Hearsay – Tips

Overview:

1. The "hearsay rule" can be found in s 59 of the *Evidence Act 1995 (NSW)* ("Evidence Act"). The rule provides:

   '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. Evidence adduced that meets the criteria set out in s 59 is not admissible. Sections 60 – 75 of the Evidence Act set out exceptions to this rule. In our opinion, the hearsay rule, and the exceptions to that rule, are important but sometimes misunderstood rules of evidence.

3. A comprehensive review of all exceptions to the hearsay is beyond the scope of this paper. The paper focusses on exceptions we have found to be more common in day-to-day criminal practice: "evidence relevant for a non-hearsay purpose", "maker unavailable", "maker available", "contemporaneous statements about a person's health etc", and "business records".

4. The paper takes the form of a series of practical tips however there is no substitute for actually reading the cases.

5. In summary, the key tips are:

   What is hearsay:

   - Tip 1 – Knowing what hearsay evidence is and is not:
   - Tip 2 – previous representations can include actions and silence:
   - Tip 3 – CCTV footage is not hearsay:
   - Tip 4 – Determine whether the evidence is being adduced to prove the fact/s asserted in the representation:
   - Tip 5 – The hearsay rule does not apply to unintended, implied fact/s:

- Tip 6 – know the difference between first-hand hearsay and more remote forms of hearsay

Evidence relevant for a non-hearsay purpose:

- Tip 7 – be wary of prosecutors using this exception as a "trojan horse" to get evidence in for its hearsay purpose:
- Tip 8 – consider using this exception to get evidence in for its hearsay purpose:
- Tip 9 – if evidence is to be admitted under this provision, and you do not want the Court using it for its hearsay purpose, consider asking the Court for a limiting direction under s 136 of the Evidence Act:

Maker available:

- Tip 10 – an account given by a witness to police, which is captured on body worn footage (BWF) is not necessarily admissible under the make available exception. This kind of evidence is generally governed by the provisions of the Evidence Act dealing with documents and credibility:
- Tip 11 – complaint evidence is not always admissible under the maker available exception:

Maker unavailable:

- Tip 12 – the Court cannot take a global approach to representations sought to be admitted under s 65(2) of the Evidence Act, it must consider each representation individually:
- Tip 13 – consider calling evidence from the OIC on the issue of whether reasonable notice has been given of the prosecution's intention to rely on this provision:
- Tip 14 is the witness 'unavailable' for the purpose of the Evidence Act Dictionary, Pt 2(4)? Consider areas for cross examination of the OIC on this point:
- Tip 15 – it is much easier for an accused person to get evidence in under the maker unavailable exception than it is for the prosecution:

Contemporaneous statements about a person's health etc:

- Tip 16 – try and utilise this exception more often:

- Tip 17 – remember this exception only applies to first-hand hearsay:
- Tip 18 – remember this exception only applies to contemporaneous representations:

Business records:

- Tip 19 – don't assume that because part of a document is admissible under this exception, that the entire document is admissible under this exception, it also applies to 'part of' a document:
- Tip 20 – a document that is admissible under this exception may be inadmissible under another provision/s of the Evidence Act:
- Tip 21 – it is not the case that a record is only admissible under this exception if there is a statement/affidavit from the business producing the record:
- Tip 22 – be aware of the distinction between the 'record' of a business and the 'product' of a business.

General:

- Tip 23 – if all else fails, consider s 135 and 137 of the Evidence Act:
- Tip 24 – remember that an unreliability direction under s 165 of the Evidence Act is available for evidence admissible under Pt 3.2 of the Evidence Act (the hearsay exceptions). This can be particularly useful for documents like medical records, CAD Records, and other documents routinely served in police briefs.

What is hearsay evidence

6. **Tip 1 – Knowing what hearsay evidence is and isn't:** Not everything said outside of Court is hearsay. Evidence will be only hearsay if it meets the following four criteria:

   1. It is evidence of previous representation;

   2. The previous representation was made by a person;

   3. The purpose of adducing the evidence is to prove the existence of a fact/s asserted in the representation; and

   4. It can reasonably be supposed that the maker of the representation intended to assert those fact/s.

These criteria are derived from the terms of s 59, which is set out above. Each of these criteria is discussed below.

7. **Tip 2 – previous representations can include actions and silence:** The hearsay rule is concerned with previous out of court representations. This is not confined to words but also includes actions and silence, so long as they were made outside of Court and are previous representations. Actions are not usually captured by the hearsay rule due to the difficulty in determining what fact/s the person making that representation was intending to assert. Often, they are not intending to assert anything. For example, a complainant may call triple 0 for a number of reasons, for example out of fear or wanting help. However, the act of calling triple 0 was not done to assert that they were in fact scared and/or wanted help. Similarly, silence is not usually captured by the hearsay rule because it is usually very difficult to determine what fact/s a person was intending to assert through their silence. Often, they are not intending to assert anything. However, if a witness is silent in the face of a serious allegation, it may be arguable that the witness is asserting that the allegation is true, and thus the silence is potentially captured by the hearsay rule: (*R v Rose* [2002] NSWCCA 455).

8. **Tip 3 – CCTV footage is not hearsay:** Evidence will only be hearsay if it is a previous representation made by a person. Plainly, CCTV footage is not a representation made by a person. To the extent it is a representation, it is a representation made by a machine. Further, even if the hearsay rule was not limited to representations made by a person, CCTV footage is not asserting any fact/s rather, it is depicting what is occurring. Thus, it does not meet the third and fourth criteria. The exception to this is if the CCTV footage includes audio from a person. The audio will be hearsay if it meets the other three criteria set out above. In those circumstances, what is said is the hearsay evidence, rather than the CCTV footage itself. When objecting to evidence on the basis that it is hearsay, you should always consider whether the representation was made by a person or by a machine. In most instances, this can be determined relatively easily. However, in some instances, it will be a mix. For example, some medical records. If it can be argued that the representation was made by a computer, but with direct human input, it may be possible to argue that the evidence is hearsay.

9. **Tip 4 – Determine whether the evidence is being adduced to prove the fact/s asserted in the representation:** The hearsay rule is what is called a "use or purpose rule". In other

words, assuming the other criteria are met, evidence is not hearsay unless the party seeking to adduce evidence is doing so for the purpose of proving the fact/s asserted in the representation. This is sometimes referred to as a hearsay purpose. To illustrate, say a prosecutor wants to adduce evidence from witness X that the complainant said, "on 4 March the accused punched me in the face". If the prosecutor wants to adduce this evidence to prove the fact asserted in the representation, namely, that the accused punched her in the face, then the evidence is being adduced for a hearsay purpose. On the other hand, if the prosecutor wants to adduce that evidence to prove that those words were said on 4 March 2023, assuming that this goes to a fact in issue, then the evidence is not being adduced for a hearsay purpose.

10. **Tip 5 – the hearsay rule does not apply to unintended, implied fact/s:** As set out above, the hearsay rule only applies to fact/s that it can 'reasonably be supposed' that the maker of the representation intended to assert. It follows that the hearsay rule does not apply to unintended, implied fact/s. Take again the example that a prosecutor wants to adduce evidence from witness X that the complainant said, "on 4 March the accused punched me in the face". The maker of the representation is the complainant and it can 'reasonably be supposed' that the fact that they intended to assert was that on 4 March the accused punched them in the face. The statement also potentially proves, by implication, that the accused was with the complainant on 4 March. The complainant's intention, in making this representation, was not to assert that they were with the accused on this date. Rather, this is an unintended, implied fact. If the prosecutor wants to adduce this evidence to prove that accused was with the complainant on this date, assuming that this goes to a fact in issue, the evidence would not be covered by the hearsay rule.

11. **Tip 6 – know the difference between first-hand hearsay and more remote forms of hearsay:** A number of exceptions to the hearsay rule, including, "maker unavailable", "maker available" and "contemporaneous statements about a person's health etc", only apply to firsthand hearsay. Other exceptions, such as, "evidence relevant for a non-hearsay purpose" and "business records", extend to more remote forms of hearsay – second-hand, third-hand and so on. Hence, it is important to understand the difference between first-hand hearsay and more remote forms of hearsay. Section 62 of the Evidence Act provides some guidance on what 'firsthand hearsay' is. To be first-hand hearsay, the maker of the representation has to have 'personal knowledge of the asserted fact': (Evidence Act, s 62(1)). The maker of the representation will have personal knowledge of the asserted fact

if their 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': (s 62(2)).

12. To illustrate, say witness X gives evidence in Court that the complainant told witness X, "The accused chased me with a knife". Assuming the evidence is being adduced to prove the accused chased the complainant with a knife, the evidence is first-hand hearsay - the maker of the previous representation is the complainant and the representation is clearly based on what she saw or otherwise perceived. This is relatively straightforward. However, consider a less straightforward example, such as, witness X gives evidence in Court that the complainant's best friend told witness X, "the complainant is scared of the accused". The maker of the previous representation is the complainant's best friend. If the representation was based on the best friend's observations of the complainant then it is first-hand hearsay. On the other hand, if the representation was based on things the complainant has told the best friend, then it is second-hand hearsay.

13. Confusion regarding what constitutes first-hand hearsay versus what constitutes more remote forms of hearsay may arise when a witness gives evidence in Court about something they previously said. This will be first-hand hearsay. To illustrate, say witness X gives evidence that Witness X told the complainant, "I saw the accused running from your house". Assuming the prosecutor is leading this to prove that witness X saw the accused running from the complainant's house, this evidence is first-hand hearsay. On the other hand, if witness X simply gives evidence that "I saw the accused running from the complainant's house", this is not hearsay. Witness X is not giving evidence of a previous representation. Witness X is just describing what witness X saw.

Evidence relevant for a non-hearsay purpose:

14. **Tip 7 – be wary of prosecutor using this exception as a "trojan horse" to get evidence in for its hearsay purpose:** This exception to the hearsay rule is found in s 60 of the Evidence Act. It is not limited to first-hand hearsay unless the evidence in question is an admission by the accused. In short, s 60 provides that if evidence is admissible for a non-hearsay purpose, then it is also admissible for a hearsay purpose. To illustrate, say the prosecutor wants to lead evidence from witness X that on 4 March the deceased told witness X, "I am scared of the accused". If the prosecutor wants to lead this evidence to prove that the deceased was scared of the accused, then it is being adduced for its hearsay purpose.

On the other hand, if the prosecutor wants to lead this evidence to prove that the deceased was still alive on 4 March, then it is being adduced for a non-hearsay purpose. If this statement from the deceased was admitted under s 60 of the Evidence Act, subject to a direction limiting its use, it would be admissible to prove that the deceased was still alive on 4 March and that the deceased was scared of the accused.

15. It often seems as though this exception is deployed as a "trojan horse" to get hearsay evidence in for its hearsay purpose. In other words, the prosecutor wants the evidence in for a hearsay purpose, but none of the other exceptions to the hearsay rule apply, so the prosecutor manufactures a non-hearsay purpose to get the evidence in for its hearsay purpose. If the prosecutor is seeking to have the evidence admitted under s 60, ask them to clearly identify the non-hearsay purpose they rely on. Once they have done that, consider whether the evidence, if it was admitted for that non-hearsay purpose, actually goes to a fact in issue. If it doesn't, the evidence won't be admissible under s 60, which applies to evidence that is 'relevant for a non-hearsay purpose'. To illustrate, if the prosecutor says, "it goes to the police's investigation of the matter" and you don't intend to impute the adequacy of the police's investigation, then the evidence is not relevant for that non-hearsay purpose.

16. **Tip 8 – consider using this exception to get evidence in for its hearsay purpose:** Section 60 is not just there for the benefit of the prosecution. Subject to the existence of a legitimate non-hearsay purpose, practitioners should use this provision to get evidence in for a hearsay purpose, where that evidence assists your case. For example, it is common for an officer-in-charge of an investigation to say under cross-examination "I didn't get a statement from that person because they said nothing happened". In this scenario, the fact of nothing happening may be exculpatory to your client. Accordingly adducing that evidence for the purpose of satisfying the Court that there are witnesses who could give relevant and probative evidence who have not been called by the prosecution is a non-hearsay purpose and would potentially buttress a *Mahmood* direction. If it is admitted for that purpose, s 60 allows it to be used for its hearsay purpose.

17. **Tip 9 – if evidence is to be admitted under this provision, and you do not want the Court using it for its hearsay purpose, consider asking the Court for a limiting direction:** If evidence is to be admitted under this provision, but you do not want the Court using it for a hearsay purpose, you should consider asking the Court to give itself a

direction, pursuant to s 136 of the Evidence Act, limiting the use of the evidence to its non-hearsay purpose. The Court can only give itself a direction like this if it is satisfied that using the evidence for its hearsay purpose would be 'unfairly prejudicial' or 'misleading or confusing'. In most instances, if you were trying to get a direction like this, you would probably argue that using the evidence for its hearsay purpose would be 'unfairly prejudicial' to the accused because the evidence cannot be fully tested in cross-examination. If you think the prosecutor is using the non-hearsay exception as a "trojan horse" to get evidence in for a hearsay purpose, but the non-hearsay purpose identified is relevant, you could say to the Court, "perhaps the simplest approach is to let the evidence in, and given the prosecutor wants it in for a non-hearsay purpose, the Court could direct itself that the evidence is limited to its non-hearsay purpose".

18. If you are seeking a direction that evidence only be used for its non-hearsay purpose, it helps to have an understanding of the rationale behind s 60. At common law, if evidence was admissible for non-hearsay purpose, it was not automatically also admissible for a hearsay purpose. Rather, it remained inadmissible for a hearsay purpose, unless one of the common law exceptions to the hearsay rule applied. As a consequence, in jury trials that took place before the introduction of the Evidence Act, where evidence was admitted for a non-hearsay purpose, the jury would be instructed that they could only use the evidence for its non-hearsay purpose, and they could not use it for its hearsay purpose. The perception, understandably, was that it was very difficult for juries to engage in this kind of compartmentalisation. One of the main reasons that s 60 was included in the Evidence Act was to overcome this difficulty. However, where the tribunal-of-fact is a Magistrate or a Judge-alone, who it is presumed is better able to engage in this kind of compartmentalisation, the rationale for s 60 carries less force. This argument is often worth citing when you are seeking a direction that the Court limit the use of the evidence to its non-hearsay purpose.

Maker Available:

19. **Tip 10 – a account given by a witness to police, which is captured on body worn footage (BWF) is not necessarily admissible under the make available exception:** The maker available exception to the hearsay rule is found in s 66 of the Evidence Act. This is an important exception to get your head around and is more nuanced than many prosecutors would have you believe. It is not simply: "well the maker of the representation is available

to give evidence therefore the representation is admissible." It is not uncommon for prosecutors to rely on this exception to have the account given by a witness to police, which is captured on BWF, admitted into evidence. Evidence of this kind if often very damning. It is usually contemporaneous, depicts the witness's raw emotion, and flows more naturally than oral evidence given many months after the incident. The reality is that evidence like this will often be admissible under the make available exception to the hearsay rule, but not always. Section 66(3) of the Evidence Act provides that a party cannot rely on the "maker available" exception if the 'representation was made for the purpose of indicating the evidence that the person who made it would be able to give in an Australian or overseas proceeding.'

20. If you can persuade the Court that the account was given by witness for the purpose of indicating the evidence that they would likely give in Court, then the prosecutor will not be able to get this account into evidence under the make available exception: (*Esposito v R* (1998) 45 NSWLR 442). The purpose is determined from the perspective of the person giving the account: (*Saunders v R* [2004] TASSC 95). In many instances, the account will have been given simply to assist the police with their investigations, however, if the police say something like, "we may need to get a statement off you, can you tell us what happened", and then the witness proceeds to give their account, you can more readily argue that the account was given for the purpose indicating the evidence that the witness would give in Court.

21. **Tip 11 – complaint evidence is not always admissible under the maker available exception:** In general, assuming the complainant is available and subject to the other provisions in the Evidence Act, complaint evidence will be admissible under the maker available exception to the hearsay rule. However, this is not always the case. Complaint evidence will only be admissible under the "maker available" exception if, when the complaint was made, the fact/s asserted by the complainant were 'fresh in the memory': (s 66(2), *Evidence Act*). In determining whether an asserted fact is fresh in the memory, the Court is to have regard to the following: the nature of the events concerned, the age and health of the person, and the period of time between when the asserted fact apparently occurred and the making of the complaint: (s 66(2A), Evidence Act).

22. To illustrate, say your client is accused of punching his partner, his partner is available to give evidence to that effect, and the prosecutor calls the partner's best friend to give

evidence that, “the [complainant] told me the accused punched her about four months ago”. You could argue that at the time this representation was made to her best friend, the fact/s asserted were not ‘fresh in the memory’ of the complainant because the asserted fact apparently happened four months prior. The prosecutor would likely argue, notwithstanding the temporal gap, the nature of the events are such that the asserted facts would have been “fresh” in the “memory” of the complainant at the time they made the complaint.

23. As a rule of thumb the more horrific incident, the more leeway the Court will give in terms of the gap between the occurrence of the asserted fact and the making of the complaint. Conversely, the more anodyne the asserted fact the less leeway the Court will give. It is also important to bear in mind that different asserted facts may yield different results. To illustrate, using the example of the client accused of punching their partner. It may be that the complainant asserting that they were punched in the face is admissible, but other facts, relating to more peripheral details, which are in dispute, may not be admissible.

Maker unavailable:

24. **Tip 12 – the Court cannot take a global approach to representations sought to be admitted under s 65(2) of the Evidence Act, it must consider each representation individually:** The maker unavailable exception to the hearsay rule is one of the more complicated exceptions to the hearsay rule, and is dealt with comprehensively in other papers. However, one aspect of it that has received insufficient attention is the fact that when the prosecution is seeking to have evidence admitted under this provision, the Court must consider each representation individually. To illustrate, say your client is charged with assaulting his partner. The partner has done a DVEC, but has not attended Court to give evidence and has been found to be unavailable, and the prosecutor is trying to get the entirety of the DVEC into evidence under s 65(2)(b) and (c). The DVEC is not one big representation. Rather, it is a series of representations. In essence, each asserted fact in the DVEC is a separate representation. For example, “the accused hit me in the face”, “the accused then called me a bitch”, “the accused then threw a cup at the wall”, “the accused then ran out of the room”. Each of these is a separate representation. The Court must consider each of these representations separately. The Court cannot take a compendious or global approach to the representations: (*Sio v R* [2016] HCA 32). The Court cannot simply reason, “if one part of the DVEC is admissible, the whole of the DVEC is admissible”.

25. If the prosecutor is seeking to have evidence admitted under this provision, and the evidence is comprised of multiple representations, which it invariably will be if it is a DVEC or written statement, make sure you indicate to the Court that the prosecutor is required to state precisely which representations they are seeking to have admitted and the Court then must assess each of those representations individually. It is often worth drawing the prosecutor's attention to this requirement before they formally make their application. Once of the best ways to deter a prosecutor from making such an application is to show them how laborious it is going to be.

26. It also is worth paying particular attention to s 65(2)(b) and (c). Was the representation made in circumstances that make it unlikely that the representation is a fabrication, or in circumstances that make it highly probable that the representation is reliable?

27. You will often come across matters where a witness or complainant is criminally concerned in a matter, for example some affrays, some domestic violence incidents, and other offences of interpersonal violence. Section 165(1)(d) of the Evidence Act deems evidence from a person who is criminally concerned unreliable for the purpose of that section.

28. Where a person could be said to be criminally concerned or with a motive to fabricate their evidence or at least minimise their role in an event, this will often provide fertile ground to object to the introduction of hearsay evidence under the unavailability exception. As outlined above, if you analyse each individual representation through this lens you may find that some or many of the representations are not admissible.

29. **Tip 13 – consider calling evidence from the OIC on the issue of whether reasonable notice has been given of the prosecution's intention to rely on this provision:** If a party intends to adduce evidence under this exception to the hearsay rule, they must give the other party reasonable notice in writing. What is reasonable will, of course, depend on all the circumstances, in particular, when it came to the prosecutor's attention that the witness was unavailable. In response to a submission that reasonable notice has not been given, prosecutors often contend that they only found out on the morning of the hearing that the witness was unavailable. This will often be because the OIC simply failed to communicate to the prosecutors' office that the witness was unavailable at an earlier point. In my view, prosecutors cannot hide behind this. On this issue, it is often worth conferencing the OIC about when they became aware of the circumstances forming the basis for the witness's unavailability. If they have known for some time, but simply have not communicated this

to the prosecutors, it is often worth adducing evidence about this. You can then argue that the notice is not reasonable because the police, and by extension the prosecutors, have known that the witness was potentially unavailable for some time.

30. Strictly speaking, s 67 is concerned with giving notice of the intention to rely on this exception. Thus, the prosecutor could argue that the intention to rely on this exception crystalised on the morning of the hearing when they were notified that the complainant would not be coming. However, in my experience, if the OIC has known for some time, the "I only just decided to make the application" argument usually does not get much traction. Don't forget, even if the Court concludes that reasonable notice has not been given, the Court can, on the application of the party relying on the exception, direct that the notice requirements be dispensed with: (Evidence Act, s 67(4)).

31. **Tip 14 – is the witness 'unavailable' for the purpose of the Evidence Act Dictionary, Pt 2(4)? Consider areas for cross examination of the OIC on this point:** A witness is not automatically rendered 'unavailable' for the purpose of the Evidence Act simply because they have not answered their subpoena or have not been answering their phone. The most common part of the definition of 'unavailable' relied upon by prosecutors is: "all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or secure his or her attendance, but without success." You will often find, when you cross-examine the OIC, that they have done little more than attempt to call a witness and/or visited their last known address to try and serve a subpoena. In our view, this is not sufficient to render a person 'unavailable'. Police have the ability to access Medicare information, Centrelink information, submit iAsk requests to banks, submit information requests to roads and maritime services etc. When cross-examined on these matters it often becomes apparent that they have done the bare minimum to try and locate a person and compel them to attend court. Attacking whether the allegedly unavailable witness is actually 'unavailable' can be an effective way in resisting a prosecutor's application under s 65. Also, <u>always</u> check when and how the subpoena was served (this should also be done when a prosecutor is seeking a warrant for a witness or complainant). Check the service date on a subpoena to see if it was served less than 5 days before the hearing and therefore out of time. If so, the subpoena is defective and cannot compel the witness to attend Court. This is usually fatal to an unavailability application where the prosecution rely in s 65(2)(g). Remember it is a significant step to admit evidence under

this exception, especially when the evidence is the account, or parts of the account, of the complainant or a main witness. It is often worth reminding the Court of this.

32. **Tip 15 – it is much easier for an accused person to get evidence in under the maker unavailable exception than it is for the prosecution:** It is much easier for the defence to get evidence in under the maker unavailable exception than it is for the prosecution. When the defence is seeking to get evidence in under the maker unavailable exception, s 65(8) applies. This provision provides that the representation will be admissible so long as it is first-hand hearsay and evidence of the representation 'is given by a person who saw, heard or otherwise perceived the representation being made'. In other words, s 65(2), and the rigorous requirements that it imposes, do not apply to the defence. To illustrate, the accused could, so long the notice requirements had been met and the evidence was otherwise admissible, give evidence that "[unavailable witness] told me they saw the complainant fall down the stairs" and "[unavailable witness] told me they saw the complainant with a black eye two days before I apparently punched her". Be aware of 65(9) which essentially allows the prosecutor to adduce evidence in the same way after the defendant has done it pursuant to s 65(8). To illustrate, say the accused was charged with murder, and wanted to adduced evidence, under s 65(8), that the deceased had told him how much she loved him, and the Crown wanted to adduce other statements from the deceased to rebut this evidence. The Crown would likely be entitled to adduce such statements under s 65(9) of the Evidence Act, and would not have to go through the rigorous requirements of s 65(2): (*R v Mankotia* [1998] NSWSC 295).

Contemporaneous statements about a person's health etc:

33. **Tip 16 – try and utilise this exception more often:** This rule provides that the hearsay rule does not apply to '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': (Evidence Act, s 66A). The previous representation needs to be first-hand and contemporaneous, however, assuming it fulfills these criteria, there is a decent chance it will be admissible under this exception. The reason – many representations will be about a person's 'health, feelings, sensations, intention, knowledge or state of mind'. A person's intention and state of mind, in particular, are very broad, and you can often argue that the previous representation falls into either of these categories.

34. **Tip 17 – remember this exception only applies to first-hand hearsay:** This exception is found in Division 2 of Part 3.2 of the Evidence Act, which deals with first-hand exceptions to the hearsay. Accordingly, it only applies when the representation was made by person X and is about person X, which is something that is commonly overlooked. To illustrate, the accused could potentially give evidence, relying on this exception, that "Just before the fight, Sam told me that he was feeling scared because [the complaint] is a really aggressive fighter". This is first-hand hearsay, so the exception potentially applies. On the other hand, the accused could not rely on the exception to give evidence, "Just before the fight, Sam told me John told him that he was feeling scared because [the complainant] is a really aggressive fighter". This is second-hand hearsay and thus is not captured by the exception. If you are intending to rely on this exception, or prosecutor is trying to rely on it, make sure the previous representation is actually first-hand hearsay.

35. **Tip 18 – remember this exception only applies to contemporaneous representations:** For a previous representation to get in under this exception, it has to be contemporaneous. The requirement that the previous representation be contemporaneous meaningfully limits the scope of this exception. As to what meant by contemporaneous, the authorities diverge. There are authorities that suggest it is limited to previous representations made in either the immediate aftermath of incident or very soon after the incident has occurred: (*Wentworth v Wentworth* NSWSC, 4 September, 1997, unreported; *R v Xypolitos* VSC 514). Whereas there are others than endorse a more liberal approach: (*R v O'Grady* [2000] NSWSC 1256). Accordingly, if you are arguing that the exception does not apply, you can always argue that the representation was not contemporaneous, unless, of course, the previous representation was made in the immediate aftermath. Conversely, if you are arguing that the exception applies, you can rely on the cases that endorse the more liberal approach.

Business records:

36. **Tip 19 – don't assume that because part of a document is admissible under this exception, that the entire document is admissible under this exception:** Don't assume that because part of a document is admissible under the business records exception to the hearsay rule that the entirety of that document is admissible under that exception. The business records exception applies to representations that were made by: 'a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact' or 'on the basis of information directly or indirectly supplied by a person who had or might

reasonably be supposed to have had personal knowledge of the asserted fact': (Evidence Act, s 69(2)). While many representations will fall into one of these categories - and the words 'reasonably be supposed' undoubtably lower the bar – don't just assume that this is so. Sometimes it will not be clear how the maker of the representation acquired knowledge of the asserted fact. The onus is on the party seeking to have the representation admitted to establish that it falls into one of these categories. If it is unclear whether the representation falls into one of these categories, the representation will not admissible under the business records exception to the hearsay rule. For example, a one page discharge summary that is part of medical records the prosecution are seeking to tender. The discharge summary will likely contain multiple representations. It may be that some of those representations are admissible under the exception, and others are not, potentially because it is not clear who made the representation or the source of their knowledge. If there is a particularly damning representation think carefully about whether it meets the criteria for admissibility under that provision.

37. **Tip 20 – a document that is admissible under this exception may be inadmissible under another provision/s of the Evidence Act:** Where a document is admissible under the business records exception to the hearsay rule, it may be that the document or part of the document is inadmissible under another provision of the Evidence Act. For example, where the prosecution are seeking to tender the complainant's medical records, but have not obtained an expert statement. If the records contain medical opinions - such as "the complainant's jaw was fractured" – that go beyond the sort of observations that a lay witness could make and give evidence about, those medical opinions would likely be inadmissible because of the opinion rule: *Lithgow City Council v Jackson* [2011] HCA 36 – [15]-[57]

38. **Tip 21 – it is not the case that a record is only admissible under this exception if there is a statement/affidavit from the business producing the record:** It is not the case that business records are only admissible if there is an affidavit or statement from the business authenticating the records. The Evidence Act simply provides that business records may be adduced in this way. If there is no such affidavit or statement, and the provenance of the records is in issue, the Court is entitled to examine the records and draw reasonable inferences about the records. If the documents are clearly medical records from the hospital the prosecutor asserts they are from, then you should fully expect the Court to conclude as

such, and should carefully consider whether a "provenance" style objection - which is really just an objection on the basis of relevance - is worth making.

39. **Tip 22 – be aware of the difference between a 'record' of a business and the 'product' of a business:** An overly enthusiastic prosecutor can sometimes attempt to use this section to admit any document from a business into evidence. However, it is imperative to remember that it only applies to records of a business. These are documents (or other means of holding information) by which activities of the business are recorded. These might typically include recordings of business activities, internal communications, and communications between the business and third parties. For example, a security company may have a system that record alarm activations – a record reflecting this would likely be admissible as a business record. However, if that company distributes a document to customers recommending how they use the system and how it be set up, this is a 'product' of the business and wouldn't fall within the exception: (*Pinnacle Runway Pty Ltd v Triangl Limited* [2019] FCA 1662).

General:

40. **Tip 23 – if all else fails, consider s 135 and 137 of the Evidence Act:** If you are trying to resist the admission of evidence and all else fails, consider objecting under s 135 and/or 137 of the Evidence Act. A detailed discussion of those provisions is beyond the scope of this paper.

41. **Tip 24 – remember s 165 of the Evidence Act:** This section allows a party to request an unreliability direction to any evidence admitted pursuant to part 3.2 of the Evidence Act. This includes all the hearsay exceptions. In practice you might regularly find that such a direction would be useful in reducing the weight to be given to documents like medical records and CAD printouts which are often full of jargon, abbreviations, and acronyms for which no evidence is called to explain. Accordingly, such a direction can go a long way to persuading a magistrate not to afford too much weight to untested hearsay evidence, and remind them of the dangers of convicting on the basis of thar evidence.

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