



FIRST HAND HEARSAY



Sue McNicol QC and Jason Harkess provide a first-hand account of a remarkable exception to the hearsay rule 22 May 2018

An Untapped Exception to a Well-known Rule

Obtaining an adequate understanding of the statutory definition of hearsay evidence under s 59 the *Evidence Act 2008* (Vic) ('the Act') is no mean feat. Hearsay is a concept that even the most astute lawyer has difficulty understanding and applying in practice. It should therefore come as no surprise that the related statutory notion of 'first-hand' hearsay, an exception to the general rule, is seen by many as an unwelcome addition to the conceptual inventory.

Nevertheless, once the notion of first-hand hearsay is properly understood, courtroom practitioners should revel in the potential forensic opportunities that the first-hand hearsay exceptions under the Act present. Evidence that a party proposes to adduce as proof of a fact may be hearsay and in violation of s 59. Confronted with the inevitability of the evidence being ruled inadmissible, counsel must contemplate what to do with this evidence in relation to their case. Should they discard the evidence and convince themselves that the evidence was not essential anyway? Or should they invoke a hearsay exception which could render the evidence admissible? Of the many hearsay exceptions set out in the Act, the first-hand hearsay exceptions are listed first. Division 2 of Part 3.2 (ss 62-68) of the Act provides for the admissibility first-hand hearsay in specified circumstances. Section 62 defines first-hand hearsay, ss 63-66A set out the substantive circumstances in which it may be admitted, and ss 67 and 68 provide for peripheral procedures associated with the giving of notice and making objections. These provisions be contemplated as a potential first line of defence against any objection made to hearsay evidence by opposing counsel.



FIRST-HAND HEARSAY EXPLAINED

What Is First-Hand Hearsay?

The notion of 'first-hand' hearsay cannot be properly understood without an adequate understanding of the parent concept of 'hearsay'. The latter was the subject of explanation in an earlier publication, 'What is Hearsay?' (published 4 April 2018). For ease of reference, however, the elements of the statutory definition of hearsay are restated in the gold box **below right**. The first-hand hearsay exceptions now force a critical distinction to be drawn between kinds of hearsay that had never been drawn at common law. Only first-hand hearsay is admissible under these exceptions, which means care must be taken to ensure that the hearsay proposed to be adduced is not second-hand, third-hand or even more remote hearsay.

Section 62(1) of the Act (reproduced **right**) defines 'first-hand' hearsay as evidence of 'a previous representation that was made by a person who had **personal knowledge** of an asserted fact.' Section 62(2) explains that the maker of the previous representation has 'personal knowledge' of an asserted fact when it is evident that this knowledge either:

- i) is based on something they have *actually perceived* with their senses (i.e. they saw, heard, smelt, tasted or touched the thing giving rise to the asserted fact); or
- ii) *might reasonably be supposed* to have been based on something they perceived with their senses.

The language of s 62 makes the concept of first-hand hearsay seem much more convoluted than it is in actual practice. The provision contemplates that a person (Person A) may personally perceive events before reporting these events to another person (Person B). Person B is called to give evidence of Person A's report. Person B's evidence is first-hand hearsay. Essentially, first-hand hearsay is evidence given by a witness who is one step removed from the person who actually perceived the events in question. This practical explanation is summarised in the black box **below** with the distinctions between direct evidence, first-hand hearsay, and second-hand hearsay depicted on **page 3**.

First-hand Hearsay Simply Put

- (1) Person **A** witnesses an event. Person **A** has '*personal knowledge*' of the event.
- (2) Person **A** tells Person **B** about the event.
- (3) Person **B** gives oral evidence in court about what Person **A** told him, to prove the event occurred. This is **first-hand hearsay**.

Evidence Act 2008

Division 2—"First-hand" hearsay

62 Restriction to "first-hand" hearsay

- (1) A reference in this Division (other than in subsection (2)) to a previous representation is a reference to a previous representation that was made by a person who had personal knowledge of an asserted fact.
- (2) A person has personal knowledge of the asserted fact if his or her 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.
- (3) For the purposes of section 66A, a person has personal knowledge of the asserted fact if it is a fact about the person's health, feelings, sensations, intention, knowledge or state of mind at the time the representation referred to in that section was made.

Elements of Hearsay (s 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*

FIRST-HAND HEARSAY EXPLAINED

Direct Evidence

Person A witnesses the Accused pushing the victim down some stairs. When Person A gives oral evidence describing the event in court, she is giving **direct evidence** concerning matters within her '*personal knowledge*'. This evidence is not hearsay.



Person 'A' witnesses the event



Person 'A'

First-hand Hearsay

Person A reports the event to Person B. When Person B gives oral evidence about this report, he is giving evidence of a '*previous representation*' made by Person A containing asserted facts that are within Person A's '*personal knowledge*'. Person B's evidence is one step removed from Person A. It is first-hand hearsay. It is potentially admissible.



Person 'A' reports the event to Person 'B'



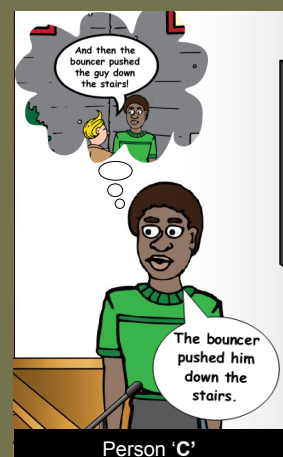
Person 'B'

Second-hand Hearsay

Person B reports the event to Person C. When Person C gives oral evidence, he is giving evidence of a '*previous representation*' made by Person B containing asserted facts that are not within Person B's '*personal knowledge*'. Person C's evidence is two steps removed from Person A. It is second-hand hearsay and not admissible.



Person 'B' reports the event to Person 'C'



Person 'C'

FIRST-HAND HEARSAY EXPLAINED

Preliminary Matters Concerning Admissibility

Having identified evidence as the first-hand hearsay, further consideration must be given to the precise context in which the evidence is proposed to be adduced. The presence or absence of certain contextual features will determine which statutory exceptions may be invoked. This include the following:

- ◆ whether the maker of the previous representation is available or '**not available**' to give evidence (different pre-conditions must be met depending on the maker's availability to give evidence in court in person);
- ◆ whether the proceeding in which the first-hand hearsay evidence is being adduced is **civil** or **criminal** (the rules are significantly less restrictive in civil proceedings);
- ◆ in criminal proceedings, whether the first-hand hearsay evidence is being adduced by the **prosecutor** or the **defendant** (greater restrictions apply to the prosecution).

The Act sets out an exhaustive list of the situations in which a person is deemed to be 'not available' for the purposes of determining the admissibility first-hand hearsay evidence (reproduced **below**).

Beyond these specific statutory considerations, counsel should also consider the precise form which the first-hand hearsay evidence is to take. Will oral evidence be given of a previous oral representation (as depicted on page 3 above), or does counsel propose to tender a previous written representation? Will the maker of the previous representation be giving evidence of their own previous oral or written representation?

Dictionary — Part 2

4 Unavailability of persons

- (1) For the purposes of this Act, a person is taken not to be available to give evidence about a fact if—
 - (a) the person is dead; or
 - (b) the person is, for any reason other than the application of section 16 (Competence and compellability—judges and jurors), not competent to give the evidence; or
 - (c) the person is mentally or physically unable to give the evidence and it is not reasonably practicable to overcome that inability; or
 - (d) it would be unlawful for the person to give the evidence; or
 - (e) a provision of this Act prohibits the evidence being given; or
 - (f) 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; or
 - (g) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success.
- (2) In all other cases the person is taken to be available to give evidence about the fact.

Written First-hand Hearsay

First-hand hearsay may be constituted by either oral evidence of a previous (oral or written) representation, or documentary evidence containing one or more previous written representations. Examples of the latter include **witness statements**, **file notes**, and correspondence such as **letters/ emails** detailing a complaint.

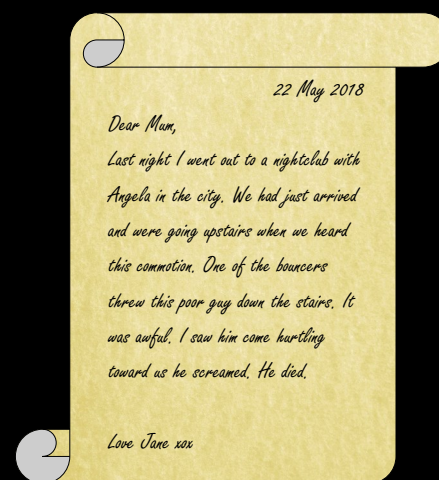


EXHIBIT 1

Maker Giving Evidence

The Act contemplates that the maker of a previous representation may give evidence about the previous representation herself (see in particular ss 64 and 66).



CIVIL EXCEPTIONS

Evidence Act 2008

Division 2—“First-hand” hearsay

63 Exception—civil proceedings if maker not available

- (1) This section applies in a civil proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.
- (2) The hearsay rule does not apply to—
 - (a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made; or
 - (b) document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

Notes

- 1 Section 67 imposes notice requirements relating to this subsection.
- 2 Clause 4 of Part 2 of the Dictionary is about the availability of persons.

64 Exception—civil proceedings if maker available

- (1) This section applies in a civil proceeding if a person who made a previous representation is available to give evidence about an asserted fact.
- (2) The hearsay rule does not apply to—
 - (a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made; or
 - (b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation—
if it would cause undue expense or undue delay, or would not be reasonably practicable, to call the person who made the representation to give evidence.

Note

Section 67 imposes notice requirements relating to this subsection. Section 68 is about objections to notices that relate to this subsection.

- (3) If the person who made the representation has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by—
 - (a) that person; or
 - (b) person who saw, heard or otherwise perceived the representation being made.
- (4) A document containing a representation to which subsection (3) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

Note

Clause 4 of Part 2 of the Dictionary is about the availability of persons.

CRIMINAL EXCEPTIONS

Division 2—“First-hand” hearsay

65 Exception—criminal proceedings if maker not available

- (1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.
- (2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation—
 - (a) was made under a duty to make that representation or to make representations of that kind; or
 - (b) was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or
 - (c) was made in circumstances that make it highly probable that the representation is reliable; or
 - (d) was—
 - (i) against the interests of the person who made it at the time it was made; and
 - (ii) made in circumstances that make it likely that the representation is reliable.

Note

Section 67 imposes notice requirements relating to this subsection.

- (3) The hearsay rule does not apply to evidence of a previous representation made in the course of giving evidence in an Australian or overseas proceeding if, in that proceeding, the accused in the proceeding to which this section is being applied—
 - (a) cross-examined the person who made the representation about it; or
 - (b) had a reasonable opportunity to cross-examine the person who made the representation about it.

Note

Section 67 imposes notice requirements relating to this subsection.

- (4) If there is more than one accused in the criminal proceeding, evidence of a previous representation that—
 - (a) is given in an Australian or overseas proceeding; and
 - (b) is admitted into evidence in the criminal proceeding because of subsection (3)—cannot be used against an accused who did not cross-examine, and did not have a reasonable opportunity to cross-examine, the person about the representation.
- (5) For the purposes of subsections (3) and (4), an accused is taken to have had a reasonable opportunity to cross-examine a person if the accused was not present at a time when the cross-examination of a person might have been conducted but—
 - (a) could reasonably have been present at that time; and
 - (b) if present could have cross-examined the person.
- (6) Evidence of the making of a representation to which subsection (3) applies may be adduced by producing a transcript, or a recording, of the representation that is authenticated by—
 - (a) the person to whom, or the court or other body to which, the representation was made; or
 - (b) if applicable, the registrar or other proper officer of the court or other body to which the representation was made; or
 - (c) the person or body responsible for producing the transcript or recording.

CRIMINAL EXCEPTIONS

65 Exception—criminal proceedings if maker not available (...*CONTINUED*)

...

- (7) Without limiting subsection (2)(d), a representation is taken for the purposes of that subsection to be against the interests of the person who made it if it tends—
- (a) to damage the person's reputation; or
 - (b) to show that the person has committed an offence for which the person has not been convicted; or
 - (c) to show that the person is liable in an action for damages.
- (8) The hearsay rule does not apply to—
- (a) evidence of a previous representation adduced by an accused if the evidence is given by a person who saw, heard or otherwise perceived the representation being made; or
 - (b) a document tendered as evidence by an accused so far as it contains a previous representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

Note

Section 67 imposes notice requirements relating to this subsection.

- (9) If evidence of a previous representation about a matter has been adduced by an accused and has been admitted, the hearsay rule does not apply to evidence of another representation about the matter that—
- (a) is adduced by another party; and
 - (b) is given by a person who saw, heard or otherwise perceived the other representation being made.

Note

Clause 4 of Part 2 of the Dictionary is about the availability of persons.

CRIMINAL EXCEPTIONS

Division 2—“First-hand” hearsay

66 Exception—criminal proceedings if maker available

- (1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.
- (2) The hearsay rule does not apply to evidence of the 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—
 - (a) the person who made the representation has been or is to be called to give evidence; and
 - (b) 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.

Note

Subsection (2) differs from the Commonwealth Act and New South Wales Act.

- (2A) In determining whether the occurrence of the asserted fact was fresh in the memory of a person, the court may take into account all matters that it considers are relevant to the question, including—
 - (a) the nature of the event concerned; and
 - (b) the age and health of the person; and
 - (c) the period of time between the occurrence of the asserted fact and the making of the representation.

Note

Subsection (2A) was inserted as a response to the decision of the High Court of Australia in *Graham v The Queen* (1998) 195 CLR 606.

- (3) If a 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, subsection (2) does not apply to evidence adduced by the prosecutor of the representation unless the representation concerns the identity of a person, place or thing.
- (4) A document containing a representation to which subsection (2) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

Note

Clause 4 of Part 2 of the Dictionary is about the availability of persons.

OTHER RELEVANT PROVISIONS

Division 2—“First-hand” hearsay

66A Exception—contemporaneous statements about a person's health etc.

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.

67 Notice to be given

- (1) Sections 63(2), 64(2) and 65(2), (3) and (8) do not apply to evidence adduced by a party unless that party has given reasonable notice in writing to each other party of the party's intention to adduce the evidence.
- (2) Notices given under subsection (1) are to be given in accordance with any regulations or rules of court made for the purposes of this section.
- (3) The notice must state—
 - (a) the particular provisions of this Division on which the party intends to rely in arguing that the hearsay rule does not apply to the evidence; and
 - (b) if section 64(2) is such a provision—the grounds, specified in that provision, on which the party intends to rely.
- (4) Despite subsection (1), if notice has not been given, the court may, on the application of a party, direct that one or more of those subsections is to apply despite the party's failure to give notice.
- (5) The direction—
 - (a) is subject to such conditions (if any) as the court thinks fit; and
 - (b) in particular, may provide that, in relation to specified evidence, the subsection or subsections concerned apply with such modifications as the court specifies.

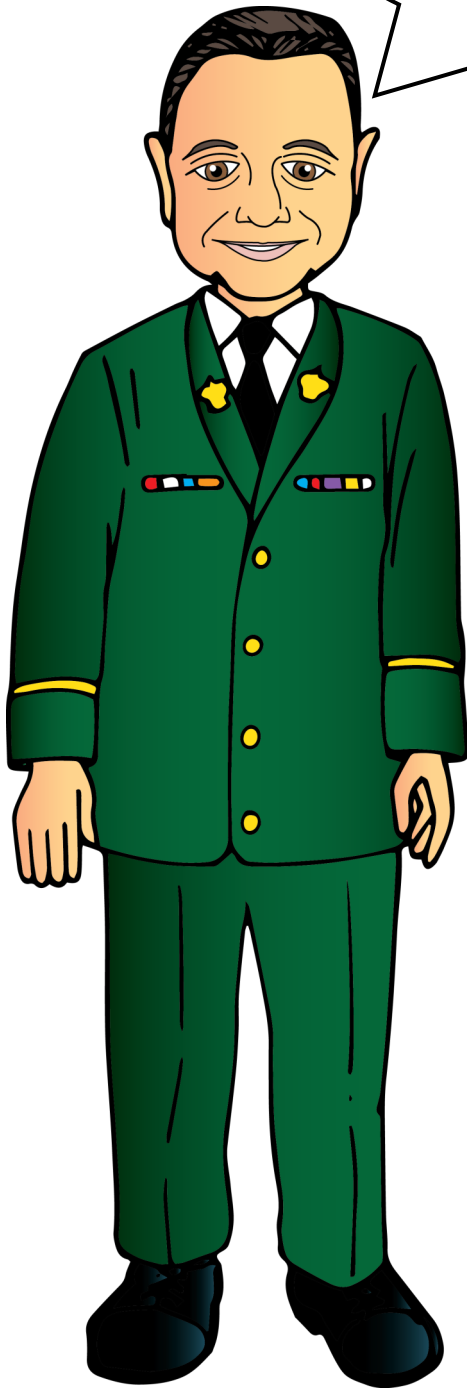
68 Objections to tender of hearsay evidence in civil proceedings if maker available

- (1) In a civil proceeding, if the notice discloses that it is not intended to call the person who made the previous representation concerned because it—
 - (a) would cause undue expense or undue delay; or
 - (b) would not be reasonably practicable—a party may, not later than 21 days after notice has been given, object to the tender of the evidence, or of a specified part of the evidence.
- (2) The objection is to be made by giving to each other party a written notice setting out the grounds on which the objection is made.
- (3) The court may, on the application of a party, determine the objection at or before the hearing.
- (4) If the objection is unreasonable, the court may order that, in any event, the party objecting is to bear the costs incurred by another party—
 - (a) in relation to the objection; and
 - (b) in calling the person who made the representation to give evidence.

Note

This subsection differs from section 68(4) of the Commonwealth Act because of the different way costs are ascertained by Victorian courts.

Don't forget sections 135 to 137 of the Evidence Act and judicial warnings about reliability!!



If a first-hand hearsay exception operates

If a first-hand hearsay exception operates to render the evidence admissible, counsel opposed to the evidence being admitted should not let the matter rest there. Whatever exceptions the Act creates for first-hand hearsay, even admissible hearsay will always have a fundamental problem associated with it—it is **always going to be less reliable than direct evidence**. It is simply a question of degree. Accordingly, the following options should always be considered:

- ◆ apply to exclude the evidence under ss 135 and/or 137 of the Act
- ◆ seek to limit the use of the evidence under s 136 of the Act;
- ◆ request reliability warnings under Part 4.5 of the Act (for civil proceedings) or under the *Jury Directions Act 2015* (for criminal proceedings).