

Hearsay

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"It's all about the he said she said bullshit" – Limp Bizkit

"Believe only half of what you see, little of what you read, and nothing of what you hear" – old saying

Hearsay often seems to be a very slippery creature: hard to grasp and hold long enough to look clearly at, analyse and understand. I often find that it seems perfectly obvious, crystal clear, in some circumstances, and then in others it suddenly turns opaque, and sullenly resists understanding.

In order to grasp it, it is important to understand a couple of things:

- What is hearsay?
- Why is it not admissible in some instances?
- Why is it admissible in some instances?

Practically, it is important to understand what it is and where it comes from, in order to understand how to use it, and, more often, how to resist it.

What is hearsay?

Before we get to the *Evidence Act*, I think it is useful to consider the old common law, which, it is said, the *Evidence Act* has codified. Some of the "old" cases contain some really good examples of what is, and what is not, hearsay. They also contain some definitions of "hearsay" that are easier to understand than the formulation in the *Evidence Act*.

Subramaniam – the classic

The classic common law case on hearsay is the (relatively) old English case of *Subramaniam –v- The Public Prosecutor* [1956] WLR 965. This case is really interesting for a number of reasons, not the least of which is the name of counsel who appeared for the appellant: Mr Dingle Foot QC. It is a decision of the Judicial Committee of the Privy Council – something you don't hear much of any more – on appeal from the Supreme Court of Malaya. (Appeals to the Privy Council from the High Court of Australia, and from State courts, were limited and then abolished in progressive legislation in 1968, 1975 and, finally, in 1986.)

Simply stated, the facts were these. Mr Subramaniam was arrested by members of what are called in the judgement “the security forces”. He had been wounded and left behind after some sort of dust-up between “terrorists”, and those security forces. He had a pouch containing 20 rounds of ammunition on him. Possession of ammunition was an offence under the Emergency Regulations then in force. It carried, as a maximum penalty, death.

Mr Subramaniam’s defence was that he was abducted by Chinese terrorists, and forced by duress to carry ammunition and other such things for the terrorists. He gave evidence of this at the trial, but was prevented by the judge from giving evidence of what the terrorists had actually said to him. The judge ruled that any evidence of what was said by the terrorists was inadmissible because it was hearsay, unless the terrorists themselves were going to be called to give evidence.

On appeal, the Privy Council said this (at 970):

In ruling out peremptorily the evidence of conversation between the terrorists and the appellant the trial judge was in error. Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. **It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but that it was made.** The fact that it was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.

The sentences I have highlighted state the classic common law formulation of hearsay.

Here is another common law formulation, from the Australian High Court in the case of *Walton –v- The Queen* (1988-1989) 166 CLR 283, and by the then Chief Justice, Sir Anthony Mason (at 288):

The hearsay rule applies only to out-of-court statements tendered for the purpose of directly proving that the facts are as asserted in the statement.

I like Mason’s formulation, because it says nothing about “the truth”. Neither does the *Evidence Act*.

In looking at these common law definitions of hearsay, we see a couple of important themes. One is, that not all out-of-court statements are hearsay. The other is, that in assessing if an out-of-court statement is hearsay, the focus is, and remains, on the “object”, or “purpose”, of the evidence.

The common law tied itself in knots made up of ever-splitting hairs in trying to distinguishing hearsay from other types of evidence, or finding exceptions to the rule against hearsay – such things as “original” evidence, “circumstantial” as opposed to “testimonial” evidence, evidence that formed part of the “*res gestae*” and so on. Mercifully, we no longer have to concern ourselves with this stuff, because the *Evidence Act* provides pretty much everything we need to know.

One thing you should note, and bear in mind when we come to the *Evidence Act*: in circumstances where the common law admitted evidence that was hearsay, but was admitted *not* for the hearsay purpose, the trial judge was required to direct the jury that it *could not use the evidence for the hearsay purpose*.

For example, in *Subramaniam*, the evidence of what the terrorists said could not be used as evidence that they would actually kill Mr Subramaniam if he did not carry out their commands. In *Walton*, evidence of what the deceased said to a number of people about her plans to meet the accused at a certain place and time could not be used as evidence that she did go there and meet the accused. And evidence that the deceased was heard to say to her three-year old son, “Daddy’s on the phone,” could not be used as evidence that it was the accused – whom the child called “daddy” - who called.

Why is hearsay not admissible?

The answer to that is simple. It is unreliable. That is the rationale for the common law’s dislike of hearsay. The quality of the evidence is affected by its remoteness, and the lack of opportunity for the party against whom it is tendered to cross-examine on it. Indeed, it is so unreliable that it is number one on the hit parade of types of “unreliable evidence” set out in section 165 of the *Evidence Act*.

Any attack that you might be called upon to make upon hearsay evidence should start with this important and long-recognised point.

Why is hearsay admissible in some circumstances?

The common law cases are, in many respects, attempts to find instances where the evidence, although hearsay, *is* reliable, and, because of that reliability, to make the evidence admissible as an exception to the rule against hearsay.

An example of hearsay evidence that was thought by the common law to be reliable is admissions. Admissions are traditionally thought to be inherently reliable because they are statements against the interests of the maker, and therefore more likely to be true than statements made in the interests of the maker.

Another kind of hearsay evidence that the common law allowed because of its inherent reliability was evidence that formed part of the *res gestae* – in other words it was a statement made during or accompanying one or more of a series of actions constituting the entire criminal transaction which the Crown seeks to prove (*The Queen –v- Benz* (1989) 168 CLR 110 at 135). This kind of evidence was thought to be reliable because of the immediacy and contemporaneity of the events allowed little opportunity or time for concoction or reconstruction.

For a similar reason, evidence of “dying declarations” was thought to be reliable enough to be admissible.

It seems to me that, generally speaking, this concept of reliability is what lies behind the various exceptions to the hearsay rule contained in the *Evidence Act*. In the post-*Evidence Act* world we live in, the answer to the question why is hearsay admissible in some circumstances is simple: because the *Evidence Act* says it is.

The Evidence Act

The definition of hearsay in the *Evidence Act* seems more complex than the common law definitions, and I guess it is, but once you break it up and grasp each part and how it relates to the whole, it becomes clear that, with one exception, it is little, if at all, different to the common law.

There is one significant change, though. You will see that the *Evidence Act* refers not to “statements” but to “representations”, which the Dictionary to the *Act* says includes representations that are express or implied, or can be inferred from conduct, or are not intended by the maker to be communicated. In one fell swoop, the *Act* has then dealt with a number of common law controversies, mercifully saving you and I from volumes of contradictory case law.

Let’s examine section 59.

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 that 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 purposes 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 circumstances in which the representation was made.

Note: Subsection (2A) was inserted as a response to the decision of

the Supreme Court of NSW in *R v Hannes*(2000) 158 FLR 359 .

(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.

Subsection (1) is, of course, the crucial one. Let's break it up to get a better grip on it:

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

(Note that "previous representation" is defined in the Dictionary as "made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced"; and as noted above, "representation" includes a number of things other than mere statements.)

It is essentially a re-statement of the common law, with the words (and the concepts) of "previous representation" replacing the words "out-of-court statement".

When we approach a piece of evidence, we need to analyse it in the terms of the section. The following 3-step approach is helpfully suggested by Simpson J in *Vickers –v- R* [2006] NSWCCA 60 at [51] (and paraphrasing somewhat the High Court's approach in *Lee* (see later)).

The first step is to identify the "previous representation" and who made the representation.

The crucial second step is to identify the *purpose* or *object* of the evidence. Is it being adduced "to prove the existence of an asserted fact"? If it is, then it is being adduced as hearsay, or, if you prefer, for a hearsay purpose. Section 59 says it is not admissible for that purpose. Note that this is not a question of

discretion. Other than evidence to which one of the specific exceptions in the Act applies, hearsay evidence is simply not admissible.

If it is not being adduced “to prove the existence of an asserted fact”, then it is not hearsay, and the section does not apply. In other words, it is admissible (subject, of course, to the various other rules of admissibility set out in the Act, such as relevance.)

The third step is to identify whether the asserted fact sought to be proved by the evidence is a fact in issue, or is relevant to a fact in issue.

The vexing section 60

Section 60 represents a significant departure from the common law. The Australian Law Reform Commission (ALRC) recommended the inclusion of section 60, on the basis that it was felt that the common law was too technical and unworkable in its distinctions of evidence, and that it was unrealistic, indeed “schizophrenic”, to tell juries to use otherwise cogent and relevant evidence in one way but not another and more obvious way. In practical terms, this is a very significant change. It is possible that all the ramifications of section 60 were not foreseen by the ALRC. Here is section 60:

So, the effect is that, where evidence of a previous representation is adduced for a non-hearsay purpose – for example, as a prior inconsistent statement relevant to an attack on a witness’s credibility - section 60 allows that evidence to be also admitted for the hearsay purpose – that is, as evidence of the facts asserted in the prior inconsistent statement. The trial judge no longer has to tell the jury that their use of the evidence is only limited to the non-hearsay purpose, and that they cannot use the evidence as evidence of the existence of an asserted fact, but that, in fact, they are permitted to use the evidence for that hearsay purpose, as well as for the purpose for which it was adduced.

Lee –v- The Queen (1998) 195 CLR 594

“[T]here is no basis ... for concluding that s 60 was intended to provide a gateway for the proof of any form of hearsay, however remote.” – at [40]

This is my favourite case on the hearsay rule, not in the least because it is one of the rare “wins” for the defence in the appellate courts in the past decade or so, or that it is only 9 pages long, but mainly because the High Court set out to teach us how properly to read and understand the scope and the limits of the hearsay rule in *Evidence Act*.

It is important to understand the facts in *Lee* in detail to understand the analysis by the High Court.

Facts in Lee

Two men, one armed with a pistol, attempted to rob the owner of a video store in Paddington early one evening. The owner, Patricia Jones, resisted the robbers by throwing first a cast iron tape dispenser at them, then picking up a stool and jabbing it at them. The one with the gun aimed it and fired it, apparently missing Mrs Jones. The one with the gun, whom she described in terms generally fitting the accused Nathan Lee, tried to take the cash register, but it fell to the floor. Mrs Jones then hit him with the stool. Both men then fled.

About 10 minutes later, police officers saw Lee and Romeo Calin a short distance away in Kings Cross Road. Lee was sweating profusely. They were searched, and Lee was found to have a pistol down the front of his jeans. Both were arrested. Lee told the police that two other men had committed the robbery and ran out, and they gave him the gun. Calin told police that he had just seen Lee in the street and asked him to repay \$80 that he owed him. He said Lee had told him, "Don't bother me I have just done a job, I fired two shots." Calin was interviewed at the police station and a written statement was prepared for him and he signed it. The relevant parts of the statement were these:

3. On Tuesday 21 March 1995, roughly eight thirty I was just walking up the street near the Hyatt... I saw this bloke who owes me eighty dollars. I only know him from the street, an acquaintance I met a couple of times and a few months ago I lent him the eighty dollars to help him out with the rent and that.

4. He is Asian, pretty chubby, dark hair, I don't know his name I just know him from the street. When I saw him, he was walking fast up past the Hyatt. He walked past me and I saw he was sweaty and that. I said to him, "Where's my eighty dollars, you owe it to me." He said, "No leave me alone leave me alone." I said, "I'm not fuckin going to leave you alone, til you give me my eighty bucks. Where is it." He said, "I haven't got it, leave me alone, cause I'm running because I fired two shots." I said, "What do you mean you fired two shots." He said, "I did a job and the other guy was with me bailed out."

At first, Calin told police he would willingly give evidence if called to do so. However, some time later he told police he was no longer willing to give evidence because he was being called a dog.

Calin was called by the prosecution in the trial. His evidence in chief was in accord with his statement, up to the point where he said he asked Lee for the eighty dollars owed to him. He then said he could not remember any further conversation with Lee. The Crown sought and, over objection, was granted leave to cross-examine Calin in front of the jury. Calin admitted he signed the document prepared by the police, but denied that the statements in it were his. The statement was tendered in evidence.

The trial judge directed the jury that, if they were satisfied that Lee said the words attributed to him by Calin in the statement, those words amounted to a confession to the crime with which he had been charged.

The argument

The High Court rejected the Crown's argument about the correctness of the trial judge's direction to the jury, which had been accepted in the Court of Criminal Appeal.

The Crown's argument was that the judge correctly allowed cross-examination of Calin on his prior inconsistent statements - ie the oral statement made to police on his arrest and his written statement made at the police station - and the making of the statements per sections 43(1) and (2). Further, the judge was correct in admitting evidence of the statements for the purpose of establishing that Calin had made prior statements inconsistent with his oral evidence, and going to the relevant issue of Calin's credibility in his asserted failure to remember the rest of the conversation. Finally, the judge was correct, by the operation of section 60, in directing the jury that they could use the words attributed to the accused Lee in Calin's statements as evidence of the facts asserted in the words – ie a confession to the crime.

The judgement

The unanimous judgement of High Court – Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ – carefully analysed various provisions of the *Evidence Act*, and is an invaluable guide to how to approach evidence embraced by sections 59 and 60. The Court had no difficulty with the first two of the steps taken by the trial judge – ie, allowing Calin to be cross-examined, and tendering his statements – except insofar as the words attributed to Lee.

The analysis went something like this. Section 59 prohibits the admission of evidence of a previous representation to prove the existence of a fact that the person intended to assert by the representation. So the questions are – what is the previous representation? What is the fact to be proved by the representation? What is the fact that the person intended to assert?

Calin's statement – here the High Court limited itself to a discussion of his written statement, on the basis that the same rules apply to his oral statement – contains a number of elements. First, he gave an account of what he had **done**: "just walking up the street, near the Hyatt"; second, he gave an account of what he had **seen**: "I saw this bloke...[h]e walked past me and I saw he was sweaty and that"; he gave an account of **things intended to explain matters**: "I lent him the eighty dollars to help him out with rent and that"; and he gave an account of **the conversation** with Lee, part of which the Crown said amounted to an admission: "...leave me alone, cause I'm running because I fired two shots... I did a job and the other guy was with me bailed out."

The first question – what is the previous representation? – is, of course, answered by the Crown as being the words of Lee. But the High Court said, no: the previous representation is the statement of Calin containing the words of Lee.

The next question - what is the fact to be proved? – is answered by the Crown as Lee's involvement in the crime.

The final question is the crucial one – what fact did the person who made the previous representation intend to assert? Because here, the previous representation – Calin's statement – can only contain facts that Calin intended to assert. **Calin's statement did not intend to assert that Lee had committed the crime.** Calin could not assert that because he could not know if Lee had committed the crime. Calin can only assert the fact that Lee said the words.

The High Court said that, once Calin's statement was admitted as a prior inconsistent statement, section 59 operates to make the statement inadmissible to prove the existence either of the facts which Calin intended to assert to the police or of the facts that Lee intended to assert to Calin. Section 60 then operates only on the facts that Calin intended to assert, but section 60 does not operate on the representations made by Lee to Calin. At [28] and [29] the Court said:

[28] ...It was only the representations made by Mr Calin to police that were relevant for the purpose referred to in section 60: the purpose being to prove that Mr Calin made a prior inconsistent statement and that his credibility was thus affected. The hearsay rule was rendered inapplicable to Mr Calin's representations, but not to the representations allegedly made by the appellant. And of course, the representations allegedly made by the appellant were not admissible under the confession exceptions to the hearsay rule created by s 81 because the evidence of these confessional statements was not first hand (s 82).

[29] To put the matter another way, s 60 does not convert evidence of what was said, out of court, into evidence of some fact that the person speaking out of court did not intend to assert. And yet that is what was done here. Evidence by a police officer that Mr Calin had said, out of court, that the appellant had said that he had done a job was treated as evidence that the appellant in fact had done a job – a fact which Mr Calin had never intended to assert. (Of course, it would have been different if Mr Calin had said in evidence in court that the appellant had said he had done a job. Then the representation made out of court was the appellant's, not Mr Calin's.)

The Court said that the correct approach for the trial judge was to reject those parts of Calin's statement that contained Lee's words per section 137, or, if not, to give clear directions to the jury about the very limited use they could

make of the evidence. The Court said that, in the circumstances of this case, the former course is preferred [41].

A really good example of a similar analysis is *Vickers –v- R* [2006] NSWCCA 60, in which Simpson J applies the reasoning in *Lee* in her usually useful way.

Example

Vicky called the police to report a breach on an AVO by her ex-boyfriend Mark. Constable Sharon Jones arrived at Vicky's house. Vicky showed Jones the AVO, which included the usual conditions about harassment and intimidation, and a condition that Mark was not to contact her by any means. She then showed Jones her mobile phone, which had a message on the screen that said, "ur ded u fucken bitch me and sum boyz will be round to smash u and zane". The message showed it was from a number identified in her phone Contacts as "Mark". She told Jones that Zane is the name of her new boyfriend. Jones took a careful note of the message in her police notebook, and she signed and dated the entry. She also noted the contact name "Mark" and the phone number shown on the phone as the one from which the message was sent. Vicky signed a statement in Jones' notebook about the relationship with Mark, the AVO, the phone she owned, Mark's number being saved in her Contacts, and receiving the message. Jones made inquiries about the number and produced a certificate from Vodafone showing that the originating number was registered to Vicky's ex-boyfriend Mark. Mark was charged with Contravene AVO, and Use carrier to intimidate or threaten.

What would be admissible evidence of the words of the message on Vicky's phone:

The phone itself?

A photocopy of the relevant screens of the phone?

Assume the phone was lost shortly after Jones left Vicky's place. What would be admissible evidence of the words of the message:

Vicky's oral evidence?

Jones' oral evidence?

Jones' notebook entry?