

- > UNDERSTAND WHAT EXAMINERS WANT
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**Question&Answer**

# **EVIDENCE**

**RITA D'ALTON-HARRISON**

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Question&Answer

**EVIDENCE**

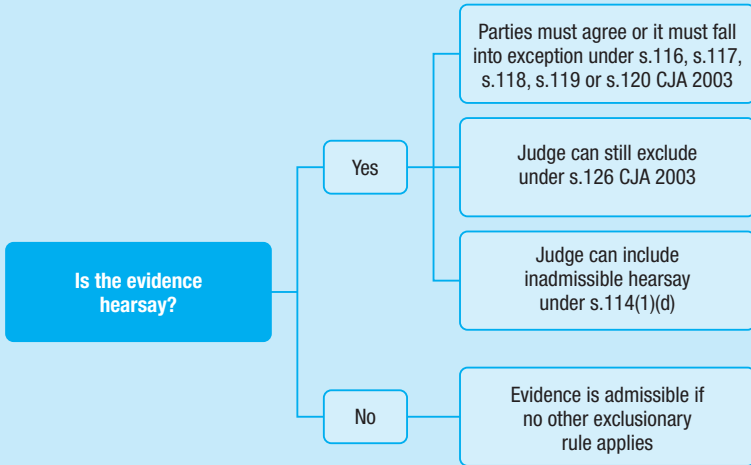
# Hearsay

# 4

## How this topic may come up in exams

Hearsay is an example of an exclusionary rule. It is common to see it examined as an essay question when looking at how exclusionary rules affect the principle of admissibility and the use of judicial discretion. In this context it would relate to issues in Chapter 1 as well as other exclusionary rules such as opinion evidence and previous judgments at trial (discussed in Chapter 5) and the rule against narrative (discussed in Chapter 3). However, hearsay equally appears in problem questions, in particular those where students are expected to identify when the exceptions under ss.116, 117 and 118 of the Criminal Justice Act 2003 might apply.

## ■ Attack the question





## Question 1

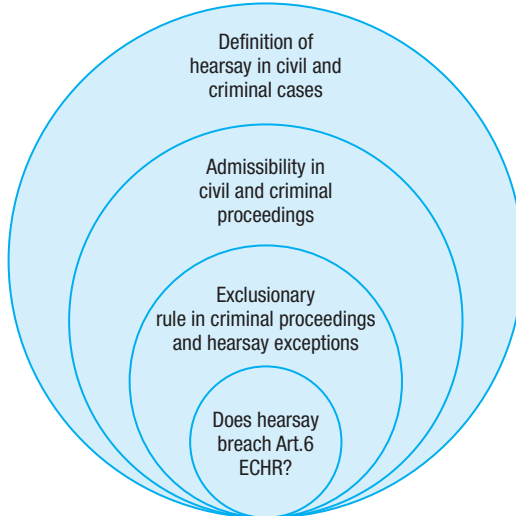
'To avoid exclusion the court searches for a convenient tag which may be given to this type of evidence so that it may pass for something other than hearsay...' (A. Zuckerman, *The Principles of Criminal Evidence* (OUP, Oxford 1989), p.197)

Analyse whether the quotation reflects the modern day approach to the admissibility of hearsay evidence. Can this approach be said to offend against Art.6 European Convention on Human Rights?

### Answer plan

- Define hearsay.
- Explain difference in approach between civil and criminal proceedings.
- Discuss the modern approach to hearsay by discussing the exceptions.
- Discuss whether approach complies with Art.6 by discussing safeguards.

### Diagram plan



A printable version of this diagram plan is available from [www.pearsoned.co.uk/lawexpressqa](http://www.pearsoned.co.uk/lawexpressqa)

## Answer

<sup>1</sup> You should show the examiner that you understand the meaning of hearsay by including a definition in your introduction and this will be expected and there will be marks awarded for this.

<sup>2</sup> As the question does not specifically ask you to deal with hearsay only in criminal proceedings you must show the examiner that you understand that hearsay is treated differently in civil cases and also explain why the remainder of your answer will concentrate on the criminal rules. This shows that you have a good level of understanding.

<sup>3</sup> The question asks you to discuss the modern day approach to hearsay and so you should address this in your answer as early as possible to show that your answer remains focused.

<sup>4</sup> The question also asks you to consider whether the approach offends against Art.6 and therefore you should also deal with this in the early stages of your answer.

<sup>5</sup> Show the examiner that you are aware of some of the Art.6 cases on hearsay as this demonstrates a familiarity and confidence with the material.

Hearsay evidence is defined in civil proceedings in s.1(2)(a) of the Civil Evidence Act 1995 as 'a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated'.<sup>1</sup> In criminal proceedings a similar definition is found in s.114(1) of the Criminal Justice Act 2003. Hearsay evidence is admissible in civil proceedings<sup>2</sup> as long as the party wishing to use the evidence gives notice to the other party. However, in criminal proceedings an exclusionary rule continues to operate and hearsay evidence is generally inadmissible unless it falls into one of the exceptions identified in s.114 of the 2003 Act.

The modern day approach to hearsay evidence,<sup>3</sup> as re-confirmed in cases such as **R v Doherty** [2006] EWCA Crim 2716, is that it is possible for an accused to be tried and convicted in England and Wales on the basis of hearsay evidence which is the sole evidence against them regardless of whether or not the accused has had an opportunity to challenge the maker of the statement.

This approach is not thought to be in conflict with Art.6 of the European Convention on Human Rights because Art.6 is not regarded as an absolute right and the 2003 Act has a number of safeguards built into it.<sup>4</sup> This was confirmed in the case of **R v Horncastle** [2009] EWCA Crim 964.<sup>5</sup> This is despite the decision in **Tahery v United Kingdom** (2009) App. No. 22228/06 of the European Court of Human Rights that 'counterbalancing factors' could not justify a conviction based on untested hearsay evidence which was the sole or decisive evidence.

## 4 HEARSAY

<sup>6</sup> As the cases on Art.6 state that the right is not breached if there are safeguards, you should show the examiner that you intend to identify and discuss the hearsay safeguards. This ensures that your answer is focused.

<sup>7</sup> Before identifying each safeguard it is helpful to discuss the hearsay exceptions briefly so that the examiner is aware that you understand the ways in which hearsay evidence will be admissible. You do not need to discuss the exceptions in great detail. This gives structure to your answer.

<sup>8</sup> Once you have identified that exceptions exist you can go on to discuss the safeguards that exist in the context of the exceptions so that your answer flows.

<sup>9</sup> You should separate out those safeguards that apply generally to the hearsay rules as opposed to being relating only to a specific hearsay exception. This gives good structure to your answer which in turn will help you to gain the available marks.

Safeguards are present throughout much of the hearsay provisions<sup>6</sup> in the 2003 Act and it is arguable that this would make it difficult for hearsay evidence to be freely admitted in the way suggested by the quotation. A party wishing to use the evidence must persuade the court (in the absence of agreement) that it falls into one of the exceptions under ss.116–118 of the 2003 Act.<sup>7</sup>

The most commonly used exception relates to absent witnesses under s.116. This exception includes a number of safeguards against the arbitrary admission of hearsay evidence.<sup>8</sup> Cases such as **R v Cole** [2007] 1 WLR 2716 and **R v Bailey** [2008] EWCA Crim 817 have confirmed that for the conditions set out in s.116(2) (a)–(d) the judge should refer to the factors set out in s.114(2) of the 2003 Act. These factors include the probative value of the statement, the circumstances in which the statement was made and the amount of difficulty involved in challenging the statement.

A further safeguard in s.116 is that s.116(2)(e) requires leave of the court before hearsay evidence can be adduced. Section 116(4) of the 2003 Act sets out factors to be taken into account by the court when considering whether the ‘fear’ provision should be used and these factors are similar to those found in s.114(2) but also include the possibility that a special measures direction could deal effectively with the issue of fear.

Further safeguards can be found in s.117 relating to business documents created or received in the course of a trade, business, profession or other occupation. The court can exclude such evidence under s.117(7) of the 2003 Act if the statement’s reliability is in doubt.

A number of general safeguards also apply to the hearsay provisions.<sup>9</sup> For example, under s.123 of the 2003 Act the maker of the statement must have had the required capability at the time the statement was made. If capability is in doubt then the burden of proof lies with the party wishing to use the hearsay evidence. The standard of proof is on a balance of probabilities.

Under s.124 of the 2003 Act where hearsay evidence has been admitted the opposing party is entitled to adduce evidence to challenge the maker’s credibility. This is an important provision to

counter the potential injustice of hearsay evidence namely that the opposing party is not given the opportunity to cross-examine the original maker of the statement. This ensures that Art. 6(3)(d) of the Convention is taken into consideration.

In addition s.126 of the 2003 Act provides an exclusionary discretion where the case for excluding the evidence substantially outweighs the case for admitting it. In fact in **R v Xhabri** [2006] 1 Cr App Rep 413 the Court of Appeal stated that a judge might have a duty to exclude hearsay evidence under s.126 if it was necessary to ensure compliance with the Human Rights Act 1998 suggesting this exclusionary discretion is broad in nature.

In the case of **R v Singh** [2005] EWCA Crim 96 it was reiterated that when hearsay evidence is admitted the judge should give a direction to the jury warning them to take into account when evaluating the probative value of the evidence that it has not been subject to cross-examination. This therefore provides a further safeguard to the admission of hearsay evidence.

The issue is whether despite these safeguards the courts still make a determined effort to admit all forms of hearsay evidence when possible as suggested by the quotation.<sup>10</sup> It is arguable that the inclusionary discretion under s.114(1)(d) allows the courts to do just that<sup>11</sup> due to the fact that since 2005 otherwise inadmissible evidence can be admitted using judicial discretion if it is in the 'interests of justice'. Consideration of the interests of justice would seem to accord with Art.6 of the Convention and in addition the discretion covers evidence tendered by the defence as well as the prosecution. The Law Commission envisaged that the inclusionary discretion would be used liberally and would depend on the 'probative value' of the hearsay evidence. However, the wording of s.114(1)(d) is wider and omits any reference to probative value.<sup>12</sup>

The evidence from case law is that discretion is being used widely. For example, in the case of **R v Y** [2008] 1 WLR 1683, CA hearsay evidence was admitted using s.114(1)(d) even though it circumvented the rule in **R v Blastland** [1985] 2 All ER 1095 excluding third party confessions as hearsay.

<sup>10</sup> You should bring your answer back to the quotation itself as you have also been asked to what extent the quotation reflects the modern approach to hearsay.

<sup>11</sup> The quotation suggests that the courts find ways to admit hearsay evidence with ease and you need to assess whether this is true or not and give examples to support or disagree with the quotation – s.114(1)(d) is a good example to use.

<sup>12</sup> Discussing the Law Commission recommendations shows a greater level of analysis and critique as it shows the examiner you can see deficiencies based on recommendations not implemented. This gives depth to your answer and will help you gain additional marks.