

HEARSAY: Hearsay Rule

Evidence of a previous out-of-court representation, adduced to prove the truth of a fact the maker intended to assert, is inadmissible unless an exception applies

Section 72 (UEL s 59) – Hearsay Rule

- 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 the person intended to assert by the representation (*an asserted fact*)

Requirements for Exclusion (ALL MUST BE PRESENT)

1. There is evidence of a "representation"
2. The representation was made "previously"
3. It was "made by a person" (the declarant)
4. It is adduced to prove the existence of a fact (the asserted fact)
5. It can reasonably be supposed the declarant intended to assert that fact

Representation

- An assertion about a fact (**s 3**); includes:
 - Express or implied representation (oral or written);
 - A representation to be inferred from conduct, including silence/inaction – **Rose**;
 - Nodding or shaking head, general body language
 - A representation not intended to be communicated; or
 - Writing in diary
 - A representation not communicated for any reason
 - Such as draft emails
- Must be **very specific in defining the representation**
 - Often sentences contain multiple representations which need be treated separately
 - Focus on each specific representation and consider what it is being used to prove, and the circumstances in which it was made – **Sio**

Previous Representation

- A representation made otherwise than in the course of giving evidence in the proceeding (**s 3**)
 - Broadly interpreted; includes representations in pre-trial proceedings – **Hoy Mobile**

Made by a Person

- Includes a public body/company/association (s 5 1A); but excludes
 - Purely machine-generated information – **Meriton**;
 - Animal conduct
 - Dog barking at intruder

Adduced to Prove Evidence of a Fact

- Hearsay is **adduced to prove the truth of the asserted fact**; original evidence is a previous representation **adduced for a NON-hearsay purpose** (credibility, tendency, state of mind)
 - If bringing into court to prove the truth of whatever the representation was about then it will be caught by the hearsay rule and it is hearsay evidence
 - If introducing that statement for any other reason than to prove its truth then it is not hearsay but rather, original evidence

Identify: (i) the representation; (ii) the FII it proves; (iii) how it will be used to prove it

Examples of Hearsay Evidence

- Evidence of a confession to a crime another had been convicted of, adduced to prove that the confessor really committed the crime – **Baker**
- Evidence statements that someone had hurt another person, led to prove the truth of this – **Harris**
- Evidence in a sexual offence case of statements made by the complainant to a friend about what happened, adduced to prove the details of the offence – **Papakosmas**
- Evidence from a factory of records of the original ID number of cars, adduced to prove this – **Myers**
- Evidence of packaging labels, adduced to prove the origin of the goods – **Patel**

Examples of Non-Hearsay (Original) Evidence

- Evidence of a threat adduced to prove that a threat was made and its effect (duress) – **Subramaniam**
 - Was not adduced to **prove the truth of the threat**, but to substantiate the mental state
- Other non-hearsay uses:
 - A lie showing consciousness of guilt – **Kamleh**;
 - Prior inconsistent statement going to credibility;
 - Medical history given to a doctor, to prove the basis of the doctor's opinion – **Welsh**;
 - Proof of English proficiency – **Bochkov**
- Onus on party claiming non-hearsay purpose to show relevance/admissibility for that purpose – **Rose**
 - Where a party seeks to adduce a prior representation, it is assumed the reason they wish to do so is to prove the truth of that representation

Section 72(2) – Declarant's Intention

- Must be a fit between what the party uses the representation to prove and what the declarant intended to assert
- Objective test: **what can the declarant "reasonably be supposed" to have intended** – **O'Grady**
 - The hearsay rule is not designed to capture unintentional representations
 - Sarcasm or representations made in jest
- The court may have regard to the circumstances in which the representation was made (**s 72(2)**)

HEARSAY: First-Hand Hearsay Exceptions

Subdivision 2 (ss 75-80) & Subdivision 3 (ss 83-89) – Exceptions Overview

- Exceptions arise where reliability concerns are diminished and/or the evidence is necessary
 - Categorised by first-hand vs more remote; declarant available vs not; civil vs criminal; prosecution vs defence
- Subdivision 1:
 - Non-hearsay purpose (**s 73**)
- Subdivision 2:
 - First-hand (**ss 76-80**)
- Subdivision 3:
 - Business records (**s 83**)

Section 75 – First-Hand Hearsay

- (2) A person has personal knowledge of the asserted fact if the 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, other than a previous representation made by another person about the fact
 - A representation by a person who had personal knowledge of the asserted fact
- Judged from the declarant's perspective
 - Knowledge based (or reasonably supposed to be) on **what that person saw, heard or otherwise perceived**, other than another person's representation about the fact
 - If the declarant is stating something they heard from another it will be second-hand or more remote hearsay
- *Perceive* means to be observed by one of the five senses – **Lithgow**
- Sufficient if it *might reasonably be supposed* the knowledge was based on perception – **Vincent**
 - Not satisfied where it is at least equally possible the info came from someone else – **Citibank**

Section 78 (UEL s 65) – Criminal Proceedings, Declarant Not Available

- Applies only in criminal proceedings (**s 11**), to first-hand hearsay (**s 75**), where the declarant is not available (**s 9**)

Section 9 – Declarant Not Available

- (1) Not available if:
 - (a) Dead;
 - (b) Not competent;
 - The accused is unavailable for the prosecution – **Kier**
 - (c) Mentally or physically unable and not reasonably practicable to overcome
 - Significant emotional or psychological harm – **Nona**
 - (d) Objects under s 28 and upheld;
 - (e) Unlawful to give evidence;
 - (f) A provision prohibits it; or
 - (g) All reasonable steps to find or secure or (h) compel failed
- (2) Otherwise, available

All Reasonable Steps

- *All reasonable steps* factors – **Huang**
 - Whether identity or location known;
 - Hired a PI, who was unable to find the witness – **AJW**
 - Seriousness of the case;
 - Importance of the evidence;
 - Inquiries made and outcome;
 - DPP had sufficient time to find witness, they did not take substantial efforts – **ZL**
 - Witnesses were in the US, the prosecution never reached out, nor took steps to compel them to do so (financial) – **Caterpillar**
 - Cost or delay compared to likely usefulness considerations
- Held that compelling witness as done in **Suteski** (stating they will be liable to the criminal charge of contempt of court) was insufficient and that a subpoena must actually be filed – **Clancy**

Section 78(2) – Listed Exceptions to First-Hand Hearsay

- (2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation:
 - (a) Was made under a duty to make representation or make representations of that kind; or
 - (b) Was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or
 - (c) Was made in circumstances making it highly probable that the representation is reliable; or
 - (d) Was:
 - (i) Against the interests of the person who made it at the time it was made; and
 - (ii) Made in circumstances that make it likely that the representation is reliable

Section 78(2) – Common Requirements

- There must be:
 - Hearsay evidence (s 72(1));
 - Which is first-hand hearsay (s 75);
 - The declarant cannot be available (s 9);
 - The witness saw, heard or otherwise perceived the declarant make the representation; and
 - If documentary evidence, the witness need to have seen the declarant writing or signing the relevant document(s) - **Conway**
 - The representation was made in one of the listed circumstances (s 78(2))
- Focus on each representation separately; what it proves; circumstances in which it was made – **Sio**

Section 78(2)(a) – Made Under a Duty

- Made under a duty to make that (kind of) representation
 - Applies to evidence given on oath in court – **Kier**
- May apply to representations made in the course of employment duties

Section 78(2)(b) – Contemporaneous Representations

- Made in approximate contemporaneity **AND** in circumstances making it unlikely to be a fabrication
- Approximate contemporaneity:
 - Assume the asserted fact occurred, then consider difference in time – **Polkinghorne**
 - *Shortly after* is flexible
 - Focus on temporal distance and its effect on likelihood of fabrication – **Williams**
 - 5 days held to be too long – **Williams**
 - 24 hours was OK – **Harris**
 - Statement must be made under the **proximate pressure** of the incident – **Curran**
- Unlikely to be a fabrication:
 - Limited to deliberate concoction – **Polkinghorne; Thomas**
 - Court may consider:
 - Circumstances at the time; and
 - Prior or subsequent circumstances affecting likelihood of fabrication – **Ambrosoli; Sio**
 - The adducing party must identify circumstances making it unlikely there is a risk of fabrication
 - Pointing to the mere absence of a motive to lie is insufficient – **Williams**
 - Relevant circumstances include:
 - Signing a statement acknowledging truthfulness and consequences – **Harris cf AB**
 - Knowing the representation could be checked by authorities – **Youkhana**
 - Consistency with other material – **Williams**; or statements by the declarant – **Chidiac**
 - Dying declarations – **Jones**

Section 78(2)(c) – Reliable Representations

- Adducing party must be able to point to circumstances that **significantly** increase the reliability
 - Interpreted strictly – **Conway**
 - The **absence of undermining factors is insufficient**
- Focus is on the **circumstances** and their implications for reliability, **not** whether the representation is actually reliable or true (that is for the jury) – **Ambrosoli**
- Examples of representations with a highly probability of reliability:
 - Young child volunteering information to a trusted person who understood the words – **TL**
 - Cognitively impaired witness, statement soon after upsetting events – **Prasad**
 - Relevant circumstances: cognitive impairment, close temporal distance; events described would have been extremely upsetting, thus stuck out in memory
 - Evidence about work systems by a witness with no personal interest, checkable – **Munro**
 - Relevant circumstances: work systems likely to be well-remembered, witness had no interest in the proceedings, information was verifiable

Sections 78(2)(d) and 78(7) – Against Interest

• The test is whether the representation was:

- (i) Against the maker's interests at the time; and
- (ii) Made in circumstances making it likely the representation is reliable
 - Consider each representation separately – **Sio**
- *Against interests* has a non-exhaustive meaning (s 78(7)):
 - Tends to damage reputation, show an unconvicted offence, or show liability in damages
- Objective test – **R v Sio**
 - Representation maker's motives are irrelevant; should be assessed contextually – **Suteski**
 - Sufficient that it tends to have the effect; not that it actually does – **El Masri**
- **Assess the circumstances, not whether the declarant is a reliable witness** – **Sio**
 - Can be satisfied even with a real, non-negligible chance of unreliability – **Sio**
- There must be positive factors removing the dangers that arise from a motive to shift blame for the accused or accomplices
 - A representation to a friend rather than police may be more reliable – **Asling**

Section 78(8) – Hearsay Evidence Adduced by Accused

- Subsection (a) requirements:
 - There is first-hand hearsay evidence (s 75)
 - The declarant is not available (s 78(1); s 9)
 - The witness saw, heard or otherwise perceived the declarant make the representation
 - The evidence is adduced by the accused in a criminal proceeding
 - **X told Y that they saw first-hand that the fire Z lit was entirely accidental, X is unable to testify, Y can testify on what X told them, without the hearsay rule applying**

- Subsection (b) requirements:
 - There is documentary hearsay evidence
 - The evidence is first-hand hearsay (**s 75**) or is reasonably necessary to refer to in order to understand the first-hand hearsay
 - The declarant is not available (**s 78(1); s 9**)
 - The evidence is adduced by the accused in a criminal proceeding
 - X instead texted Y that the fire Z lit was entirely accidental

Section 78(9) – Rebutting Accused’s Hearsay Evidence

- Where the accused adduced (and had admitted) a representation, the prosecution/co-accused may adduce another first-hand representation about the same matter
- The requirements for this are as follows:
 - (1) The accused has adduced evidence of a previous representation, admitted(**s 78(8)**)
 - (2) There is first-hand hearsay evidence about the same matter (**s 75**)
 - (3) The declarant is not available (**s 78(1); s 9**)
 - (4) The witness saw, heard or otherwise perceived the declarant make the representation; and
 - (5) The evidence is adduced by the prosecution or a co-accused in a criminal proceeding

Section 81 – Notice Requirements

- A party relying on **ss 78(2), (3) or (8)** must give reasonable written notice of their intention to adduce the evidence to the other party (**s 81(1)**)
 - The notice must state the particular provisions on which the party intends to rely in arguing that the hearsay rule does not apply to the evidence (**s 81(3)(a)**)
- On application of the party, court may direct that an exception applies, dispensing of notice (**s 81(4)**)
 - The direction may provide that the exception or exceptions concerned apply with the modifications the court specifies (**s 81(5)**)
 - The court may impose conditions on the direction: (**s 81(6)**)