EVIDENCE NOTES

STEP BY STEP

1. **DOES THE PROBLEM INVOLVE A CIVIL ACTION OR A CRIMINAL ACTION** (Remember: Civil = Plaintiff/Defendant – Criminal = Accused/Crown)

2. **IDENTIFY THE PARTIES (eg. defendant/accused, witness, co-defendant etc.)**

3. **WHAT TYPE OF EXAMINATION IS IT: EXAMINATION IN CHIEF / CROSS EXAMINATION / RE-EXAMINATION**

4. **POINTS TO LOOK FOR IN PROBLEM**

VOIR DIRE CIVIL/CRIMINAL

Applies both to **civil and criminal proceedings** and to a judge sitting alone or with a jury. Within the context of the uniform Evidence Acts, a voir dire is used to determine preliminary questions as stipulated in s 189.

S 189(1) – If the determination of a question whether:

(a) evidence should be admitted (whether in the exercise of a discretion or not); or

(b) evidence can be used against a person; or

(c) a witness is competent or compellable;

depends on the court finding that a particular fact exists, the question whether that fact exists is, for the purposes of this section, a preliminary question.

It is not a matter of discretion as to whether or not the jury is present rather it is mandated by statute that they are not to be present and this is set out in **s189(2)**:

(2) If there is a jury, a preliminary question whether:

(a) particular evidence is evidence of an **admission**, or evidence to which **section 138** applies; or

(b) evidence of an admission, or evidence to which **section 138** applies, should be admitted;

is to be heard and determined in the jury's absence.

On all other matters if a prelim question happens during the proceedings the Judge will instruct the jury to leave the court room. This is set out explicitly in **s189(4)**:

(4) If there is a jury, the jury is not to be present at a hearing to decide any other preliminary question unless the court so orders.

The matters that the court may take into account in deciding whether to make an order to exclude the jury are set out in **s189(5)**.

(5) Without limiting the matters that the court may take into account in deciding whether to make such an order, it is to take into account:

(a) whether the evidence to be adduced in the course of that hearing is likely to be prejudicial to the defendant; and

(b) whether the evidence concerned will be adduced in the course of the hearing to decide the preliminary question; and

(c) whether the evidence to be adduced in the course of that hearing would be admitted if adduced at another stage of the hearing (other than in another hearing to decide a preliminary question or, in a criminal proceeding, a hearing in relation to sentencing).

S189(8) provides that evidence that is adduced during the course of the voir dire is not to be adduced as evidence in the trial unless the evidence of the witness is inconsistent with other evidence given by

the witness in the proceeding or other witness has died. In these 2 cir evidence given by the witness in the voir dire could be admitted unless the court decides in the exercise of its discretions that it should not be admitted.

ADMISSIBILITY [INSERT DIAGRAM]

1 IS THE EVIDENCE RELEVANT (s55) – Part 3.1

Evidence that is relevant in a proceeding is evidence that if it were accepted could rationally affect (directly or indirectly) the assessment of the probability of the existence of a 'fact in issue' in the proceeding. **s 55(1).** **S 56** of the UEA provides that relevant evidence is admissible **(s 56(1))** and evidence that is not relevant is inadmissible **(s 56(2)).**

The fact in issue in the proceeding is whether _____. Clearly the evidence in relation to _____could be found to be relevant as there is a logical connection between the evidence and the fact in issue and establishes the probability that _____

OPTIONAL: Further, even though the evidence may be 'circumstantial', circumstantial evidence need not have any particular degree of probative force to be relevant.

2 Does the HEARSAY RULE apply Part 3.2 / See also ADMISSIONS Part 3.4 and CHARACTER Part 3.8

[INSERT SLIDE 8, 11, 16, 17 OF WEEK 4]

First hand hearsay ***[Evidence of a PR by A that fact X occurred, where A had personal knowledge of the fact, is first hand hearsay]***

Second hand hearsay ***[Evidence of a PR by A that B said X occurred, where B had personal knowledge of the fact, is second hand hearsay]***

Third hand hearsay ***[Evidence of a PR by A that B said that C said X occurred, where C had personal knowledge of the fact, is third hand hearsay]***

FIRST HAND HEARSAY

[Hearsay relates to out of court statements which are being introduced into evidence in court to prove a particular fact in issue]

Four requirements for evidence to be caught by hearsay rule:

1. The **evidence is a 'previous representation'** (both 'previous representation' and 'representation' are defined in the Dictionary to the UEA);
2. The 'previous representation' was made '**by a person'**;
3. The evidence of a previous representation is **adduced to prove the existence of a fact** asserted by the representation;
4. It can reasonably be supposed that the **person who made the representation intended to assert the existence of that fact**.

S59(1) provides that evidence of a PR(defined **s62(1))** made by a person is not admissible to prove the existence of a fact that it can be reasonably be supposed that the person intended to assert by the representation. **[IMPORTANT: Unintended assertions are not caught by the hearsay rule]. S62** defines "first hand" hearsay.

EXCEPTIONS TO HEARSAY RULE – HEARSAY RULE WILL NOT APPLY

S63 –civil proceedings if the maker of the PR is **not available** to testify. **S67** notice req appl. **Slide 17**

*[EXAMPLE: **63(2)(a)** the person who made the previous representation in that scenario would be **Joan**. If Joan is not available to testify then evidence of the representation made by Joan may be given by a person who saw, heard or otherwise perceived the representation being made who in the scenario is Joan's father. If the scenario was a **civil case** then pursuant to the exception to the hearsay rule in s63, Joan's father could give evidence in the trial that Joan said that a man in green clothes is breaking into the neighbors house.*

***63(2)(b) - document** If Joan had written down what she saw when looking through the telescope then that note of what she saw would be a document so far as it contains the representation, namely I see a main in a green shirt, green pants and brown shoes trying to break into the neighbors, which representation would call within the context of 63(2)(b). IN OTHER WORDS **IT WOULD NOT BE CAUGHT** BY THE HEARSAY RULE AND THE DOCUMENT WOULD BE ADMISSIBLE TO PROVE THE FACTS ASSERTED IN THE REPRESENTATION, namely that a man was trying to break into the neighbors house and that man was wearing a green shirt, green pants and brown shoes.*

S64 (should be read in conjunction with s 68) – CIVIL PROCEEDINGS if the maker of the PR is available to testify. **S67** notice req appl. **See slide 17**

***s64** will apply if Joan is available to give evidence. The proviso in **s64(2)** to the hearsay evidence contained in the previous representation being admissible in a civil trial when the maker of the representation is available to give evidence is that **it would cause undue expense or delay to call that person** or would not be reasonably practicable.*

***64(3)** means that the hearsay rule would not apply to the representation that was made by Joan, namely the statement to her father that "dad I see a man in a green shirt, green pants and brown shoes trying to break into the neighbors house" or to the representation that was made by Joan's father namely, "Joan says a man in green clothes is breaking into the neighbours house". If Joan or Joan's father is going to be called to give evidence or has given evidence then the hearsay rule would not apply to those previous representations.*

> **S68 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.

S65 – CRIMINAL PROCEEDINGS if the maker of the PR **is not available** to testify. **S67** notice req appl.

65(2) Hearsay rule does not apply to evidence of a previous rep that is given by a person who saw, heard or otherwise perceived the rep being made, if the rep was:

(a) made under a **duty to make that rep** or to make reps of that kind; or

(b) made when or shortly after the asserted fact occurred and in circumstances that make it **unlikely to be a fabrication**; or

(c) made in circumstances that make it **highly probable that rep is reliable**; or

(d) **against interests of person who made the rep** at the time the rep was made, and was made in circumstances that **make it likely that the rep is reliable**

However, **s65(8)** easier for **defence**

EXAMPLE : Defendant's evidence is that:
- he was buying drugs off of the victim, but did not kill him
- a person named Mark (who at the time of the trial is dead) saw him buying drugs off of the victim and then leaving
- Herbert, who works at a pub close to the murder scene, will testify that Mark told him of the murder of the victim before the victim's body was found

Can the Defendant call Herbert to give evidence of what Mark told him?

65(8) The Hearsay rule does not apply to
(a) Evidence of a PR adduced by [a defendant/accused] if the evidence is given by a person who saw, heard or otherwise perceived the representation being made; and
(b) A document tendered as evidence by [a defendant/accused] so far as it contains a PR, or another representation to which it is reasonably necessary to refer in order to understand the representation.

Therefore, on our scenario: The Defendant wants to call H to give evidence of the rep that Mark made to H and whether or not the D can call H is governed by section 65(8).

Applying s65(8)(a) the rep in this fact scenario is the rep by Mark to H relating to the murder of the victim. Given that H is a person who saw, heard or otherwise perceived the rep being made and H is being called by the Defence in the criminal trial then the hearsay will not apply to that rep and H can be called and evidence of the rep can be given through H.

What this means is that if the D is calling evidence it does not have to satisfied the 4 criteria set out in s65(2), it only needs to satisfy the criteria set out in s65(8). In other words in a criminal trial where the maker of the previous rep is not available it will be easier for a D to get in the hearsay evidence than it would be for the prosecution.

S65(9) provides that if evidence of the previous rep about a matter has been adduced by the D which in the example above **would be the evidence of the rep that Mark made to H which is adduced into evidence through H** by the defendant, if that rep has been admitted the hearsay rule does not apply to evidence of another rep about the matter that is adduced by another party. In our example this other party might be prosecution and has been given by a person who saw, hears or otherwise perceived the other rep being made.

Prosecution
In other words if you were calling evidence in response to the hearsay evidence led by the D under s65(8) you do not have to satisfy the criteria for calling hearsay evidence if the maker is not available for a criminal trial set out in s65(2), you need only satisfy the requirement in s65(9).

S66 –criminal proceedings if the maker of the PR **is available** to testify.

Section **66** can be relied on for the admission of first-hand hearsay evidence in a criminal trial when the person who made the representation (**s 66(2)(a)**), or, alternatively, a person who saw, heard or otherwise perceived the representation being made (**s 66(2)(b)**), has given, or will be giving, evidence in the trial, but will be admissible under **s 66(2)** only if, when the