



# A cheeky look at Hearsay

Thursday 21 March 2024

# Agenda

## What is hearsay?

An overview of hearsay evidence.

What is hearsay, when is it admissible and when should it be excluded?

## Maker unavailable

Exception: First-hand hearsay in criminal proceedings where the maker is unavailable (Section 65).

## Relevance

Firstly, the threshold issue - is the previous representation relevant to a fact in issue in the proceedings?

## Maker available

Exception: First-hand hearsay in criminal proceedings where the maker is available (Section 66).

## The hearsay rule

The hearsay rule excludes evidence of a previous representation when it is adduced to prove the existence of a fact.

## Limiting and excluding the evidence

Once admitted, the evidence might be limited (Section 136) or excluded (Sections 135 and 137).

## First-hand hearsay

First-hand hearsay: the person who made the representation had personal knowledge of the asserted fact.

## Jury directions

Where exclusionary arguments fail, robust directions should be given.

## Exceptions

- Non-hearsay purpose.
- Maker unavailable.
- Maker available.
- Contemporaneous statements.
- Business records.

## Final comments

Hearsay checklist and wrap up.

# The hearsay rule

Hearsay, commonly understood as evidence from a witness attesting to what they have heard another person say about facts, though the witness did not perceive those facts personally.

The hearsay rule excludes evidence of a previous representation when it is adduced to prove the existence of a fact (Section 59).

A representation will engage the hearsay rule only if it satisfies four criteria:

1. The evidence must be a previous representation.
2. The previous representation must be made by a person.
3. The evidence of a previous representation is adduced to prove the existence of a fact asserted by the representation.
4. It can reasonably be supposed that the person who made the representation intended to assert the existence of that fact.



# First-hand hearsay

**First-hand hearsay refers to hearsay where the person who made the representation had personal knowledge of the asserted fact.**

First, is the evidence sought to be adduced first-hand hearsay?

Various exceptions (sections 63 to 66A) apply to first-hand hearsay only.

First-hand hearsay refers to hearsay where the person who made the representation had personal knowledge of the asserted fact.

A person has personal knowledge if the person saw, heard or otherwise perceived the asserted fact.

A person does not have personal knowledge of the asserted fact if based on a previous representation made by another person about the fact.

## **Example**

Person A witnesses a car accident event. Person A has 'personal knowledge' of the car accident.

Person A tells Person B about the car accident.

Person B gives oral evidence in court about what Person A told him, to prove the car accident occurred. This is first-hand hearsay.

## **Case example**

*Glowacki v The King* [2023] VSCA 176

# Exceptions to the rule

Common exceptions to the hearsay rule include, but are not limited to:

- Evidence relevant for a non-hearsay purpose (section 60);
- First-hand hearsay in criminal proceedings where the maker of the representation is unavailable (section 65);
- First-hand hearsay in criminal proceedings where the maker of the representation is available (section 66);
- First-hand hearsay of contemporaneous statements about a person's health etc. (section 66A); and
- Business records (section 69).

# Non-hearsay purpose

**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.**

If a representation is relevant for a non-hearsay purpose, it is admissible.

It does not invoke the pre-requisites to engage the hearsay rule.

Whenever evidence relevant for a non-hearsay purpose is admitted, it can be admitted also as evidence of the fact stated.

It applies to both first and second hand hearsay and more remote hearsay. But this is not so where the evidence is evidence of an admission.

## Case examples

*Lee v The Queen* (1998) HCA 60

*Schanker v The Queen* [2018] VSCA 94

## Examples of a non-hearsay purpose:

- Admissions.
- Prior consistent or inconsistent statements.
- Evidence of words spoken, or representations made where the evidence is led to prove the fact of what was said within a particular context or to show something about the event, or to explain a sequence of events.
- Evidence which sheds light on the nature of a relationship.

## Use of the evidence

Section 136 may be used to limit the use of this evidence, and section 137 to exclude the evidence if their terms apply.



# Maker unavailable

In a number of specified situations, first-hand hearsay is not excluded by the hearsay rule in criminal proceedings where the maker of the representation is not available.

The dictionary in the Evidence Act sets out when a person is taken to be unavailable.

## Section 65 of the Evidence Act

Broadly speaking, there are 6 types of previous representations that may constitute an exception to the hearsay rule where the maker of the statement is not available:

- (i) Previous representations made under a duty;
- (ii) Previous representations made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication;
- (iii) Previous representations made in circumstances that make it highly probable that the representation is reliable;
- (iv) Previous representations against the interests of the person who made it at the time it was made and made in circumstances that make it likely that the representation is reliable;

(v) Previous representations made in the course of giving evidence if the accused cross-examined the person who made the representation about it; or had a reasonable opportunity to cross-examine the person who made the representation about it; and

(vi) Previous representations relied on by the accused.

## Case examples

*Glowacki v The King* [2023] VSCA 176

*Schanker v The Queen* [2018] VSCA 94

*Huici v The King* [2023] VSCA 5

*Snyder (a pseudonym) v The Queen* [2021] VSCA 96

*Thomas (a pseudonym) v DPP* [2021] VSCA 269

*Vitale v The Queen* [2020] VSCA 237

*Sio v The Queen* [2016] HCA 32

# Contemporaneous statements

## Section 66A of the Evidence Act

The hearsay rule does not apply to evidence of a previous representation made by a person if the representation was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind.

It applies to first-hand hearsay only.

It is necessary to establish the state of mind to which it refers is itself directly relevant under section 55 of the Evidence Act.

## A common example

Evidence of fear expressed by a murdered wife about her husband is usually admissible against an Accused under this exception, if it is first-hand hearsay.



# Maker available

If certain criteria has been met, first-hand hearsay is not excluded by the hearsay rule in criminal proceedings where the maker of the representation is available.

## Section 66 of the Evidence Act

The hearsay rule does not exclude evidence of a representation that is given by the person who made the representation or a person who saw, heard or otherwise perceived the representation being made if the person who made the representation has been or is to be called to give evidence; and either:

- i. When the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation; or
- ii. The person who made the representation is a victim of an offence to which the proceeding relates and was under the age of 18 years when the representation was made.

In determining whether the occurrence of the asserted fact was fresh in the memory, the court may take into account all matters that it considers are relevant to the question, including:

- The nature of the event concerned;
- The age and health of the person;
- The period of time between the occurrence of the asserted fact and the making of the representation.

Freshness is not confined to the time which elapses between the occurrence of the relevant event and the making of the representation about that event.

## Case example

*LMD v The Queen* [2012] VSCA 164

# Business records

## Section 69 of the Evidence Act

The hearsay rule does not exclude previous representations contained in business records that are made by persons who have personal knowledge of the asserted fact.

An exception to this exception is when representations are made in connection with an investigation relating to or leading to a criminal proceeding.

## Examples

- Entries in files of Victorian government departments made by departmental officers .
- Autopsy reports prepared for the Coroner's Court.
- Phone bills, maps, or hospital records.

# Discretionary exclusions

**As with all evidence to which a hearsay exception applies, discretionary exclusions remain a possibility.**

Section 136: General discretion to limit use of evidence.

Section 137: Exclusion of prejudicial evidence.

## Case examples

*Schanker v The Queen* [2018] VSCA 94

*Huici v The King* [2023] VSCA 5

*Snyder (a pseudonym) v The Queen* [2021] VSCA 96

*Thomas (a pseudonym) v DPP* [2021] VSCA 269

*Vitale v The Queen* [2020] VSCA 237

*Lee v The Queen* (1998) HCA 60

# Jury directions

Where exclusionary arguments fail, robust directions are the last resort.

Generally, the direction should cover the following:

- The need for caution when considering any hearsay evidence.
  - Out of court statements may be unreliable.
  - It was not possible to assess the maker's credibility at the time they made the original statement.
  - The process of repeating a statement compounds any weaknesses of the people involved such as imperfect perception, memory or sincerity.
  - Errors can occur when the original statement is made, when it is heard or when it is repeated in court.
- The possibility that even if the witness' evidence is accepted as truthful, it might not be an accurate representation of what happened.
  - A warning that the law says that every jury must take any potential unreliability into account when considering evidence of an out of court or hearsay statement.

If hearsay evidence has been admitted for another purpose (pursuant to section 60), then it is preferable for a trial judge to direct a jury that the factual assertions in a representation admitted may be used as evidence of those facts.


# Final comments

Consider the following checklist when dealing with hearsay evidence:

- 1 • What is the previous representation?
- 2 • Is the previous representation relevant?
- 3 • Is the previous representation hearsay?
- 4 • If so, is it first-hand or more remote hearsay?
- 5 • Do any of the exceptions apply?
- 6 • Do any discretionary or mandatory exclusions apply?
- 7 • What jury directions should be given?



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