
# The Law Commission

Consultation Paper No. 117

# The Hearsay Rule in Civil Proceedings

HMSO

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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This consultation paper, completed on 30 November 1990, is circulated for comment and criticism only. It does not represent the final views of the Law Commission.

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# The Hearsay Rule in Civil Proceedings

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## THE HEARSAY RULE IN CIVIL PROCEEDINGS

## CONTENTS

## PART I

## INTRODUCTION

1.1 The Report of the Civil Justice Review[1] recommended that the Lord Chancellor should commission an enquiry into the usefulness of the hearsay rule and the current machinery for rendering hearsay admissible. The Lord Chancellor referred this matter to the Law Commission in October 1989. Our terms of reference are

> "to consider the law of England and Wales relating to the admissibility of hearsay evidence in civil proceedings, and to advise
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> (a) whether the rule against hearsay (as modified by the Civil Evidence Acts) should be retained in whole or in part;
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> (b) whether or not it is retained, whether any, and if so what, procedures are required in circumstances where the evidence sought to be adduced is of a hearsay nature;
>
> (c) whether the rule should be applied differently in differing types of proceedings or circumstances."

1.2 Our enquiry is, accordingly, limited to an investigation of the operation of the rule in civil proceedings. We do not consider the application of the rule in criminal proceedings. Its operation in civil proceedings, where much hearsay evidence is now admissible, is governed by substantially different rules from those governing criminal proceedings and we do not think that

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1. June 1988, Cmnd. 394, recommendation 26.

developments in the civil law have any implications for the criminal law.[2]

1.3 The Civil Justice Review referred to criticisms of the hearsay rule which had been made by, in particular, the judiciary.

> "Some respondents to consultation, including Chancery judges, considered that the hearsay rule itself could usefully be abolished but that the court would have to be given express power to exclude evidence of a superfluous nature. Others, including some High Court judges, considered that the hearsay rule itself should be retained as a reflection of the 'best evidence' rule. They would, however, be prepared to support a review of the Civil Evidence Act 1968 and R.S.C. Order 38, which relate to the same matter."[3]

1.4 The recommendations of the Review are progressively being implemented, both by primary legislation[4] and, in respect of procedural recommendations, by reform of rules of court. In view of the links between rules of civil procedure and rules of evidence, it is timely to consider how effectively the hearsay rule serves the civil courts.

1.5 The need to make rules of evidence as clear, relevant and fair as possible is particularly important in view of the intention to allocate many more trials to county

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2. Law Reform Committee 13th Report, Hearsay Evidence in Civil Proceedings, (1966), Cmnd. 2964; see below, paras. 3.19-21.

3. Ibid., para. 268. In fact the Chancery judges in supporting the abolition of the hearsay rule and recommending an express power to exclude evidence referred only to the fact that without such power the court would have to listen unnecessarily to anecdotal evidence which would give rise to delay and cost. Memorandum from the Judges of the Chancery Division, para. 6.14 (unpublished).

4. Courts and Legal Services Act 1990.

courts and to keep the High Court for cases of unusual complexity and significance. Criticisms of the hearsay rule made by the judiciary in response to the Civil Justice Review's Consultation Papers suggest that the rule may not always be strictly observed in practice if it impedes the proper trial of a case. An example is the treatment of out of court statements made by children in cases where abuse is alleged, the inadmissibility of which was demonstrated by the decision in H v. H ; K v. K (Minor) (Child Abuse: Evidence).[5] This prompted the creation of a new statutory exception to legitimise a practice which had been adopted by courts.[6]

1.6 The hearsay rule in civil proceedings was abolished in Scotland by the Civil Evidence (Scotland) Act 1988 ("the 1988 Act"), which came into force on 3 April 1989, and the Law Reform Advisory Committee for Northern Ireland has recently published a Discussion Paper provisionally recommending reform.[7] Reform of the hearsay rule is a topic of current concern in many other common law jurisdictions (often in the context of a revision of all the rules of evidence). Over the past fifteen years the question of reform of the hearsay rule has been argued in Canada, Australia, New Zealand and the Republic of Ireland. In many of these countries the debate is still continuing. In the USA, at the Federal level, the law of evidence has been codified and this code or modified versions of it has been adopted in many States.

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5. [1990] Fam. 86 (C.A.): See below, para 2.62.

6. Children Act 1989, s.96; Children (Admissibility of Hearsay Evidence) Order 1990, S.I. 1990, No. 143 (the "1990 Order").

7. Hearsay Evidence in Civil Proceedings, (1990) Discussion Paper No. 1.

Arrangement of the Paper

1.7 Part II of this paper examines the present law. Part III considers the case for reform, commenting both on the principles underlying the mistrust of hearsay evidence and the application in practice of the rule in different courts and different proceedings. Part IV illustrates two basic options for reform which we put forward for consideration and considers the range of safeguards which are potentially available to prevent abuse of the power to adduce hearsay evidence. Our preliminary conclusions are set out in Part V together with a summary of the questions which we would particularly wish consultees to address. We include in an Appendix an outline comparison with the manner in which reform of the hearsay rule has been, or is being, considered in other jurisdictions.

## PART II

## THE PRESENT LAW

### A Hearsay at Common Law

2.1 Hearsay, in general terms, prevents one person testifying to the truth of what he has been told by another person. The rule and the exceptions developed together as new exceptions were defined by courts, and in the nineteenth century the first, piecemeal, statutory exceptions were created. Further common law refinement of exceptions to the rule was halted by the case of Myers v. Director of Public Prosecutions[1] when Lord Reid said

> "The only satisfactory solution [to the need to create new exceptions to the rule] is by legislation following on a wide survey of the whole field, and I think that such a survey is long overdue. A policy of make do and mend is no longer adequate."

2.2 Since Myers, although the rule has been sidestepped by a number of devices,[2] reform of the hearsay rule has been statutory, most notably in the present context by the Civil Evidence Act 1968 ("the 1968 Act"). We describe in this Part the history of the rule, both common law and statutory, and the close relationship between hearsay and other rules of evidence.

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1. [1965] A.C. 1001, 1022.

2. A. Ashworth and R. Pattenden, "Reliability, Hearsay Evidence and the English Criminal Trial", (1986) 102 L.Q.R. 292; A.A.S Zuckerman, The Principles of Criminal Evidence, (1989) p. 187.

## The Development of the Rule

2.3 Lord Reid's speech in Myers v. Director of Public Prosecutions provides an illuminating comment on the pattern of development of the rule at common law. He said,[3]

> "Many reasons for the rule have been put forward, but we do not know which of them directly influenced the judges who established the rule. The rule has never been absolute. By the nineteenth century many exceptions had become well established, but again in most cases we do not know how or when the exception came to be recognised. It does seem, however, that in many cases there was no justification either in principle or logic for carrying the exception just so far and no farther. One might hazard a surmise that when the rule proved highly inconvenient in a particular kind of case it was relaxed just sufficiently far to meet that case, and without regard to any question of principle."

2.4 Prior to the beginning of the seventeenth century there was no rule against hearsay evidence. Jurors were expected to enquire into the facts of the case before the day of trial and were selected for their local knowledge. It was only when the system for bringing witnesses to court, rather than sending the jurors out to enquire and find out the facts, came into being that considerations as to what a witness should or should not be allowed to relate developed.[4]

2.5 Awareness of the need for good and sufficient witnesses began to throw doubt on the propriety of depending on extra-judicial assertions, either alone or as confirming

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3. [1965] A.C. 1001, 1020.

4. J.H. Wigmore, "The History of the Hearsay Rule", (1904) 17 Harv. L.R. 437.

other testimony given in court.[5] Although no precise date can be given, Wigmore is of the view that between 1675 and 1690 the doctrine was fixed and by the early 1700's the reason for the doctrine was being given as the lack of opportunity of cross-examination.[6] The focus on cross-examination may have led to the view that the rule arose because of the adversarial system[7] rather than because of the changing function of jurors vis à vis witnesses.

## The Ambit of the Rule

### (i) Formulation of the common law rule

2.6 Various formulations of hearsay have been debated.[8] Cross's formulation is that

> "an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted".[9]

This formulation covers not only the exclusion of assertions by persons who do not give evidence at the trial (which is hearsay in the strict sense of the term), but also the exclusion of previous statements by persons who do give evidence at the trial.[10] Assertions may be made orally,

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5. Wigmore, ibid. p. 443.

6. Wigmore, ibid., pp. 445, 448.

7. Professor E.M. Morgan, Foreword to the Model Code of Evidence, American Law Institute, (1942) p. 36.

8. Cross on Evidence, (7th ed., 1990) (ed. Tapper) pp. 42-43; Phipson on Evidence, (14th ed., 1990) para. 21-02; J. Stephen, Digest of the Law of Evidence, art. 15.

9. Cross, op.cit., p. 42.

10. The latter are discussed below, at paras. 2.71-73.

in writing or by conduct. If made for the purpose of proving a fact, the assertion is caught by the common law rule and rendered inadmissible unless one of the recognised exceptions applies.

2.7 The applicability of the rule to assertions made orally or in writing is easy to see. A is not allowed to give evidence in court of what B told him or what he saw in a document if the purpose is to assert the truth of what was heard or read. There is also general agreement that the rule covers conduct which is assertive of a fact in issue. For example, in the case of Chandrasekera v. R.,[11] the dying victim's signs to witnesses, in response to the question of who had attacked her, were said to be assertive of the identity of her attacker and would have been inadmissible hearsay but for a statutory provision under a Ceylon Ordinance which rendered such evidence admissible.

2.8 There is considerably less certainty amongst commentators and in case law as to the extent to which conduct which appears to evince a belief in a state of affairs, rather than being explicit (in the way shown in the Chandrasekera case), is or ought to be regarded as hearsay and thus inadmissible. Although a nod of the head in response to a question may be agreed by all to be an assertion, there are many situations in which conduct may be implied by a person perceiving it to be assertive whether or not the person whose conduct is being interpreted intended to imply anything.

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11. [1937] A.C. 220.

2.9 It is in relation to implied assertions that lack of clarity as to the scope of the hearsay rule is most apparent.[12] The most famous case concerning implied assertions is Wright v. Doe d. Tatham.[13] In that case correspondence which had been sent to the deceased by third parties (who had since died) was adduced in evidence as being relevant to the issue of the deceased's competence to make a valid will. It was held that the correspondence ought to have been excluded because the writing of the letters constituted implied assertions of a hearsay nature by the third parties of the deceased's testamentary capacity. Despite detailed analysis of the issues, the court did not make clear its reasons for extending the ambit of the hearsay rule to implied assertions. The picture is complicated by the fact that another ground (the rule against opinion evidence) might also have rendered the evidence inadmissible but was not considered by the court.

2.10 The issue whether all implied assertions are hearsay has not been resolved by the 1968 Act. It is generally accepted that section 2(1) of the 1968 Act, which covers "statements" made, "whether orally or in a document or otherwise" covers conduct, but there is still debate as to whether an implied assertion comes within the definition of "statement" in section 10(1) of the Act which "includes any representation of fact, whether made in words or otherwise".[14]

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12. M. Weinberg, "Implied Assertions and the Scope of the Hearsay Rule", (1973), 9 Melbourne Univ. L.R. 268, 269.

13. (1837) 7 Ad.& E. 313; 112 E.R. 488.

14. The proper definition of "statement" for the purposes of the hearsay rule has been debated in some detail, in S. Guest, "Hearsay Revisited" (1988) 42 Current Legal Problems 33, and C. Tapper, "Hillman Rediscovered and Lord St Leonards Resurrected" (1990) 106 LQR 441.

2.11 Several different approaches have been identified in the way implied assertions ought to be regarded vis à vis the hearsay rule.[15] Some have treated all implied assertions as hearsay and inadmissible to the same degree.[16] Others have regarded implied assertions as not being hearsay, and thus not excluded by the rule. For example, the (U.S.) Federal Code of Evidence formulates the hearsay rule in such a way as to appear to exclude all implied assertions from the ambit of the hearsay rule. Cross distinguished between conduct and statements, supporting the view that non-assertive statements are hearsay but not non-assertive conduct. More recently, Guest has proposed a definition of "assertion" which emphasises that the rule is only meant to cover assertions expressed in ways whereby meaning is apparent by virtue of publicly understandable conventions of meaning.[17] Tapper, on the other hand, has suggested that the dividing line is to be drawn by reference to whether or not there was an intention to assert.[18]

(ii) Exceptions to the rule

2.12 It has been said[19] that most of the common law exceptions to the hearsay rule arose from considerations of necessity or the presence of some factor in the evidence which increased its probability of trustworthiness, and which outweighed the dangers of ambiguity, insincerity, faulty perception and erroneous memory to which all

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15. M. Weinberg, ibid at p. 268, 285.

16. R.W. Baker, The Hearsay Rule, (1950), p. 6.

17. S. Guest, op cit.

18. Cross, op. cit p. 517.

19. Wigmore on Evidence. (3rd ed., 1940) para. 1420.

evidence, but particularly evidence which could not be tested by cross-examination, was liable. The exceptions can be described by reference to several general categories, though it is clear that the scope of each of the exceptions as recognised at common law is circumscribed by many qualifications and some conditions. The exceptions listed under the codification of the hearsay rule in the U.S. Federal Code of Evidence provides a picture of the number and variety of the exceptions which had been recognised at common law.[20]

2.13 In broad terms, the exceptions cover certain statements of deceased persons, namely declarations against interest, declarations in the course of duty, declarations as to public or general rights, pedigree declarations, dying declarations and statements by testators concerning the contents of their wills. Statements in public documents are generally admissible evidence of the truth of their contents.[21] Admissions and voluntary confessions adverse to the maker's case are received as proof of the truth of their contents.[22] Testimony on former occasions, previous statements of witnesses, evidence through interpreters, evidence of age, ancient documents and reputation have all, in some circumstances, been recognised as justifying common law exceptions to the hearsay rule.

2.14 The recognition of exceptions to the hearsay rule has been described as the contribution of the common law to

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20. See below, Appendix, paras. 6.06-6.10.

21. Wilton & Co. v. Philips (1903) 19 T.L.R. 390.

22. McKewen v. Cotching (1857) 27 L.J.Ex. 41, 6 W.R. 16.

the reform of the rule.[23] Reform through case law has been seen as preventing rigid application in situations where it would be especially difficult to adduce other evidence and where there are factors in the evidence which enhance its circumstantial probability of trustworthiness.

## B The First Statutory Exceptions

2.15 The first statutory developments governing the admissibility of certain forms of records arose in a similar way to the creation of new common law exceptions, in that they were a response to considerations of necessity and the generally acknowledged reliability of certain documentary evidence. They were piecemeal reforms concerned with such matters as particular forms of proof of documents or convictions and statutory certificates or declarations of certain facts: Births and Deaths Registration Acts of 1936, 1874, 1953, Marriage Act 1949. Registers of births, deaths and marriages became admissible evidence which could be proved by certificate. The Evidence Acts of 1845 and 1851 made provision for the use of certified copies, and the Bankers' Books Evidence Act 1879 provided that any entry in a banker's book would be regarded as prima facie evidence of such entry. The Inheritance (Family Provision) Act 1938 made provision as to admissibility of evidence of a testator's intentions. These provisions have survived the more recent legislation on hearsay.

## C Evidence Act 1938

2.16 The Evidence Act 1938, ("the 1938 Act") which still applies in civil proceedings in the magistrates' courts, was

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23. Cross, op. cit., p. 534.

the first statutory intervention in reform of the hearsay rule to go beyond providing new exceptions for specific categories of documents. Although it deals with wider categories of documentation and records, it applies only to documents. Oral hearsay was left to the common law rules. It has been argued that it only covers statements which tend to establish facts, and not to statements of opinion,[24] though there are dicta in Dass v. Masih[25] that the Act does extend to opinion evidence. The 1938 Act retains the aspect of the best evidence rule which requires original documentation, though it also provides a discretion to admit secondary evidence.[26] The utility of the 1938 Act was limited by the restrictive conditions which it imposed, but it contained elements which were subsequently adopted and developed in the 1968 Act, most notably, the grounds of unavailability excusing the need for a hearsay declarant to attend court and the guidance as to the weight to be attached to hearsay statements.

## D Myers v. D.P.P.

2.17 As mentioned earlier, the creation of new common law exceptions to the hearsay rule was brought to a halt by the decision in Myers v. D.P.P. This case concerned criminal proceedings relating to stolen cars. It was alleged that identifying serial numbers marked on the cars at the time of manufacture were altered by the defendants when they stole the cars. The prosecution put in as evidence

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24. Law Reform Committee, 13th Report, at para. 13; R. Urich, "Reform of the Law of Hearsay", (1974) Anglo-Am. L.R. 184, 191.

25. [1968] 1 W.L.R. 756, 761C-G, per Lord Denning M.R., and 765C-766G per Salmon L.J., (C.A.).

26. Section 2(1)(b).

of the true origin of the cars records of the serial numbers noted at the time of manufacture by employees. The House of Lords held that the records were inadmissible hearsay as they did not come within any recognised exception relating to records, though, as other evidence supported the conviction, it was upheld. The court heard detailed argument as to the origins and development of the rule. In giving their opinion their Lordships were unanimous in their criticism of the state of the law but a majority were of the view that further judicial development of new exceptions to the rule could not continue.[27]

## E Criminal Evidence Act 1965

2.18 Parliament responded swiftly, enacting the Criminal Evidence Act 1965 which applied to criminal proceedings the business record provisions contained in the 1938 Act and thereby addressed the particular problem that had faced the court in Myers. The 1965 Act liberalised the rules governing criminal proceedings in a number of respects.[28] It eliminated the disqualification of information provided by an "interested person". It deleted the requirement for continuous records and the information no longer had to have been supplied to the person making the record directly by someone with personal knowledge of the facts recorded. It also removed the authentication requirements, adopted a wider definition of records and provided for situations in which the original declarant was available but had no recollection of the facts. All these were matters which were subsequently incorporated in the 1968 Act.

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27. Myers v. DPP [1965] A.C. 1001, 1022, per Lord Reid.

28. Cross on Evidence (3rd ed., 1967), p. 493.

## F Civil Evidence Act 1968

2.19 The 1968 Act, which governs the admissibility of hearsay evidence in most civil proceedings, made all first-hand hearsay and much second-hand documentary hearsay admissible provided certain conditions were satisfied. It gave effect to the recommendations of the Law Reform Committee (hereinafter called "the Committee"), 13th Report, "Hearsay Evidence in Civil Proceedings".[29] Section 1(1) provides,

> "In any civil proceedings a statement other than one made by a person while giving oral evidence in those proceedings shall be admissible as evidence of any fact stated therein to the extent that it is so admissible by virtue of any provision of this Part of this Act or by virtue of any other statutory provision or by agreement of the parties, but not otherwise."

2.20 It is generally accepted that the words "but not otherwise" in section 1(1) were intended to emphasise that the Act superseded both the common law rule and the common law exceptions to it. The exceptions which the Law Reform Committee recommended ought to be retained were re-enacted in the Act by operation of section 9, and are considered in further detail below.[30]

2.21 The width of the Act has been commented on by Cross. It is stated that[31]

> "The student should now be able to see that, rather than creating a huge exception to it, the Civil Evidence Act

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29. Op. cit.

30. See below, paras. 2.50-55.

31. (7th ed., 1990), at p. 543.

1968 may be said to have abolished the rule against hearsay as hitherto known in civil cases. An accurate statement of the rule in relation to proceedings to which the Act applies would have to be in terms of a general ban on second-hand hearsay statements subject to important exceptions".

Hearsay is not defined in the Act, but it is described in a formulation which closely reflects the one adopted by Cross.[32] It regulates any evidence which has the characteristics described by section 1(1), regardless of whether or not the evidence is also covered under the heading of another rule of evidence.

(i) Consent

2.22 Section 1 of the 1968 Act retains the common law position that hearsay evidence may be used where the parties agree. Hearsay evidence adduced by agreement accounts for a high proportion of the hearsay evidence heard in civil proceedings. This may be express or implied by the failure to take objection, for instance, in relation to the hearsay aspects of a document which is before the court. Where there is consent there is no need to comply with the notification procedures and other safeguarding provisions of the 1968 Act. The parties are assumed to be aware of what they have agreed to. In practice therefore it is only necessary to consider the 1968 Act where there is an objection to the hearsay evidence.

(ii) Admissibility of statements

2.23 Sections 2, 4 and 5 of the Act identify the statements made admissible by the Act.

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32. (7th ed., 1990) p.42.

2.24 Section 2(1) provides that,

> "In any civil proceedings a statement made, whether orally or in a document or otherwise, by any person, whether called as a witness in those proceedings or not, shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible."

2.25 This subsection appears to be very wide. However, where the statement is oral or in some other non-documentary form, section 2(3) effectively restricts section 2(1) to first-hand hearsay. Section 2(3) provides,

> "Where in any civil proceedings a statement which was made otherwise than in a document is admissible by virtue of this section, no evidence other than direct oral evidence by the person who made the statement or any person who heard or otherwise perceived it being made shall be admissible for the purpose of proving it..."

2.26 Section 2(3) does not expressly state what is the position regarding documentary hearsay, but it has been interpreted[33] as carrying the implication that multiple hearsay is admissible if the evidence is adduced in documentary form and otherwise complies with the terms of the Act. The provisions relating to rules of court, which are similar for statements admitted under sections 2, 4 and 5 are discussed together, below, at paragraphs 2.36-2.43.

(iii) Previous statements of witnesses who give evidence at trial

2.27 The policy underlying the admissibility of previous

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33. Cross, (7th ed., 1990) p. 542.

statements, whether consistent or inconsistent, of witnesses who give evidence at the trial was closely analysed by the Committee. It intended to preserve the circumstances where at common law such statements were admissible: for example, previous inconsistent statements which discredited the witness, or previous consistent statements to rebut a suggestion of recent fabrication, or arising out of the use of documents to refresh a witness's memory.

2.28 The majority, whose view was implemented in the 1968 Act, were of the view that there should be a new power to admit all previous statements, whether consistent or inconsistent, as evidence of the facts they contained. For this reason, the formulation of hearsay adopted in section 1(1) of the 1968 Act was cast in such a way as to cover previous statements by witnesses who give evidence at the trial as well as statements by persons who do not give evidence at the trial. The Committee took account of the particular fear that use of previous consistent statements would encourage superfluous evidence by providing that this extension of admissibility should be subject to the discretion of the court, and a requirement of leave was included.[34] Section 2(2), accordingly, provides that where the maker of the previous statement is to be called as a witness his previous statement cannot be given without the

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34. Section 3(1)(b) preserves the common law position that previous consistent statements are to be admitted as of right only for the purposes of rebutting a suggestion of recent fabrication by the witness: Fox v. GMC [1960] 1 WLR 1017, 1025. In other circumstances, however, even if the witness's testimony is attacked in cross-examination, evidence of previous consistent statements may not be admitted: Phipson, op. cit., paras. 12-55 and 12-60. Section 3(2) preserves the position in relation to refreshing the witness's memory.

leave of the court, and must generally not be given before the conclusion of the maker's examination in chief.

2.29 The 1968 Act did not retain the special rules which at common law had prevented the statements of particular persons from being adduced in evidence. It put an end to the common law position that an out of court statement, such as an informal admission of a co-defendant, was inadmissible as proof of facts relevant to a co-defendant (or co-plaintiff, as the case may be). Similarly, statements by the servants or agents of a party, which could not at common law be proved if they were adverse to the party's interest, became admissible under the Act.

(iv) Records

2.30 Section 4 governs the admissibility of records. Section 4(1) provides,

> "Without prejudice to section 5 of this Act [computer records], in any civil proceedings a statement contained in a document shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if the document is, or forms part of, a record compiled by a person acting under a duty from information which was supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information and which, if not supplied by that person to the compiler of the record directly, was supplied by him to the compiler of the record indirectly through one or more intermediaries each acting under a duty."

2.31 The section thus allows the admission of both first hand and (where expressly provided for under the Act) multiple hearsay and goes beyond matters which would be admissible under section 2. The Act, continuing the

approach taken by the Criminal Evidence Act 1965, did not retain the requirement for a continuous record. Similar conditions are applied to those imposed in relation to section 2, and similar procedural safeguards provided by rules of court.

2.32 The ways in which the provisions concerning records in the 1968 Act have been criticised are discussed in Part III.[35]

(v) Computerised records

2.33 Section 5 enables a statement contained in a document produced by a computer to be admissible as evidence of any fact of which direct oral evidence would be admissible, if certain conditions are met in relation to the statement and the computer which generated it.

2.34 These conditions, set out in section 5(2) are elaborate. They require regular use of the computer over the period in question, regular supply of information to the computer, proof that the computer was operating properly in all such ways as could affect the accuracy and production of the statement, and that the information supplied to the computer was derived from information provided in the ordinary course of its use. Although these provisions are detailed they do not refer to the relevance of the likelihood of mistake in the manual inputting of information on to the computer, or errors in the software. Further discussion of these provisions is contained in Part III.[36]

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35. See below, paras. 3.56-3.60.

36. See below, paras. 3.61-3.69.

(vi) Procedural requirements

2.35 Although described categories of hearsay statements are admissible, the Act does not make them unconditionally admissible. Sections 2, 4 and 5 of the Act all require compliance with rules of court. We illustrate the scheme of the rules of court made under section 8 of the 1968 Act, by reference primarily to the County Court Rules, given that these are the rules which govern a high percentage of all contested civil proceedings, but also to the Rules of the Supreme Court.

C.C.R. Order 20 and R.S.C. Order 38

2.36 The rules made under the power referred to are contained in C.C.R. Order 20, rules 14-24 and R.S.C. Order 38, rules 20-32. In outline the procedure is as follows. If a party wishes to adduce a hearsay statement[37] he must serve notice on all other parties of his desire to do so.[38] In the County Court the notice must be served not less than 14 days before the date fixed for trial whereas in the High Court the notice must be served within 21 days after setting down for trial. If it is non-documentary hearsay, the adducer must give particulars of the maker of the statement and the substance of the statement or words used and the time when it was made. If it is documentary, it must be accompanied by a copy of the document. If the adducer claims that the maker cannot or should not because of his unavailability be called, he must give his reasons.

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37. The term 'hearsay statement' is used in this paper to cover any form of hearsay evidence rendered admissible under the 1968 Act.

38. C.C.R. O.20, r.14; R.S.C. O. 38, r.21.

2.37 Where the statement is a record, the adducer must give particulars of the compiler, the original supplier, the chain through which the information passed and the time, place and circumstances of the compiling of the record.[39] Where the record is a computer record, a copy of the document and particulars of the persons responsible for managing the computer operations, for supply of the information to the computer and for the operation of the computer must be provided. It must be stated that the computer was operating properly at the time in question and reasons must be given for any claim that a person referred to cannot be called.[40]

2.38 R.S.C. Order 38, rule 25 (which applies to both High Court and county courts) lists the reasons for not calling a person as a witness on the grounds of unavailability. These, which are taken from section 8(2)(b), are that the person in question is (a) dead, (b) beyond the seas, (c) physically or mentally unfit to attend as a witness, (d) cannot with reasonable diligence be identified or found or, (e) cannot reasonably be expected to have any recollection of matters relevant to the accuracy of the statement.

2.39 If the opposing party requires the maker of the hearsay statement to be called, he must serve a counter-notice within 7 days after receipt of the notice.[41]

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39. R.S.C. O.38, r.23, which applies to both High Court and county courts.

40. R.S.C. O.38, r.24, which applies to both High Court and county courts.

41. C.C.R. O.20, r.17; R.S.C. O.38, r.26 under which the party has 21 days to serve his counter-notice.

If the adducer has cited one of the reasons specified in rule 25, the other side cannot serve a counter-notice unless he contests that reason. If the adducer fails to produce the maker of the hearsay statement, having received a counter-notice, he has no right to use it as evidence.[42] The court can determine any issue as to availability for the purpose of rule 25 before the trial,[43] and may give directions as to the proper manner of adducing statements made in previous proceedings.[44]

2.40 However, the rules give the court a residual discretion to allow a hearsay statement which is admissible under the 1968 Act to be given in evidence despite non-compliance with the rules or where refusal might otherwise compel one side to call an opposing party.[45]

2.41 If a party wishes to impeach the credibility of the maker of a hearsay statement, he is required to serve a counter-notice requiring his attendance (unless the maker is unavailable under rule 25).[46] If the other side intends to give evidence as to a previous inconsistent statement by the maker of the hearsay statement, he must serve notice of that intention, though the court is given a discretion to admit despite non-compliance.[47]

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42. C.C.R. O.20, r.17(4); R.S.C. O.38, r.26(4).

43. C.C.R. O.20, r.18; R.S.C. O.38, r.27.

44. C.C.R. O.20, r.19; R.S.C. O.38, r.28.

45. C.C.R. O.20, r.20; R.S.C. O.38, r.29.

46. C.C.R. O.20, r.21; R.S.C. O.38, r.30.

47. C.C.R. O.20, r.22; R.S.C. O.38, r.31.

2.42 The court has a discretion to disallow or award costs against a party who unreasonably insists on the attendance of the maker of the hearsay statement.[48]

2.43 C.C.R. Order 20, rules 25-28 and R.S.C. Order 38, rules 34-38 cover the procedural matters relevant to the adducing of expert and opinion evidence. Where it is asserted that the maker of a statement of expert evidence cannot or should not be called, the rules relevant to hearsay statements are also applied.

(vii) Judicial discretion

2.44 The introduction of judicial discretion to admit hearsay statements which are admissible under the Act notwithstanding non-compliance with the notice provisions of the 1968 Act was recognised by the Committee, which recommended it, as a considerable novelty. The Committee referred to the types of situation in which it recognised the need for discretion, but at the same time registered concern at the possible consequences of allowing judges too much freedom in determining whether or not to apply the rules of evidence.

2.45 Section 8(3)(a) conferred a rule making power[49] to give the court a discretion to admit hearsay statements despite non-compliance with the notice requirements, and to give directions concerning certain statements which have previously been given in other legal proceedings. However,

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48. C.C.R. O.20, r.23; R.S.C. O.38, r.32.

49. Exercised in R.S.C. O.38, r.29 and C.C.R. O.20, r.20.

the Committee's concerns are reflected in section 8(3)(a) which directs that there is to be no residual discretion in the rules to exclude statements where the requirements of the Act have been complied with.

2.46 The discretion to dispense with the notice requirements has been exercised in various situations. Courts have admitted hearsay statements where notification was served after the expiry of the prescribed time limit,[50] or where notification was altogether omitted.[51] On the other hand courts have refused to admit such statements which if admitted would have caused the other party genuine difficulty because of their substantial length[52] or where the party seeking to adduce the statements has deliberately failed to serve the notices in order to surprise the other side.[53] In Morris v. Stratford-on-Avon RDC,[54] it was stated that courts would view a failure to comply with the notification procedures unfavourably. In other circumstances an adjournment may be granted where the procedures have not been duly complied with.[55]

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50. Rover International Ltd. v. Cannon Film Sales Ltd. [1987] 1 W.L.R. 1597 (Ch.D.)

51. Morris v. Stratford-on-Avon RDC. [1973] 1 W.L.R. 1059 (C.A.).

52. Rover International Ltd v. Cannon Film Studios Ltd. [1987] 1 W.L.R. 1597.

53. Ford v. Lewis [1971] 1 W.L.R. 623 (C.A).

54. [1973] 1 W.L.R. 1059, 1065 A-B, per Megaw L.J. (C.A.).

55. Minnesota Mining and Manufacturing Co. v. Johnson and Johnson Co. [1977] F.S.R. 210.

(viii) Guidance as to weight

2.47 Section 6(3) of the 1968 Act, like the 1938 Act, provides some guidance as to the weight to be accorded to hearsay evidence. Courts are required to have regard

> "to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement and in particular.... whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent the facts".

2.48 Also, where information is supplied in relation to records, regard has to be paid to whether the first supplier of the information did so contemporaneously and whether anyone in the chain leading to the compiling of the record had any incentive to conceal or misrepresent the facts.

(ix) Impeaching credibility

2.49 Section 7 of the 1968 Act deals with the problem of raising as an issue in proceedings the credibility of a maker of a statement who does not attend and give evidence, (whether because of his unavailability or because the content of his statement has not been challenged). Section 7 admits any evidence which, if the maker of the hearsay statement had been called, would have been admissible for the purpose of destroying or supporting his credibility as a witness. The intention was to ensure that use of hearsay statements would not prevent evidence relevant to the possible bias or interest of the maker of hearsay statements being adduced. Rules of court were made with the aim of ensuring that this power was not abused, for example, by the opposing party not challenging a hearsay notice but seeking to adduce damaging evidence as to the maker's credibility,

which because he has not been called, he does not have the opportunity to refute.[56]

(x) Retained common law exceptions

2.50 Reference has been made[57] to the common law exceptions to the hearsay rule. To a large extent the need for exceptions was removed by the provisions contained in the 1968 Act for the conditional admissibility of first-hand and some second-hand hearsay. But the Committee recognised that certain common law (and statutory) exceptions, which either already incorporated safeguards of the sort to be provided by the recommended reform, or which by their nature would be unduly hampered by the reform requirements of the Act,[58] needed to be maintained. The statutory exceptions include those which have been referred to at paragraph 2.15 above.

2.51 Section 9 differentiates between two categories of exceptions: those (described in section 9(2)) to which none of the provisions of the Act as regards notice and the other constraints applies and a second category (described in section 9(4)) which were to be monitored by procedural safeguards.

2.52 The Act does not seek to affect the rules of law concerning the admissibility of admissions adverse to interest nor to alter the manner of their admission. The

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56. C.C.R. O.20, r.21; R.S.C. O.38, r.30.

57. See above, paras. 2.12-14.

58. 13th Report, paras. 42 and 43.

Committee[59] considered it inappropriate that the requirements of notice should be imposed on admissions. This avoids imposing an additional hurdle hampering a party from adducing an admission made in an informal way but which the other side may not wish to accept was made and enables multiple hearsay as well as first hand hearsay evidence of the giving of the admission to be adduced.

2.53 The other categories which, by section 9(1), are not subjected to the provisions of the Act relate to published works on matters of a public nature and public documents where the probability of reliability and the fact that the information is publicly available are seen as justifying the non-application of the procedures under the Act.

2.54 Section 9(3) deals with the common law exceptions which were to be maintained, but where the manner of admission of the evidence (e.g. as to prior notice) was to be regulated by the provisions of the Act wherever possible. Into this category come exceptions of the type described in section 9(4); evidence of reputation, questions of pedigree or the existence of a marriage or evidence of reputation or family tradition relevant to the existence of any public or general right or identifying any person or thing.

2.55 It is said[60] that the Act formally converts the retained common law exceptions into statutory provisions by making them admissible by virtue of section 9(1), and that

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59. 13th Report, para. 29.

60. Cross, (7th ed., 1990), p. 560.

courts have erred in continuing to refer to admitting evidence under the common law exceptions.[61] However, although describing the common law exceptions which it preserves, the Act explicitly provides that the description of those rules of law is not to be construed as altering the rules in any way (section 9(6)) and it may be appropriate for courts to continue to consider the common law exceptions. Given the continued relevance of the preserved exceptions in criminal proceedings, understanding of the scope of those exceptions may continue to change over time.

(xi) Proceedings to which the 1968 Act applies

2.56 The 1968 Act, section 18, defines those civil proceedings to which the Act applies. It

> "includes, in addition to civil proceedings in any of the ordinary courts of law -
>
> (a) civil proceedings before any other tribunal, being proceedings in relation to which the strict rules of evidence apply; and
>
> (b) an arbitration or reference, whether under an enactment or not,
>
> but does not include civil proceedings in relation to which the strict rules of evidence do not apply."

It does not, however, apply to magistrates' courts[62] although there is power to extend its provisions to those courts.[63]

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61. Cross, (7th ed., 1990), pp. 543-44.

62. See below, paras. 3.22 - 3.35.

63. Civil Evidence Act 1968, s.20(4).

(xii) Proceedings to which the strict rules of evidence do not apply

2.57 The phrase "to which the strict rules of evidence do not apply" used in the proviso to section 18 has the effect of excluding certain proceedings, most notably the wardship jurisdiction of the High Court (but also other specialist jurisdictions such as are exercised by coroner's courts, prize courts, ecclesiastical courts and election courts) from the operation of the Act. The proceedings of tribunals and inquiries are also excluded unless the strict rules of evidence are applied by the particular tribunal.[64] It was the view of the Report of the Franks Committee on Administrative Tribunals and Enquiries,[65] that it would be a mistake to introduce the strict rules of evidence into the majority of tribunals.

2.58 The wardship jurisdiction of the High Court provides the primary example of proceedings which are regarded as not bound by the hearsay rule. Lord Devlin in Re K.,[66] said

> "An inflexible rule against hearsay is quite unsuited to the exercise of a paternal and administrative jurisdiction. The jurisdiction itself is more ancient than the rule against hearsay and I see no reason why that rule should now be introduced into it."

2.59 The use of hearsay evidence in wardship proceedings has been commented on by the Court of Appeal, most recently

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64. For example, the Lands Tribunal.

65. (1957) Cmnd. 218., para. 90.

66. [1965] A.C. 201, 242.

in the case of Re W (Minors) (Wardship: Evidence).[67] Neill L.J. said

> "the correct approach to the matter is to recognise that in wardship proceedings, which are of a special kind and which involve to some extent the exercise by the court of a parental or administrative jurisdiction, hearsay evidence is admissible as a matter of law, but that this evidence and the use to which it is put has to be handled with the greatest care and in such a way that, unless the interests of the child make it necessary, the rules of natural justice and the rights of the parents are fully and properly observed."[68]

## G Civil Evidence Act 1972

2.60 The Civil Evidence Act 1972 ("the 1972 Act") expands the area regulated by the Civil Evidence Act 1968 to cover statements of opinion and expert evidence. Apart from statements generated by a computer[69] Part I of the 1968 Act applies mutatis mutandis to statements of opinion. The 1972 Act also expands the scope of matters about which experts may give evidence. There is a different procedure regarding notification and admission of evidence in that, as regards expert evidence, the court has control over whether it will allow expert evidence to be given. However, once this hurdle has been surmounted the provisions for notification are similar to those which apply to hearsay statements.

## H Children Act 1989

2.61 Section 96(3) of the Children Act 1989 is the most

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67. [1990] 1 FLR 203.

68. [1990] 1 FLR, 203, 227G; other issues relating to this case are commented on below, at para. 3.37.

69. Covered in s.5 of the 1968 Act.

recent addition to the list of statutory exceptions to the hearsay rule. It was a direct response to the problems identified in the cases of H v. H; K v. K (Minors) (Child Abuse: Evidence).[70]

2.62 H v. H and K v. K were appeals from decisions of divorce county courts denying access to fathers in proceedings under the Matrimonial Causes Act 1973. The judges at first instance found as a fact that sexual abuse had taken place, relying heavily on the statements of children made to social workers (who were not acting as court welfare officers or preparing reports for the court). The grounds for appeal on the issue as to hearsay (in K v. K) were that that children's statements to the social workers should not have been admitted as evidence because objection had been taken to their adduction. The Court of Appeal held that, as the parties had not agreed to the admission of the hearsay statements, the proceedings were governed by the 1968 Act. Section 2(1) of that Act did not render the evidence of the social workers who heard the children's statements admissible as the children were not old enough to give sworn evidence and unsworn evidence from children in civil proceedings was not admissible. The Court reviewed the application of the hearsay rule in proceedings relating to children. It affirmed the freedom of the wardship jurisdiction from the strict rules of evidence[71] but maintained those rules did apply to the proceedings in question.

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70. [1990] Fam. 86 (C.A.).

71. Subsequently confirmed by the Court of Appeal in Re W (Minors) (Wardship: Evidence) [1990] 1 FLR 203; see above, para. 2.59.

2.63 The decision in H. v. H.; K. v. K. caused much concern for several reasons. First, the statements made by children who were too young to give evidence could not be put before the court (at least as evidence of their truth) by the people to whom they had been made, whether doctors, social workers, police officers, foster parents, relatives or friends. The only means of getting them before the court would be by way of the welfare officer's report. Secondly, it has long been recognised that a welfare officer's report must of necessity contain some hearsay, if the court is to be properly informed of all the factors which may affect the welfare of the child, and it may be impractical and illogical to rely on the second or third hand hearsay in a welfare officer's report rather than on the evidence of the person to whom the statement was made. Thirdly, decisions affecting children are made at all levels in the court structure and as Butler-Sloss LJ pointed out application of the strict rules in some proceedings but not others "may well lead to confusing, inconsistent and anomalous results".[72] Evidence might be available in some cases and in some courts and not in others even though the facts and circumstances were similar.

2.64 Section 96 addressed these concerns in two ways. Section 96(2) made provision for courts in civil proceedings to hear the unsworn evidence of a child despite his lack of understanding of the nature of the oath.[73] Section 96(3) also enabled the Lord Chancellor to make an order disapplying the hearsay rule in proceedings relating to the upbringing, maintenance or welfare of children. The Children

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72. [1990] Fam. 86, 112G.

73. Similar to that provided in criminal proceedings by the Children and Young Persons Act 1933, s.38.

(Admissibility of Hearsay Evidence) Order 1990,[74] made pursuant to the power in section 96 of the 1989 Act, came into force on 10 March 1990. It provides that

> "In civil proceedings before the High Court or a county court, evidence given in connection with the upbringing, maintenance or welfare of a child, shall be admissible notwithstanding any rule of law relating to hearsay."[75]

Corresponding (but more specific) provision is contained in Article 2(2) of the 1990 Order for proceedings in magistrates' courts which is commented on below (at paragraph 3.32). The position in wardship has already been stated in paragraphs 2.58-59.

## I Other rules of evidence

### Introduction

2.65 The outline of the rules of evidence which follows is intended to demonstrate their interrelationship and to place the consideration of reform of the hearsay rule in the overall context of the body of rules which might be affected by such reform.

### (i) Relevance

2.66 Relevance is generally regarded either as a fundamental principle (more a matter of logic than law), which applies even before "rules of evidence" are applied,[76] or as the first test

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74. S.I. 1990, No.143.

75. Article 2(1).

76. James B. Thayer, A Preliminary Treatise on Evidence at Common Law (Reprinted 1969), pp 264-265.

of admissibility which should be applied to a particular piece of evidence.[77] Phipson[78] suggests that the terms "relevant" and "admissible" should be regarded as meaning respectively, that which is logically probative, and that which is legally receivable, whether logically probative or not.

> "The true position appears to be that, in the absence of statutory provisions, nothing that is not logically relevant is admissible, but that many facts that are logically relevant are excluded for various reasons based on practical considerations as to the reasonable and fair way of administering justice..."

A decision to abolish the exclusionary hearsay rule would not mean that all hearsay evidence would always be admitted at the trial. In addition to all the other rules as to what is legally receivable, courts have inherent power to control proceedings, particularly to avoid waste of court time and unnecessary costs. The use of superfluous hearsay evidence could be deterred in this way and also through the pre-trial procedures which are designed to ensure that by the time a case comes to trial only the essential issues and conflicts of evidence require hearing. We consider below,[79] ways in which the exercise of these powers could be developed to meet any increased dangers of the use of superfluous evidence which might flow from reform of the hearsay rule.

(ii) Best evidence

2.67 It has also been suggested that at some point in

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77. For example, see Law Reform Commission - Australia, Report No. 38, Evidence (1987) p. 69. On particularly unreliable evidence being found to be insufficiently relevant, see A.A.S. Zuckerman, The Principles of Criminal Evidence, (1989) p. 40; Cross (7th ed., 1990) p. 61.

78. Phipson on Evidence, (14th ed., 1990), para. 7-04.

79. See below, paras. 4.53-54.

history the requirement to adduce the best evidence of the fact in issue was the fundamental rule[80] and that hearsay came to be excluded because it normally failed this test. Whilst relevance is a test related to what facts are in issue (i.e. the objects of proof), best evidence is a test related to how facts may be proved (i.e. the methods of proof).

2.68 The decline in strict application of the best evidence rule is such that it has been said that the rule as it relates to admissibility of evidence is becoming virtually obsolete (except in relation to the failure to produce original documentation where it could have been produced.)[81] However, the responses of the Queens Bench Division and Family Division judges to the Civil Justice Review and the approach of other reviews of the subject show that the general idea of "best" evidence may still have currency as a principle underlying other more specific rules. Moreover, when a court is assessing the weight of admitted evidence, considerations of what is the "best" evidence are, fairly obviously, of great relevance: this point was emphasised in the debates surrounding the Civil Evidence (Scotland) Act 1988.[82]

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80. Phipson, op. cit., para. 7-12.

81. 13th Report, para. 36; Garton v. Hunger [1969] 2 Q.B. 37, 44 (C.A); R v. Governor of Pentonville ex p. Osman [1990] 1 WLR 277, 308; Kajala v. Noble (1982) 75 Cr.App. Rep. 149 (C.A.).

82. Hansard, (H.C.) 16 May 1988, Vol. 133, col. 747; Official Report (H.C.) of the First Scottish Standing Committee, 21 June 1988 (second sitting) col. 49.

(iii) Original evidence

2.69 The hearsay rule has also to be distinguished from the rules relating to original evidence. Failure to appreciate the difference is one of the most common misapprehensions as to the scope of the hearsay rule. An assertion is hearsay and inadmissible when the purpose of adducing it is to prove the truth of what it asserts. It is not hearsay, and is thus not excluded on those grounds, if adduced to prove the fact that the statement was made and not the truth of what the statement asserted. A statement may also be admissible as original evidence where the fact in issue relates to the speaker's state of mind rather than the truth of the statement. In Subramaniam v. Public Prosecutor[83] the court admitted evidence of threats made to the defendant by terrorists as evidence that the defendant had been acting under duress when he committed offences. The truth of the threats was immaterial to the offences being tried, but it was central to the defendant's defence that threats had been made which he believed and caused him to act under duress.

(iv) Res gestae

2.70 The principle of res gestae is an inclusionary rule of evidence which, like original evidence, inhabits a similar sphere to hearsay statements. It concerns evidence which is inextricably linked to the act in issue: it is literally a part of the story. Courts have differed on their interpretation as to what counts as res gestae. The importance of this inclusionary rule at common law, now mainly for criminal proceedings, is that where a statement is admitted as part of the res gestae, it is evidence of the

83. [1956] 1 W.L.R. 965.

truth of what was asserted, not just the fact of the statement. Its role in civil proceedings governed by the 1968 Act has been largely ousted by the provisions rendering hearsay admissible.

(v) Previous consistent statements

2.71 At common law a witness could not be asked in examination-in-chief whether he had made a previous consistent statement with his present testimony: "what the witness himself said outside the witness box is not evidence".[84] Answers to such questions are excluded by the rule against self-serving statements[85] but such evidence is now also excluded by some formulations of the rule against hearsay.[86]

2.72 The closeness of the relationship between this rule and the rule against hearsay was recognised by the 1968 Act which subjected both to its system of regulated admissibility, albeit with the difference that previous consistent statements are not generally admissible as of right, but only with the leave of the court[87]. It allowed previous consistent statements of parties or other witnesses to be adduced as evidence of the facts stated. In considering further reform of the hearsay rule, it will have to be decided whether further reform of the rule relating to

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84. The Committee, 13th Report, para.5.

85. Sometimes also called the rule against narrative or the rule against self corroboration.

86. Cross (7th ed., 1990) p. 281; and see above, para. 2.6.

87. Sections 2(2) and 3(1)(b) 1968 Act. See also above, paras. 2.27-28.

the admissibility of previous consistent statements by witnesses would be desirable. It would be wrong to presume that further reform of the hearsay rule must or should automatically be applied also to the rule against self serving statements.

2.73 In Scotland, for example, when the Civil Evidence (Scotland) Act 1988 abolished the exclusionary rule as to hearsay, it still maintained one element of the common law rule against the use of previous statements: the inadmissibility of precognitions (extra-judicial statements made by a party on legal advice earlier in the proceedings). It was considered that such precognitions should continue to be inadmissible for all purposes for two reasons. First, such reports were in effect the combined product of the maker of the statement and another person (the precognoscer) who did not have any knowledge of the facts. Secondly, precognitions were prepared with the specific purpose of litigation in mind.[88]

(vi) Opinion and expert evidence

2.74 Generally, witnesses may only give evidence of facts within their own knowledge; they may not give evidence of opinion or on matters about which expert knowledge is considered necessary by the court, or where the issue relates to a matter which it is for the court to decide, known as an "ultimate issue". The 1972 Act provided that any witness, whether an expert or not, may give evidence of opinion where it is given as the unavoidable means of

88. Evidence: Report on Corroboration, Hearsay and Related Matters in Civil Proceedings, Scot. Law Com. No. 100 (1986), para. 3.57.

conveying facts which the witness directly perceived (e.g. "the car was travelling at about 30 m.p.h."). It changed the common law exclusion on opinion relating to ultimate issues by providing that the relevant matters as to which experts were enabled to give evidence included evidence of ultimate issues.[89]

2.75 For the most part opinion evidence is based on knowledge and information accumulated and interpreted by the witness from various sources, some identifiable, some not, and previous experience. In this sense such evidence will generally incorporate elements of hearsay. This is reflected in the way that reform of the rules of expert and opinion evidence were superimposed on the hearsay provisions of the 1968 Act so as to ensure that the hearsay factors inherent in such evidence would also be covered wherever statute permitted expert and opinion evidence to be given.

2.76 Reform of the hearsay rule may necessitate some reconsideration of the scheme of the 1972 Act and of the use of the procedural mechanisms that it shares with the 1968 Act in order to retain the rules relating to expert and opinion evidence.

(vii) Admissions

2.77 A party's statements adverse to his interest are received as evidence of the truth of their contents in civil and criminal proceedings. They almost inevitably involve an element of hearsay unless the admission is made by the witness when giving direct oral evidence. Admissions may be

89. Section 3.

formal or informal. Formal admissions are an aspect of procedural law: they are made by a party for the purposes of the proceedings and are conclusive of the truth of their contents. The admissibility of informal admissions is part of the law of evidence and was recognised as an exception to the common law rule against hearsay. It was justified on the grounds that a person will not say something which is against his interest unless it is true and that, accordingly, admissions have a great probability of reliability. The common law insofar as it relates to admissions coming within the scope of the 1968 Act is preserved under section 9 of that Act and it would not appear that reform of the hearsay rule would alter the continued effect of the common law rule.

(viii) Affidavit evidence

2.78 In general, the same rules of evidence apply to affidavit evidence as to evidence given on oath in court at the trial.[90] By R.S.C Order 41 rule 5 an affidavit may contain only such facts as the deponent is able of his own knowledge to prove. There are, in practice, several differences in the freedom to use hearsay statements based on information and belief in proceedings conducted by affidavit which are recognised in rules of court. In the High Court under Order 41, rule 5(2), affidavits used in interlocutory hearings may contain statements of information or belief if the sources and grounds are given. Also in summary proceedings under Order 14 and Order 86 evidence based on statements of information and belief is permissible. There are also differences between the High Court and county courts: County Court Rules permit the inclusion of statements of information and belief in

90. C.C.R. O.20, rr. 1-10; R.S.C. O. 41.

affidavits used at both interlocutory and final stages, though the court has the power to prevent use of affidavit evidence where the interests of justice so require.[91]

2.79 It is unclear whether the provisions as to affidavits which have developed over many years are now consistent with the policy of the 1968 Act. For example, R.S.C. Order 38, rule 21(4) disapplies the rule requiring notice to the other side of the intention to use hearsay where affidavits are to be used at the trial (presumably because filing of affidavits provides satisfactory notice). The rule refers instead to Order 41 which generally precludes use of statements of information and belief in affidavits at trial. If hearsay were never included in affidavits meant for use at trial, there would be no conflict. But there can be little doubt that hearsay is sometimes included in affidavits, whether intentionally or not. Under County Court Rules, as has been mentioned above, it is expressly permitted.[92] Given that the policy of the 1968 Act was to provide procedures for notifying, explaining and challenging the use of hearsay, proceedings conducted on affidavit at present may be failing to draw attention to those safeguards.

2.80 Before statute overtook the common law exceptions, hearsay statements were admissible if they fell within one of the established exceptions. The rules made under the 1968 Act were meant to preserve the benefit of these exceptions but to ensure that due notice was given to the other side of the circumstances justifying the use of the

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91. C.C.R. O.20, r.9(1).

92. See above, para. 2.78.

hearsay statement. So, for example, where a witness has died his hearsay statement can be given, but the other side is informed (under Order 38, rule 25) of the reason for the witness's unavailability. If the provisions of Order 38, rule 21 are disapplied, there is no occasion to tell the other side of the reason for using the hearsay statement. If the provisions of Order 41 are decisive, there is no power to put in the hearsay statement of the deceased witness without resort to Order 38, rule 3 for an express direction allowing a statement on oath of information or belief. Unnecessary divergence of procedures for challenging hearsay in an affidavit as distinct from hearsay notified under Order 38, rule 21 would thus seem to be potentially confusing. More importantly, the possibility that trials on affidavit evidence should be hampered by a stricter approach to the use of evidence than those which apply to oral evidence seems contrary to the intention of the 1968 Act. Consultees may wish to consider whether the rules relating to the use of hearsay evidence in affidavits should be clarified in the event that reform of the 1968 Act and rules of court were to be preferred.

## J Recent procedural developments: prior exchange of witness statements

2.81 Recently, there have been several developments in the field of procedural law reflecting changes in the approach of courts and practitioners to the way civil proceedings should be conducted. These developments stress the need for fairness, the avoidance of unnecessary cost and delay and greater openness in the identification of the issues to be tried and the disclosure of evidence. They have inevitably had an influence on perceptions of adversarial procedure and rules of evidence which support

that trial process. In Davies v. Eli Lilly & Co,[93] Lord Donaldson MR commented, with respect to discovery,

> "...litigation in this country is conducted "cards face up on the table". Some people from other lands regard this as incomprehensible. "Why", they ask, "should I be expected to provide my opponent with the means of defeating me?" The answer, of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the court does not have all the relevant information, it cannot achieve this object."

2.82 The contribution of the Civil Justice Review to this process has already been mentioned.[94] Amendments to the Rules of the Supreme Court have been made broadening the courts' powers to require prior exchange of all experts' evidence[95] and prior exchange of witness statements.[96] These developments have now been extended to county courts.[97] The amendments introduced by R.S.C. Order 38 rule 2A, allowing pre-trial exchange of non-expert witness statements demonstrate the move towards greater openness in pre-trial procedure now established in the High Court where exchange of proofs is normally directed.[98] The Civil Justice Review recommended that it should not be possible, without the special leave of the court, to call a witness whose statement has not previously been served on the other

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93. [1987] 1 WLR 428, 431H.

94. See above, para. 1.4.

95. R.S.C. O.38, rr.37 and 38.

96. R.S.C. O.38, r.2A.

97. County Court (Amendment No. 4) Rules 1989, S.I. 1989 No. 2426.

98. Supreme Court Practice 1991, para. 38/2A/5; Practice Direction (Chancery: Summons for Directions) [1989] 1 W.L.R. 133; Guide to Commercial Court Practice (2nd ed., 1990), para. 14.1.

parties.[99] Order 38, rule 2A goes some way towards this and new rules made implementing some of the recommendations of the Civil Justice Review also move in that direction[100] with rules to encourage more informative pleading, the use of interrogatories and costs sanctions for failure to admit facts and documents.

2.83 It is arguable that the hearsay rule and the conditions subject to which hearsay statements are admitted under the 1968 Act should take account of these developments. First, if an important purpose of the notice provisions under the 1968 Act is to prevent surprise, there is a case for providing that where there has been an exchange of proofs which satisfies Order 38 rule 2A, it is not necessary to specify that the notice has been served for the purposes of the 1968 Act. At present such a prior exchange of witness statements does not constitutes notice for the purposes of the 1968 Act unless the notice also satisfies the time and other requirements of O.38, r.21 and is expressly stated to be a notice under the 1968 Act. Similarly there is a case for making it clear that where there has been disclosure of experts' reports and joint statements under Order 38 rules 37 and 38 no separate notice is needed for the purposes of the 1968 Act. Second, however, consultees may wish to consider whether, in cases to which the procedure envisaged by Order 38 rules 2A, 37 and 38 apply, there is any need for further application of rules restricting hearsay, that might be thought to serve the same objective, of adequate prior warning of relevant evidence, as do the present procedures under the 1968 Act.

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99. Para. 230 and Recommendation 22.

100. Rules of the Supreme Court (Amendment No. 4) 1989, S.I.1989 No. 2427.

## PART III

## THE CASE FOR REFORM

3.1 Part II has described the present law. Although much hearsay evidence is statutorily admissible, underlying the statute there is the exclusionary rule. In this Part we consider the case for reform. First we consider the principles underlying the hearsay rule and the arguments for and against the admissibility of hearsay evidence. The differences in the statutory development of the rules of civil and criminal evidence in recent years are also mentioned as indicative of changing attitudes as to the underlying principles served by those trial processes. The particular problems with the present law which have appeared under the present statutory provisions are then examined.

### A The Underlying Principles

3.2 In this section we consider the reasons for mistrust of hearsay evidence and the extent to which these justify its inadmissibility in civil cases. As has been seen in the commentary on the development of the law, common law refinement[1] of the rule has occurred largely in the context of criminal proceedings, whereas much of the development in civil proceedings has been statutory. Consideration of the principles served by the hearsay rule in civil proceedings may help to identify whether, even if hearsay evidence is admissible, safeguards are needed in

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1. See above, paras. 2.3-2.15.

such proceedings and if so which safeguards would be most effective.

(i) Arguments supporting the exclusionary rule

3.3 **Cross-examination.** There is general agreement that the desirability of testing evidence by cross-examination is the main and most compelling justification for the continued exclusion of hearsay evidence.[2] Cross-examination, Wigmore considered,

> "is beyond any doubt, the greatest legal engine ever invented for the discovery of the truth".[3]

3.4 Cross-examination is important in a system with a preference for adversarial trial and orality in proceedings. Scrutiny of the witness enables the court to consider his candour, intelligence, physical and mental capacity, his reactions to stress, all of which may add or detract from the convincing proof of his initial statement. The placing of the evidence in its contextual setting also has, it has been suggested, benefits to those scrutinising the witness and his evidence.

> "Even where there is no cross-examination, the jurors may perceive inconsistencies in the various portions of a witness' testimony, and the jurors' realisation that not all pertinent facts were perceived or remembered may lead them to question the accuracy of those facts which

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2. Wigmore on Evidence (3rd ed., 1940), para. 1365; Cross, (7th ed., 1990) p. 513; Professor E M Morgan, "Hearsay Dangers and the Application of the Hearsay Concept", (1948) 62 Harv.L.R. 177; Scot. Law Com. No. 100 (1986), para. 3.21.

3. Wigmore op. cit., para. 1367.

were reported. Context, like cross-examination, aids jurors in evaluating all testimonial dangers..."[4]

3.5 **Inability of juries to weigh hearsay.** Lord Bridge, in R. v. Blastland said

> "Hearsay evidence is not excluded because it has no logically probative value. Given that the subject matter of the hearsay is relevant to some issue in the trial, it may clearly be potentially probative. The rationale of excluding it as inadmissible, rooted as it is in the system of trial by jury, is a recognition of the great difficulty, even more acute for a juror than for a trained judicial mind, of assessing what, if any, weight can properly be given to a statement by a person whom the jury have not seen or heard and which has not been subject to any test of reliability by cross-examination. ...The danger against which this fundamental rule provides a safeguard is that untested hearsay evidence will be treated as having a probative force which it does not deserve."[5]

There are now very few civil jury trials, and previous reform has not made special provision for the exceptional case where there is a jury.

3.6 **Relevance of the oath.** It may be argued that evidence given on oath continues to provide an additional degree of trustworthiness by concentrating the attention of the witness on the solemnity of the need to tell the truth. The possibility of proceedings for perjury where previous statements have been made on oath may also enhance the likely trustworthiness of evidence.

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4. R. O. Lempert and S. A. Saltzburg, A Modern Approach to Evidence, (2nd ed., 1983), p. 352. The 'testimonial dangers' referred to are generally listed as ambiguity, insincerity, faulty perception and erroneous memory.

5. [1986] 1 A.C. 41, 53H-54C.

3.7 **Best evidence.** Where practicable, courts will insist on the best evidence being adduced. The fact that evidence is of a hearsay nature will often disclose that there is another source of more direct testimony (the maker of the reported statement) which might be adduced. The exclusionary rule's insistence on the production of the best evidence is a way of preventing the danger of weaker proofs being substituted for stronger ones.

3.8 **Danger of protraction of trials.** There is a widely held fear that there will be a tendency for hearsay evidence to protract trials.[6] Some courts may find it more difficult than others to control the giving of hearsay evidence which has little probative value or which adds nothing to what has already been covered by evidence of greater weight. The danger of superfluous evidence is common to all types of evidence and as the Scottish Law Commission pointed out, liable to be dealt with by the courts in the same way.[7] The most effective deterrent is that of costs, in that the courts may disallow costs unnecessarily generated.

3.9 **Danger of error through repetition of statement.** The dangers of faulty perception and erroneous memory may be compounded by the repetition and embellishment of a statement. This is why reform of the common law on hearsay has concentrated on the admissibility of first hand hearsay where the danger of multiplied unreliability is less.

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6. Phipson op. cit., para. 21-06, and the response of the Queen's Bench Division and Family Division Judges to the Civil Justice Review, who said: "It would [also] unduly prolong trials and therefore increase the expense of investigation to no useful purpose," (Appendix, page 6) Unpublished.

7. Scot. Law Com. No. 100 (1986), para. 3.19.

(ii) Arguments supporting reform of the exclusionary rule

3.10 The arguments against the exclusionary rule reflect a judgment as to the accuracy of its claimed benefits and, to some extent, awareness of other considerations which demonstrate ways in which the rule hampers civil courts in their task of finding where the truth lies.

3.11 **Hearsay is relevant evidence.** The hearsay evidence which is excluded by the existence of the rule is relevant to the issues being tried. In civil proceedings the centrality of the rule as to relevance has been achieved by the courts' own expressed reluctance to hear argument on evidential technicalities. There is no longer the same consensus that it is reasonable to prevent civil courts from hearing potentially valuable evidence solely on the grounds that it is hearsay.[8]

3.12 **Cross-examination.** Whilst cross-examination helps to highlight possible dangers of faulty memory or perception, it has been doubted whether it often identifies ambiguity or insincerity, two of the main testimonial infirmities. Morgan comments that "experience in the courtroom demonstrates that [the] most important service [of cross-examination] is in exposing faults in perception and memory".[9]

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8. Scot. Law Com., No. 100 (1986), para. 3.22.

9. "Hearsay Dangers and the Application of the Hearsay Concept", (1948) 62 Harv.L.R. 177, 188.

3.13 Though clearly a very useful tool, cross-examination does have its rigours.[10] These may in certain circumstances be quite inappropriate for discovering the truth, such as where the witness is particularly vulnerable as is the case with young children, or is overawed by the task of giving direct evidence.

3.14 Cross-examination is not the only acceptable method for testing evidence. Reference has already been made to proceedings conducted on affidavit evidence or where exchange of witness statements may be directed. In this way faults in perception and memory come to light and may be resolved, leaving only the critical conflicts of evidence to be tested at trial. In this way costs may be saved and the length of trials reduced.

3.15 **Role of the jury.** Given the comparative rarity of jury trials in civil cases, it is debatable whether an exclusionary rule of evidence is needed for such an exceptional consideration.

3.16 **Relevance of the oath.** Many commentators have doubted whether the absence of the oath is a relevant factor justifying the exclusion of hearsay evidence. Furthermore, the view that the essential and real reason for the rule is to permit cross-examination,[11] and that the absence of the oath is only incidental, can be demonstrated by the fact

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10. Wigmore op. cit., para. 1367: "It may be that in more than one sense it takes the place in our system which torture occupied in the medieval system of the civilians."

11. Wigmore op. cit., para. 1362.

that even an oral statement made under oath is excluded by the hearsay rule if given on a previous occasion and not subject to cross-examination.

3.17 **Best evidence.** In some situations hearsay is the best available evidence even if not the best conceivable evidence. In Myers v. DPP Lord Reid pointed out that the exclusionary rule applies regardless of the cogency of the particular hearsay evidence.[12] In some cases, however, it is the best and only conceivable evidence of a fact in issue.

3.18 **Allowing evidence to be given in a natural way.** The benefit of allowing witnesses to give their evidence in the most natural way without interruption on technical points has been recognised, particularly in the area of tribunals. It is likely that the confidence of the public in the proper administration of justice will be enhanced by this and by the knowledge that as far as possible all relevant evidence necessary to help the court to discover the truth has been heard.

(iii) Re-consideration of the purposes served by the hearsay rule in a civil context

3.19 In considering reform of the hearsay rule it is important to appreciate the reasons justifying separate treatment of criminal and civil rules of evidence. The major difference is the greatly reduced use of juries in civil trials other than for defamation proceedings. In 1989 in the county courts of the 22,259 trials heard, only 104

12. [1965] A.C. 1001, 1024.

had juries.[13] It can no longer be correct for rules of civil evidence to be based on an assumed separation of tribunals of fact and law when in practice the same person (the judge) who determines whether a hearsay statement is admissible is also responsible for weighing its probative value. Arguments based on the danger of misleading juries similarly lose their force. The different burden of proof, discovery, the diversity of types of proceedings and the variety of forms of relief being claimed by each side against the other in civil litigation provide a very different background from that which applies in criminal cases where the nature of the proceedings and the dangers of miscarriages of justice leading to loss of liberty are of a different order.

3.20 Civil proceedings in general rely to a higher degree than criminal proceedings on the use of documents to provide both the background against which the substantive issues are to be argued and the evidence relevant to the facts in issue. It may be for this reason that civil courts are particularly reluctant to allow the taking of technical points as to hearsay. Argument on such points might only deflect the court from the issues at the heart of the dispute. The importance of documentation and the desire to ensure that as far as possible technical points are resolved before the case comes on for trial can be seen in the coverage of such matters in civil rules of procedure and in particular by the move to greater openness in pre-trial procedure.

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13. There figures were supplied by the Lord Chancellor's Department. The corresponding figures for High Court trials are not available but jury trials in the High Court are very rare save in defamation cases.

3.21 It is not surprising, therefore, that reform of the hearsay rule has developed separately and has progressed further in civil proceedings than in criminal proceedings. The 1938 Act took a wider approach to the use of documentary evidence than any of the earlier piecemeal reforms which created exceptions to the common law hearsay rule applicable to both civil and criminal proceedings. The 1968 Act (again concerned only with civil proceedings) in effect abolished the exclusionary rule for first hand oral and documentary hearsay in civil proceedings.

## B Application of the rule against hearsay in different courts and proceedings

### (i) The Hearsay Rule in Magistrates' Courts

3.22 It has been noted that the provisions of the 1968 Act do not apply to magistrates' courts. In making its recommendations which led to the Civil Evidence Act 1968, the Law Reform Committee said

> "For lay magistrates to have to apply different rules of evidence according to the kind of case which they were trying would, we think, be confusing for them and might give rise to difficulties and errors in both criminal and civil cases."[14]

3.23 The Committee also considered that substitution of the existing statutory limitations, which they recommended, by a system of procedural safeguards and judicial discretion could not be readily adjusted to the circumstances in which civil proceedings are conducted in magistrates' courts. The

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14. 13th Report, para. 50.

notice and counter-notice system would be difficult to apply where the parties were without professional assistance.

> "It would not be easy for multi-partite courts of laymen to exercise consistently that judicial discretion as to the admissibility of particular hearsay evidence which is another feature to which we attach importance".[15]

Despite these reservations, the power to apply the provisions of the 1968 Act to magistrates' courts was included by Parliament but has not been exercised.[16]

3.24 The Law Reform Committee did not address in detail the need for reform of the hearsay rule in magistrates' courts. It may have been correct in its view that there were facets of the 1968 Act's procedural safeguards which might not be successfully applied in magistrates' courts. The need to avoid complex procedural rules is of particular importance in courts which frequently deal with parties who are not legally represented. The desire to avoid unnecessary costs and delay in proceedings also counters to some extent the benefits of relying on costs and adjournment powers which were designed with High Court proceedings and legally represented parties in mind. It is proposed to make more use of written statements in proceedings under the Children Act.[17] This may be significant of a desire to assimilate the practice of magistrates' courts in respect of evidence in family proceedings to the practice of higher courts.

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15. 13th Report, para. 50.

16. Section 20(4).

17. Joint Consultation on the Draft Children Act Rules: Lord Chancellor's Department and Home Office, 1 October 1990.

3.25 At present four different regimes apply to hearsay evidence in magistrates' courts. Their licensing jurisdiction involves the application of the approach to evidence which applies to tribunals; their domestic jurisdiction is governed by the common law rules of evidence as modified by the 1938 Act; their care jurisdiction is governed by the common law rules as recently modified by the rules made under Children Act 1989 and it is the development of rules for this purpose which has provided the main stimulus for reconsideration of the magistrates' courts approach to hearsay. The criminal jurisdiction exercised by magistrates is, of course, governed by the rules of evidence applicable to criminal proceedings.

(a) Licensing

3.26 In exercising their licensing jurisdiction, magistrates are not bound by the strict rules of evidence. Licensing is the term given to certain administrative duties concerning, among other things, the sale of intoxicating liquor, possession of firearms, and some legal betting. Magistrates control these matters by issuing, or refusing, or renewing or repealing the applicant's licence. In some cases the grounds for determining such matters are governed by statute, in others by binding precedent. Any interested party may give evidence at the hearing, and neither side, unless the statute states otherwise, has to prove any application or objection beyond reasonable doubt. Magistrates are allowed to listen to and, depending on the particular circumstances, rely upon hearsay evidence submitted at such hearings.

3.27 There is little authority on the point, but in Kavanagh v. Chief Constable of Devon Lord Denning M.R.

commenting on the exercise of administrative jurisdiction relating to licensing said,

> "...from time immemorial the court of quarter sessions exercised administrative jurisdiction. When doing so, the justices never held themselves bound by the strict rules of evidence. They acted on any material that appeared to be useful in coming to a decision, including their own knowledge. No doubt they admitted hearsay, though there is nothing to be found in the books about it. To bring the procedure up to modern requirements, I think they should act on the same lines as any administrative body which is charged with an inquiry. They may receive any material which is logically probative even though it is not evidence in a court of law. Hearsay can be permitted where it can fairly be regarded as reliable."[18]

3.28 Roskill L.J. added

> "Lord Denning M.R. [has] pointed out that when one looks at the relevant sections of the Firearms Act 1968 one finds references to the need for the officers concerned to be "satisfied" of certain matters. That seems to me the key to the present case. In reaching a decision whether or not he is "satisfied", he is entitled and indeed obliged to take into account all relevant matters, whether or not any reports and information given to him would be strictly admissible in a court of law."[19]

3.29 Thus the duty on administrative bodies to consider all relevant matters and the effect of statute conferring jurisdiction on the tribunal are understood to make the strict rules of evidence inapplicable to the extent that their use might prevent the licensing body from carrying out its proper task.

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18. [1974] Q.B. 624, 633.

19. Ibid., p. 634.

(b) Domestic and care proceedings

3.30 At present, magistrates' courts have two distinct jurisdictions in family matters. Domestic courts deal with private law disputes between husbands and wives or mothers and fathers, while juvenile courts deal with care cases involving local authorities. The admissibility of hearsay evidence in all magistrates' courts is governed by common law as regards oral hearsay and documentary hearsay which does not come within the scope of the 1938 Act outlined in Part II above.[20]

3.31 However, in Humberside County Council v. R.[21] care proceedings were described as "essentially non-adversary, non-party proceedings", where courts would discourage the taking of too technical an approach to the application of the common law rules on the admissibility of hearsay evidence. In H v. H; K v. K (Minor) (Child Abuse: Evidence)[22] and Bradford City Metropolitan Council v. K (Minors),[23] however, courts confirmed the applicability of the hearsay rule in care proceedings in the juvenile court. As well as giving guidance on how the common law rules applied in the juvenile courts, the court in the Bradford case stated that although the hearsay rule had to a certain extent been relaxed in care proceedings before a juvenile court, the relaxations had been confined within well-defined limits.

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20. See above, para. 2.16.

21. [1977] 1 W.L.R. 1251, 1255 (D.C).

22. [1990] Fam. 86.

23. [1990] Fam. 140.

3.32 It was to legitimise the use of hearsay evidence in all proceedings relating to the upbringing, welfare or maintenance of children that the most recent statutory exception to the hearsay rule was created,[24] although at present this reform retains the separate treatment for magistrates' court proceedings. The 1990 Order as it applies to magistrates' courts, provides that

> "(a) a statement made by a child,
>
> (b) a statement made by a person concerned with or having control of a child, that he has assaulted, neglected or ill-treated the child,
>
> (c) a statement included in any report made by a guardian ad litem under rule 25(3)(a) of the Magistrates' Courts (Children and Young Persons) Rules 1988 or by a local authority under section 9(1) of the Children and Young Persons Act 1969,
>
> shall be admissible as evidence in connection with the upbringing, maintenance or welfare of a child notwithstanding any rule of law relating to hearsay."

3.33 This provides a special and limited dispensation for the admissibility of hearsay evidence in juvenile courts. It does not, however apply to the magistrates' domestic jurisdiction. Its scope is more closely circumscribed than the corresponding provision for the High Court and county courts referred to above.[25]

3.34 Before the decisions in H v. H.; K v. K. and the Bradford case, the Government had announced its intention of applying the Civil Evidence Act 1968 to all civil

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24. See above, paras. 2.61-64.

25. See above, para. 2.64.

proceedings in magistrates' courts.[26] This followed its acceptance of the recommendation of the Review of Child Care Law[27] that the Act should be extended to care proceedings. It was felt illogical to provide for hearsay to be admissible in care cases but not in cases concerning children in domestic proceedings. When the Children Act 1989 is implemented, specialist family proceedings courts will be created in magistrates' courts, combining domestic and care jurisdictions and separating these from both their adult and their juvenile criminal jurisdictions. Magistrates will be especially trained to exercise their family jurisdiction.

3.35 The question will then arise as to whether the provisions of the 1990 Order will be generalised to all family cases in magistrates' courts and whether the provisions applicable in the county courts and High Court will also apply in magistrates' family proceedings courts. As all levels of court are to be brought within a linked structure with concurrent jurisdiction in children's cases, this would certainly be the logical and practical result. Cases might otherwise have to be transferred to a higher court simply because of the more restrictive rules of evidence in the magistrates' courts. This development would solve the problem of hearsay statements in cases concerning children, but the question would still remain as to whether there should be reforms in cases concerning adults.

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26. 2nd February 1989. Announcement by John Patten, Minister of State of the Home Office. Home Office News Release.

27. (1985), para. 16.37.

(ii) Hearsay in family proceedings generally

3.36 Reference has already been made to the case of Re W (Minors) (Wardship : Evidence), and the freedom of the wardship court from the strict rules of evidence.[28] Whilst recognising the paternal and administrative aspects of the wardship court's jurisdiction, the types of issues which it is called on to determine in the best interests of the child are common to other courts exercising family jurisdiction. Decisions of the wardship court provide guidance as to the manner in which other courts should approach the task of determining similar issues relevant to the welfare of the child. Its influence has been seen recently in the case law on the weighing of evidence arising from video-recorded disclosure interviews.[29]

Video-recorded evidence

3.37 Re W is also of interest in that the judge at first instance is reported to have treated the evidence of the child recorded on video as direct evidence.[30] There is an increasing trend in proceedings involving allegations of child abuse to regard video-recorded evidence as direct, not hearsay evidence, and it is significant that this development has occurred in the wardship court where the 1968 Act does not apply. Whilst a video recording would be hearsay within the definition of the 1968 Act, section 1, it is more direct than the evidence which could be given by a

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28. See above, paras. 2.58-59.

29. See, for example, Latey J in Re M (A Minor) (Child Abuse : Evidence), Note [1987] 1 FLR 293, 295, and Scott-Baker J. in Re E (A Minor) (Child Abuse : Evidence) [1990] Fam. Law 157.

30. [1990] 1 F.L.R. 203, 203G-H, headnote.

person to whom the child had spoken,[31] avoiding the dangers of the hearsay witness adding to the possible ambiguity, insincerity, faulty perception and erroneous memory inherent in the original statement.

3.38 If common law development of new exceptions to the hearsay rule had not been stopped by Myers v. D.P.P., video recorded evidence might have become a further exception to the hearsay rule, justified on the usual grounds of the circumstantial likelihood of reliability, and necessity, as young children would not be competent to give evidence. It is, of course, much more direct evidence of what the child actually said and how he or she said it, although the child is still not available for cross-examination.

3.39 It is the essential similarity in the issues faced by all courts exercising family jurisdiction which has prompted disquiet with applying the hearsay rule to family proceedings. There are particular problems in proving abuse or neglect of children who are too young to give sworn evidence. Courts are reluctant to submit a child to the trauma of giving evidence and have sought to find other ways in which to compensate for this, primarily by use of reports of social workers and guardians ad litem.

Cases involving the welfare of children

3.40 Where the welfare of the child is the paramount consideration, courts need to consider not just the facts in issue, but also the future, i.e. what is likely to happen, where do the child's best interests lie, what are the wishes and feelings of the children concerned? The performance of

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31. As in Re W.

this task by courts exercising family jurisdiction necessarily expands the scope of the courts' investigation. Although the proceedings may well be fiercely contested, there is a growing appreciation that it is inappropriate to regard the issue of the child's welfare as one to be decided solely on the cases presented by the opposing parties. The court has its own investigative and pro-active role.

3.41 The incompatibility of the hearsay rule with express statutory functions given to courts will be highlighted in a new way when the Children Act 1989 comes into force in 1991. That Act provides for the flexible allocation and transfer of children's proceedings between different levels of courts according to complexity. The evaluation of the need for transfer relates to the complexity of the issues in the case; it is not meant to be determined by reference to the different ability of courts to hear evidence, or the different manner in which such evidence is heard.

3.42 The focus on complexity of issues poses a new challenge to rules of evidence, to serve the trial process and not to constrain the ability of courts to hear and to weigh all the evidence relevant to carrying out that task. Conformity between all the different levels of courts hearing children's proceedings will be of particular importance if the policy of the Children Act 1989 is to be secured. A similar point might also be made with reference to the provisions in the Courts and Legal Services Act 1990 which seek to ensure that cases are heard by the level of tribunal appropriate to the complexity of the issues involved. Differences in rules of evidence would hamper the achievement of this goal.

Abrogation of the hearsay rule in all family proceedings

3.43 It may be artificial, in some family proceedings, to seek to distinguish between issues relevant to the child's welfare and those of his family which may also be in issue, for example on application for maintenance for a child or for the spouse in divorce proceedings. Whilst the 1990 Order under the Children Act abrogates the hearsay rule for those proceedings relating to the welfare, maintenance and upbringing of children, other issues relating to adults will continue to be bound by the strict rules of evidence under the present law.

3.44 The family jurisdiction ranges from such matters as divorce and ancillary issues concerning financial provision and property adjustment, or the upbringing and maintenance of children, to domestic violence, adoption, legitimation and the care and supervision of children. It is a wide field, but characterised by an equal need to consider not only the past but also the future of the parties concerned, and is to this extent sui generis. Justiciable issues may often take second place to the role of the court in exercising discretion in the granting of relief, based on an assessment of likely future developments and of best interests. The character and personalities of the people concerned are often relevant to the exercise of this discretion in a way which is seldom if ever encountered in other types of litigation.

3.45 The 1990 Order can be seen to provide only a partial solution even to the problems faced by courts exercising the jurisdiction relating to children. It does not alleviate the problems of different rules of evidence applying in different courts handling what are essentially similar issues. Three different regimes remain: the

wardship court's freedom from hearsay; the abrogation of the rule in the High Court and county court, and the more limited abrogation in magistrates' courts.[32] It is for consideration whether there is any further need to retain the distinction between the wardship court's approach to hearsay, and that which is to be applied by the other courts under the 1990 Order.

3.46 It is also for consideration whether (whatever recommendations are made for the hearsay rule in other non-family proceedings) the abrogation of the hearsay rule under the Children Act 1989 should be further extended to apply to all family proceedings. Such an expansion would prevent any danger of disputes that evidence was wrongly admitted or though rightly admitted because of the existence of an issue in relation to a child, was wrongly relied on in determining an issue relevant to the adult parties.

3.47 It is clearly not practicable to reconsider the rule so recently introduced under the 1989 Act. Nor, it is suggested, will it be practicable to have different rules for different proceedings or different courts exercising jurisdiction under that Act. It is also unlikely to be practicable for courts to draw fine distinctions between evidence which is admissible because it relates to children and evidence which has technically to be admitted under the 1968 Act (or some other exception to the hearsay rule). In practice, it might be preferable to abrogate the rule altogether, so that courts at all levels could concentrate

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32. Discussed above, see paras. 2.64 and 3.32 - 3.33.

more clearly on the weight and reliability of all the relevant material which is put before them.

(iii) Arbitration proceedings

3.48 Arbitrators are in general bound by the rules of evidence[33] except where the parties agree otherwise. Often such agreement is incorporated in the reference to arbitration or in the contract out of which the dispute arose. The position is different for arbitrations under section 64 of the County Courts Act 1984. These are freed from the application of the strict rules of evidence by the effect of section 10(3A) of the Civil Evidence Act 1968 and C.C.R. Order 19, rule 5(2).

3.49 There are a great variety of types of arbitration, and views as to the need for rules of evidence may differ. Some arbitrations are of an informal nature and members of the tribunal may not be legally qualified. Others closely reflect the procedures of the ordinary courts of law and not only the arbitrator, but the parties before him may be lawyers. Arguments similar to those which apply to other forms of tribunals might suggest that the strict rules of evidence are incompatible with the purposes of arbitration; on the other hand, there may be a conscious desire to emulate the procedures applicable in the ordinary courts, as conducive to high quality decision making. The desire for evidential simplicity is not necessarily related to the complexity or amounts in issue. The strict rules of evidence are frequently waived in weighty commercial arbitrations which involve significant sums of money, as

33. Sir M. J. Mustill & S. C. Boyd, Commercial Arbitration (2nd ed., 1989), p. 352.

well as in the types of arbitration heard in county courts for small amounts of money and consumer disputes. We invite the views of consultees on what the position for arbitration proceedings should be, in the event of reform of the hearsay rule, and in particular, whether the parties should retain the power to agree that particular rules of evidence should or should not apply.

## C Particular Problems which have been experienced with the 1968 Act

### (i) Notice provisions under the 1968 Act

3.50 The single loudest complaint against the 1968 Act is that the notice provisions which it contains and the rules of court made thereunder are so complex that practitioners have avoided using them.[34] If this is so, the purpose which the notice provisions were devised to serve may have been forgotten. The Scottish Law Commission, commenting on the 1968 Act notification procedures, suggests[35] that the exception may have become the rule, in that parties are relying on the court's discretion to include where there has been a failure to comply with the rules, and not using the rules to warn the other parties of the intention to adduce hearsay evidence.

### Purpose of notification

3.51 Further reform of the notification procedure

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34. R. Urich, "Reform of the Law of Hearsay", (1974) Anglo-American Law Rev. 184, 209 and J. D. Heydon, Evidence, Cases and Materials (2nd ed., 1984), 361.

35. Scot Law Com. No. 100 (1986), para. 3.32.

requires agreement as to the aims which notification serves and whether these aims can be secured in other or more effective ways. The Committee envisaged that the notification procedure would ensure that the hearsay elements in evidence were recognised and communicated to the other side in sufficient time for any objections to be considered. Notification, and the possibility of challenge, would also further the overall aim of ensuring that reliance upon hearsay would be restricted to cases where the maker of the statement is not available as a witness and to cases where the facts which the statement tends to establish are not seriously in dispute although they have to be proved.

3.52 The criticisms which have been recorded of the notification requirements have related not specifically to the particular refinements for special circumstances but to the inconvenience and difficulty of correctly categorising in advance evidence of a hearsay nature, particularly the difficulty of foreseeing oral hearsay in time to give the required period of notice. This criticism goes to the heart of the practicability of notification requirements.

3.53 The rules of court made under the Civil Evidence Act 1968 give effect in elaborate detail to all the matters referred to by the Committee. The Committee also envisaged, however, that the relegation of such matters to rules of court would facilitate later revision by the rule committees in the light of experience.[36] There has, however, been no comprehensive revision of the rules since their introduction. There has, accordingly, been no re-appraisal of the need for the rules which contain particular

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36. 13th Report, para. 46.

refinements to cover special situations, nor of whether the central rules requiring notice and counter notice are serving the central purpose intended for them.

3.54 The Scottish Law Commission adopted the view that the aims which notification served were those of avoiding surprise and enabling a challenge to be mounted. For this purpose it recommended giving courts power to delay admissibility of the hearsay until the witness was produced. Instead of the 1968 Act style notice provisions, it proposed simpler provisions covering the need to serve a notice and a counter-notice.[37] Refinements aimed at other matters were not included. There was no requirement to categorise the degree of hearsay (because the recommendations did not consider there was any further need to make that distinction), no requirement to specify the reasons for unavailability, no preliminary hearing to determine disputes or for special directions in the case of certain types of legal records, no power relating to costs, no special provisions for records and computer generated documents designed to alert the opposing party to the chain through which the record had been compiled and asserting correct working of the computer at the relevant time.

3.55 We have referred to more recent developments towards the greater exchange of evidence in general.[38] As these develop it is necessary to consider the interrelationship between the rules that give effect to them and the complex notice-giving provisions of the 1968 Act. The different procedures to be adopted in proceedings on

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37. Scot. Law Com. No. 100 (1986), paras. 3.43-3.47. See para. 4.7(b) below.

38. See above, paras 2.81-83.

affidavit evidence incorporating hearsay are not particularly easy to determine; it may be even more difficult to know what notice requirements apply where prior exchange of witness statements occur.

(ii) Reform of the provisions relating to records

3.56 Differing criticisms of section 4 of the 1968 Act have been considered by commentators.[39] One criticism is that the section tries to deal in the same way with too wide a category of "records": not only business records which experience has shown are reliably and accurately kept, but also other forms of records which are less accurate and reliable.

3.57 It has been said that insofar as section 4 is directed to business records it is unnecessary to impose conditions relating to the reliability of the supplier and compiler or to require that the compiler be under a duty. Irrespective of any duty, business records may, it is said, be treated as being reliable in the ordinary course of events. But insofar as section 4 also applies to other records, it has been said that more attention should have been devoted to issues such as the competence of the supplier and compiler, and the extent to which the accuracy of the document can be checked in other ways. Other jurisdictions have enacted legislation differentiating between the greater reliability of a business record (which is usually widely defined) and other records.[40]

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39. J. D. Heydon, op. cit., p. 357.

40. For example Rule 803(6), Federal Rules of Evidence (U.S.A).

3.58 The Scottish Law Commission also acknowledged the special claim to reliability of a wide class of business records and extended that reasoning to simplifying not only the admissibility provisions, but also the authentication requirements.[41] It referred to the common law presumption that business books are presumed to be accurate, if regularly kept[42] and if they are limited to such matters as fall directly within their province and of which they are the ordinary and proper record.[43] It recommended an extension of this presumption to render documents admissible as evidence of the facts stated in them where the documents are or form part of a record compiled in the course of a duty to record such information.[44]

(iii) Proof of the absence of an entry from business records

3.59 A further point covered by the 1988 Act, reflecting a point which has featured in reforms of the hearsay rule in other jurisdictions, was to provide that the absence of an entry from business records should also be admissible as evidence of the non-occurrence or non-existence of the matter in issue. This matter has arisen in the context of two cases R. v. Shone[45] and R. v. Muir.[46]

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41. See below, para. 3.69.

42. Dickson, Law of Evidence in Scotland, paras. 114 and 1104.

43. Ibid., para. 1227.

44. Scot. Law Com. No. 100 (1986), paras. 3.67,3.68 and 3.70.

45. [1983] 76 Cr. App. R. 72. The decision in this case illustrates both the avoidance of hearsay problems by the recategorisation of hearsay as direct evidence, and of the manner in which the hearsay rule can be undermined by circumstantial inference.

46. [1984] 79 Cr. App. R. 153.

3.60 The growing differences between criminal and civil rules of evidence which have already been mentioned[47] might suggest that it is unnecessary in the context of reform of the hearsay rule in civil proceedings to address such technical points which in practice would only be taken in criminal proceedings. On the other hand, the point is capable of clarification as has been demonstrated by Section 7 of the 1988 Act. This provides that

> "(1) In any civil proceedings, the evidence of an officer of a business or undertaking that any particular statement is not contained in the records of the business or undertaking shall be admissible as evidence of that fact whether or not the whole or any part of the records have been produced in the proceedings.
>
> (2) The evidence referred to in subsection (1) above may, unless the court otherwise directs, be given by means of the affidavit of the officer."

(iv) Computer records

3.61 Several criticisms have been raised concerning the computer record provisions in the 1968 Act. It is said that the approach adopted in the Act was fundamentally flawed in that there is no intrinsic reason for differentiating between different forms of record keeping and that doing so causes anomalies and confusion.[48] It is also said that the provisions are outdated and fail to recognise the original element in such evidence - as distinct from information which is simply collated and stored by the computer from a human source.[49] Reed also suggests that

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47. See above, paras. 3.19-21.

48. C. Tapper Computer Law, (4th edn. 1989), p. 395.

49. Ibid., p.373; C.Reed, "The Admissibility and Authentication of Computer Evidence - A Confusion of Issues", (1990) Vol. 6.2, Computer Law and Security Report, p. 13.

section 5 should be replaced by procedures for the authentication rather than the admissibility of computer generated information.

(a) Outdated conditions of admissibility

3.62 Section 5(2) of the 1968 Act imposes the following conditions on the admissibility of computer generated evidence. These are -

> "(a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any body, whether corporate or not, or by any individual;
>
> (b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;
>
> (c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and
>
> (d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities."

3.63 The criticism of these conditions is centred on the now outdated considerations which led to those conditions and not others being included in the statute.[50] It has been said, for example, that the safeguards were directed at the batch processing of identical transactions and mainframe

50. C. Reed, ibid, at p. 14.

computer operations processing large numbers of similar transactions daily. The development of computer technology, in particular the use of microcomputers, and the diversity of tasks which can be performed on computers with more sophisticated software have changed ideas as to what safeguards are needed. Those which were imposed by the 1968 Act reflect the background pattern of activity relevant to record keeping of a non-computerised type; but the new tasks relevant to the keeping of a wider range of records on computer have not been taken account of.

(b) Unnecessary specific provisions for computer records

3.64 Tapper[51] suggests that special provisions for computerised records may be unnecessary. Furthermore, he points out that section 5 of the 1968 Act does not build in the element required of other categories of permitted, reliable, second-hand hearsay, namely personal knowledge of the information put in, which is the area most easily recognised as the source of inaccuracy of computer held information.[52] These points were taken up in the recommendations of the Scottish Law Commission (and implemented in the Civil Evidence (Scotland) Act 1988) which accords no special, separate treatment to statements produced as computer records. It does not distinguish between computerised records and other business records. The definition of document which it adopted was drawn sufficiently widely to embrace computerised records.

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51. C. Tapper, op. cit., p. 395.

52. Ibid., p. 396.

(c) Evidence entirely generated by computers

3.65 A particular problem which computers pose for the traditional method of testing evidence is that, by the nature of things computers cannot, of course, give direct oral evidence. The provisions of section 5 and the rules of court which render identified persons concerned in the management, supply of information to and running of the computer operations, liable to be called as witnesses, cannot overcome in some situations the absence of any person who might be examined as to the element in the evidence generated entirely by the computer.

3.66 Similarities between the problem of testing the accuracy of computer records, and statements produced by other complex (though not computerised) technology is demonstrated by the case of Sapporo Maru (Owners) v. Statue of Liberty (Owners).[53] In this case two vessels collided on the Thames. A shore station had recorded the echoes of the two vessels on a radar film strip. The court held that the film strip was admissible and not subject to the hearsay rule. The radar records were produced mechanically not by a computer; the evidence was original and it was neither within the knowledge of any individual person nor was it the result of the intervention of any person.

3.67 In another case, Castle v. Cross,[54] the printout was that of a mechanical intoximeter device which was partly computer controlled. The court equated computer and

53. [1968] 1 W.L.R. 739.

54. [1984] 1 W.L.R. 1372.

mechanically produced printouts and relying on Cross,[55] applied the common law presumption that, in the absence of contrary evidence, mechanical instruments were in order when used. The printouts were held to be admissible evidence. This presumption in favour of regular operation which applies to mechanical devices may, eventually, be extended to computer driven operations as the two types of operations come to be regarded in the same way.

3.68 The Scottish Law Commission considered that original information generated by a computer should be treated in the same way as that generated by any other complex machinery.[56]

(d) Admissibility and authentication of evidence

3.69 The provisions of section 5 have also been said to confuse two different issues inherent in the nature of written documentation: the admissibility of a document and its authentication. It has been proposed[57] that the outdated and inappropriate nature of the procedural safeguards required for computer generated documents should be replaced by clear authentication requirements for such documents. Such requirements would address the need for proof that the contents of the record have not been altered improperly, that the information originated from its purported source, and that extraneous information added to the record, such as a date, is accurate.

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55. (5th ed., 1979), p. 47.

56. Scot. Law Com. No. 100 (1986), para. 3.66.

57. C. Reed. op cit. p.16.

(v) Grounds of unavailability

3.70 It has been suggested that the grounds on which the maker of a hearsay statement may be excused from the requirement to attend and give evidence due to his "unavailability" should be extended, bringing in new categories of witnesses whose hearsay evidence ought to be admissible without the other side having the right to ask that they give oral evidence. The New Zealand Law Commission,[58] for example raises for consideration the possible expansion of the categories of unavailability to cover witnesses who are old, young children and children who have been the subject of sexual abuse. Whilst the witnesses may in fact be available, the effect of the proposal would be to treat them as unavailable for reasons of public policy in protecting the vulnerable.

3.71 The circumstances in which unavailability per se justifies an additional exception to the hearsay rule is a matter which has been considered in other law reform proposals. These are commented on further in the Appendix. The conclusion generally drawn is that unavailability is less of a criterion than considerations of necessity and the likely reliability of the evidence.

**Questions on the procedural safeguards**

3.72 It would be particularly useful to have information from legal practitioners on the procedural safeguards put in place by the 1968 Act and the rules of court, in order to

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58. Preliminary Paper No. 10: Hearsay Evidence (June 1989), paras. 21 and 53-56 in particular.

form an informed view as to their effectiveness and desirability. Consultees are requested to respond to the questions posed in Part V of this paper on this matter.

## PART IV

## OPTIONS FOR REFORM

4.1 Our examination of possible reforms of the hearsay rule has centred on analysis of two options and two other issues which need to be dealt with whichever option for reform may be preferred. Both of the main options we examine are further developments of the existing law. They are

***Option 1: Continued limited admissibility within the framework of a simplified Civil Evidence Act procedure, or**

***Option 2: Abolition of the exclusionary rule.**

4.2 It is the use of an exclusionary rule to govern the use of hearsay that we challenge in our second option, not the continued need for an awareness of what is hearsay. Both options would involve a statutory description of hearsay evidence such as that which is contained in the 1968 Act. Awareness of the hearsay nature of evidence will obviously continue to be relevant when considering its weight and its liability to the various testimonial dangers

4.3 The associated issues which need to be considered as additional facets of the two main options for reform are

* **the safeguards which should be built into reform under either option and**

* **the extent to which differences in certain courts and proceedings should be allowed to continue.**

4.4 Our analysis of the options and associated issues seeks to identify the implications of reform. We have set out in Sections A and B of this Part the advantages and disadvantages, as we see them, of each of the main options. They reflect two different approaches to how far the underlying policy of the 1968 Act may be further developed. However, the overall shape of reform and the practical implications of the main options depend on the decisions that are taken about the two associated issues, the safeguards and the extent to which differences are to continue to be made between courts and types of proceedings. These associated issues are considered in Parts C and D.

## A OPTION 1: RETENTION OF THE EXCLUSIONARY RULE; REFORM OF THE 1968 ACT

4.5 This option is based on the premise that the hearsay rule as modified by the 1968 Act performs satisfactorily, but that its operation would be improved by reform primarily of the notification procedures. This option for reform within the 1968 Act structure might be cast as follows.

4.6 **(a)** The primary legislation would retain the same approach to hearsay as it does at present. In effect the 1968 Act has changed the concept of an exclusionary rule into a rule of admissibility as regards first-hand and second-hand hearsay which is thought to be particularly reliable, subject to compliance with certain procedural safeguards designed to protect against abuse of the power to

use hearsay evidence and the danger of surprise and prejudice.

4.7 (b) The notice procedure contained in the 1968 Act would be simplified. A simplified procedure would need to have the following elements.

(i) There should be a duty to notify the other side of the intention to adduce (and to oppose the use of) hearsay evidence, giving particulars.

(ii) In the case of oral hearsay, the power of the opposing party to require attendance of the person to give direct evidence should be retained where his attendance was "reasonable and practicable".[1]

4.8 (c) Additionally, it might be desirable to express on the face of a reforming statute the purposes served by the notification requirements. These aims are to ensure that hearsay statements which one party wishes to adduce are made known to the other parties sufficiently in advance of the trial to provide the other party with a fair opportunity to prepare to meet it or to decide whether to require the maker to be called.

4.9 (d) With this statement of purpose clearly established, rules of court might be able to be cast in simpler terms:

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1. This was an element in the Scottish Law Commission's recommendations (R. 9 and para. 3.54) which was not implemented in the 1988 Act.

(i) as to the content of the notification, information as to the maker of the statement, the grounds of information and of belief that the statement is true and the substance of the statement;

(ii) specifying the procedure for requiring the maker to attend.

4.10 **(e)** The 1968 Act already incorporates safeguards as to use of evidence as to credibility, costs penalties and the discretion to admit evidence notwithstanding non-compliance with the notice provisions. Section C of this Part discusses a range of safeguards which might be further developed within this option.

4.11 **(f)** The opportunity might be taken to remedy various particular problems with the 1968 Act which have been identified.

**Advantages of option**

4.12 (i) **It is accepted**. Despite the criticism of the notice procedures, the 1968 Act with its procedural safeguards and judicial discretion has in practice regulated the admissibility of hearsay evidence in a way which has not provoked complaints of injustice. The value of retaining a familiar system is not to be underestimated.

4.13 (ii) **It gives certainty to understanding of hearsay**. The 1968 Act was successful in simplifying to a considerable degree the confusion of the common law rule. It remedied most of the practical problems that had been experienced under the common law rule and rendered

irrelevant arguments as to whether evidence was admissible under other rules of evidence, for example as res gestae or as a self-serving statement. It provides clarity by its express provision describing the evidence of a hearsay nature which needs to be regulated.

4.14 (iii) **Advantages of prior notification of hearsay.** Prior notification has benefits to both sides. It avoids unnecessary costs being incurred and gives the other party sufficient time to consider the probative value of the evidence before the hearing. Express reference to the purposes of notification might further promote this benefit.

**Disadvantages of option**

4.15 (i) **Changing attitude to exclusionary rules.** Recent developments in procedural law[2] are leading away from the policy basis on which the 1968 Act was enacted. There is no longer agreement that relevant evidence should be rendered inadmissible by a rule of law simply because it is of a hearsay nature.

4.16 (ii) **Cumbersome task of classification of hearsay.** The dislike of the notification procedures centres on the need to analyse the nature and degree of hearsay in order to provide the other side with the proper notification. Such effort is costly in legal time given the difficulties involved in correctly identifying and classifying hearsay. Much hearsay evidence is uncontroversial and the effort of classification and detailed information of the chain or recording of the statement is unwarranted. The option for

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2. See above, paras. 2.81-83.

simplification of the notice procedures, either along the lines suggested above, or along the lines recommended by the Scottish Law Commission, does not overcome these problems.

4.17 (iii) **Rules of notification are unavoidably complex.** Despite the stated intention of the Scottish Law Commission to set out a simplified notification procedure, the provisions it laid down were not much simpler than those proposed by the Law Reform Committee in 1968. The full complexity of the rules made under the 1968 Act did not become apparent until they had been formulated by the Supreme Court Rule Committee. It would be hard to prevent rule committees responding to pressure from courts to cover difficulties which cause problems for the court concerned. It must be doubtful, therefore, whether the desire to achieve simplicity (which we incorporate in this option)[3] can be realised.

4.18 (iv) **Inappropriateness for certain types of proceedings.** There are difficulties in adapting the 1968 Act for the purposes of magistrates' courts. This is shown by the fact that the Act has still not been extended to those courts.

**Other reform of the 1968 Act**

4.19 If it is considered that the 1968 Act continues to provide the best approach to regulating the admissibility of hearsay, it would be necessary to consider which of the other particular problems with the Act, discussed earlier in this Paper, should be tackled. Few of these problems have been the subject of judicial comment, which may suggest that

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3. See above, paras. 4.7-4.9.

they are not issues over which there is a large or widespread concern in practice.

4.20 The points (not all of which are compatible) which might need to be reviewed concern

(a) relaxation of the conditions regulating the admissibility of business records,

(b) removal of the special provisions relating to computerised records,

(c) recognition of the need to provide for the admissibility of evidence generated entirely by computer or other sophisticated processes,

(d) introduction of a provision requiring personal knowledge of the likely degree of reliability of the working of the computer or of the accuracy of input and other relevant factors in the maintenance of the system and its output,

(e) provision for the authentication of computer records,

(f) provision for the admissibility of hearsay evidence of the absence of a record,

(g) elaboration of the statutory guidance concerning the weight of hearsay evidence,

(h) review of the accepted categories of unavailability excusing the attendance of the maker of the hearsay statement,

(i) duplication of notice requirements in the light of the new provisions for prior exchange of experts' evidence and witness statements,[4]

(j) review of the rules relating to the use of hearsay in affidavits.

**4.21 The views of consultees are invited on which of these particular points ought to be addressed, in the event that reform of the Civil Evidence Act 1968 were to be the option eventually preferred.**

## B OPTION 2: ABOLITION OF THE EXCLUSIONARY RULE

4.22 The Civil Evidence (Scotland) Act 1988 ("the 1988 Act") provides a precedent for this option. It deals with many of the points which have been discussed as particular problems with the present law. It has the following features.

4.23 (a) **Abolition of the exclusionary rule**. The 1988 Act abolished the exclusionary rule. In this way Parliament has indicated its view that it is no longer acceptable in principle to have a general rule which excludes relevant evidence solely because of its hearsay nature.

4.24 (b) **Both first-hand and multiple hearsay are admissible**. The Act puts an end to the need to distinguish for the purposes of admissibility between first-hand and

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4. See above, paras. 2.81-83.

multiple hearsay, and the need to identify the successive links in a chain involved in the creation of records.

4.25 (c) **Oral and documentary hearsay and assertive conduct.** All statements adduced as representations of fact are covered by the definition of "statement" contained in section 9 of the 1988 Act.[5] For all practical purposes, this puts an end to the debate whether assertive conduct is, or should be treated as, hearsay.[6] The 1988 Act does not, however, make clear whether it was intended to alter the common law rules as to the admissibility of evidence of opinion. It might be advisable to state that reform does not affect rules as to admissibility other than in relation to its hearsay element.

4.26 (d) **No requirement of notification.** The Act does not require any notification of the intention to use hearsay evidence. The purposes of notification have been discussed.[7] In deciding not to require prior notification, the 1988 Act may, in theory, have increased the possibility of unfair surprise at the trial and the danger that weaknesses in hearsay statements will not be discovered. These dangers may be partly offset by the procedural rules designed to achieve pre-trial exchange of evidence. We also canvass other possible safeguards which would address this potential hazard.[8]

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5. Scot. Law Com. No. 100 (1986), para. 3.60.

6. See above, paras. 2.8-2.11

7. See above, para. 3.51.

8. See below, Section C of this Part.

4.27 (e) **Minimal judicial discretion.** The court is not given the power to refuse to admit evidence solely on the grounds that it is hearsay, nor to delay its admissibility for the purposes of insisting that an available witness whose statement is challenged attend and give direct oral evidence. Some element of discretion is retained, however, particularly in relation to the power to allow additional witnesses to attend.

4.28 (f) **Elementary safeguards: power to call additional witnesses.** In the course of passage of the Bill the Government stressed that the power to call additional witnesses was the preferable way of taking account of the desire to ensure that a witness whom it is reasonable and practicable to call is in fact called if his hearsay statement is challenged. It was also thought that this power would address the tactical issues parties should weigh in deciding whether to adduce hearsay statements where oral evidence was practicable.[9]

4.29 Consideration should be given to the manner in which such additional witnesses are called. Where it is the party who has objected to the use of a hearsay statement who wants the witness to give oral evidence, it is inappropriate for that party to be the one who calls the witness. He will want to be able to cross-examine the person both as to the accuracy of the statement and his credibility as a witness. It would be more appropriate in such situations for the analogy of the procedure for affidavit evidence to be adopted. On this the witness would be treated as being

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9. See Official Report (H.C.) of the First Scottish Standing Committee on the Civil Evidence (Scotland) Bill 21 June 1988, (second sitting) cols. 39-55.

tendered for cross-examination (and re-examination if necessary) by the party who put in his statement. Where it is the party who has tendered the statement who decides, perhaps in the face of a strong challenge by the other side, to call his witness, this difficulty does not arise.

4.30 (g) **No statutory guidance as to weight**. The approach adopted in the 1988 Act is that it would be impracticable to give statutory guidance and that the matter should be left to the court to determine as it sees fit, as it does with the weighing of all other evidence which is tested for probative value.

4.31 (h) **No special provisions for computer records**. The criticism of the present provisions concerning computer generated evidence have been discussed.[10] The 1988 Act provides no special reference, but ensures that the definition of records extends to computer held and generated output. Accordingly, it assumes that in essence computer held and computer generated records and documents are no different from any others.

4.32 (i) **Application to all civil courts and tribunals**. The 1988 Act achieves simplification by rationalising the approach of all forms of tribunals and inquiries in applying the same (non-) rule concerning hearsay.

**Advantages of abolition**

4.33 (i) **Simplicity**. The main advantage of this

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10. See above, paras. 3.61-69.

option is its simplicity. The rules of evidence would become simpler to understand, for practitioners, courts and litigants alike. The need to classify the precise nature of the hearsay evidence and to analyse correctly the combination of forms of hearsay which are often combined in one statement would be overcome by abolition of the exclusionary rule. It is partly the impossibility of simplifying the rule which generates the calls for its abolition.

4.34 (ii) Concentration on the substantive issues. In care proceedings, courts have for a long time made clear their disapproval of the taking of technical points in relation to hearsay evidence.[11] Abolition of the exclusionary rule would simply reinforce this judge-led development. It acknowledges not only judicial disapproval of parties generating additional costs on matters which are not really in dispute, but also the awareness that the taking of technical points distracts concentration from the real issues being litigated. In this way reform would eliminate a tactical ploy.

4.35 The Scottish Law Commission were of the firm opinion that the arguments against hearsay did not justify the retention of a general rule of inadmissibility. They recommended that the exclusion of relevant evidence on the grounds of hearsay should itself be the exception not the rule.[12] In the passage of the Civil Evidence (Scotland)

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11. Humberside County Council v. R. [1977] 1 W.L.R. 1251, 1255 per Lord Widgery C.J., (D.C.).

12. Op. cit., para. 3.37. However, they did qualify their recommendation by proposing certain safeguards, paras. 3.43-3.52. These were not adopted.

Act 1988, the Government went even further than the Commission recommended in confirming the basic attitude that inadmissibility of relevant evidence on the grounds that it was hearsay was no longer regarded as justifiable. Thus abolition enables the court to consider more, relevant evidence, and to analyse the weight of all evidence in a consistent way, whether it is hearsay or not.

4.36 (iii) **Professional common sense**. Reform on this model reflects the common sense judgment that no party would willingly put forward hearsay evidence if better direct evidence were available, and that this consideration would in practice ensure that abolition of the rule would not be abused. In 1978 the Law Reform Commission of New South Wales in its Report on Hearsay Evidence,[13] when considering the merits of abolition as a possible reform, commented

> "Those who have favoured abolition stressed the artificiality of excluding hearsay evidence, and the interruption and confusion suffered by witnesses as a result. Everyone is accustomed to having hearsay information when making day-to-day decisions, some of great importance, in his private or business affairs, and everyone is accustomed to assessing the reliability of such information... No sensible litigant and certainly no competent advocate, would call weak evidence if stronger evidence were available, or expose his case to ridicule by multiplying valueless hearsay repetitions of a statement."

4.37 A similar belief that commonsense would prevail without the need for an exclusionary rule was also apparent in the debates during the passage of the Civil Evidence (Scotland) Bill which led to the 1988 Act. It was said that it should be for the parties to decide which evidence has

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13. Report No. 29, para. 1.3.3.

the greatest weight and to adduce it.[14] If hearsay is used the parties take the risk that a court may consider that it has less weight. In practice, parties will only resort to the use of hearsay where it is the best evidence they can find.

4.38 (iv) **Minimising judicial discretion**. To those who fear reform of evidence law which confers a substantial element of judicial discretion, this model holds an additional advantage in that the scope for judicial discretion is minimised. Such discretion, it is said, is a hindrance to parties in preparing for trial and determining which evidence to adduce, causing uncertainty and wasted costs.

**Disadvantages of abolition**

4.39 (i) **Danger of re-invention of the rule under another guise**. In its 1978 Report on the Rule against Hearsay the Law Reform Commission of New South Wales was cautious about recommending abolition of the rule. It said that:-

> "Our caution is motivated as much by the fear that such a drastic reform would be ineffective in practice, as by concern about the risks traditionally urged in opposition to hearsay evidence. Courts are characteristically conservative.... Attempts at wide-ranging reform which leave the courts without precise directions may only result in old rules and practices reappearing in a new guise. If the law gave no guidance on when hearsay evidence should be received or acted on, judges and magistrates who are conditioned to reject or scorn it would probably develop new rules and practices to protect the courts against an apprehended flood of valueless evidence.... If the

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14. Hansard (H.C.), 16th May 1988, vol. 133, col. 747.

admissibility of hearsay evidence were left to the discretion of the courts, many old rules and attitudes might well surface as guides to the exercise of the discretion. If there were no discretion to reject, the arguments would be transferred to issues either of relevance or of weight, and again the apparently simple reform might turn out in practice not to be as sweeping or as practicable as had been anticipated."[15]

4.40 If there were to be no additional element of structured judicial discretion, the danger of judges re-inventing, or inventing a new exclusionary rule to replace, the hearsay rule might need to be taken into consideration. These points are addressed in Section C.

4.41 (ii) **Suggesting increased approval of use of hearsay evidence**. It would be misleading if abolition of the rule were to suggest that courts no longer disapprove of the use of hearsay evidence.

## C SAFEGUARDS

4.42 As part of our terms of reference, we are asked to consider, whether or not the exclusionary rule is to be retained, what if any safeguards are required in circumstances where evidence which is adduced is of a hearsay nature. Different safeguards might be required for example for documentary and oral evidence. The question of which, if any, safeguards should be built into any reform is relevant to both the options considered above.

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15. Report No. 29, para. 1.3.3. The Commission subsequently adopted the recommendations for the form of the hearsay rule proposed in the Final Report of the Australian Law Reform Commission, No. 38 Evidence (1987), referred to further below: Appendix 6.27-31.

**4.43 Given the sometimes competing desires for simplicity and fairness, consultees are invited to consider which of the safeguards would be most effective in preventing abuse of the power to use hearsay evidence and whether safeguards are necessary where hearsay is already admissible.**

(i) Evidence as to credibility

4.44 We have commented above[16] on the provisions regarding the power to adduce evidence reflecting on the credibility of makers of hearsay statements. These safeguards were incorporated in both the 1968 Act and the 1988 Act and are thus common to both options. They provide a substantive safeguard in that they alter the scope of what would otherwise be regarded as relevant evidence (evidence as to credibility is generally inadmissible) and act as a deterrent to tactical abuse of the power to use hearsay.

(ii) Power to lead additional witnesses

4.45 This element of the abolition option has been commented on above.[17] Whilst questions of order at trial may be largely treated as procedural matters, the power to lead or to call for the purpose of cross-examining an additional witness would be a change of some significance requiring express provision.

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16. See above, para. 2.49.

17. See above, paras. 4.28-29.

(iii) Restriction of use of hearsay evidence where it is reasonable and practicable for witness to attend

4.46 This is of particular importance where oral hearsay evidence is adduced. A major justification for the hearsay rule is its support for the requirement to adduce the best evidence. One safeguard which has been considered by most bodies contemplating reform of the rule is that hearsay should not be used where it is reasonable and practicable for the witness to attend. Most recently it has been incorporated in the recommendations of the Scottish Law Commission (though rejected by the Government) and in the proposals of the Law Reform Advisory Committee for Northern Ireland.[18]

4.47 Considerations of "reasonableness" reflect such factors as the importance of the evidence to the facts in issue and the likely delay and cost of adducing direct evidence. Consideration of the availability of the witness would be taken account of in considering the "practicability" of calling him. It might be necessary to consider the most appropriate criteria - "reasonableness" and "practicability" - slightly further, however, as neither term would appear to acknowledge the superior reliability of many categories of records over direct oral evidence which have generated common law and statutory exceptions exempting the need for direct oral evidence. Any reform which restricted the parties' rights under the present law to adduce written documentation without having to call the maker (who might be available) might be considered a backward step, given the ever increasing reliance in civil proceedings on documentation and records.

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18. See below, Appendix, para.6.48; Discussion Paper, paras. 5.31-5.33, 5.38.

(iv) Guidelines on weight of hearsay

4.48 A structured approach building on the present provisions might be adopted to make clear the sort of factors which a court would be directed to take into consideration in weighing hearsay evidence. The explicit statement of such factors would also provide helpful guidance for practitioners. The matters set out below are an illustration of what might be relevant to be included within such an approach. In determining the weight of evidence courts could be alerted to the need to consider in the case of contested hearsay evidence,

(a) the reasons why the maker of a hearsay statement has not attended, including whether it would have been reasonable or practicable to require the party to produce the witness and the cost of producing direct oral evidence in relation to the importance of the fact in issue,

(b) whether the hearsay statement provides the only or the best available evidence of a fact in dispute,

(c) whether the other side has been notified of the purport of the statement and given sufficient details of the maker or process of its recording, to enable checks to be made prior to the hearing, and to appreciate the significance of the document,

(d) whether there is any cause to suspect that the maker of the statement had any motive to misrepresent or conceal facts, and whether any evidence as to the credibility of the maker of the hearsay statement has been adduced and

(e) the extent to which the statement is an edited account or made under legal advice, and whether created contemporaneously or in contemplation of proceedings.

4.49 The Scottish Law Commission, however, doubted the efficacy of statutory directions as to weight:

> "It may be suggested that this problem (lack of opportunity to cross-examine) could be met by some statutory direction that the court should attach little or no weight to hearsay in appropriate circumstances. However, we doubt whether this would always achieve a useful result. In some cases it would only be if the person alleged to have made the statement had been examined in relation to it that the court would really have any adequate material on which to decide what weight should be given to it."[19]

(v) Costs rules and penalties

4.50 We referred earlier to the increasing trend in recent years to promote reforms of court procedures which reduce unnecessary costs. The Law Reform Committee's recommendations led to the inclusion of a rule specifically designed to discourage the taking of unjustified objections to hearsay notices. A range of penalties further developing the effectiveness of the costs sanction might be devised. More recent examples of the use of costs sanctions have been described[20] in the manner of implementing the Civil Justice Review's procedural recommendations.

**4.51 Consultees are invited to consider what further development of costs sanctions might be provided as safeguards against the abuse of the power to use, or to challenge, hearsay evidence.**

(vi) Safeguards by judicial control

**4.52 Consultees are invited to consider by reference to**

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19. Scot. Law Com. No. 100 (1986), para. 3.38.

20. See above, para. 2.82.

**the questions below, the extent to which the court should be able to exercise a discretionary control over the use of hearsay evidence.**

**(a) Should there be judicial discretion to exclude evidence on the grounds that it is repetitive of facts of which there is other evidence or is otherwise of little probative value?**

4.53 The danger that the court would have to listen unnecessarily to anecdotal evidence without specific power to exclude it was a matter expressly referred to in the comments of the Chancery judges when responding to the Civil Justice Review on the issue of hearsay. Although courts appear already to have such a power through their inherent power to control proceedings before them, specific statutory provisions might encourage its use. A discretion to exclude might also be used in situations as where, for example, the hearsay statement was made by a person who is giving evidence at the trial and whose former statement adds nothing to that testimony. This discretion ought, arguably, to extend not only to hearsay evidence, but to all evidence which is of little probative value if it appears to the court that the purpose for which it is adduced has already been covered by other evidence, and that it adds nothing to that other evidence. The aim of this power to exclude unnecessary evidence would be to limit the length of proceedings, ensuring quality, not quantity of evidence.

4.54 A similar point has been covered in other jurisdictions. For example, Rule 403 of the U.S. Federal Code provides that evidence which is otherwise admissible (which includes hearsay, but applies generally) may be

excluded if

> "its probative value is substantially outweighed by ... considerations of undue delay, waste of time, or needless presentation of cumulative evidence".

**(b) Should there be judicial discretion to exclude statements made in contemplation of litigation?**

4.55 Another factor which might be relevant to the exercise of discretion could be whether the statement was made in contemplation of litigation and under legal advice. This was a factor taken into account by the Scottish Law Commission in recommending that precognitions should not be admissible.[21] The use of previous statements as evidence of the facts stated was the sole matter on which the Law Reform Committee divided in its recommendations. As referred to above[22] no special provision was included in the 1968 reforms on this point, but it was the one sticking point in the 1988 Act.

**(c) Should there be judicial control over the admissibility of the previous statements of witnesses?**

4.56 The Law Reform Committee were unanimous in the need for judicial discretion, most particularly in the situation where a witness is giving evidence and one party wishes to put in a previous statement, either confirming his testimony or inconsistent with it. Where the previous statement was consistent, the need for discretion was related to the desire to avoid the proliferation of evidence. Where the evidence was inconsistent, courts were concerned with the

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21. Scot. Law Com. No. 100 (1986), para. 3.57.

22. Para. 2.28.

abuse of the right to admit evidence to overcome the failure of the witness to come up to proof. The retention of discretion on this point would be appropriate in the event that the rule excluding previous consistent statements were to be retained despite abolition of the exclusionary rule.[23]

## D CONSIDERATION OF WHETHER ALL COURTS AND ALL PROCEEDINGS CAN UNIFORMLY APPLY THE SAME HEARSAY PROVISIONS.

4.57 It may be unavoidable that some courts or proceedings should have different provisions as to the admissibility of hearsay evidence. If so it would be necessary to provide exceptions to any preferred option for reform to take account of this.

4.58 A consistent advantage of applying the same reform to all courts is the public confidence generated by awareness that such courts apply the generally accepted rules of evidence. It eliminates an anomaly and removes unnecessary difficulties for legal advisers operating in different courts. It helps to avoid forum shopping which may arise simply because of the fear of the unfamiliarity with the rules of evidence which the court will apply. So to each of the advantages mentioned below in relation to the application of either of the main options should be added this advantage.

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23. See above, paras. 2.71-2.72.

(i) Magistrates' Courts

4.59 A major advantage of the abolition option for magistrates' courts lies in the simplification of the rule of evidence which it would secure. It avoids the complication of judicial discretion as to admissibility, and if coupled with guidance as to the weighing of hearsay might provide valuable assistance to magistrates.

4.60 If, on the other hand, reform of the 1968 Act were to be favoured, the experience of operating the Civil Evidence Acts 1968 and 1972 would provide some benefits of experience and familiarity as to how the inclusionary discretion operates. Refinement and simplification of the notification requirements might help to remedy the main defect of the present law.

4.61 The similarities between the administrative functions performed by magistrates in licensing matters and those of other administrative tribunals which are not subject to the strict rules of evidence, may suggest that it is necessary to preserve the freedom of this jurisdiction from constraints as to admitting hearsay evidence.

(ii) Family Proceedings

4.62 The policy underlying the Children Act 1989, section 96 and the 1990 Order demonstrates concern to protect the ability of the courts hearing children proceedings to hear relevant evidence which might otherwise be excluded by the hearsay rule. Statute has now endorsed the position which had been developing de facto in family proceedings over a long period, led by the influence and guidance of the wardship court.

Advantages of abolition of the exclusionary rule

4.63 It would seem to be particularly important to preserve the position secured by the Children Act 1989 in any wider reform of the hearsay rule. If abolition is favoured, that would of course render special provision for family proceedings unnecessary. The wardship court provides a useful precedent of non-application of the rule coupled with careful guidance as to the weighing of evidence of a hearsay nature which might prove a useful starting point in considering the value of guidelines applicable in other courts.

4.64 If other safeguards were to be added, the applicability of these safeguards to family proceedings would need to be tested against the criterion as to whether they added to or detracted from the ability of the courts to perform the more inquisitorial role demanded of them as well as the more common considerations as to whether such safeguards would add unnecessarily to cost and delay. The desire to avoid unnecessary complexity would suggest, for example, that notification procedures are otiose in family proceedings which are generally (except in magistrates' courts) conducted on affidavit evidence. In proceedings under the Children Act, it is proposed to provide for the exchange of witness statements at all levels of court.[24]

Reform of the 1968 Act

4.65 There would be considerable disadvantages in seeking to apply even a reformed exclusionary rule to children proceedings. This would mark a retreat from the

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24. Joint Consultation on the Draft Children Act Rules.

policy of the Children Act 1989 which commanded a large measure of support and arose from considerable unease following H. v. H and K v. K at the prospect of returning to the application of the 1968 Act.

4.66 A further disadvantage of reforming rather than abolishing the exclusionary rule, is that it would be necessary to consider widening the ambit of the abrogation of the hearsay rule to cover not just children proceedings but other family proceedings, for the reasons mentioned earlier[25] as to the essential similarity and overlap of hearings to determine issues relevant to both adults and children.

4.67 Reference has been made to the possible expansion of the definition of an "unavailable" witness in the 1968 Act as a way of enabling hearsay to be put before the court. This might provide a means for ensuring that evidence by children is admissible, without the fear of exposing them to the trauma of attending court and giving evidence. However unless the boundaries of first hand hearsay were significantly expanded to cover, for example, video-recorded evidence and unless the difficulty posed by the non-competence of young children to give sworn evidence were overcome, it would appear that this device would be of limited assistance, and might provoke much argument on evidential technicalities.

(iii) Courts to which the strict rules of evidence do not apply

4.68 We have referred to the existence of courts and

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25. See above, paras. 3.43-47.

tribunals to which the strict rules of evidence do not apply. The reasons for their freedom differ but relate to a common theme that the task imposed on the court, whether by statute or as the result of case law or inherently, necessitates the court or tribunal adopting a less legalistic form of procedure that allows evidence to be heard which might not be admissible under the strict rules. It is not within our terms of reference to consider the question of the approach to procedural rules adopted by tribunals. We would only comment that the recent developments in trial procedure which are happening in the civil courts are moving in the direction which tribunals have already secured and that it seems most unlikely that any imposition of the strict rules of evidence would be considered suitable to the procedure of such tribunals.

4.69 For this reason we consider that option 1 (reform of the 1968 Act) could not be appropriate for these courts, nor could the introduction of elaborate safeguards which light be unduly restrictive of the procedural approaches adopted by these courts and tribunals. The abolition of the exclusionary rule in Scotland effected by the 1988 Act does, on the other hand, extend that reform to virtually all tribunals, inquiries, arbitrations and other forms of adjudication.

(iv) Arbitration

4.70 It has been suggested that there is strong support for freeing arbitrations from the constraints of the strict

rules of evidence.[26] Abolition of the exclusionary rule would go some way towards achieving that desire, whereas reform of the 1968 Act would not.

### 4.71 Consultation Issues

**Consultees are requested to consider the questions posed in Part V of this paper concerning magistrates' courts, family proceedings, arbitration and the scope of civil proceedings.[27]**

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26. Letter (dated 19 January 1990) from Mr Justice Steyn, Chairman of the Departmental Committee on Arbitration Law, to Law Commission.

27. Questions 7-11.

## PART V

## PROVISIONAL CONCLUSIONS

5.1 There can be little doubt that the rule excluding hearsay is the most confusing of the rules of evidence, posing difficulties for courts, practitioners and witnesses alike. Because litigants need to know in advance what evidence they should assemble, it is of particular importance that the rules should be as easy to understand and to apply as is possible whilst continuing to serve the aims of evidence law. Any reform of the hearsay rule which succeeded in improving the clarity of understanding of its purpose and the manner in which it is to be applied would do much to improve evidence law as a whole.

5.2 Of all the arguments for and against the hearsay rule, and the discussion of the aims which it serves, the most weighty is the support it gives to the right to cross-examine. Cross-examination is seen as the best safeguard yet devised to assist courts in assessing the true probative value of evidence. But the form of the exclusionary rule and the exceptions and procedures which have been devised have proved to be ineffective in many different ways. It is inherent in the nature of an exclusionary rule that it may in important circumstances operate to exclude the best, the most relevant and the most necessary evidence. The exceptions which have developed have demonstrated the limitations of a non-discretionary rule and the procedures for notification have only served to demonstrate the continuing difficulty which courts and practitioners have in correctly identifying in advance the hearsay nature of evidence.

5.3 On the other hand, it is important to maintain awareness of the dangers of courts misunderstanding the probative value of hearsay evidence and some form of safeguard may be necessary to perpetuate widespread recognition of such dangers. The safeguards need to alert those involved in court proceedings to the dangers exacerbated by loss of the opportunity to cross-examine and the danger that parties may come to exploit tactical advantages by resorting to hearsay rather than direct evidence.

5.4 Our provisional view is that the weaknesses of the exclusionary rule against hearsay cannot be remedied just by way of a clearer explanation of the present law: the present law is irremediably difficult to understand and explain to the wide audience that is expected to comply with it. Secondly, we consider that there is a role for judicial discretion in the application of rules of evidence and that reform of the hearsay rule must retain this flexibility, despite the cost in terms of certainty which it does entail. Thirdly, we also consider that it is not justifiable to exclude relevant evidence solely because it is of a hearsay nature and that the interests of justice may be better served by providing the court with all the relevant information necessary to make an informed decision.

5.5 These factors have influenced our approach to the possible ways in which the rule could be reformed. In Part IV we have analysed two main options and two associated issues which we consider are most relevant in any reform of the rule. We have considered the way that other common law jurisdictions have approached reform of the hearsay rule and the differing dividing lines that have been drawn between categories of admissible and non-admissible hearsay. Whilst we have chosen to concentrate on two possible options for

reform, we include in an Appendix to this paper an outline of the present law and law reform proposals in those other countries.

## PROVISIONAL RECOMMENDATION

**5.6 Our provisional recommendation is that the best option for reform is abolition of the exclusionary rule, but that there should be some elementary and simple safeguards against abuse of the power to adduce hearsay. Consultees are invited to comment on the two options and the issues as to safeguards and the courts and proceedings to which reform should apply.**

## SUMMARY OF CONSULTATION ISSUES

**5.7 We invite the assistance of consultees in addressing the following matters.**

* <u>The Models for Reform</u>

(1) Should reform of the hearsay rule be by way of reform of the 1968 Act (Option 1) or by abolition of the exclusionary rule (Option 2)?

(2) If reform of the 1968 Act is to be preferred, which of the particular problems with the Act which have surfaced ought to be addressed, in addition to the main complaint as to notification procedures?[1]

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1. See above, paras. 3.50-3.71.

* **Safeguards**

(3) Are any safeguards needed at all for documentary, or oral, hearsay statements? If they are, given the sometimes competing desires for simplicity and fairness, which of the suggested safeguards would be most effective?

(4) What further development of costs sanctions might be provided as safeguards against abuse of the power to use or challenge hearsay evidence?

(5) If the hearsay rule is to be reformed what should happen to the rule against the previous self serving statements of witnesses?

(6) To what extent should the court be able to exercise control over the use of hearsay evidence?[2] In particular,

(a) Should there be judicial discretion to exclude superfluous or time wasting statements?

(b) Should the leave of the court be retained where it is sought to adduce previous consistent statements or any previous statements made in comtemplation of litigation?[3]

* **Application to all Courts and Proceedings**

(7) Are there any special considerations relevant solely to magistrates' courts' civil jurisdiction (apart from their family and licensing proceedings) which suggest the need for a different rule as to hearsay or different safeguards from those which would apply to other courts?

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2. See above, paras. 4.53-4.56.

3. See above, paras. 2.71-2.72.

(8) If reform of hearsay were to be by reform of the 1968 Act rather than abolition, should the provisions of the 1990 Order be preserved and extended to other categories of family proceedings?

(9) Is there any further need to retain the distinction between the wardship court's approach to hearsay and that which is to be applied by the other courts under the 1990 Order?

(10) Should arbitration proceedings continue to be bound by the strict rules of evidence as to hearsay (unless waived by agreement) in the same way as other civil proceedings unless the parties agree otherwise?

(11) Are there any respects in which the identity of courts or proceedings which are or are not governed by the civil rules of evidence needs to be clarified?

- **Questions on the procedural safeguards contained in the 1968 Act**

  **It would be particularly useful to have information from legal practitioners on the following points concerning the procedural safeguards put in place by the 1968 Act and the rules of court, in order to construct an informed view on the effectiveness of the present scheme of rules.**

(12) At what stage in the preparation for trial do you consider the need to serve hearsay notices?

(13) Do you seek agreement with the other side as to admissibility of hearsay statements in the way set out in the rules, or do you use a different, less formal approach?

(14) To what extent does the likelihood of the other party being unrepresented or not legally represented affect the manner in which notification of hearsay, or challenge to the use of hearsay, is handled?

(15) Are the difficulties in complying with the notification requirements due to difficulties in foreseeing the use of oral or written hearsay at the trial, or in correctly categorising evidence by reference to its hearsay features?

(16) How often does it happen that in the course of giving oral evidence at trial a witness gives unexpected hearsay evidence?

(17) From your experience, to what extent are the present rules under C.C.R. Order 20 and R.S.C. Order 38 observed?

(18) What is your view as to the relevance and practicality of those rules and their importance to regulating the use of hearsay evidence?

(19) Does compliance with the provisions of the Act in practice generate difficulties or cost or delay?

* **Other Matters**

(20) Is there a need to eliminate inconsistencies and areas of overlap between the notice provisions under the 1968 Act and other rules relating to pre-trial exchange of evidence and affidavit evidence?[4]

* (21) We invite views on any other points which we may have overlooked or which consultees may consider need to be further developed.

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4. See above, paras. 2.78-2.83 and 3.55.

## APPENDIX

## HEARSAY IN OTHER COMMON LAW JURISDICTIONS
## THE PRESENT LAW AND LAW REFORM PROPOSALS

### Introduction

6.1 This Appendix provides an overview of the manner in which hearsay evidence is regulated in other common law jurisdictions: the United States of America, Canada, Australia, New Zealand, Ireland, Scotland and Northern Ireland. The common law origins and development of the hearsay rule are the same for all these jurisdictions. As this has been described in Part II of the paper it is not repeated here. We look at the present law and, where applicable, at proposals made by law reform bodies in those jurisdictions for reform. We consider particular features of recent case law and statutory intervention which identify differences between those jurisdictions.

## UNITED STATES OF AMERICA

### The Present Law

6.2 Codification of evidence law began in the United States of America in 1939, and in 1945 a proposed Model Code of Evidence ("the Model Code") was published by the American Law Institute. It proposed to preserve the exclusionary rule against hearsay evidence, to recognise a number of express exceptions and to adopt a new definition of hearsay covering all active and passive conduct, both verbal and non-verbal. As regards the exceptions, the Model Code proposed a wider exception rendering admissible previous consistent and inconsistent

statements by the witness as truth of their contents. Hearsay statements would also be admissible where the declarant was unavailable, or present and subject to cross-examination. The term "unavailable" was defined in a way which went beyond the common law interpretation, taking in such issues as privilege and the relevance of considerations such as the expense and inconvenience of procuring the presence of the witness. Many of the other exceptions followed from the common law precedents.

6.3 The Model Code was not implemented, but was the basis for considerations which led to the eventual adoption of the Federal Code of Evidence. Two particular points on which the Federal Code adopted a more cautious approach concerned the admissibility of previous statements by witnesses, and the use of a widely defined ground of unavailability as sufficient justification for admitting hearsay evidence.

Federal Code

6.4 The United States has codified the rule against hearsay as part of a Code applying to civil and criminal proceedings which governs Federal Courts and courts exercising Federal jurisdiction ("the Federal Code"). More than half of the States have also adopted the Federal Code or a modified version of the Code into their state legislation.[1] The Federal Code has been incorporated into the revised Uniform Rules of Evidence (1974).

6.5 The Federal Code adopted with some significant modifications the Model Code approach. It affirmed the exclusionary rule against hearsay, defined its scope and listed the recognised exceptions. The definition of hearsay it adopted departed from the common law to the

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1. McCormick on Evidence (3rd ed., 1984), preface page vii.

extent that the Code explicitly excepted from the ambit of the rule certain types of statement such as admissions against interest and some prior statements of witnesses. It incorporated the common law position that parties could agree to waive the rule: a party who does not make a timely objection to hearsay cannot complain about its admission.[2] Despite the desire to codify all the recognised exceptions, the Code also provides for the admission of hearsay not covered by those exceptions, where admissibility is justified on grounds of its likely reliability and necessity for the hearsay statement to be admitted.

6.6 The Federal Code contains 27 specific exceptions and two general exceptions. These are arranged by reference to whether the declarant is available, the majority applying whether or not the declarant is available. Each of the categories is qualified by detailed criteria and in some cases by procedural conditions. The exceptions, in outline are as follows.

6.7 Exceptions where availability of declarant immaterial (Rule 803)

(1) statements describing a sense impression;
(2) excited utterance;
(3) statements as to existing mental emotional or physical condition;
(4) statements for the purposes of medical diagnosis;
(5) recorded recollection, made or adopted by the declarant when the matter was fresh in his memory;
(6) records of regularly conducted activity, e.g. made in the course of a regularly conducted business activity;
(7) absence of such a record as mentioned in (6) above;
(8) public records and reports;

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2. Rule 103.

(9) records of vital statistics, e.g. of births, deaths or marriages records or data compilations in any form if made to a public office according to law;
(10) absence of a public record;
(11) records of religious organisations;
(12) marriage and similar certificates made by an authorised person;
(13) family records;
(14) records of documents affecting an interest in property;
(15) statements in documents affecting an interest in property;
(16) statements in ancient documents;
(17) market reports and commercial publications;
(18) learned treatises;
(19) reputation concerning personal or family history;
(20) reputation concerning boundaries or general history;
(21) reputation as to character;
(22) judgment of previous conviction;
(23) judgment as to personal family or general history;
(24) other exceptions with equivalent guarantees of trustworthiness.

Unavailability

6.8 Rule 804 defines unavailability in a way which applies uniformly to all the recognised exceptions, and lists five circumstances in which a hearsay statement is admissible if the declarant is unavailable. The definition covers persons who are exempt from giving evidence on the grounds of privilege, or who refuse to testify, or who testify that they cannot remember, or who are unable to be present due to death, or physical or mental illness or infirmity, or whose attendance could not be secured.

6.9 The issue as to whether considerations of reliability or unavailability provided sufficient justification for admitting hearsay

evidence was a matter of particular controversy.[3] The definition of "unavailability" eventually adopted was more restricted than the Model Code had recommended. Two groups of recognised exceptions were devised: the first where the availability of the declarant was immaterial and the second where the hearsay statement was only admissible if the declarant was unavailable. The first group correspond to exceptions based on reliability as the primary justification, the second to cases where the exception is born of necessity.

6.10 The five exceptions in the group depending on unavailability (under Rule 804(b)) are

(1) former testimony,
(2) statements under belief of impending death,
(3) statements against interest,
(4) statements of personal or family history and
(5) other exceptions having equivalent guarantees of trustworthiness.

Grounds for new exceptions

6.11 The two general exceptions mentioned above, in Rule 803(24) and Rule 804(b)(5), did not come from the common law but were new provisions devised to enable courts to hear evidence of a hearsay nature which had not previously been recognised by courts but which could claim to be justified on grounds both of reliability and necessity. They are in similar terms. Rule 803(24) provides

"Other exceptions.
A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that

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3. McCormick op. cit., para. 326, page 916; R. O. Lempert and S. A. Saltzberg, A Modern Approach to Evidence, (2nd ed., 1983), pp. 499, 500.

(A) the statement is offered as evidence of a material fact;

(B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant."

Judicial Discretion

6.12 The Code maintains an important role for the court in determining whether the requirements of the hearsay exceptions contained in Rules 803 and 804 are satisfied. It reinforces the role of judicial discretion whilst providing a framework of guidance to courts as to how to interpret the discretion allowed to them, and assistance to practitioners in informing them of the grounds on which to argue for admissibility. Under Rule 403

"(1) The judge may in his discretion exclude evidence if he finds that its probative value is outweighed by the risk that its admission will

(a) necessitate undue consumption of time, or

(b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or

(c) unfairly surprise a party who has not had reasonable ground to anticipate that such evidence would be offered."

6.13 The Rules concerning hearsay evidence are not entirely freestanding within the Federal Code. Not only does evidence have to satisfy the conditions of the Code as regards its hearsay rules, but it must also comply with any other provisions of the Code that are

relevant e.g., it must be relevant,[4] it must be duly authenticated,[5] and meet the conditions of the original writing rule.[6] There must also be sufficient evidence that the declarant had personal knowledge of the matter asserted in the hearsay statement.[7]

6.14 The Code makes an exception for double or multiple hearsay if both the original and the included hearsay fall within recognised exceptions.[8] It provides that evidence as to the credibility of a witness whose hearsay statement has been admitted is admissible to the same extent as if the witness had given testimony.[9]

**CANADA**

**The Present Law**

6.15 A particular feature of hearsay law in Canada has been the effect of the decision of the Supreme Court in Ares v. Venner.[10] In that case the plaintiff sought to prove that a hospital doctor's decision on a medical treatment matter had been negligent. He put in evidence certain notes made by the nurses who had attended him. The defendant objected to the use of the notes as hearsay evidence. The

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4. Rule 401.
5. Rule 901.
6. Rule 1002.
7. Rule 602.
8. Rule 805.
9. Rule 806.
10. [1970] S.C.R. 608; 14 D.L.R. (3d) 4.

Supreme Court, upholding the trial judge who admitted the notes, stated that as the nurses who had made the notes were present at trial and available to give evidence, though not called, their notes met the test of trustworthiness and were correctly admitted in evidence. The Supreme Court referred to the minority view in Myers v. D.P.P.[11] that the boundaries and scope of the exceptions to the hearsay rule were not closed and that the courts had a discretion to expand them, providing the necessary conditions and circumstances obtained.

6.16 It has been suggested that the effect of the Ares decision is not clear.[12] It does not give guidance as to the conditions or circumstances it had in mind which would justify the creation of new exceptions. In particular, it is not clear whether the decision is confined to medical records or if it has a wider and more general application.

6.17 Several Provinces have modified the hearsay rule by statute and the pattern of the first statutory exceptions resembles developments in England and Wales recognising exceptions for certain documentary records and, following the decision in Myers, on business records. Such legislation is epitomised by section 35 of the Evidence (Ontario) Act 1970, which is similar to the Evidence Act 1938 (England and Wales), though it applies to both civil and criminal proceedings.

**Future Reform**

6.18 There have been two major surveys of the law of evidence: first by the Law Reform Commission in 1975 and secondly by the Federal/Provincial Task Force on the Uniform Rules of Evidence in 1982

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11. [1965] A.C. 1001 (H.L.)(per Lords Donovan and Pearce).

12. S. A. Schiff, Evidence in the Litigation Process (2nd ed., 1983), pp. 361-362.

("the Task Force"). Both bodies made recommendations within an overall codification exercise, neither of which have been implemented.

6.19 The Law Reform Commission published a proposed Evidence Code in 1975. Its proposals were particularly concerned to reduce the complexity of the hearsay rule. It proposed that the exclusionary rule should be maintained, that hearsay should be defined and a list of exceptions recognised by statute. It proposed that the Code should be liberally construed and that matters not covered should be determined in the light of reason and experience.[13]

6.20 The later Task Force recommended against replacement of the common law and its exceptions by an exhaustive code, but adopted the Law Reform Commission's recommendations as to the retention of the exclusionary rule. These recommendations have not yet been implemented, though they were accepted by the Uniform Law Conference and formed the basis for a draft Uniform Evidence Act (referred to as the Canada Evidence Bill 1982).

Unavailability

6.21 As in the United States, close consideration was given to the question of the availability of a witness whose hearsay statement was sought to be put in evidence. The Task Force came to a similar conclusion that whilst availability was relevant to certain exceptions, it was less of a criterion than considerations of necessity and likely reliability. The grounds of unavailability in the Canada Evidence Bill 1982 resemble those adopted under the Federal Code and reflect a more cautious attitude than had earlier been recommended. The Model Code (for the U.S.) and the Law Reform Commission (for Canada) had recommended that considerations of the importance of the issue and the

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13. Sections 2 and 3.

expense and inconvenience of securing direct oral evidence might be taken into consideration when deciding whether a declarant was unavailable. These recommendations were not accepted in the final versions of the Codes.

6.22 Acceptance of the greater value of first-hand rather than multiple hearsay can be seen in the Task Force's recommendation that in cases where admissibility depended on the unavailability of the witness, only first-hand hearsay was allowed.

Judicial Discretion

6.23 The Canada Evidence Bill 1982 reflects the decision in Ares by acknowledging the courts' general discretion to admit hearsay.

> "A court may create an exception ... that is not specifically provided for by (the Canada Evidence Bill) if the criteria for the exception sufficiently guarantee the trustworthiness of the statement."[14]

6.24 The draft legislation also reflects the Task Force's recommendation that there should be no discretion to exclude admissible hearsay (unlike the Federal Code) and it qualifies the parties' right to waive objection to hearsay by adding a requirement of the court's consent.[15]

6.25 The Task Force did not recommend that there should be a general statutory requirement of notice, though it urged all provinces to consider ways in which the danger of surprise could be minimised.

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14. Section 49(3).

15. Section 49(2).

The Present Law

6.26 Most States have enacted Evidence Acts supplementing or replacing certain common law exceptions to the hearsay rule.[16] Statutory intervention has concentrated on exceptions relating to documentary hearsay, and in particular statements recorded in other physical forms, such as on computers or microfilm. Such legislation is broadly similar to that contained in section 1, Evidence Act 1938 together with elements similar to those contained in the Civil Evidence Act 1968 as regards records, with some refinement to the scope of business records.

Future Reform

6.27 Most reform at State level has concentrated on resolving particular problems by the creation of new limited exceptions. More recently, however, the Australian Law Reform Commission have published two reports on evidence in Federal Courts and courts exercising federal jurisdiction.[17] The proposals apply to both civil and criminal proceedings, and the Commission hope that the draft Evidence Bill will be used as a model by the States and Territories.

6.28 The Commission recommended that the exclusionary rule be retained and that hearsay should be defined. First hand hearsay

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16. For a statement of the common law and statutory exceptions, see P. Gilles, Law of Evidence in Australia, (1987) Chapters 20-21.

17. Australian Law Reform Commission No.26 Evidence (Interim), (1985) and A.L.R.C. No.38 Evidence, (1987) (with draft Bill).

(meaning representations by persons based on personal knowledge) would be admissible in civil proceedings. Where the maker of a first-hand hearsay statement is unavailable, his statement will not be excluded if notice has been given to the other side. Where the maker is available, a first-hand hearsay statement will be admissible if it would cause undue expense or delay or would not be reasonably practicable to call the maker of the statement, but notice must be given to the other side and objection may be taken.

6.29 As regards second-hand or more remote hearsay, the Commission recommended that the rule should not to be relaxed except in a limited number of categories chosen on the basis of reliability and necessity (relating to business records, contents of tags, labels etc and reputation as to certain matters). The Commission recommended safeguards: the court would have the power to direct that witnesses be called and documents produced where hearsay evidence was led, and evidence as to credibility would also be admissible.[18]

6.30 The Commission recommended that judicial discretion should be limited in the interests of certainty, but incorporated a general discretion (applying to both civil and criminal proceedings) to exclude evidence.

> "Where the probative value of evidence is substantially outweighed by the danger of unfair prejudice or confusion or the danger that the evidence might mislead or cause or result in undue waste of time, the court may refuse to admit the evidence."[19]

6.31 The New South Wales Law Reform Commission has accepted (with minor changes) the recommendations of the Australian Law Reform

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18. Australian Law Reform Commission, Report No. 38, Evidence, (1987) paras. 127-132 and 142-147.

19. Clause 117.

Commission as the basis for State legislation.[20] One of the changes was to recommend the introduction of an inclusionary discretion, which courts could exercise where they found there to be reasonable grounds, in the light of all of the circumstances, to believe that the evidence was sufficiently reliable to be admitted.

**NEW ZEALAND**

**The Present Law**

6.32 The common law exclusionary rule against hearsay still applies in New Zealand, and the pattern of statutory intervention has been similar to that in other jurisdictions, in that the first legislation dealt with the creation of new specific exceptions to meet particular needs in the area of documentary records. The Evidence Amendment Act 1945 was the first major statutory intervention. It is closely similar to the Evidence Act 1938 (England and Wales), reproducing section 1 (documentary records, unavailability of witness) and section 2 (guidance as to weight).

6.33 The need to address in particular the issues of admissibility of oral hearsay and opinion evidence, and the effect of the Myers case in precluding further judicial development of exceptions prompted the Torts and General Law Reform Committee Report on Hearsay Evidence in 1967. Its recommendations influenced the Evidence Amendment (No.2) Act 1980 which extends to both civil and criminal proceedings.

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20. New South Wales Law Reform Commission, Evidence Report LRC No.56, (1988).

6.34 The Act does not define hearsay or codify its exceptions. It preserves the common law position and other statutory exceptions to the common law rule.

6.35 As regards the admissibility of documentary hearsay evidence in civil proceedings, the Act provides that any statement by a person made in a document and tending to establish a fact or opinion in issue is admissible if certain conditions are satisfied. These conditions are that the maker of the statement had personal knowledge of the matter and is unavailable (as defined in the Act) and that undue delay or expense would be caused by obtaining direct oral evidence, or that the document containing the statement is a business record made pursuant to a duty and relating to the business.[21]

6.36 The admissibility of oral hearsay is governed by section 7. An oral hearsay statement is admissible as evidence of the facts asserted if the maker of the statement has personal knowledge of the matters dealt with in the statement and is unavailable to give evidence.

6.37 There is discretion to exclude admissible evidence in jury trials if

> "the prejudicial effect of the admission of the statement would outweigh its probative value, or if, for any other reason the Court is satisfied that it is not necessary or expedient in the interests of justice to admit the statement."[22]

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21. Section 3.

22. Section 18.

6.38 Oral or documentary hearsay of fact or opinion is admissible by consent of the parties and the Act gives similar guidance as to the weight to be accorded to hearsay to that contained in the Evidence Act 1938.

### Future Reform

6.39 The working of the Evidence Amendment (No.2) Act 1980 is now under review by the New Zealand Law Commission.[23] It suggests five options for reform: minor clarification of the 1980 Act, including in particular clarification of the meaning of unavailability; full revision of the Act, dealing with issues such as the danger of manufactured evidence in civil proceedings, admissibility of first-hand evidence where the maker is unavailable and widening the categories of admissible second-hand hearsay; revision extending to aspects of the rule presently dealt with by other specific statutes (e.g. public documents) and under common law; a comprehensive review of the rule against hearsay, including such issues as the definition of hearsay and distinctions between it and res gestae, confessions and admissions, and the need for a residual discretion to admit hearsay evidence; or abolition of the rule in civil proceedings. Consultation is still continuing on this review.

## IRELAND

### The Present Law

6.40 There has been less statutory development of the rule in

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23. New Zealand Law Commission, Preliminary Paper No.10, Hearsay Evidence (June 1989).

Ireland than in other jurisdictions. Ireland does not have an equivalent to the Evidence Act 1938 but there are many statutory provisions creating exceptions for particular records such as bankers books, the registers of births, deaths and marriages, and to references to deeds, instruments and Acts of Parliament mentioned in contracts for the sale of land.

6.41 As with other jurisdictions, the rule against hearsay does not apply to administrative tribunals where the strict rules of evidence do not apply.

Future Reform

6.42 The Law Reform Commission issued a Working Paper in 1980[24] which recommended reform of the rule in civil proceedings. The Commission was of the view that as a general rule facts in issue were best ascertained by the viva voce examination of witnesses having personal knowledge of the matter. It considered that a rigid exclusionary rule was undesirable, but that hearsay should continue to be excluded where the witness is available to give evidence. The Commission followed up its 1980 paper by issuing a Report in 1988 confirming its recommendations[25]. Neither the 1980 Paper nor the 1988 Report have as yet been implemented.

6.43 In the draft legislation recommended by the Commission the exclusionary rule is retained as a statement of principle, but large exceptions to the rule are created by providing that hearsay is to be admissible if the witness is unavailable, if other parties are

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24. The Rule against Hearsay - Working Paper No. 9 (1980).

25. The Rule against Hearsay in Civil Cases (LRC 25, 1988).

notified, and if the statement is proved by the best available evidence. The court is given a discretion to exclude hearsay if it is of insufficient probative value or if its admission would operate unfairly against any party. No distinction is drawn between first-hand and multiple hearsay. Specific provisions were recommended securing the admissibility of particular categories of statements including prior inconsistent statements, witnesses refreshing memory, business and administrative records and admissions against interest. The Commission recommended that the out of court statements of children who are not competent to give evidence should not be admissible.

**SCOTLAND**

6.44 An analysis of the Civil Evidence (Scotland) Act 1988 is contained in Part IV of the paper. By section 2 the exclusionary rule against hearsay has been abolished. Both first-hand and multiple hearsay are covered as are representations both of fact and opinion whether oral or documentary or otherwise. The one element of the exclusionary rule which is retained is the inadmissibility of precognitions for all purposes; apart from this all previous statements are admissible as evidence both of the facts stated and may be used on the issue of the credibility of the witness.[26] Elementary safeguards are provided in section 4 by allowing additional evidence to be led. Clarification is given of the manner in which business documents are to be authenticated and adduced and as to the use of copy documentation.[27] Provision is made covering evidence that a statement is not contained in business records.[28]

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26. Section 3.

27. Sections 5 and 6.

28. Section 7.

6.45 The Act does not make specific reference to the manner in which courts should weigh hearsay, and there are no special rules for computer generated records. There is no requirement of notification of the intention to adduce hearsay and courts have no discretion to exclude or delay admissibility of such evidence. The reform applies to virtually all civil courts and tribunals.

## NORTHERN IRELAND

### The Present Law

6.46 The law in Northern Ireland resembles the position which existed in England and Wales when the Evidence Act 1938 was in force in all courts, with some more recent refinements adding new statutory exceptions. First hand documentary hearsay is admissible subject to restrictive conditions by virtue of the Evidence Act (NI) 1939, and the Civil Evidence Act (NI) 1971 makes a limited category of second-hand documentary hearsay admissible, namely records compiled under a duty and supplied by a person with personal knowledge of the information, and computerised records. There are notification requirements in the 1971 Act and the court has an inclusionary discretion.

### Future Reform

6.47 The rule against hearsay in civil proceedings is under review by the Law Reform Advisory Committee for Northern Ireland which has recently issued a Discussion Paper.[29] The criteria used by the Committee to test the present law and reform proposals were simplicity, certainty, economy of cost and fairness to the parties. These are applied to five options for reform. Of these five, four are not

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29. Hearsay Evidence in Civil Proceedings, (1990) Discussion Paper No. 1.

favoured by the Committee: retention of the present law, rationalisation of the existing exceptions, reform along the lines of current English law and outright abolition of the rule.

6.48 The option preferred by the Committee is abolition of the rule subject to safeguards. The safeguards they considered necessary were aimed at bolstering the courts' preference for use of the best evidence and for direct oral evidence where the witnesses was available. This they considered was similar to the reasoning underlying the approach recommended by the Scottish Law Commission[30] and the Irish Law Reform Commission[31] The Committee's proposals do not favour notification requirements but suggest that the aim of avoiding surprise at trial could be achieved by powers of adjournment.

6.49 The paper disapproves of the approach implemented in the Civil Evidence (Scotland) Act 1988 on the grounds that it does not provide safeguards and in particular does not safeguard the best evidence rule and the right to cross-examine. It is of the view that there is a fundamental principle that a party is entitled to insist on use of the best reasonably available evidence where such evidence is in dispute[32] and that the importance of cross-examination in eliciting the truth ought to be safeguarded[33].

6.50 Consultation is still in progress on the Committee's proposals.

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30. Scot. Law Com. No. 100, 1986, though not implemented in the way they recommended.

31. Working Paper No.9 - 1980, and The Rule against Hearsay in Civil Cases (LRC 25, 1988), not yet implemented.

32. Discussion Paper para 5.40.

33. Discussion Paper, para. 4.19.



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