker of the representation in which case evidence of firsthand W admissible **(s 64(2))**
      - 1. Unreasonable expense or delay (**Caterpillar**)
        - a. Cost of securing the witness compared to the value of the litigation
        - b. Importance of the witness's evidence
    - ii. The maker of the representation is called to give evidence **(s 64(3))**
      - 1. Document containing must not be tendered before conclusion of examination in chief of the maker, unless court gives **leave (s 64(4))**
  - b. Party seeking to give evidence must give notice **(s 67)**
    - i. See above
  - c. Objection may be made within 21 days **(s 68)**
    - i. Notice must be given **(s 68(2))**
    - ii. If the objection is unreasonable the court may order costs **(s 68(4))**
- 4. **Criminal proceedings, maker not available (s 65)**
  - a. The hearsay rule does not apply to evidence of a previous representation given by **firsthand witness** if the representation was: **(s 65(2))**
    - i. (a) made under a duty to make that representation or
    - ii. (b) made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication or
      - 1. Strict contemporaneity not necessary but should ensure that the only evidence admitted is where the memory has not faded by the lapse of time – **Williams v The Queen (2000)** (5 days not proximate enough)
      - 2. Contemporaneity is a factor, not a focus. Courts appear to be focused on reliability – **Harris v The Queen (2005)** (W made a complaint within 24 hours of being assaulted)
      - 3. Mere formalities of making a witness statement at a police station and possibility of perjury conviction sufficient to satisfy reliability condition
    - iii. (c) made in circumstances that make it highly probable that the representation is reliable; or
    - iv. (d) was:
      - 1. (i) against the interests of the person who made it at the time it was made; and
        - a. Person more likely to be telling the truth if against his interest
      - 2. (ii) made in circumstances that make it likely that the representation is reliable

- a. Court must not consider likelihood of reliability by reference to the overall impression gained from all of the W or co-accused's statements, rather, each relevant fact (***Sio***)
    - v. Comments
      - 1. **s 65(2)** requires admissibility to be determined for each relevant fact sought to be proved.
      - 2. The TJ must be directed not to the apparent truthfulness, but to the objective circumstances in which the statement was made.
      - 3. **s 65(2)(d)(ii)** requires a trial judge to be positively satisfied that the representation tendered was made in circumstances that make it likely to be reliable.
  - b. **Representation made in court proceeding:** The hearsay rule does not apply to evidence of a previous representation made in the course of a court proceeding if, the defendant in the proceeding to which this section is being applied (**s 65(3)**)
    - i. (a) cross-examined the person who made the representation about it; or
    - ii. (b) had a reasonable opportunity to examine the person who made the representation about it
    - iii. NOTE multiple defendants: evidence of previous representation admitted under s 65(3) cannot be used against another D who did not have or not examine (**s 65(4)**)
  - c. **Evidence adduced by defendants:** The hearsay rule does not apply to (**s 65(8)**)
    - i. Evidence of previous representation adduced by a defendant or a document containing the representation
    - ii. If evidence has been admitted under (8) hearsay rule does not apply to evidence adduced by another party of a representation on the same matter (**s 65(9)**)
- 5. **Criminal proceedings if maker available (s 66)**
  - a. Hearsay rule does not apply where (**s 66(2)**)
    - i. Maker is or will be called to give evidence of their own previous representations and
    - ii. The occurrence of the asserted fact was fresh in their memory at the time rep was made
  - b. In determining whether the occurrence was fresh in the memory of a person, the Ct may take into account all matters that it considers are relevant to the question including (**s 66(2A)**)
    - i. (a) the nature of the event concerned; and
    - ii. (b) the age and health of the person; and
    - iii. (c) the period of time between the occurrence of the asserted fact and the making of the representation
    - iv. **Commentary:** Ct takes a contextual approach (rather than linguistic) and account for extended length of time where the events may have been especially traumatic ('looms large in the memory of the complainant' ***R v XY*** c.f. pre 2009 amendment approach in ***Graham***)
      - 1. No need to be 'recent' or 'immediate'
      - 2. Temporal connection not a focus though still is a factor
      - 3. Court will take into account nature of event e.g. the circumstances of the offence sufficiently memorable/ unusual to withstand the passage of time, be imprinted in the complainant's memory
    - v. **Still requires a temporal factor:** Delay exceeding 20 yrs cannot be regarded as fresh in the memory (***Clay (a Pseudonym) v R [2014] VIC***)
      - 1. But it is a VIC case, and arguably, years should not matter as much as context
      - 2. However, XY has been criticised in subsequent cases for being too peculiar in its facts, and for placing too much emphasis on the vividness of the events (***Clay, ISJ***)
      - 3. Though in ***Pate*** Ct held that delay of (12) years is not by itself determinative. There is no 'bright line' beyond which it cannot be fresh in the memory.
      - 4. However, court also said that the greater the period that has passed, the greater the need for there to be some reason why the event would be fresh in the memory.
  - c. Exception to the exception (**s 66(3)**)
    - i. s 66(2) does not apply to evidence of a previous representation if the previous representation was made for the purpose of indicating the evidence that the person who made it would be able to give
      - 1. i.e. hearsay representations contained in police statements or other similar documents may not be saved by **s 66(2)**