

Hearsay

Law

[Margaret Ross et al, *Walker and Walker: The Law of Evidence in Scotland* \(5th Edition, Bloomsbury Professional 2020\), chapter 8.](#)

1. Hearsay is evidence of what one person (the witness) says that another person (the maker of the statement) has said orally, in writing or by conduct (the statement). A distinction is made between primary hearsay (see paragraph 27.3 below) and secondary hearsay (see paragraph 27.4 below). Often, when hearsay or an exception to the “hearsay rule” is referred to, what is meant is secondary hearsay. The admission of hearsay per se does not breach article 6(1) of the European Convention on Human Rights ([McKenna v HM Advocate 2000 JC 291](#); [HM Advocate v Nulty 2000 SLT 528](#)). The nature of hearsay evidence, and how it should be regarded, ought to be explained to the jury ([Higgins v HM Advocate 1993 SCCR 542](#), 552C) bearing in mind the following dictum of the Lord Justice General (Carloway) in [Wilson v HM Advocate \[2021\] HCJAC 12, 2021 SCCR 141](#), at paragraph [54]:

“When directing a jury on the value of hearsay and the reasons for its general exclusion, but occasional admission, a trial judge may be well advised to direct the jury on these reasons. As ever, when doing so the judge should bear two general matters in mind. First, in relation to the assessment of credibility and reliability, which is pre-eminently a matter for the jury to determine, it is important not to be condescending to the jury (see e.g. [Moynihan v HM Advocate \[2016\] HCJAC 85, 2017 JC 71](#), Lord Justice Clerk (Carloway), delivering the opinion of the court, at paragraph [22]), especially when the issues have already been extensively canvassed in the parties’ speeches... ..Secondly, in ensuring that a fair trial takes place, the trial judge must have regard not only to the interests of the accused, but also to those of the public and the alleged victim in seeing that crime is properly and fairly prosecuted.... If a balanced view is to be maintained, a trial judge ought normally to point to those factors which might result in the hearsay being accepted as proof of fact as well as those pointing towards its rejection for that purpose. In this case, the judge’s directions were heavily in favour of the latter and thus the appellant.”

If an explanation is not given, the appeal court might hold that the failure amounted to a miscarriage of justice.

Primary hearsay

2. "Primary hearsay" is evidence of the fact that the statement by the other person was made, irrespective of its truth or falsehood ([Walkers on Evidence, paragraph 8.1.1.](#)). Evidence that a statement was made may be allowed, if relevant, for that limited purpose. Thus, evidence that a witness has previously made a statement differing from his evidence may be allowed ([Walkers on Evidence, paragraph 8.2.2;](#) and see Prior Statements). Evidence of what a witness says they heard someone say may be allowed to explain the witness's state of knowledge or why they did something. Evidence of what an accused said is generally admissible.

Secondary hearsay

3. The general rule is that any statement or assertion, other than one made by a person while giving oral evidence, is inadmissible as evidence of any fact or opinion stated or asserted ([Morrison v HM Advocate 1990 JC 299](#), 312; see [Report on Hearsay Evidence in Criminal Proceedings \(Scot Law Com No 149, paragraph 3.2\)](#) and [Walkers on Evidence, paragraph 8.1.1.](#)). Thus, indirect evidence of the truth of the facts alleged in the statement is excluded.

4. There are exceptions to the exclusion of secondary hearsay evidence. These are dealt with in more detail under the following headings in this manual:

De recenti statements.

Prior statements.

Statement by deceased or unascertainable witness, etc. below.

Res gestae statement below.

Exculpatory and mixed statements by accused – see the Morrison and McCutcheon Rules below.

Statements out with presence of accused below.

Statements made to police/investigators by suspect below.

5. Unattributable hearsay is not evidence ([Cook v HM Advocate \[2019\] HCJAC 24, \[2019\] WLUK 31](#)).