

Topic 8: Hearsay

Is it hearsay?

- Previous representation
- Document
- Made by a person
- Representation contains an asserted fact + intended
- Is the evidence being adduced to prove the assertion true?

Does an exception apply?

- Representation for non-hearsay purpose (i.e. not to prove the asserted fact true) (s60)
- Competency exception
- Admissions
- First Hand Hearsay (ss 66, 65, 64, 63)
- Business Records Exception

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 (s59). Therefore, [evidence] may be inadmissible and excluded as it is prima facie hearsay evidence.

(1) Is it hearsay?

1. Previous Representation [Who made it? What did they say? Why is it relevant?]

Hearsay evidence is evidence of a previous representation. A previous representation is 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 (EA Dictionary). In this case, [evidence] is a previous representation because it was made outside the witness box.

Representations (very broad definition) include:

- An express or implied representation (oral/writing); or
 - Express: A tells you that B is on the phone
 - Implied: A answers the phone and says 'Hello B'; and you could assume B is on the phone
- A representation to be inferred from conduct; or
 - Blanket over B's body may infer that B is dead
- A representation not intended by its maker to be communicated to or seen by another person; or
 - Diary or work notes
- A representation that for any reason is not communication
 - A draft email that is not sent

Document

A 'document' is:

- Anything on which there is writing
- Anything on which there are marks, figures, symbols or perforations having a meaning for person qualified to interpret them
- Anything from which sounds, images or writing can be reproduced with or without the aid of anything else
- A map, plan, drawing or photograph

A representation contained in a document is taken to have been made by a person, if it was written or signed by that person

2. Made by a person

The previous representation must be made by a person. Person is not defined in the Evidence Act. In this case, the previous representation was made by [maker] and they are a person.

*Likely includes corporations

3. Representation contained an assertion (+ assertion was intended)

The previous representation made by [maker] must contain an assertion and the assertion must have been intended. [Maker] must have intended to make the representation for it to be caught within the hearsay rule.

What is the assertion? The representation does contain an assertion, that [assertion]

- Implied assertion: An assertion which may be implied from words or conduct, even though the word/conduct was not intended to be assertive

Was the assertion intended? In determining whether the assertion was intended regard should be had to all the circumstances (s59(2A)). In this case it seems [likely/unlikely] that the assertion was intended because...

Unintended representations (Walton) (eg. things said without thought, instinctive reactionary statements, spontaneous) are not hearsay – rationale is that there is less danger of fabrication

Walton: Child saying 'Hello Daddy' was adduced to prove that it was the child's father on the phone. Under s59, this was an unintended representation and could be adduced (not caught by the hearsay rule)

- But, this evidence would likely be challenge under s137 as minimal probative value and the danger of prejudice is high because the child was first told by their mother that it was the D on the phone

4. Is the evidence adduced to prove that the assertion is true? [Ask: what is the purpose of the evidence]

Additionally, for the evidence to be caught by the hearsay rule (and inadmissible) the evidence must be adduced to prove the assertion to be true. However, if the evidence is not being adduced to prove the assertion is true, then it will fall outside the hearsay rule.

In this case, the assertion the representation makes is that [assertion]. The purpose of adducing the evidence is to prove [what is the purpose of adducing the evidence – Is it to prove the assertion true? Or another purpose (eg. to show the state of mind)]

In this case, the evidence [is/is not] being adduced to prove the assertion true. Consequently it [will/will not] be hearsay evidence.

Not hearsay if adduced for another purpose (non-hearsay purpose (s60)), such as:

- To prove a mental state (Subramaniam) – relevant to the defence of duress
- To show a person's intention and plan (Walton; Kamleh; Ratten)

Subramaniam: D charged with wearing ammunition belt and plead duress in defence. Gave evidence that he was captured and forced by terrorists to wear the belt or be killed by them and described what they said to him.

- Hearsay evidence adduced for non-hearsay purpose: Threats were not adduced to show that the terrorists wanted to kill him (i.e. prove asserted fact true - hearsay); but rather to prove that the threats had the effect of making him fearful and acting under duress (i.e. proving the mental state; not that the asserted fact is true – non-hearsay)

Ratten: D charged with murder of his wife. He argued that it was accidental. Evidence of a series of phone calls; D's dad calls (1:09); hysterical woman called yelling 'get me the police' (1:15); Police call D's house (1:20)

- Hearsay evidence adduced for non-hearsay purpose: "Get me the police" was not adduced to show that the woman wanted to police; but rather to show that she was hysterical (state of mind)

May need to consider s137 in these cases

(2) If hearsay evidence: Does an exception apply?

While this does appear to be hearsay evidence and prima facie inadmissible (s59), an exception may apply allowing it to be adduced.

1. Relevant for a non-hearsay purpose (i.e. adduced not to prove the assertion true)

Under s60(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. The asserted fact outlined in the representation is [assertion]. The purpose of the evidence is to prove [not the assertion (something else) eg. state of mind]. Consequently, the evidence may be relevant for a non-hearsay purpose and therefore not caught by the hearsay rule.

2. Competency Exception

Section 60(1): Cannot use 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 this evidence because of s13(1)

- If the witness could not give evidence on their own right, this should not be an alternative option (cannot sneak evidence of incompetent people through hearsay)

(i.e. was the person who made the initial representation a child???)

3. Firsthand Hearsay (FHH) [Is it FHH? Is the maker available? Is it criminal or civil?]

[Evidence] may be admissible on the first hand hearsay (s62) exception, as [person giving the evidence] was told [evidence] directly from [maker]. This is a [civil/criminal] proceeding. In this case, [maker] is [available/unavailable] because...

Therefore, regard must be had to [s63; 64; 65; 66].

Is the maker unavailable because :

- a) Dead
- b) Not competent
- c) Mentally/physically unable
- d) Unlawful for them to give evidence
- e) EA prohibits it
- f) All reasonable steps taken to secure and compel attendance without success (EA Dictionary)

Types of firsthand hearsay:

- Criminal proceedings, maker unavailable (s65)
- Criminal proceedings, maker available (s66)
- Civil proceedings, maker unavailable (s63)
- Civil proceedings, maker available (s64)

Ask:

1. Is it first hand hearsay?
2. Is the maker available?
3. Is it a criminal or civil proceeding?

A. Criminal proceedings; maker unavailable (s65)

Section 65(2): Hearsay rule does not apply to evidence of a previous representation that is given by person who saw/heard/perceived representation being made if

- (a) the maker was made under a duty to make that representation or (e.g. doc/paramedic); or

- (b) was made when/shortly after asserted fact occurred and in circumstances that make it unlikely the representation is a fabrication; or
- (c) was made in circumstances that make it highly probable the representation is reliable or
- (d) was
 - (i) against interests of person who made it at the time it was made; and
 - (ii) made in circumstances that make it likely the representation is reliable.

(a) Was the maker under a legal duty to make that representation (s65(2)(a))

In this case [maker] was the maker of the representation. As [role/duty eg. police/ambulance/medical practitioners] they were under a legal duty to make the representation. As such their previous representation may be an exception to the hearsay rule (s65(2)(a))

(b) Made shortly or during the time of the fact that is being asserted/circumstances unlikely fabrication (s65(2)(b))

The previous representation may not be subject to the hearsay rule if it was made shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication (s65(2)(b)). There is a contemporaneity requirement here, however whether it was made shortly after will be fact dependent (Willaims). Regard must be had to the specific facts (Harris).

In this case, it is likely that it will be made shortly after because [facts – consider motive to lie (eg. if someone is dying, they are less likely to be lying); possibility of fabrication]

- 4 hours is okay (Conway)
- 24 hours after is okay (Harris)
- 5 days was too long (Williams)

(c) Was made in circumstances that make it highly probable that the representation is reliable (s65(2)(c))

The previous representation may not be subject to the hearsay rule if it was made in circumstances that make it highly probable that the representation is reliable (s65(2)(c)). Do circumstances the representation was made in, make it highly probable and reliable? (Munro cf Williams)?

Consider (Munro):

- Is it easy to recall
- Does the maker have any reason to lie (no interest)
- Person respected for honesty and professionalism

(d) Made against the persons interests & circumstances make it likely reliable

Whether representation is against interests is determined by objective test (Sio). Identification of circumstances which of themselves warrant conclusion that representation is reliable, not general assessment of whether likely that maker is reliable witness .

Section 65(7): A representation is taken to be against the interest of the person who made it if it tends to:

- a) Damage their reputation
- b) Show the person has committed an offence for which they have not been convicted; or
- c) Shows that the person is liable in an action for damages

B. Criminal proceedings; maker available (s66)

The hearsay rule does not apply to evidence of a representation that is given by a person who made the representation, or a person who saw/heard/perceived the representation being made if:

- (a) P who made the representation has been or is called to give evidence **and**
- (b)

- (i) when the representation was made, the occurrence of the asserted fact was **fresh in the memory** of P who made the representation **or**
- (ii) P who made representation is a **victim of offence** to which the proceeding relates and was **under 18** when representation was made (s66(2)) – **particularly relevant to sexual offence of children cases**

Ask: Was the asserted fact of the representation fresh in the memory?

In determining whether it was fresh in the memory of [maker] consider may be had to s66(2A). In determining whether the occurrence of the asserted fact was 'fresh in the memory' of a person, the court may take into account all relevant matters, including –

a) The nature of the event

- 'Traumatic', 'striking' or 'emotion-eliciting' events remain fresh for longer (Clay)
- 'Unusual feature' of the even makes it more likely to remain fresh (Clay)

b) The maker's age and health

- c) The **period of time between** the occurrence of the asserted fact and the making of the representation
 - Not determinative (ALRC; Clay)
 - Particularly traumatic event likely to remain fresh for many years (Bauer; Clay)
 - A period longer than 20 years may be too much though

'Fresh in the memory' does not mean 'recent' or 'immediate' (Graham). The nature and seriousness of the offending has a strong impact on whether it is likely to be 'fresh' in a person's memory

Ask: Was the maker of the representation the victim + under 18 years when representation made

C. Civil proceedings; maker unavailable (s63)

Section 63(1) applies in a civil proceeding if a person who made a previous representation is not available to give evidence about an asserted fact. The hearsay rule does not apply to

- (a) Evidence of representation that is given by a person who saw/heard/perceived the representation being made; or
- (b) A document, so far as it contains the representation/another representation to which it is reasonably necessary to refer in order to understand the representation (s63(2))

D. Civil proceedings; maker available (s64)

Section 64(1) applies in a civil proceeding if a person who made a previous representation is available to give evidence about an asserted fact. The hearsay rule does not apply to:

- a) Evidence of a representation that is given by a person who saw, heard or otherwise perceived the representation being made; or
- b) A document, so far as it contains the representation/another representation to which it is reasonably necessary to refer in order to understand the representation

- If it would cause undue expense or delay, or would not be reasonably practicable to call the person who made the representation to give evidence

In considering whether it is not reasonably practicable, factors include:

- The cost of securing the witness' attendance
- How important the litigation is
- The overall significance of the witness' evidence to determining the case
- The age and health of the witness

If hearsay admitted – consider any jury directions (warnings – s31; 32 JDA)

4. Business Records Exception (s69)

While the [document] is hearsay, it may be an exception to the rule on the basis that it is a business record (s69).

1. Is there a business?

It is likely that [business] is a business. Business is broadly construed (Lancaster) to include activities engaged in (by DHS, other social welfare agencies, hospitals, medical practices and kindred health care providers)

2. Is the evidence (previous representation) a business record?

[Document] may be deemed a business record. As per s69(1) a document is a business record if:

- a) It is part of the records kept by individual/body/organisation in the course of or for the purpose of a business; or
- b) Contains a previous representation made or recorded in document, in course of or for the purpose of business

3. Where no records are kept?

Section 69(4): If

- (a) occurrence of even of a particular kind is in question; and
- (b) In the course of business, a system has been followed of making/keeping record of occurrence of that kind

- hearsay rule does not apply to evidence that tends to prove there is no record kept in accordance with that system

4. Does the person on the end of the chain, have personal knowledge of the assertion?

Section 69(2): Hearsay rule does not apply to a document if the representation was made

- (a) by a P who had/might reasonably be supposed to have had personal knowledge of the asserted fact (did the person who made the document have personal knowledge of the assertion?); or
- (b) on the basis of info directly (SHH)/indirectly supplied (THH) by a P who had/might reasonably be supposed to have had personal knowledge of the asserted fact (did the person who made the document have direct info from a person with personal knowledge?)

Number of intermediaries does not matter so long as the person at the end of the chain has/had personal knowledge (Lancaster; Lithgow)

Section 69(5): P taken to have had personal knowledge of a fact if the P's knowledge of the fact was, or might reasonably be supposed to have been, based on what the P saw/heard/otherwise perceived (other than a PR made by P about the fact).

5. Electronic Communications Exception (s71)

The hearsay rule does not apply to a representation contained in a document recording an electronic communication so far as the representation is a representation as to—

- (a) the identity of the person from whom or on whose behalf the communication was sent; or
- (b) the date on which or the time at which the communication was sent; or
- (c) the destination of the communication or the identity of the person to whom the communication was addressed.

Stevenson v The Queen: Facebook posts were admitted to prove the applicant was aware the complainant was 15 years old. Facebook posts constituted a document