WHAT IS HEARSAY?

Sue McNicol QC and Jason Harkess consider what many are afraid to ask 4 April 2018

An old rule made uniform by modern statute

Hearsay is commonly understood as evidence from a witness attesting to what he or she has heard another person say about facts, though the witness did not perceive those facts personally. The common law has long recognised a general prohibition against the admissibility of hearsay evidence. It is defined as evidence of a statement made out of court which is adduced to prove the truth of a fact asserted in the statement. The two essential features of hearsay evidence at common law are therefore: (1) an out of court statement; and (2) adduced for a testimonial (i.e. 'hearsay') purpose.

The *Evidence Act 2008* (Vic) came into effect on 1 January 2010. It codified the common law rule and is 'uniform' with legislation in other Australian jurisdictions. Section 59 retains the essential features of the common law definition, though is expressed in a way that makes the statutory definition a little more complex (see grey box **above right**). There are five constituent elements to hearsay evidence under s 59 (see gold box **right**). It is a rule of exclusion. If the five elements apply, it operates to exclude evidence that is otherwise relevant. The rationale for the general prohibition against hearsay evidence is that such evidence is potentially unreliable, cannot be tested by cross-examination, and is not usually the 'best' evidence available.

Evidence Act 2008 — Section 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 New South Wales in *R v Hannes* (2000) 158 FLR 359.

Elements of Section 59

(1) a previous representation

(2) made by a person

(3) containing an asserted fact

(4) intended to be asserted by the maker (*objectively* determined)

(5) adduced by a party to prove the asserted fact

Note: All five elements must be established for the evidence to qualify as hearsay under the *Evidence Act 2008*

‘Previous Representation’

The *Evidence Act 2008* defines ‘*representation*’ and ‘*previous representation*’ (see **right**). They must be read together for the purposes of the s 59 analysis. Evidence of a ‘previous representation’ is taken to mean much the same as the common law’s reference to evidence of an ‘out of court statement’. Such evidence usually takes one of two forms:

(1) oral evidence given by a witness who is attesting to what another person has said to them on an earlier occasion outside of court (see Scene 1 **below**);

(2) documentary evidence, tendered by a party as an exhibit, which records a person’s written words made on an earlier occasion outside of court (see Scene 2 **below**).

Evidence Act 2008 — Dictionary

...

“previous representation” means a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced.

...

"***representation***" includes—

(a) an express or implied representation (whether oral or in writing); or

(b) a representation to be inferred from conduct; or

(c) a representation not intended by its maker to be communicated to or seen by another person; or

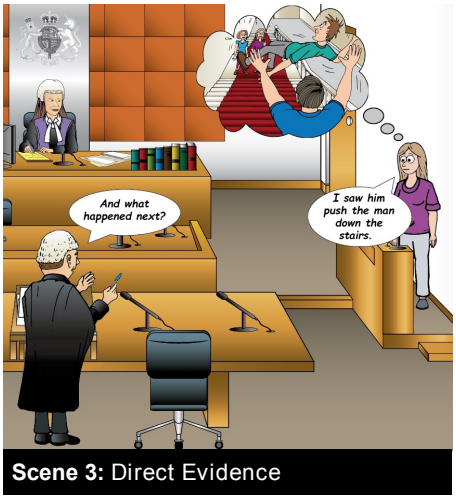
(d) a representation that for any reason is not communicated;

Scene 1: Evidence of a Previous *Oral* Representation

Scene 2: Evidence of a Previous *Written* Representation

Direct Evidence

Evidence of a previous representation, and hearsay evidence more generally, is often contrasted with **direct evidence**. The witness who gives direct evidence about facts recounts her *direct perceptions* of the occurrence of those facts. This kind of evidence is depicted in Scene 3 (**right**). The witness in Scene 3 is giving direct evidence about the same facts about which she made previous representations to the witness in Scene 1. Which evidence is better evidence — the oral evidence in Scene 1 or in Scene 3?



Scene 3: Direct Evidence

‘Made by a Person’

The question of whether the previous representation was ‘*made by a person*’ is rarely an issue. It will usually be obvious if a human being was responsible for making the oral or written representation proposed to be adduced. In Scene 1 and Scene 2 above, both situations involve the adduction of evidence of a previous representation made by a person.

The requirement that, in order to be hearsay, the representation must be traceable to human authorship reflects the underlying rationale of the prohibition against such evidence. Human beings are complicated creatures with a variety of personal motivations, some good and some bad. The hearsay prohibition recognises that humans have a tendency to make things up if it is in their interests to do so, particularly when they are not under oath and not subject to cross-examination. Any ‘representations’ they make outside the courtroom should therefore be treated with am abundance of caution.

‘Asserted Fact’

Implicit in any section 59 analysis is the need to identify within the previous representation, with some degree of precision, the relevant fact that has been asserted by the person who made the representation. The definition of ‘*representation’* contemplates that representations may be express or implied. Evidence of previous representations may therefore contain asserted facts which are ***expressly*** asserted or which are asserted by necessary ***implication*** having regard to what was expressly stated. In instances of the latter, the legal analysis involves looking at the evidence of the previous representation and ‘reading between the lines’ to identify the asserted fact of evidential significance.

In Scene 1 above, the asserted fact of evidential significance to be found within the previous representation is ‘[*the Accused] pushed the [victim] down the stairs*’. For the purposes of the s 59 analysis, the assertion may be characterised as an express assertion because it reproduces almost verbatim the express words that were used by the person who made the previous representation. The distinction between express and implied sometimes may appear obvious on occasions (see e.g. *Walton v The Queen* (1989) 166 CLR 283, summarised **right**). However, implied assertions are often more subtle and argumentative (see e.g. *Ratten v The Queen* [1982] AC 378 (PC), summarised **right**).

Do photographs contain asserted facts?

Photographs are ‘previous representations’ of real life scenes. But if the photograph contains no words (e.g. a sign), does it ‘assert’ anything? The concept of assertion connotes the use of human language. Arguably a photograph asserts nothing. It is simply a 2-dimensional replicated image of a 3-dimensional scene.

Are computer records ‘made by a person’?

Many documents created today are generated through automated computer processes (e.g. bank statements, phone records). There may be no human input in creating these records, though the algorithmic equations and computer code that generate the records are a product of human endeavour. However, the question of whether such records are ‘*made by a person*’ for the purposes of s 59 is hardly ever litigated, most probably because other provisions in the *Evidence Act 2008* operate to render such documents admissible even if they were considered hearsay (e.g. s 69, excepting business records).

Ratten v The Queen

A Prosecution witness who was a telephonist gave evidence that she received a call and spoke to a female (the victim) who said: *‘Get me the police please.’* Defence Counsel argued that this was evidence of a previous representation containing the implied assertion that Mrs Ratten was being attacked by the Accused. The Privy Council disagreed, ruling that at most the previous representation implied that Mrs Ratten was in need of the police at a time when she is a state of anxiety or fear.

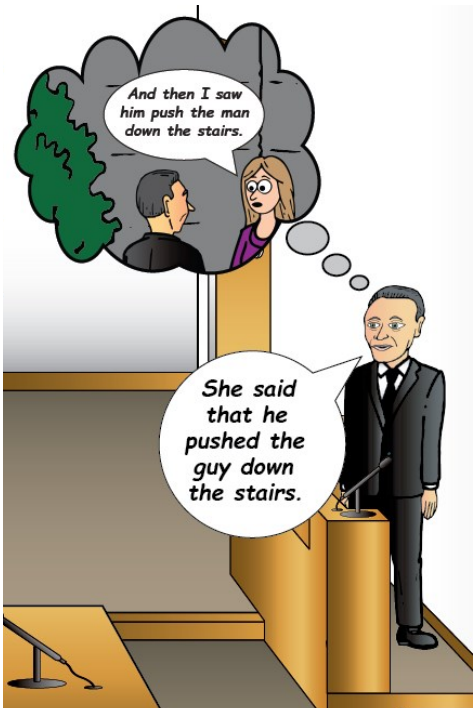
Walton v The Queen

A Prosecution witness gave evidence that she observed the victim answer the telephone and say to her child, ‘*Daddy’s on the phone.’* This was evidence of a previous representation containing the **expressly** asserted fact that the Accused was connected to the other end of the phone line. The witness then gave evidence that she observed the child take the phone and say, ‘*Hello Daddy’*, which the High Court found contained the **implied** assertion that the Accused was on the other end of the phone line.

‘Intended to Assert’

The statutory definition of hearsay under s 59 of the *Evidence Act 2008* introduces an element that was not established as a definitional component of hearsay at common law. To qualify as hearsay under s 59, it must be established that the maker of the previous representation ***intended*** to assert the fact contained in the representation at the time it was made.

The intention of the person who made the previous representation is determined objectively, having regard to the circumstances in which the representation was made (see s 59(2A)). Understandably, the subjective intentions are not relevant to the court’s inquiry because these may never be able to be ascertained if the maker of the representation is not called to give evidence.



In Scene 1 (cropped **right inset**), the inquiry into intention for the purposes of the s 59 analysis calls for consideration of the state of mind of the person at the time she was making the previous representation to the witness. Attention is therefore focused on the female depicted in the thought bubble emanating from the witness as he is giving evidence. The critical question is, *‘What was she intending to assert in the course of the conversation she was having with the witness when she said one man pushed another down the stairs?’*. In this instance, her intentions are self-evident given that the asserted fact is derived from the express words of her statement. As a matter of common sense, most people intend to assert matters by the words that they explicitly communicate. For this reason, the element of intention is very rarely an issue—it is usually always established.

The element of intention in the statutory hearsay formulation again reflects the underlying rationale of the general prohibition against such evidence. If it is established the person who made the representation intended to assert the facts contained in it, there is an obvious concern that the facts asserted may be a deliberate fabrication. The reliability of the evidence is called into question, and so s 59 sensibly operates to exclude it.

The corollary point to this is that s 59 should not operate to exclude evidence of previous representations containing ***unintended*** assertions. There is unlikely to be any great concern about such evidence being fabricated if the assertions were unintended, and so the general rule of exclusion ought not apply. But this raises a particularly difficult question—when is an asserted fact unlikely to have been intended? When it contemplated the kind of evidence to which the element of intention was not meant to capture, the Australian Law Reform Commission had in mind evidence of previous representations that where adduced for the purpose of proving ***implied assertions***. If one has to ‘read between the lines’ to identify the asserted fact, then there is an argument to be made that the person who made the previous representation may have had no intention to assert the implication arising out of their express words. Accordingly, in *Walton v The Queen* (see **above, p 3**) evidence of the previous representation made by the child—*‘Hello Daddy’* —does not expressly assert anything; it is a greeting, not an assertion. The implied assertion contained in the child’s statement was found to be that the Accused was on the other end of the telephone line. Did the child intend to assert this fact when he greeted his father? Arguably not, and so this evidence might not be captured by the s 59 exclusionary rule. Similar considerations can be given to the evidence in the case of *Ratten v The Queen* (see **above, p 3**). However, an approach to s 59 which classifies all implied assertions as ‘unintended’ would incorporate an overly simplistic view of the interpretation of natural human language. As Chief Justice Spigelman observed in *R v Hannes* (2000) 158 FLR 359, the concept of intention ‘*may encompass any fact which is a necessary assumption underlying the fact that the assertor does subjectively advert to.*’ The point was well made by his Honour because it recognises that language is a socially complex phenomenon. When people articulate their thoughts through verbal or written expression, they often intend to communicate not only what is expressly stated, but an abundance of other matters that can be found by reading between the lines. And so it may be that the element of intention in s 59 has very little work to do. This may explain why there is very little case law on the point.

‘To Prove’ the Asserted Fact

The final element that falls for consideration in the s 59 analysis is that which concerns the purpose for which the evidence of the previous representation is being adduced. Is it being adduced for the purposes of proving the asserted fact contained in it? If so, the evidence is being adduced for a ‘hearsay’ purpose and s 59 would operate to exclude it.

This particular issue can sometimes be quite complicated because evidence of previous representations is often adduced in the course of proceedings for a variety of different reasons. Evidence of a previous representation is not necessarily relevant because it helps counsel to convince the tribunal of the fact of the existence of the facts asserted within it. Whether the evidence is being adduced for a hearsay purpose therefore depends significantly on the forensic determination that has been made by counsel in relation to the evidence. A number of questions need to be considered by counsel who is proposing to adduce the evidence:

(1) Why is counsel seeking to adduce evidence of previous representation?
(2) In counsel’s view, how is the evidence relevant to his or her case?
(3) Is the evidence relevant for the purposes of proving an asserted fact contained in the representation?
(4) Is the evidence relevant for some other purpose?
(5) Is the evidence relevant for multiple purposes, one of which is a hearsay purpose?

In Scene 1 (cropped **right insets**), attention is drawn to these questions. How they are answered will depend on a host of other variables that are peculiar to the facts in issue and how the court proceedings have transpired. If a fact in issue is whether the Accused pushed the victim down the stairs, and the female witness depicted in the thought bubble is unavailable to give evidence, counsel’s purpose for eliciting evidence of the previous representation may indeed be to prove what is asserted by it. If, however, the female witness gave evidence earlier in the proceeding, counsel’s purpose for eliciting the evidence may be quite different—to **undermine her credibility if** her evidence was inconsistent what she said in the previous representation, or perhaps to **bolster her credibility** if opposing counsel suggested in cross-examination that she had lied about seeing the Accused push the victim down the stairs. These may be legitimate non-hearsay forensic purposes for which the evidence is being adduced. If that is counsel’s purpose, s 59 is not immediately triggered.

The common law remains instructive because this element of s 59 was intended to restate the essential component of the old common law rule. In contemplating the non-hearsay uses that may be made of evidence of previous representations, appellate courts have identified a number of different legitimate forensic purposes that may be applicable (see examples on **right**).

Why is Counsel asking this question?

How is this evidence relevant?

Non-Hearsay Uses of Previous Representations

- Proof of a prior inconsistent statement (credibility purpose)
- Proof of prior consistent statement (credibility purpose)
- Proof of the fact that a statement was made which has legal significance in itself (e.g. a threat to kill; an offer in a civil contract claim; a defamatory publication; misleading and deceptive statements under the Australian Consumer Law)
- Proof of a lie (post-offence incriminating conduct)

And if it is hearsay?

The purpose of this publication is to outline the requirements that must be met before evidence qualifies as hearsay evidence under s 59 of the *Evidence Act 2008*. There are five elements. If they are all satisfied in relation to a piece of evidence, s 59 operates to exclude the evidence for the purposes of proving the asserted fact contained in it. The evidence is therefore *prima facie* inadmissible as hearsay evidence under s 59.

However, at common law, and now under the *Evidence Act 2008*, the rule against hearsay is arguably more well known for its many exceptions than its absolute application. An 'exception' to the hearsay rule refers to a rule that operates to permit evidence of a previous representation being admitted for a hearsay purpose, though the evidence is in *prima facie* violation of the general prohibition under s 59. The many exceptions to the hearsay rule are beyond the scope of the present publication. However, some important exceptions that should always be remembered include the following:

- First-hand hearsay (ss 62-67)
- Evidence admissible for a non-hearsay purpose (s 60)
- Business records (s 69)
- Admissions (s 81)

These exceptions, among others, will be addressed in future publications.