

1. Is the evidence relevant?

(1) S 56 provides that evidence must be relevant to be admissible

(2) s 55 outlines what is relevant:

- 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
 - o Fact in issue (FII) = the elements of the offence, doesn't have to go directly to proving an element, can just be part of the chain of reasoning, minimal logical connection between the evidence and the fact in issue is enough, has to make a fact in issue more probable or less probable than it would be without the evidence
 - o **Smith** – HCA confirmed that evidence must be relevant to an element of the offence or in the chain of factual reasoning that leads to the proof of an element.
- s 55(2) specifically states that evidence is not taken to be irrelevant only because it relates to the credibility of the witness.
- s 57 provides that evidence can be provisionally relevant if its relevance depends on further evidence being adduced in the trial

(3) Make a rational argument as to why this piece of evidence is relevant

- not considered to be a difficult standard to meet, just need minimal logical connection – **Smith**
- **Evans** – did not meet this standard as dressing the appellant in items revealed nothing about the appellant that was not already apparent to jury, decided to be unfairly prejudicial (facts: robbery case, ID issue, pros had accused wear overalls & balaclava, walk around saying phrase assailant used)

If not relevant → inadmissible

If relevant → ADMISSIBILITY HURDLES

2. Does the hearsay rule apply?

s 59-75 Hearsay, Exceptions

(1) Hearsay Rule

- S 59 provides that evidence of a previous representation made by a person is not admissible to prove the existence of a fact they intended to assert by the representation

(2) Does it have a non-hearsay purpose?

- S 60 provides that evidence will be excepted from this rule if it is relevant for a non hearsay purpose AND that if it gets in for such a purpose, then it is relevant for all purposes
 - o Typical non-hearsay purposes:
 - **Subramanian v Public Prosecutor** – effect on the listener
 - **Kamleh v the Queen** – impeachment
 - Offered to contradict what someone said before → this goes to credibility

Evidence Summary

- Note: court may use **s 136** general discretion to limit the use of evidence if the evidence got in under a non-hearsay purpose (and now can be used for everything)
 - Make sure this doesn't conflict with the reasoning of **s 60**

(3) Hearsay analysis:

- Identify previous representation (PR)
 - **Dictionary:** PR = (a) express or implied representation (oral or in writing), (b) representation to be inferred from conduct, (c) representation not intended by its maker to be communicated/seen, (d) a rep for any reason isn't communicated
- Identify the intended asserted fact (IAF)
- Is the PR being adduced for its IAF?
 - If it is → hearsay – caught by s 59
 - Now consider → exceptions
 - If it is not → not hearsay, admissible by virtue of **s 60**

s 92(3) hearsay rule does not apply to evidence of judgements & convictions

If it is hearsay → Step 2a, look for EXCEPTIONS

If it is not hearsay → look for other admissibility issues

2a. Does a hearsay exception apply?

(1) s 61(1) provides that a person must have been competent

- Must have been competent at the time of the previous representation for it to be hearsay (used to prove the intended asserted fact)
- **S 61(3)** – competence presumed unless the contrary is proved
- **s 13** – provides that competence means capable of understanding a question and giving answers that can be understood
- Note: this requirement does NOT apply to **s 66A** exception – **s 61(2)**

(2) is the hearsay an admission?

- **S 81** provides that the hearsay rule does not apply for admissions
 - work out whether there is an admission/consider whether the exception applies

(3) is the hearsay character evidence?

- **S 110** provides that the hearsay rule does not apply to evidence presented by the defendant to prove that they are of good character generally or in a particular respect

(4) is the hearsay first-hand – must be first-hand for s 65, s 66, s 66A exceptions - s 62(1)

- **S 62** – restriction to first-hand hearsay
 - can be two people involved – the person making the PR and the witness who hears the previous representation
 - must be 'based on something the person saw, hears or otherwise perceived, other than a previous representation made by someone else about the fact – **s 62(2)**

(5) is the maker of hearsay UNAVAILABLE?

(1) Definition of unavailable

Evidence Summary

- **Dictionary Pt 2 s 4** – defines ‘not available’ → (a) dead, (b) incompetent, (c) mentally, physically unable, (d) unlawful to provide evidence, (f)-(g) reasonable steps taken to seek party and either secure their attendance or compel them but cannot find them.
 - o **Caterpillar** – a witness who never responded to a request to fly at his own expense from US to Aus was NOT unavailable.
 - o **Suteski** – witness refused to testify, was held in contempt of court but still refused, held to be unavailable.

(2) Exception:

- **s 65** provides that the hearsay rule does not apply to evidence of a previous representation given by a person if the representation:
 - o **(2)(a) was made under a duty to make the representation**
 - Example: railroad inspector who inspected track safety
 - o **(2)(b) was made shortly after the asserted fact happened AND in circumstances that make it unlikely to be a fabrication:**
 - i.e. an excited utterance right after something happened
 - ‘shortly after’
 - **Williams** – 5 days after, court held expression ‘shortly after’ makes it clear there will not be a strict contemporaneity requirement to render the evidence admissible as res gestae – said approximate contemporaneous is preferred → 5 days too late
 - o **Facts:** W alleged to have committed bank robbery, S participated in taped record interview 5 days later incriminating W, said he was gardening & found gun in his garden, not aware of gun buried there, said W told S ‘I’ve done a roort’ → S dies before trial, pros tenders interview tape
 - Note: **Williams** also goes to circumstances unlikely to be fabrication.
 - ‘circumstances unlikely to be a fabrication’
 - **Harris** – evidence admissible because unlikely to be fabrication. had regard to circumstances such as only mild intoxication, formal police statement with warning about false statements, knowledge of witnesses, victim did not appreciate the nature of his injuries. → all more probable that it was not fabricated.
 - o **Facts:** man is punched, goes to hospital but isn’t admitted, goes to police station next day and makes a statement, then dies as result of punch. Pros relied upon s 65 to bring statement in.
 - o **(2)(c) was made in circumstances that make it highly probable that the representation is reliable:**
 - No temporal requirement here
 - **Williams** – held that ‘highly probable’ is an onerous standard, evidence in this case failed to reach it, they were interrogated 5 days later
 - **Munro** – 6 years later (couldn’t argue (b)) obligation to tell truth in police statement doesn’t make reps reliable. The fact that someone might face prosecution if they provide false evidence does make it more likely that they’ll give reliable evidence. Ct can find circumstances that make it high

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- probability of reliability → well-remembered system of work, no personal interest in outcome of case, desire to improve reputation outweighed by desire to avoid criminal prosecution for false evidence.
- **Facts:** Cleaner gives statement about system of work making it likely that a cigarette with GBH suspect's DNA on it was likely left there recently.
- (2)(d) was (i) a statement made against the interests of the person who made it at the time and (ii) in circumstances that make it likely the representation is reliable
 - **Sio v The Queen** – maker made representations against his personal interests, so they were deemed to be a hearsay exception under (2)(d)
 - *'it is not a light thing to admit a hearsay statement inculcating an accused where the maker is available'* – no opportunity to cross-examine them to find weaknesses
 - **Sio v the Queen** – focus is not on the truthfulness of the person, but to the objective circumstances in which it was made → this is primary concern
 - Co-accused's statement was plainly apt to minimise culpability by maximising that of the accused
 - Can look to statements around the PR & if they're reliable, PR likely to be reliable
 - **Facts:** man alleged to be in joint enterprise with accused in murder trial, told police in recorded interview that accused put him up to robbery, gave him knife, drove him there
 - s 65(7) deems that a statement is against the maker's interests if it tends:
 - (a) to damage their reputation; or
 - (b) show the person has committed an offence they have not been charged for; or
 - (c) show they are liable for an action in damages
 - **Aisling v the Queen** – admitted statement of co-offender because made PR to friend and not police, this supports reliability of the statement
- NOTE: s 67 notice requirement → this exception will not apply unless party has given reasonable notice in writing to each other party

(6) is the maker of the hearsay AVAILABLE?

- S 66(2) provides that the hearsay rule does not apply to evidence of a PR if, when the representation was made, the happening of the asserted fact was fresh in the memory of the person who made the representation
 - Court may take into account all matters it considers relevant here including:
 - (3)(a) the nature of the event concerned
 - (3)(b) age and health of the person
 - (3)(c) time between the happening of the asserted fact and the making of the PR
 - **R v XY** – 'fresh in the memory' is not necessarily temporal, child sexually assaulted over a period of 5 years, suggests events are firmly planted in his mind.
- S 66(4) if a representation is made for the purpose of *indicating evidence* s 66(2) does not apply.

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(7) Is it a contemporaneous statement about a person's health?

- s 66A provides that the hearsay rule does not apply to evidence about a PR made by a person if it was a contemporaneous representation about the person's health, feelings, sensation, intention, knowledge or state of mind
 - o if intention is adduced to show they actually did X → PR is not the IAF – non-hearsay purpose - **Kamleh**
 - o cannot be knowledge about what happened in the past

(8) Second-hand hearsay exceptions

- S 69 business records exception
- S 70 content of tags, labels, writing
- S 71 telecommunications
- S 72 ATSI customs
- s 73 reputation as to relationships and age
- s 74 reputation of public or general rights
- s 75 interlocutory proceedings

If no exception applies → it is hearsay, inadmissible for hearsay purpose. Step 3

If exception applies → ADMISSIBLE as hearsay

3. Does the opinion rule apply?

(1) Does the evidence fall within the opinion rule?

- Evidence of an opinion is INADMISSIBLE to prove its content s 76(1) –
 - o opinions may be admissible to prove something *other* than the content of the opinion. Need not be 'I think', but something *not* based on first-hand perception, i.e. 'it seemed like.'
 - o Opinion: an inference drawn or to be drawn from observed and communicable data. i.e. ambo finding someone unconscious, saying they fell 1.5m, but they didn't see the fall = no personal knowledge of the info they are relating to the jury (**Lithgow**) Facts only, no conjecture

(2) is the opinion relevant otherwise than as opinion evidence?

- If opinion is offered for a purpose other than its content, if there is a non-opinion purpose it will also be admissible for an opinion purpose (s 77)
 - o Note: if it gets in for another purpose, it gets in for everything

(3) Opinion Analysis

- What is the previous representation?
- What is the intended asserted fact in the PR?
- Is the PR being adduced to prove the IAF?
 - o If yes → inadmissible under s 76, go to EXCEPTIONS
 - o If no → not caught by opinion rule, admissible by virtue s 77

3a. Opinion Exceptions

EXCEPTION: Is the opinion an admission?