

Part 3.1 – Relevance

55 Relevant Evidence

- (5) The evidence that is relevant in a proceeding is evidence that, if it were accepted, **could rationally affect** (directly or indirectly) **the assessment of the probability of the existence of a fact in issue** in the proceeding.
- (6) In particular, evidence is not taken to be irrelevant only because it relates only to –
 - (a) The credibility of a witness, or
 - (b) The admissibility of other evidence, or
 - (c) A failure to adduce evidence.

56 Relevant evidence to be admissible

- (1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.
- (2) Evidence that is not relevant in the proceeding is not admissible.

Test	To be admissible, evidence must be relevant to the proceeding (s 56). In accordance with the definition in s 55, evidence is relevant if it could rationally affect (directly or indirectly) the assessment of the probability of the existence of a <u>fact in issue</u> in the proceeding. STEPS: 1. Look at the charge to determine what elements need to be proven. 2. Depending on the pleadings of either party we can extrapolate the facts in issue. 3. On this basis, determine whether or not the impugned evidence could rationally affect assessment of probability of FI <i>Papakosmos</i> → evidence must be relevant to be admissible. It must then navigate exclusionary rules and discretions.
Low bar	• <i>HML</i> → evidence may be relevant in providing context, explaining something otherwise courier, or reinforcing plausibility. • <i>Mundarra Smith</i> → test is whether the evidence <i>could rationally affect</i> the probability of a fact in issue, not whether it proves it. • <i>Cornwell</i> → facts providing surrounding context (not themselves facts in issue) are relevant. • <i>Imm</i> → reliability/credibility is a matter for the jury. Judge must take evidence at its highest and assume it will be accepted as true by the jury. Evidence only has to have slight probative value to be admissible. • <i>Bauer</i> → take evidence at its highest: exclude only if contamination/concoction so extreme that no jury could rationally accept it.
E.g	• <i>Mundarra Smith</i> → police recognition of accused in CCTV = not relevant; jury equally placed to make comparison → only relevant if witness has an <i>advantage</i> over jury. • <i>Volpe</i> → shoe/dna evidence = relevant; doesn't need to prove fact alone, can support inference alongside other evidence. • <i>Neal</i> → comments about his wife's frigidity relevant (akin to establishing motive) but excluded via s 137. • <i>Evans</i> → Broad threshold of relevance met (dressing in robber's clothes), but excluded as prejudicial. • <i>Wannouch & Lee</i> → no logical link – inference must be evidence-based/ grounded in logic not speculation.

57 Provisional Relevance

- (1) If the determination of the question whether evidence adduced by a party is relevant depends on the court making another finding (including a finding that the evidence is what the party claims it to be), the court may find that the evidence is relevant –
 - (a) If it is reasonably open to make that finding, or
 - (b) Subject to further evidence being admitted at a later stage of the proceeding that will make it reasonably open to make that finding
- (2) Without limiting subsection (1), if the relevance of evidence of an act done by a person depends on the court making a finding that the person and one or more other persons had, or were acting in furtherance of, a common purpose (whether to effect an unlawful conspiracy or otherwise), the court may use the evidence itself in determining whether the common purpose existed.

Part 3.2 – Hearsay

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** 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 purpose 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 circumstance** in which the representation was made.
- (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.

Purposive rule → directed toward preventing use of a previous representation to prove the **existence of a fact**.

***Generally excluded** because it denies opposing party the chance to cross-examine the original speaker – but this rationale is imperfect → some hearsay is inherently reliable (e.g. business records); cross-examination can be flawed; speaker may be available to testify; + judicial directions can address issues rather than outright exclusion.

Test: Is it hearsay???

1. Previous representation	Per UEA definition → Representation includes: (a) An express or implied representation (whether oral or in writing), or (b) A representation to be inferred from conduct, or (c) A representation not intended by its maker to be communicated or to be seen by another person, or (d) A representation for any reason is not communicated - Lee → representation = not just spoken/written statements but conduct & everything conveyed to observer - Rose → Silence or failure to respond can amount to a “representation” - depending on context & factual inference drawn from it.
	Previous representations → representations that are made outside the current trial in which evidence is being adduced; also NOT related proceeding (i.e. interlocutory hearings).
2. Made by a person	Not Animals or Machines w/out human input → turns on whether its creation required human contribution - Hansen Beverage Co → Data involving human intervention = hearsay, human action is an intentional representation (e.g. TV ratings from button presses). - O'Meara → applies if the asserted fact originates from a person who had personal knowledge
3. Containing an intended assertion of fact (maker's purpose)	Must be an intended assertion of fact → Covers express assertions + implied assertions the maker can reasonably be supposed to have intended having regard to the circumstances (objective test) (s 59(2A)) - Lee → having regard to the circumstances in which it was made, what can it reasonably be supposed that the maker of the representation actually intended to assert?? - O'Grady → can apply to intended implied assertions.
4. Adduced to prove the existence of fact (declarants purpose)	Will only be hearsay if it is used to prove the existence of a fact it can reasonably be supposed the maker of the representation intended to assert → depends on purpose (R v Lee) - If used for another purpose, it is original evidence and not hearsay (Walton, Pollitt). E.g. → Third-party confession to prove another committed the crime (Baker); Deceased's statement to prove who caused their injuries (Abel); complainant's prior statements to prove offence details (Papakosmas); accused's admission to prove they're the offender (Lee)

Non-hearsay previous representations → can be admitted as **original evidence** when they are not used to prove the truth of their contents → falling outside hearsay rule e.g.

- Prove a statement was made
- Prior representations can have a **dual purpose** → original evidence as credibility & hearsay for the truth
- Establish a person's **state of mind** (though treated as hearsay w/ s 66A exception) e.g. evidence an accused was threatened can show duress (**Subramaniam**) or statements of a victim expressing fear shows non-consent (**Matthews**)

Steps/considerations

1. **Relevance** – ss 55-56
2. **Is it hearsay** per s 59 → apply definition.
3. Is it **first-hand hearsay** or **second-hand/more remote** hearsay (per s 62 definition for first-hand)?
4. If the **maker is unavailable** (s 65) → also consider whether being adduced by prosecution vs defence
 - a. + **notice requirement** under s 67
5. If the **maker is available** → s 66.
6. For **second-hand hearsay** → only available if **specific exceptions** in ss 69-75 apply
7. Consider if **s 60 is relevant** → e.g. waive hearsay rule in relation to evidence already admitted.
8. Note additional exceptions (e.g. character of + expert opinion abt accused persons s 110 & 111; admissions (s 81)).
9. ***Note **competency requirement** per s 61
10. Consider discretionary/mandatory exclusions/ limited use – ss 135-137
11. If admitted → **reliability warning if requested (s 165(1)(a))** → judge must warn jury that hearsay evidence may be unreliable + explain why → warning is preferred over exclusion.

S 60 non-hearsay/dual relevance exception

60 Exception: Evidence relevant for a non-hearsay purpose

- (1) 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**.
- (2) This section applies **whether or not** the person who made the representation had **personal knowledge** of the asserted fact (within the meaning of section 62(2)).
- (3) However, this section **does not apply** in a criminal proceeding **to evidence of an admission**.

NOTE – the admission may still be admissible under s 81 as an exception to the hearsay rule if it is “first hand” hearsay: s 82.

Function	S 60 removes the hearsay restriction for previous representations that have both a non-hearsay & hearsay relevance, but only after the representation has been admitted for its non-hearsay purpose. • Note – prone to s 136 exclusion and other Part 3.11 discretions (exclude unfairly prejudicial hearsay; limit) • Note – applies to second-hand and more remote hearsay per s 60(2) • Excludes application to admissions s 60(3) → promotes practicality & fairness by avoiding artificial evidentiary distinctions, letting courts evaluate relevant evidence on its merits e.g. helps in expert evidence cases or with prior statements.
Cases	• <i>Adam</i> → prior inconsistent statement (first used for credibility) used for truth under s 60) → witness retracted statement about fatal stabbing; prosecution used s 38 (unfavourable witness) & s 103 (credibility) • <i>Welsh</i> → s 60 applied to statements forming the basis for an expert psychiatrist opinion. • <i>Roach</i> → how discretions interact with s 60 ○ Noting aim to avoid artificial distinctions, discretions should be used narrowly to prevent real unfairness, not restore common law rules.

61 Exceptions to the hearsay rule dependent on competency

- (1) This Part **does not enable the 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 contemporaneous representations** 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.
- Exceptions have a **competency requirement** → uses definition in s 13(1) & applies it to the point in time when the representation was made, creating expectation that any representation admitted through an exception in Part 3.2 is a representation made when the person had/could demonstrate they had baseline competence.

Div 2 – First-hand hearsay

62 Restriction to “first-hand” hearsay → **provides definition

- (1) A reference in this Division (other than in subsection(2)) to a previous representation is a reference to a previous representation that was made by a person who had **personal knowledge of an asserted fact**.
- (2) A **person has personal knowledge** of the asserted fact if his or her knowledge of the fact 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.
- (3) For the purposes of section 66A, a person has personal knowledge of the asserted fact if it is a fact about the person’s health, feelings, sensations, intention, knowledge or state of mind at the time the representation referred to in that section was made.

- A previous representation will only constitute first-hand hearsay if the person who made it had **personal knowledge of the facts asserted** and the representation is being used to prove those facts.
- S 62(2) → **personal knowledge** can only come from what a person has (or can **reasonably be supposed to have**) **seen heard, or otherwise perceived**. I.e. if previous representation has a representation embedded in it - it's not first-hand
- *Lee* → second-hand hearsay of a witness’s alleged account of the accused’s admissions was inadmissible; it would only be admissible if the witness testified directly.
- *Vincent* → Robbery victim’s account of a woman’s statement about seeing a getaway car admissible: timing, context, and wording **supported inference she was reporting her own observation**.
- *Adam* → Witness’s police statement admissible as first-hand hearsay since it **implied direct perception** of events.
- *Welsh* → Accused’s statements to psychiatrist about hallucinations admissible under s 66A as expression of state of mind/health, satisfying s 62 personal knowledge.
- *Conway* → Diary entry alleging prior drugging was inadmissible because no one perceived the deceased writing it

‘Unavailability’ – defined relatively broadly in UEA

4. Unavailability of persons

- (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 section 16 (competence and compellability: judges and jurors), **not competent to give the evidence**, or
 - (c) The person is **mentally or physically unable** to the evidence and it is not reasonably practicable to overcome that inability, or
 - (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 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 cases, the person is taken to be available to give evidence about the fact.

- Courts interpret “unavailability” liberally to include reluctant or hostile witnesses
- Under cl 4(1)(c) &(g) → can cover fear-based or unwilling witnesses e.g. domestic violence complainant exempted (*Nicholls*)
- *Sutseki* → refusal to testify despite contempt warnings treated as unavailability w/ cl 4(1)(g) since all reasonable compulsion failed.
- Effort standard: *Aujla & Singh*, extensive but unsuccessful attempts to secure an overseas effort met “Reasonable efforts” threshold under cl (4)(1)(f) &(g).
- *Mindshare* → refusal based on privilege amounted to unavailability.