

A CONSIDERATION OF THE RETENTION OF
THE HEARSAY RULE IN THE LAW OF EVIDENCE

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PREFACE

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CHAPTER ONEINTRODUCTION

"Naturally there will be those, as did Blackstone in his day, who consider the present state of the common law as the acme of perfection, and there will be those who, while grudgingly admitting that some things might be improved, will be fearful of making the situation worse, and certainly no better, by a major operation. If, however, courts are to continue to command respect and to preserve those things for which courts exist, there should be no policy of intellectual appeasement in a matter of such fundamental importance. Courage, common sense and sanity enough to retain the proved values of the past while recognising the practise needs of the present are essential. Time will prove whether the law gave too little and too late."¹

An attempt has been made in this thesis to deal with what is probably the most written about and fraught area of the law of evidence - consideration of the

1. White, C. "The Law of Evidence : Present and Future" (1942) 20 Canadian Bar R. 714.

retention of the hearsay rule in the law of evidence. Any consideration must take cognizance of the fact that it is "a matter of such fundamental importance". Any consideration must take account of the fraught nature of this issue and delve deeply into the writings and developments on this issue in this country and elsewhere. Finally any consideration must recognize that the issue of retention goes to the foundation of our Anglo-American system of trial procedure and to the oral and adversarial nature of such procedure.

"A distinctive and cherished ideal of our trial tradition is that evidence in the main should be limited to the statements in court to witnesses who have observed the facts and are produced for cross-examination".¹

The English and American approaches to this issue have been chosen for closer scrutiny because the English approach has been the most radical to date and because the American approach has been of the nature of reform but of a far more conservative nature. They also offer stark contrasts to the South African approach to the issue which is mired in the past and in comparison with the English and American writing poorly argued and analysed.

It should become obvious that the question to be addressed is not so much whether the rule should be

1. Cross on Evidence (5 ed) 1976 p 479.

retained or reformed, but essentially to what extent the rule should be reformed. This is true of all three systems analysed.

Throughout I have attempted to draw heavily on prevailing attitudes in England, America and South Africa to show the rationale behind the rule and to show those issues that were and still are the force behind the continued existence of the rule. I have dealt in detail with analyses of the so-called "hearsay dangers" because, as I shall try to show, those are the "lowest common denominator" in any consideration of the retention of the rule. I have tried to deal in detail with attitudes of the proponents of fundamental reform and those who propose less fundamental reform. I have dealt with the legislation that exists in both England and America - England because of its tremendous interest as an example of fundamental reform; the United States because of its less radical approach and specifically because of its two catch-all sections that have done much to develop the scope of hearsay exceptions.

In the first chapter I have looked in detail at the views on and reforms of the rule in England. In the second I have done the same of the law in the United States. In the third I have looked at the Roman and Roman-Dutch Law of hearsay and looked in detail at the prevailing views of the rule in South Africa together with those reforms that have taken place. In the fourth and final chapter I have attempted to make some theoretical conclusions about the degree of retention of the hearsay rule by drawing on the law that has been set out in the previous three chapters.

Perhaps it is appropriate to begin my approach to this difficult and vexed question with the following statement :-

"I suppose there never was a more slapdash, disjointed and inconsequent body of rules than that which we call the Law of Evidence. Founded apparently on the propositions that all jurymen are deaf to reason, that all witnesses are presumptively liars and that all documents are presumptively forgeries, it has been added to, subtracted from and tinkered with for two centuries until it has become less of a structure than a pile of builder's debris."¹

1. C.P. Harvey QC - The Advocates Devil p 79
quoted by Mr. Justice Nicholas - "The Abolition
of the Hearsay Rule" p 59.

CHAPTER TWOENGLISH LAWINTRODUCTION

The approach of this chapter is to deal firstly with English law attitudes to the value of and rationale behind the hearsay rule, secondly to consider English Law attitudes to reform of the law generally, thirdly to analyse the reform that has taken place in the English civil law in the past twenty years, and fourthly to analyse the reform that has taken place in the English criminal law up to, and including, the Police and Criminal Evidence Act 1987 and to analyse certain more recent journal articles.

It is hoped by fairly detailed analysis to illustrate the approach taken by the English law with regard to this vexed question and to use these legal developments as a basis to view a retention or abolition of the hearsay rule in a South African context.

DEFINITIONS

In order to establish a basis from which to work it is necessary to quote a few definitions as stated by the foremost English authorities. Halsbury defines hearsay as follows :-

"Hearsay evidence in its legal sense is evidence given by a testifying witness

of a statement made on some other occasion, when it is intended as evidence of the truth of what was asserted"¹

Cross :-

"... a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact stated"²

and Phipson :-

"Former statements of any person whether or not he is a witness in the proceedings, may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted in them ..."³

The most expansive definition, and one that appears to be preferred by writers in England is that enunciated by the Privy Council in *Subramanian v Public Prosecutor*⁴ :-

"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the

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1. Laws of England (4 ed) Vol. 17 (1975) para 53.
 2. Cross on Evidence (5 ed) (1976) p 462.
 3. Phipson on Evidence (12 ed) (1976) para 625.
 4. [1956] 1 WLR 965.

evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of statement but the fact that it was made."

RATIONALE

English writers are fairly consistent, in the most modern treatise written on the topic of hearsay evidence, in viewing the genesis of the rule being that unreported statements are untrustworthy evidence of the facts stated therein. These are, however very different grounds for expressing the hearsay rule advanced.

The first reason, and that most often advanced, and most widely supported, is that the person making the statement originally is not under oath nor subject to cross-examination. The statement is thus unreliable. The maker's lack of veracity, defective memory, perception and narration cannot be tested by cross-examination. Further his demeanour while under such cross-examination cannot be observed.

"Whoever has attended to the examination, the cross-examination, and re-examination of witnesses ... has observed that a very different shape their story appears to take in each of these stages ..."¹

1. per Bayley J - Berkling Peerage Case (1811) 4 Camp 401 @ 405.

The importance of the inability to cross-examine hearsay testimony has been expressed as follows :-

"A person who relates hearsay is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities; he entrenches himself on the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author."¹

Heydon² expresses the fear that light and ill-considered statements are made more readily out of court and behind a person's back, than in court or to his face.

Cross³ is of the opinion that the absence of opportunity to test the maker of the statement through cross-examination is "the best all embracing reason that can be given for the rule."

Legal historians seem to be divided between those who believe the rule developed due to the distrust of the capacity of the jury to evaluate hearsay evidence, and those who believed the rule developed due to the inequity of depriving a party of the opportunity of cross-examining the maker of the statement. It would seem, however, that the rule developed at the same time as the modern form of English trial.

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1. per Chancellor Kent - Coleman v Southwick 9 Johns 150 (1812).
 2. Evidence - Cases and Materials (2 ed) (1984) p 308.
 3. Cross on Evidence (5 ed) op cit p 479

Tapper¹ in Cross on Evidence contrasts the reasoning process involved in the court (and jury) accepting direct testimony, as opposed to that involved in accepting hearsay testimony. With direct testimony the jury is asked to believe that a witness did see the event, that he has remembered the event correctly, that he is not ambiguous in relating that event to the court, and that his testimony is sincere. Sincerity may be induced by the sanction to the oath, but he argues that the principal guarantee for these factors is the ability of the opposition to test these factors by cross-examination. The jury must thereby be satisfied that the witness believes the event occurred and that such belief is justified in all the circumstances.

Tapper argues that all the dangers normally present in these conclusions are naturally multiplied when hearsay statements are placed before the jury. Here the jury must be satisfied that the witness believes he heard a third party say an event occurred, that this witness' belief was justified; that the third party believed that the event occurred; and that that third party's belief was justified. Here there are none of the safeguards that apply to direct testimony. There is no opportunity to test this third party by cross-examination and there is a diminution of those safeguards with respect to the party testifying because there is no direct link between the testimony and the proposition that results from it.

This point is emphasised by Fagelson who states :-

1. Cross on Evidence (6 ed) (1985) p 457.

"... hearsay statements are not subject to testing by cross-examination and that, being of "second hand" nature, inaccuracy may creep into the repetition of the statement. Furthermore, if the maker of the statement does not himself testify, the tribunal of fact may not be able to determine whether, for example, he was speaking ironically. In addition, hearsay evidence is notoriously easy to fabricate".¹

Ashworth and Pattenden submit that the following can be described as the major justifications for the hearsay rule : hearsay evidence is second-hand and open to misreporting; the absence of the maker of the statements means that the statement cannot be tested by cross-examination; admission of hearsay may lead to unnecessary proliferation of evidence and the consequent lengthening of trials; that admission of hearsay could lead to manufactured evidence.²

It is thus felt that hearsay requires a special exclusionary rule because it results in increased dangers of impaired perception, bad memory, ambiguity and insincerity, that cannot be tested by cross-examination.

The second reason later given for excluding hearsay is that it is in conflict with the best evidence rule.

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1. "The Problem of Reliable Hearsay Evidence" 92 LQR (1976) 26.
 2. "Reliability, Hearsay Evidence and the English Criminal Trial" 102 LQR (1986) 293 at 294.

The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested by cross examination and the light which his demeanour would throw on his testimony is lost."¹

Legal historians however feel that there is little historical connection between the exclusion of hearsay and the best evidence rule. Further it would seem that if the maker of a statement is dead or unobtainable, the hearsay report is in fact the best evidence and on that basis should be admitted. On this basis, an out-of-court statement made soon after the event in question is probably more reliable than are made in court years later affected by poor memory, and interest caused by the case.

A further reason given for the exclusionary rule is the fact that a jury would attach undue weight to the hearsay testimony. Again legal historians have concluded that this was not a reason for the establishment of the rule. It was only in the 19th century that distrust of the jury is mentioned in the cases. It can be argued on the one hand that the weakness of hearsay evidence would be obvious as a matter of common sense to the better educated modern jury (and that in difficult cases the court may give explicit directions), and on the other hand that modern education may not be helpful in weighing the

1. per Lord Normand - Teper v R [1952] 2 All ER 447 @ 449.

value of hearsay and that the property qualification in the past may have ensured that "hard-headed" men sat on juries.

A fear that the evidence given as a hearsay statement may be concocted is also given as a reason for the exclusionary rule. However Cross¹ argues that often evidence of indisputable value is excluded through the working of the rule.

Finally, there is the danger of inaccuracy through repetition. This applies more particularly to oral hearsay because if A narrates what B told him C said there is the danger firstly that the precise wording of C's statement will be detrimentally affected by the repetition and secondly its purport may further not be before the court. This risk is generally reduced in the case of written hearsay.

Considering the legal writings of the major English authorities, it would thus seem that the major rationale behind the rule against hearsay is the inability to test the hearsay statement through cross-examination. Despite this, the English authorities dislike the extensive ambit of the rule and feel that the rule is absurd in many respects. A telling comment is that of Heydon² :-

Whatever the strength of the arguments against admitting hearsay, there is no doubt that the [common law] ... has

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1. op cit p 479.
 2. op cit p 309.

many disadvantages. The rule is unjust where it excludes hearsay evidence of a person who is dead or unavailable, or unidentifiable. It means that the case will be decided without taking into account all the available evidence, imperfect though some of it may be. The need to call direct rather than hearsay evidence adds to the cost of proving facts which are not really in dispute. The rule tends to confuse witnesses by preventing them from telling their story in a natural way. The present law is very complicated ... Finally, the evidence excluded is often highly reliable and would be thought convincing by ordinary men in their everyday affairs ... The rule may operate harshly in preventing the accused from clearing himself in reliance on hearsay ..."¹

And again²

The difficulties and absurdities of the hearsay rule are matters of such common knowledge that they hardly need to be stated. The rule excludes evidence that is sometimes extremely convincing. It applies, in general, even though the maker is not available

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1. op cit p 309.
 2. Williams : "The Proposals for Hearsay Evidence: [1973] Crim Law Review 76.

to give evidence ... so that there is no question of putting pressure upon the proponent to get better evidence. It excludes not only evidence of oral statements but documentary evidence. It excludes not only statements by non-witnesses but even previous statements by witnesses. It operates even against the defence. It fragments the evidence given by a witness. And it is immensely involved with many exceptions."

REFORM OF THE LAW

In England there has been severe criticism of the hearsay rule. Both Lord Reid in Myers v DPP¹ and Lord Diplock in Jones v Metcalfe² have described the rule as absurd. Tapper argues that the rule developed along with the jury and was concerned to prevent the jury being undermined by evidence that could not be tested by cross-examination. Now that the vast majority of cases are heard without a jury and

"... a more literate and technologically advanced society provides and depends upon more reliable methods of keeping track of what has happened than can possibly be provided by the unassisted collection of witnesses, even though exposed to cross-examination by an opponent."³

He argues that the hearsay rule should be retained where such records are not available in order to ensure that testimony relies on personal knowledge and not merely reporting of what the witness has been told by others. Thus he argues the business of reform must be to prevent the rule from causing unnecessary difficulties, but at the same time preserving its efficacy.

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1. [1964] 2 ALL ER 881 at 889.
 2. [1967] 3 ALL ER 205 at 258.
 3. Heydon - op cit p 475.

It has been argued, inevitably, that the hearsay rule excludes reliable evidence. Fagelson argues that :-

"Despite the various 'dangers' attendant on the exception of hearsay in general, there are cases in which statements technically within the definition of hearsay are nevertheless 'fair, clear, reliable and sensible' and whose exclusion would serve no rational purpose ..."¹

A useful example of this, that is often quoted, is R v Rice². Here the Court of Criminal Appeal upheld the admission of an airline ticket for the purpose of showing that the person whose name was on the ticket was in fact a passenger on the flight in question. The Court admitted the ticket as

"The relevance of that ticket in logic and its legal admissibility as a piece of real evidence both stem from the same root, viz., the balance of probability recognised by common sense and common knowledge that an air ticket which has been used on a flight and which has a name upon it has more likely than not been used by a man of that name ..."³

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1. "The Problem of Reliable Hearsay Evidence" 92 LQR (1976) p 26.
 2. [1963] 1QB 857.
 3. at 871. See also Guest S "The Scope of the Hearsay Rule" 101 LQR (1985) 385 at 386, and see Gardner (1968) 13 FLR 345.

The court did however stress that it was necessary to distinguish between the document's relevance and its probative significance because

"... the document must not be treated as speaking its contents for what it might say could only be hearsay. Thus a passport cannot say "my bearer is X" nor the airticket "I was issued to"."¹

As has been pointed out by Fagelson, for example,² the judgment did not constitute an exception to the hearsay rule, but instead suggested that the rule should not apply to evidence as free of the hearsay dangers as the ticket appeared to be.³

There are two different approaches to reform. The first is by common law and the second is by statute.

In the past reform has been carried out by the courts. This had the advantage of proceeding step by step and permitting of the retraction of a step in the wrong direction. However this does not provide a foundation of security. It is well suited to situations in which the rule is particularly prone to cause difficulty, and to those situations in which inability to cross-examine creates grave risks. However, it is less suited to preventing deliberate manipulation in such situations or in providing a

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1. *ibid.*
 2. "The Problem of Reliable Hearsay Evidence" 92 *LQR* (1976) 26 at 27.
 3. however see Cross on Evidence (1 ed) p 467.

secure foundation of certainty for the new techniques of record keeping.

In *Sugden v Lord Leonarde*¹ Justice MR suggested that new exceptions to the hearsay rule could be developed by the courts. The Master of the Rolls argued that there were underlying principles in each of the exceptions to the rule. These were that the case must be one in which there is difficulty in obtaining other evidence, the declarant must be disinterested in the sense that the statement was not made in his interest, the declaration must be made before a dispute arises or before litigation is contemplated, and finally the declarant must have had a special means of obtaining that knowledge not normally possessed.

This is an interesting approach to the search for a basis for reform of the law. However, as has been pointed out by Cross for example², this approach taken by the Court of Appeal in the nineteenth century has been swept aside by *Myers v DPP*.³ Furthermore reform in England of the rule and the exceptions to the rule have taken an altogether different course.⁴

It would seem that common law reform aims to prevent the rigid application of the rule while at the same time preserving its efficacy. For example, where evidence occurred so long ago that no one who can speak from personal knowledge is left alive, the law had created a number of exceptions where the statement was made by a deceased person.

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1. (1876) IPD 154.
 2. Cross on Evidence at p 466.
 3. [1964] 2 ALL ER 881 and see below.
 4. Similarly, a different approach has been taken in the United States.

However, since the case of Myers v DPP¹ there has been little likelihood of reform of the hearsay rule by way of the development of the common law exceptions. Lord Reid in this case recommended that the legislature intervene to reform the law because the rule was too wide and diverse, but also too interconnected, for arbitrary cases to alter the law in any coherent manner. added to which litigation would be purely fortuitous.

Reform of the English law began with the Evidence Act of 1938. The statute was confined to civil cases and applied to documentary hearsay. It was supplemented by the Criminal Evidence Act 1965, designed specifically to deal with the admissibility of business records in criminal cases in response to Myers v DPP. A more thorough survey was undertaken by the Law Reform Committee, which recommended replacing the 1938 Act by a comprehensive statute dealing with oral and documentary evidence, thus providing a completely statutory foundation for the admission of hearsay in civil proceedings. This was accomplished by Part I of the Civil Evidence Act 1968. The Civil Evidence Act 1972 extended the regime of the 1968 Act to statements of opinion. The Criminal Law Revision Committee reported on Evidence in 1972, and made far reaching recommendations which have partially been implemented as the Police and Criminal Evidence Act 1984 which makes more limited provision.

While not here dealing with the legislation in the field of criminal law reform² it is worthwhile noting the following comments written recently after

1. [1964] 2 ALL ER at 881.
2. See below.

the Police and Criminal Evidence Act of 1984 with reference to the effect of Myers v DPP

"... it might be thought that ... relaxation [of the hearsay rule] would be prevented by the House of Lords decision ... In fact considerable relaxation of the rule has been engineered by the courts, but the decisions constitute not so much a retreat from Myers as a partial abandonment of the hearsay/non-hearsay analysis of evidence. Courts have rarely mentioned Myers ... let alone attempted to distinguish it. Rather, they have increasingly turned to reliability as the direct criterion of admissibility."¹

The same writers submit that there has been a re-orientation in criminal cases with the movement being pragmatic rather than doctrinal. Judges have referred to the inconvenience of excluding hearsay especially when it is the best evidence available, or the only evidence available. These writers urge what they refer to as the functional approach - the admission of hearsay wherever cross-examination would not assist the court in assessing the reliability and wherever the declarant is available for cross-examination although he has forgotten the facts of his out-of-court statement. There is, they submit,

1. Ashworth, Pattenden - "Reliability, Hearsay Evidence and the English Criminal Trail" 102 LQR (1986) 292 at 326.

emerging in English decisions, a set of "common sense" propositions about the reliability of various types of evidence which should assist the court in assessing the value of hearsay. These are (a) documentary evidence is more reliable than (b) inculpatory statements are more reliable than exculpatory (c) conduct is more reliable than words (d) non-assertive statements are more reliable than assertive statements (e) statements close in time to the event are more reliable than those far removed, and (f) statements made in the midst of excitement are more reliable than others.¹

It would seem, thus, despite Myers and subsequent legislative activity that common law reform has gone on inevitably.

Heydon² postulates several broad approaches to reform. The first is to adopt the technique of the Criminal Evidence Act 1965, that is, to enact statutes on a piecemeal basis to destroy particular anomalies forced on the courts by the common law rule. The second is to enact a hearsay code containing a broad ban on hearsay together with clearly stated exceptions. The third is to abolish the ban on hearsay completely - the judge would then exclude evidence of too little weight, but the remainder of the evidence would be left to the jury in the same way as direct evidence.

Phipson³ puts the English courts' attitude conclusively as follows :-

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1. ibid pp 326-328.
 2. op cit p 349.
 3. op cit para 360.

"The decision in Myers v DPP indicated that the judges were not prepared to scour the rule of any of its technical incrustations, or relax any of its rigidity, a task which was said to be one for the legislature. Had the House of Lords seen fit, hearsay evidence might have been admitted if it was, for example, "intrinsically reliable", which would seem the sort of flexible concept with which the common lawyer is well experienced. Judicial boldness was wanting however, and the result of the invitation to parliament and of the practical necessities of litigation in the modern world led to statutory reform."

Implied Assertions

An area of hearsay evidence that is considered by English and American writers to be at the boundaries of the rule is that of implied assertions. The question arises as to whether conduct, which was not intended to be assertive, is hearsay if reliance is placed on the conduct in question by someone other than the witness who is testifying.¹

This question arose because of remarks by Baron Parker in Wright v Doe d Tatham.²

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1. see for example Cross and Wilkins - An Outline of the Law of Evidence (5 ed) p 129 and see Guest S - "The Scope of the Hearsay Rule" 101 LQR 385 at 388 et seq
 2. (1837 7 Ad & El 313 at 387.

"... the supposed conduct of the family or relations of a testator, taking the same precautions in his absence as if he were a lunatic; his election in his absence, to some high and responsible office; the conduct of a physician who permitted a will to be executed by a side testator; the conduct of a deceased captain on a question of sea-worthiness, who, after learning every part of the vessel, embarked in it with his family; all these, when deliberately considered, are, with reference to the matter in issue in each case, mere instances of hearsay evidence, mere statements, not on oath, but implied in or vouched by the actual conduct of persons by whose acts the litigant parties are not to be bound."

Tapper¹ argues strongly that the hearsay rule should not be extended into the area of implied assertion. An out-of court statement that a ship was sea-worthy by the captain would be hearsay but this does not mean that evidence of his conduct, which would appear to indicate a belief in the sea-worthiness, should be hearsay. Furthermore it is not clear such an analysis of hearsay would end.

"Every human action can be presented as an implied assertion of the actor's belief in the satisfaction of the conditions under which he would be be

1. op cit p 472 - 474.

preposed to perform it. Any such analysis would inevitably lead to confusion since much hearsay so extensively defined would go unrecognised, and injustice would occur on account of the anomalies which would flood into the problem of the admissibility of evidence ... It is submitted that it is better to accept the dictates of common sense and to restrict the definition of implied hearsay to that implied by conduct itself intended to be assertive."¹

Stephen Guest looks at the question of implied assertions from two different views.² The first view he calls the "definitional approach". He takes Cross's definition of hearsay and looks to see whether the notion of implied statements, as taken from cases is consistent with this definition. His conclusion is that the definition would have to be extended to cover situations developed by the cases, especially those examples given in Wright v Doe d Tatham. His suggestion is as follows :

"The reformulation of Cross's rule would then have to be as follows:
'Conduct (including stating) other than that of a person while giving oral evidence in the proceeding is inadmissible as evidence of any state of mind to be inferred from that

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1. ibid.
 2. "The Scope of the Hearsay Rule" 101 LQR 385.

conduct."¹

He argues that the rule as thus formulated would logically result in stating being seen as merely one of many types of conduct from which a state of mind could be inferred.

The second view Guest takes is the rationale approach. He concludes that the rationale behind the rule is that hearsay does not permit testing by way of cross-examination to eliminate possibilities of concoction and distortion, and suggests that the possibility of concoction is the clearest danger in hearsay evidence. He thus concludes that

"It would be an elaborate kind of deception to induce others to infer

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1. op cit at 400. The example Guest gives here to show the absurdity of this extension of the rule is as follows : "A, who has a knife, is observed to follow B in a stealthy manner. Coming quickly up behind B he yells "I intend to kill you, B" and then delivers a mortal wound. The report of A's statement offered as evidence of his state of mind in his trial for murder is clearly hearsay ... Now compare this with a report of A's being observed to do precisely the same thing but in the absence of his yelling out "I intend to kill you, B". The report of A's behaviour is then offered as evidence of his state of mind, the court being asked to infer from A's behaviour that he has an intention to kill. This cannot be hearsay. Nevertheless if we follow the logic of the cases ... once stating is seen to be just one of the types of conduct from which states of mind can be inferred the hearsay rule becomes too wide."

that you had a particular state of mind from actions which appear not to be directly to the point of your deception ...

We use the term "lie" ... in reference to stating but not in reference to other forms of conduct ... The distinction is not sharp for obviously there is a gradation from the most obvious form of concoction, lying, to other forms of deception by way of acting other than stating. But it is clear that a line must be drawn somewhere and it is submitted that it be drawn here; it is a line that can be drawn safely within the classic formulation and would operate to exclude the clearest cases where both concoction and distortion are possible."¹

Although this chapter is intended to deal primarily with English law it may be useful at this point to consider an illuminating American view on the issue of implied assertions. John Macguire in his article "The Hearsay System : Around and Through the Thicket"² also considers the problem of extending the definition hearsay to remove danger inherent in such testimony. Like Guest he focuses on the rationale behind the hearsay rule and concludes that in respect of implied assertions the hearsay dangers involved are untested

1. op cit at 404.
2. 14 Vard L. Rev 741 (1961).

perception and the memory of the hearsay declarant. Unlike Guest he feels that the definition of hearsay should be extended, and suggests the following extension of the rule, to cover the possible dangers in such testimony.

"Evidence of conduct (behaviour) by any person, although not constituting a statement of the version of a matter it is offered to prove, is hearsay evidence if so offered as to call for reliance upon untested perception or memory of such person."

Macquire defines conduct in this suggested extension to include both action and inaction.

It will be submitted in the Conclusion to this thesis that Macquire's approach is to be preferred as it attempts to remove inherent hearsay dangers from such implied assertions.

REFORM OF THE CIVIL LAW

Very generally, the effect of the Civil Evidence Act 1968 is that, provided certain statutory conditions are fulfilled, the court is obliged to admit all first hand hearsay and it has a discretion to do so even though those conditions are not fulfilled. Further, provided certain statutory conditions are fulfilled, the court is obliged to admit documentary records, and has a discretion if the conditions are not met (records may contain first or second hand hearsay). The most important feature of the legislation is that, in civil cases, all exceptions to the rule against hearsay are statutory.

Other features of this act are to allow second hand hearsay statements to be received if contained in a record; to prevent the party against whom the hearsay statement is tendered from being taken by surprise by introducing a notice procedure. While the act gives the court wide inclusionary discretion, it has no exclusionary discretion except when the maker of the statement is called as a witness.

Tapper¹ defines "first hand" and "second hand" hearsay as :-

"By a 'first hand' hearsay statement is meant a statement made by A and proved either by his direct oral evidence, or by the production of the document in

1. op cit p 482.

which he made it, or by the direct oral evidence of a witness who heard him make it. If a witness swears that A told him that B had said something, or if a document asserts that the author was told something by others, or that he is repeating what he read in another document, the hearsay statement proved by the witness or narrated in court by the author of the document is 'second hand'."

Section 1(1) of the Act provides that

"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."

Thus the act has not created a large exception to the rule, but has abolished the rule as hitherto known in civil cases.

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 in which direct oral evidence by him would be admissible."

This in effect admits all hearsay evidence subject to certain provisions. The first condition is that of S 2(3)

"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."

The subsection has the effect of restricting hearsay evidence admissible under S2 to 'first hand' hearsay.

The second condition on which hearsay evidence is admissible under S2, when the maker of the statement is not called as a witness, is that one of the five reasons, specified in clause 1(b) of the section, for not calling him should be present. These are that he is dead, or beyond the seas, or unfit by reason of his bodily or mental condition to attend as a witness, or that despite the exercise of reasonable diligence, it has not been possible to identify, or find him, or that he cannot reasonably be expected to have any recollection of matters relevant to the accuracy of the statement.

S4 and S5 of the Act deal with admissibility of records. Only documents which are, or are part of, a record can be admitted under S4(1). The main purpose of this subsection is to ensure admissibility of hearsay statements which are not "first hand" i.e. they are not made in a document, nor proved by direct oral evidence of the maker, or proved by a witness who heard or otherwise perceived them being made. Documentary hearsay statements are admissible, 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 supplied by a person who had or may reasonably be supposed to have had personal knowledge. In the Act there is no definition of "record". To the dismay of the English writers the courts have adopted a restrictive interpretation of "record". In H v Schering Chemicals [1983] . ALL ER 849 Bingham J held that research reports, articles and letters in medical journals did not qualify. In Savings and Investment Bank Ltd v Casco Investments (Netherland) BV [1984] 1 ALL ER 296 Peter Gibson J held that a report on a company by Board of Trade inspectors did not qualify, and held that it should not resort to a selection of material submitted together with comments and conclusions.

Tapper¹ comments :-

"The liberalising aim of the Evidence Act 1938 was frustrated by restrictive interpretation, and led to dissatis-

1. op cit p 494.
2. [1983] 2 ALL ER at 849.

faction eventually culminating in the passage of the 1968 Act. The approach now adopted by judges at first instance seems to be in some danger of duplicating that entire saga, though fortunately it is not yet too late for the Court of Appeal to reaffirm the intention of the legislature by adopting a broader approach to the meaning of record in S4."

Some commentators go further and attack the duty requirement of the section¹

"The reliability of a record derives from the fact that it was made in the course of ordinary repetitive business practice, not from any duty."

Heydon comments on the criticisms of the duty requirement by stating that :-

"[t]hese criticisms seem unfair and pedantic. The spirit of the Act is a reliance on common sense. Hearsay conservatives may fairly say that the dangers of 'common sense' are not appreciated : hearsay radicals may fairly say that while the Act is far too elaborate and unnecessarily complex;

1. Newark & Samuels - "Civil Evidence Act 1968" (1968) 31 MLR 668 at 670.

that the draftsmans faith in common sense is too qualified. But the radical critics of the Act cannot have it both ways. They cannot say both that greater and procedurally simpler admissibility of hearsay should be accepted and that greater safeguards should exist. The fact is that all the fears of the radicals will be rendered groundless by a competent court and all the conservative fears made real by incompetent courts. A court proceeding in the light of common sense will understand that some records are intrinsically reliable, some need cross-checks, some compilers and recorders must be cross-examined as to their experience, competence and responsibility."¹

S5 of the Act deals with computerised records. The Law Reform Committee had regarded the difficulty of the 1938 Act in dealing with the modern system of record keeping as one of the defects of the 1938 Act.² S10(1)(c) defined document as including

"any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the

1. op cit p 357.
2. Cmnd 2964 para 16 (a).

aid of some other equipment) of being reproduced therefrom."

S5 further states :-

In any civil proceedings a statement contained in a document produced by a computer shall, subject to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible ...

This provision is subject to conditions of great complexity which basically require that the computer had been used regularly for processing information of the form in question, that the computer had been working properly for the period in question and that the information contained in the document should be of the sort ordinarily supplied.¹

The provisions have proved unsatisfactory since there is a clash between the provision of S4 and S5. S5 makes no requirement that any person at any stage of the process need have personal knowledge of the accuracy of the information from which the document derived.¹ The provisions have attracted criticism on account of their needless complexity and their omission to cater for the most common cause for inaccurate computer output, inaccurate input. (The result has been improved legislation in England - the

1. A very detailed discussion on the subject is available on p 498 of Tapper op cit.

Police and Criminal Evidence Act 1984 - limited as yet to criminal proceedings).

S9 has specifically preserved certain common law exceptions; S4 has codified them due to the fact that, firstly, second hand hearsay is admissible under them in circumstances differing from those in S4 and S5 and secondly because notice procedure is inappropriate in these cases. Subsection (1) and (2) put on to a statutory basis the common law rule relating to the reception of evidence of informal admissions and those relating to reception of public documents. Subsections (3) and (4) of the section perpetuate the common law rules rendering admissible (i) statements tending to establish reputation of family tradition for the purpose of proving pedigree, marriage, public or general rights.

Minor provisions of the Civil Evidence Act 1968 include Section 2(3). This section contains a proviso under which a statement made while giving oral evidence in some other legal proceedings, either civil or criminal, may be proved in any manner authorised by the court. This testimony in former proceedings was admissible at common law, if between the same parties. Now, however, this former testimony is admissible even if the parties are different. A party desiring to give a statement made in former proceedings in evidence under this section must serve notice to that extent on all other parties. Further the trial judge must give leave for the statement to be given in evidence.

One of the most important innovations of the 1968 Act is the requirement, under Section 2, that notice be

given when seeking to introduce a hearsay statement. A party desiring to give in evidence a statement admissible under S2 must serve notice of his intention to all other parties to the proceedings.

Notice procedure is set out in the Rules of Court made by Ord 38 rr 21-6. The object of the notice procedure is to prevent surprise and to provide an incentive for parties on whom the notice is served to agree to the reception of the hearsay statement without calling the maker. Provision is made in Ord 38 r 26 for service of a counter-notice requiring that named person to be called as a witness. If that person is available as a witness and is not called, the statement will generally be inadmissible, subject to the discretion of the court. If the counter-notice was unreasonable, Ord 38 r 32 provides for the disallowance of the costs of the counter notice. The procedure departs from the usual rule that no party is required to disclose in advance the evidence he intends to adduce at the trial. It would seem to be the price to be paid for the admission of hearsay evidence not open to cross-examination. The notice procedure has been criticised on a number of grounds. It is cumbersome; it removes the advantage of surprise, and the rule that evidence need not be disclosed before trial. A party wishing to issue a counter-notice does not know whether to ask for the presence of the maker without knowing what the other evidence will be. McInerney J argues¹ that :-

1. Harding D E "Modification of the Hearsay Rule" (1971) 4 ALJ 531 at 566.

"In my experience most practitioners really get to the bones of a case the night before it begins, and it is then that they discover all the relevant evidence, it is then that the SOS's are sent out for the missing witnesses, and how are you going to accommodate the facts of justice life ... to the necessity of notice and counter-notice, I don't know."

It would seem however that late discovered evidence that is relevant can be dealt with by the inclusionary discretion. Lord Diplock¹ states that the notice procedure was adopted because :-

"... we thought it was important that there be no discretion to exclude hearsay if certain safeguards were provided. When you are preparing a case you must know what evidence will be admitted when you come to trial, and that is why our approach was that we shall give discretion to admit but give no discretion to exclude if the necessary conditions of ensuring, as far as one can, the reliability of the hearsay evidence produced are complied with."

An illustration of the enforcement by English courts of

1. ibid p 569.

the notice procedure is that of Ford v Lewis¹. No notice had been served in respect of a hearsay statement; the reason given by the defendant's counsel for not doing so was the fear that plaintiff's witnesses might trim their evidence to meet the defendant's statement. The trial judge admitted the statement. A new trial was ordered by the appeal court holding that it would not be right for the court to exercise the Ord 38 r 29 discretion in favour of someone who had deliberately flouted the rules.

Two further sections have to be discussed in this overview of the 1968 Act. The first is Section 6(3). This states that the court may have regard to all the circumstances from which the accuracy or otherwise of the hearsay statement may be inferred. This deals with contemporaneity of the statement to the relevant occurrence or facts dealt with and whether the maker of the statement had any intention to deceive. The second section is Section 7. This section enables assessment of the credibility of the maker of a statement introduced under Section 2, or the supplier of information contained in records put in under Section 4 and 5. This enables two types of evidence to be adduced; firstly, evidence to support or destroy this person's credibility, secondly, evidence that shows that this person made a previous inconsistent statement.

It is now necessary, briefly, to deal with comments and criticisms by the English writers of the 1968 Act.

1. [1971] 2 ALL ER 983.

England's foremost author on evidence, Sir Rupert Cross, has the following to say :

It would be hard to maintain that the Act provides a perfect solution to the hearsay problem, but it is submitted that the solution it does provide is ... the best that has appeared to date ... It must be confessed, however, that it would be unwise to set too much store by a solution to the hearsay problem which only applies to civil cases; the great merit of the American and Canadian solution is that they also apply to criminal proceedings."¹

Tapper² advances further criticisms. He submits that the absence of a definition of "record" is leading to an over-restrictive application of Section 4. He suggests that as the act places more weight on probative value than admissibility the act should go further in allowing second hand hearsay. He criticises the computer provision saying :-

"It is doubtful if any special provision is necessary at all, but if it is to be retained it would be sensible to introduce some check on the reliability of the information fed into the machine, and preferably, in the

1. op cit p 508.
2. op cit p 506.

course of doing so, to simplify the conditions for admissibility. It might also be desirable to restrict the width of the definition of a computer."¹

Alistair Kelman and Richard Sizer in The Computer in Court² illustrate the difficulties of the law dealing with computers, especially as raised in R v Pettigrew³. In this case the Court of Appeal held that a print-out produced by the Bank of England's computer was inadmissible. The successful submission was that no person had personal knowledge of what emerged from the computer. The issue was the number on bank notes and the numbers could never have been said to be personal knowledge of anybody because they were recorded purely by operation of the machine. The difficulty raised in Pettigrew applied to the 1965 Act and has been cured by the provisions of the 1984 Act. It remains illustrative of the minefield of difficulties raised by even the most meticulous draftsmen when dealing with computer produced evidence.⁴

Criticism is also levelled at what is regarded as an elaborate notice procedure. The criticism is that parties are not always advanced enough in their preparations for trial to be able to give timeous

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1. ibid p 507.
 2. (1982).
 3. [1980] 71 C App Rep 39.
 4. See Williams [1980] Crim L.R. p 239-240, and Smith - "The Admissibility of Statements by Computer" [1981] Crim L.R. P 387-391.

notice - the prescribed time is usually 21 days before trial.¹

1. See the arguments of McInerney J and Lord Diplock supra.

CRIMINAL LAW REFORM

The Civil Evidence Act 1968 applies exclusively to civil proceedings. Until recently the criminal law regarding hearsay evidence was governed by the common law rules as amended by certain statutes, especially the Criminal Evidence Act. The 1965 Act has now been repealed by the Police and Criminal Evidence Act 1984.

"The Police and Criminal Evidence Act 1984 has transformed this subject [hearsay in criminal proceedings] from one primarily determined by common law rules to one dominated by statute. The Act, unlike the Civil Evidence Act 1968, does not in terms supplant the whole of the common law, but it has taken over so much of the ground, that the old rules of the common law now govern only a very small part of the field, although since the legislation employs a number of concepts developed by the common law, so it will for some time have an influence upon the interpretation of the new law."¹

(The major area effected by this act is the law relating to confessions which is outside the scope of this discussion).

It is necessary here to discuss, briefly, the Criminal

1. Tapper op cit p 533.

Evidence Act 1965 because it illustrates where changes have been made in the 1984 Act and differences between the English Civil and Criminal Law.

The Criminal Evidence Act 1965 was passed in response to the decision of the House of Lords in Myers v DPP¹. This decision held that motor manufacturers records were inadmissible as evidence of the numbers on cylinder blocks placed in engines by workmen who were no longer identifiable, or could have any recollection of the facts of the matter. The wording of the Act is similar to that of S4 of the 1968 Act but it is confined to trade or business records kept for trade or business purposes. In one important respect the 1965 Act differs from S4 of the 1968 Act. It is more permissive in that it does not require proof of any duty on the part of the compiler of the record, or of intermediate suppliers of the information to the compiler. Under the Act certain computerised records may come within its scope, but others may be excluded because they do not comply with the requirement of personal knowledge on the part of those supplying the information to the compiler, as in R v Pettigrew.²

The Police and Criminal Evidence Act 1984's relevance to this discussion is that it repeals the Criminal Evidence Act 1965. The new provisions are not as radical as those envisaged by the Criminal Law Revision Committee, or in fact those enacted by the

1. [1964] 2 ALL ER 881.
2. Supra.

Civil Evidence Act. The 1984 act applies only to documentary hearsay and operates in addition to, and not in substitution for, the common law. It does enact special provisions for documents produced by computer.

Mirfield comments that "[t]here has been no root and branch reform of the law of hearsay ... nothing has been done about oral hearsay."¹

S68 of the 1984 Act applies to documentary records. The main import of the section is that admissibility of documents as evidence of its contents is determined by reference to duty on the part of the compiler and not its character as a business record. The relevant subsection reads as follows :

"(1) Subject to section 69 below, a statement contained in a document shall be admissible in any proceedings as evidence of any fact stated therein of which direct oral evidence would be admissible if -

(a) the document is or forms part of a record compiled by a person acting under a duty from information supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of

1. "The Evidence Provisions" [1985] Crim L.R. 574.

any of the matters dealt with in that information."

Leave is required where a statement "setting out the evidence has been prepared for the purpose of any pending or contemplated proceedings."¹ Mirfield comments that

"Presumably the court will be astute to ensure that section 68 is not used to protect potential witnesses from cross-examination and will be well aware of the possibility of manufactured evidence being put before it."²

Generally, however, S68 contains no leave requirement although it is broadly equivalent to section 4 of the Civil Evidence Act 1968.

The Act has regard to the special nature of criminal proceedings. A special qualification is, even though the evidence satisfies these provisions, the court still has a discretion to exclude such evidence by refusing leave to give such evidence unless the admission be in the interests of justice bearing in mind the contents of the statement, and prejudice to the accused due to lack of opportunity of cross-examination. This would seem to offer a discretion to the court to avoid manufactured false evidence which

1. Schedule para 2.
2. "The Evidence Provisions" [1985] Crim L.R. 574-575.

the Criminal Law Revision Committee regarded as a serious problem. Also included is a provision from the Civil Evidence Act which directs attention in assessing weight to the presence of any motive to misrepresent.

Special provision has been made in S69 for the admission of computer records.¹ The provisions are very important.

"(1) In any proceedings, a statement in a document produced by a computer shall not be admissible as evidence of any fact stated therein unless it is shown -

(a) that there are no reasonable grounds for believing that the statement is inaccurate because of improper use of the computer;

(b) that at all material times the computer was operating properly, or if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents."

Mirfield comments on section 69 saying that :-

1. See generally : Walters & O'Connell - A Guide to The Police and Criminal Evidence Act 1984 pp 87-88.

"This is, unlike section of the 1968 Act, comparatively simple, and it is to be hoped that the rules of court (which have yet to be made) will not contain arcane complexities like those to be found in Section 5".¹

It is to be noted that this Act does not define the word "computer" and the word must be taken to be that definition in common useage. This will have the advantage of allowing the meaning to keep up with technological developments.

(It is interesting to note that the British Government consulted experts such as Colin Tapper when drafting the legislation. He suggests that the sole condition of admissibility be "that the computer should have been operating properly at all times".² Walters and O'Connell suggest that this formulation has been largely followed in the Act).³

It would seem that a hearsay statement produced by a computer must satisfy the requirements of both S69 and S68. Thus no such statement can be admitted unless the supplier of its information had personal knowledge of its truth.

Tapper¹ makes the following cogent comments about what is probably potentially the most important area of

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1. op cit p 576.
 2. Computers and the Law op cit p 29.
 3. op cit p 88.
 4. op cit p 560.

hearsay development.

"The increasing use of word computerised word-processing systems for the production of documents, and the widespread diffusion of personal computer systems does however mean that more and more documents are going to become subject to S69, and many of them will not bear on their face any indication of having been produced by a computer. It is suggested that this phenomenon also points in the direction of abandoning special provision for documents produced by computers, and towards that of subjecting them to exactly the same regime as any other documents."

THE PROPOSALS OF THE CRIMINAL LAW REVISION COMMITTEE

It is necessary to deal in some detail at this stage with the proposals of the Criminal Law Revision Committee, for although the Committee's recommendations have not been entirely heeded, the recommendations are highly relevant to a discussion about the retention of the hearsay rule. It will be necessary to quote extensively from the 11th Report 1972.

Paragraph 229 states :-

"We recognize that there is a case for preserving the rule against hearsay

evidence in criminal trials. The principle arguments are related closely to the essential features of criminal trials as compared with civil trials. These are (i) the fact that in a criminal trial the evidence is mostly given orally, (ii) the fact that trials on indictment at least, once begun, are ordinarily continued without adjournments for further inquiries and (iii) the fact that there is little by way of preliminary proceedings ... The high standard of proof required for a conviction ... is also an important consideration. Another argument which has much concerned us is the danger of manufactured evidence ... We have no doubt this is a real danger ..."

Nevertheless the Committee felt that the hearsay rule in criminal cases should be abolished and replaced by a system similar to that in the Civil Evidence Act. The Committee felt that the existence of the 1968 Act was a reason for having something similar for criminal trials.

Paragraph 236 states :-

"The scheme which we propose ... is as follows

- (i) to make admissible any out-of-court statement if (1) the maker is called as a witness or (b) he cannot be called because he is dead [etc]...

- (ii) to make admissible statements contained in certain kinds of records if the information in the statement was supplied by a person having personal knowledge of the matter in question and the supplier (a) is called as a witness, (b) cannot be called for one of the reasons referred to or (c) cannot be expected to remember the matters dealt with in the information.
- (iii) to make special provision for the admissibility of information derived from computers.
- (iv) ...
- (v) to provide that, subject to certain safeguards, out-of-court statements shall be admissible if the parties so agree.
- (vi) to clarify the law providing that hearsay evidence shall be admissible only under the provisions mentioned, under any other statutory provision or under the common law rules specifically preserved by the Bill.

The Revision Committee did however limit the reception of hearsay statements. Paragraph 237 makes it clear that only "first-hand" hearsay is admissible. Further a statement will not be admissible by virtue of the impossibility of calling the maker unless the party seeking to introduce the statement has given notice to

other parties of intention to do so setting out the particulars of the statement and setting out why the party cannot call the maker. Finally, a statement, made after the accused has been charged, by a person who is unavailable to testify will not be admissible at all.

Despite the Committee's very liberal stance concerning the removal of the hearsay rule it does make the following comment that is very important in any consideration of the retention or rejection of the rule.

"The preservation of the principle of orality in criminal trials seems to us particularly important. We are not concerned to argue that the English system is the best system; but since this system is clearly going to be preserved in its essentials, it would be wrong to disrupt it by giving the parties complete freedom to choose between proving their case by oral evidence given by witnesses of the events in question and proving it by second-hand evidence of these events. To do so would alter the character of trials and be likely to confuse juries. The essence of our proposed scheme is to supplement the oral evidence by hearsay evidence which is likely to be valuable for the ascertainment of the truth and cannot be given because of the restrictions in

the present law."¹

The Committee appears to have had the greatest difficulty with overcoming manufactured evidence or at least providing for safeguards against such evidence. They were concerned with the possibility of the defence producing a statement, of a witness now "unfortunately" unavailable, that exculpates the accused. The Committee had this to say at paragraph 240 :-

"Some think that to admit hearsay evidence would not greatly increase the possibility of manufactured evidence which already exists with first-hand evidence : others think that the danger would be much greater. In our view it must be taken that the danger, although not great enough to require the rejection of any hearsay evidence exculpating the accused in a way as suggested, or the rejection of hearsay evidence in general, is great enough to require and justify the imposition of the proposed restriction as to giving notice of intention to give the statement in evidence and that as to statements made after the accused was charged."

A final important comment made by the Committee was on

1. para 239.

the question of admitting hearsay at the discretion of the court i.e. allowing useful hearsay otherwise inadmissible and excluding dangerous hearsay. The Committee rejected this option on four grounds. First, there would be considerable divergence of opinion and therefore practice between courts. Secondly, courts would tend to allow hearsay evidence freely for the defence but not for the prosecution - the Committee was opposed to making distinctions between the parties. Thirdly, it would make preparation for cases tremendously difficult because parties would have no advance idea of whether the court would admit the hearsay statement. Fourthly, in summary trials the court would have to hear the evidence before deciding whether to admit it.

There was considerable response to the proposals of the Committee. The Bar Council attacked the recommendation setting out the following objections to the proposals :-

"the tribunal of fact in the vast majority of criminal cases is a bench of magistrates and, where they are not involved, it will be, substantially, a jury, the stakes involved in criminal cases are higher than in civil, in that a persons's reputation and frequently, his liberty are at risk; and the atmosphere is more highly charged, particularly in "complaint-orientated" cases such as sexual offences or certain

categories of assault."¹

The Bar Council felt that because of these reasons witnesses would be far more willing to give unreliable or perjured evidence in criminal trials than civil proceedings.

".... it would provide an opportunity to the mendacious to give lying evidence which could not be tested satisfactorily. If such an opportunity were to be provided, we are sure it would be taken and, if taken, that in a high proportion of cases it would succeed in its purpose."²

Discussion and comment on the proposals comes from the liberal side of the spectrum too. Williams in "The Proposals for Hearsay Evidence"³ argues that the four reasons given for not abolishing the hearsay rule completely are not sufficient. He cites the example of France where there is no hearsay prohibition and yet courts prefer to hear the witnesses. The president of court advises the jury that certain evidence, such as hearsay, has little or no weight. He suggests that it is hard to imagine the court accepting statements from unidentifiable persons accusing the defendant, under the proposals of the Revision Committee.

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1. Bar Council Memorandum on the 11th Report para 176.
 2. para 177.
 3. op cit.

"The proposal is more likely to help the defence than the prosecutions because, owing to the difference in the burden of proof, a slight piece of evidence favourable to the defence may win an acquittal, whereas the same evidence offered for the prosecution will not convict the defendant unless it is solidly supported by other circumstances.' But there are cases where a statement by an unidentifiable or unfindable person may have considerable weight, in the general context of the other evidence, and where it should clearly be considered by the jury."

Academic writers also seem equally divided on reform of the Criminal Law. Cross¹ protests against criticising liberalisation on the basis that it would not be safe to convict on the basis of such evidence alone. He argues that in most cases the hearsay statement would be of significance taken together with other evidence and that although it is sometimes done it cannot be safe to convict on oral evidence of one witness alone, let alone on the basis of one hearsay statement.

Phipson and Elliot succinctly state the problem as follows :-

1. op cit p 575.

"Although most of the scheme has not given rise to controversy, not so with the central proposal to allow a statement to be given if the maker is unavailable for the reasons specified. This has been objected to because of its tendency to allow anonymous and probably manufactured evidence, e.g. the Crown using a letter from an unfindable person who claims to be an eye-witness to the matter, or the defence using a statement made by someone who is untraceable but who claims to have seen the accused at a place miles away at the relevant time ..."¹

One final comment, and one which raises extremely serious problems for any proposed reform of the hearsay rule in South Africa for example, comes from Ashworth and Pattenden.² The writers remark that a general survey of cases tends to show that extension of hearsay admission "tend to favour the prosecution".³ They remark further that "[t]his leads to the question whether defendants' rights are diminished by the movement towards increased admissibility." The writers point to the American principle of right to confrontation and the accused's right to confront the witness and test his evidence

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1. Manual of the Law of Evidence (Iled) (1980) p 281-282.
 2. op cit.
 3. ibid.

with respect to accuracy of perception, memory and verbal communication of what actually happened. They argue that the hearsay rule protects this right whereas the recent English decisions detract from this. The writers conclude this part of their argument stating :-

"... any reform of the hearsay rule, whether clandestinely by the courts or expressly by the legislature, ought to be preceded by an examination of its effect on defendants and on the balance between prosecution and defence in the trial process."¹

1. ibid.

CONCLUSIONCIVIL LAW

There is very little written comment available on the working of the Civil Evidence Act 1968. In fact the dearth of writing and cases is remarkable. One comment, however, is that of A. Zuckerman :-

"The Civil Evidence Act 1968 did not abolish the rule against hearsay, it merely made some hearsay admissible, subject to certain procedural safeguards. In practice, however, the effects of the Act have been more radical, for parties nowadays rarely object to hearsay or take procedural points. It is therefore unusual to have a judicial pronouncement on the interpretation of this Act." (discussing Savings and Investment Bank v Casco Investments [1984] 1 ALL ER 296)¹

This is in sharp contrast to the comments made shortly after the publication of the Act in 1968, where it was foreseen that the strict procedural requirements of the Act and the notice requirements would result in less hearsay being admitted in evidence than under the newly repealed Evidence Act 1938.

1. "Evidence - Hearsay in Civil Proceedings" ALL ER Annual Review (1984) 152.

Altogether one is left with an impression that the requirements of this section may normally relegate the use of hearsay to "fringe" facts which the opposite party might be willing to concede at the trial ... in other words, ... the hearsay provisions of the Act will be less used in practice than might be supposed. That is not to say that some such safeguard was not necessary in respect of evidence which cannot be tested by cross-examination at the trial; it perhaps merely illustrates that less reform is not as simple as is sometimes suggested."¹

It is suggested that the 1968 Act has in fact created a whole new approach to the hearsay question of admissibility. In the sophisticated English legal system it is working well, as is shown by the lack of controversy over the procedure and safeguards of the Act. The reforms thus carried out, although initially undertaken carefully to enlarge the scope of hearsay admissibility, have in fact vastly altered the landscape of hearsay evidence in civil matters. This suggestion is supported by the comments of P. Murphy :-

"Although the Act is often spoken of as an "exception" to the rule against hearsay and arguably is so, it is more

1. Blum, W. "Civil Evidence Act 1968 - I" Vol 112 The Solicitors' Journal 13 Nov. 1968 891 at 892. See also Samuels, A. "Civil Evidence Act 1968 in action" - Vol 114 The Solicitors' Journal 20 Nov. 1970 857.

realistic to say that it has created a wholly new rule for civil proceedings in favour of the admission of hearsay, while maintaining a sceptical vigilance over the weight of evidence so admitted ..."¹

CRIMINAL LAW

In criminal law the Police and Criminal Evidence Act 1984 has allowed in documentary hearsay and hearsay produced by computers as evidence. Its effect is best described as follows :-

"The Police and Criminal Act 1984, ... is destined to change the way we think about some of the most significant subjects within the law of evidence. In one statute, Parliament has provided for much wider use of documentary hearsay evidence in criminal cases."²

Murphy comments further :-

"At length, the [Act] recognised that hearsay contained in documentary records or produced by computers should, with adequate safeguards, be admissible in criminal proceedings. Though less comprehensive than the Civil Evidence Act the 1984 Act represents a

1. A Practical Approach to Evidence (2 ed) p 157.
2. Murphy P. op cit in the Preface.

major change in the philosophy of criminal evidence and allows juries to be confronted with the most reliable kinds of hearsay evidence. It will be surprising if it is not the thin end of the wedge.¹

He finally adds :-

"It is probable that, as the new rules prove successful and the fears of misleading juries subside, further modernisations of the rules pertaining to criminal cases will be contemplated."²

There can be no doubt that English reforms have gone very far in admitting hearsay evidence. In general, too, at least in civil matters, the law seems to be working satisfactorily. In criminal matters, however, and oral hearsay is still not admissible unlike in civil actions.

It will now be profitable to review American reforms and to indicate the glaring dissimilarities between that system and the English system. More comprehensive comments on the suitability of the English type reforms in a South African context have been left to the conclusion at the end of this thesis.

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1. ibid p 158. See also McFarlane, G. "Police and Criminal Evidence Act 1984 - IV" Vol 129 The Solicitors' Journal 15 Feb 1985 p 111; Rice, R. (ed). "Police and Criminal Evidence Act 1984 : Implementation of Part VII" Vol 135 New Law Journal 1985, p 1189.
 2. Ibid p 228.

CHAPTER THREEUNITED STATES LAWINTRODUCTION

There is an extraordinary wealth of material in the form of text books, journal articles and case law in the United States about the hearsay rationale, proposals for reform and arguments for differing theoretical approaches to the retention of the hearsay rule.

The proposed approach of this section is to set out a variety of definitions of hearsay postulated by American writers; set out a brief historical perspective on the rationale; establish an accepted rationale for the hearsay rule and its exceptions; discuss a few of the more exciting and thought provoking approaches taken by American writers; investigate the arguments put forward for retaining or reforming the hearsay rule; and finally consider the reforms carried out by the Federal Rules of Evidence and certain of the more controversial rules as an exercise in illustrating how cautious reform as opposed to large scale abolition can be effective, as an approach to a consideration of the hearsay rule.

Much of the writing, and indeed many of the most sophisticated arguments about the hearsay rule, deal with the connection between hearsay and the jury. I have attempted to extract those elements from the discussions that apply evenly to jury and non-jury

trials as this discussion is centred ultimately on possible approaches in a South African context.

A further issue that often arises in United States cases and articles is that of the effect on liberalisation of the hearsay rule of the Sixth Amendment to the Constitution which requires basically that an accused is entitled to confront his accusers in court. The implications for an extended admission of hearsay testimony is obvious, but its extent has created tremendous difficulties in the United States. However the discussion has a more limited application in a South African directed context.

DEFINITIONS

Hearsay is defined in the United States, as in England, in many ways. Wigmore defines hearsay as follows :-

"... the hearsay rule, as accepted in our law, signifies a rule rejecting assertions offered testimonially, which have not been in some way subjected to the test of cross-examination."¹

Lempert & Salzburg define hearsay as :-

1. Evidence Vol 5 (1975) para 1362 (but also see note 1).

"... an out-of-court "statement" offered for the truth of the matter asserted"¹

McCormick defines hearsay as :-

"evidence of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein and thus resting for its value upon the credibility of the out-of-court assessor"²

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1. A Modern Approach to Evidence (1982) p 357.
 2. McCormick on Evidence quoted in Gardiner - Criminal Evidence (1978) p 68.

RATIONALE

It is not necessary to duplicate the opening chapter on the rationale behind English Law hearsay. Suffice it to say that the United States writers on hearsay follow a very similar historical view of hearsay. McCormick¹ for example traces the development of the hearsay rule as follows :-

"The development of the jury was, no doubt, one important factor ... [However] it is not until this period of the gradual emergence of the witness testifying publicly in court that the consciousness of the need for exclusionary rules of evidence begins to appear. It had indeed been required even of the early witnesses to writings that they could speak only of "what they saw and heard" and this requirement would naturally be applied to the new class of testifying witnesses ..."

He does conclude by saying however :-

"Whether the rule against hearsay was, with the rest of the English Law of evidence, in fact "the child of the jury" or the product of the adversary

1. para 244 at 576-81.
2. *ibid.*

system may be of no great contemporary significance. The important thing is that the rule against hearsay taking form at the end of the seventeenth century was neither a matter of "immoral usage" nor an inheritance from the Magna Carta but, in the long view of English Legal History, was a late development of the common law."

This historical perspective is also reflected in Morgan's article "Hearsay Dangers and the Application of the Hearsay Concept."¹ He asserts that there has never been a stage when English or American courts rejected all hearsay evidence and argues that once all hearsay was received without question. Further as parties to litigation began to take advantage of offering information in court and the jurors came more to rely on that testimony and not personal knowledge, more emphasis was placed on the weakness of hearsay testimony. In the late sixteenth century more emphasis was put on value rather than admissibility. By 1700 however hearsay was inadmissible except for corroboration of other evidence, emphasising comparative value rather than admissibility. It was during the period in which the adversary system was finally adapted that the hearsay rule was adopted.

1. 62 Harvard Law Review 177 (1948).

"Before the opening of the eighteenth century, then, we find three reasons for excluding hearsay. The court and jury must base their findings upon what the witness knows and not upon what he is credulous enough to believe; the witness must make that knowledge known under sanction of fear of the consequences which falsehood will bring; and the adversary must have the opportunity to cross-examine. There is no suggestion that any one of these is less necessary where the trier is a court than where it is a jury."¹

MODERN RATIONALE - NEED FOR CROSS-EXAMINATION

That being the historic rationale for the rule, what of modern US attitudes? American writers and jurists have advanced a wider range of impressive and closely argued justification for both the retention, and modification of the hearsay rule. The major justification for the retention of the rule is that wherever possible evidence placed before court must be tested by cross-examination. This approach obviously parallels closely English Law attitudes to the rule. Wigmore states²

"[T]he rule aims to insist on testing

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1. ibid at 182, 183.
 2. I Wigmore S 8c quoted in Dallas County v Commercial Union Assurance Co. 286 F2d 388.

all statements by cross-examination, if they can be ... No one could defend a rule which pronounced that all statements thus untested are worthless; for all historical truth is based on uncross-examined assertions; and every day's experience of life gives denial to such an exaggeration. What the Hearsay rule implies - and with profound verity - is that all testimonial assertions ought to be tested by cross-examination, as the best attainable measure; and it should not be bordered with the pedantic implication that they must be rejected as worthless if this test is unavailable."

The importance of cross-examination to all approaches to the hearsay problem cannot be denied. Elaborate attempts have been made to construct theories that will negate this factor, but every satisfactory discussion returns to the fundamental assumption - to negate the fundamental dangers that exist in hearsay evidence¹ the evidence should generally be excluded because such evidence is not subject to the medium which normally exposes testimonial inaccuracies i.e. hearsay evidence is not normally subject to cross-examination.

1. See below - the section dealing with the "hearsay dangers".

Wigmore asserts that the value of cross-examination can be divided into two parts. First is what he calls "proof by direct examination of the same witness, contrasted."¹

"The fundamental feature is that a witness, on his direct examination, discloses but a part of the necessary facts. That which remains suppressed or undeveloped may be of two sorts, (a) the remaining and qualifying circumstances of the subject of testimony, as known to the witness, and (b) the facts which diminish the personal trustworthiness of the witness."²

The second part Wigmore calls "proof by other witnesses called by the opponent contrasted."³

"The first is that the cross-examination immediately succeeds in time the direct examination. In this way the modification or the discredit produced by the facts extracted in more readily perceived by the tribunal ... But, chiefly, the advantage is that the cross-examined witness supplies his own refutation. If

1. op cit para 1368 at p 36.
 2. ibid.
 3. ibid.

qualifying or discrediting answers are extracted from him, they are the more readily believed. No other witness' credit intervenes to add a contingency of mistake."¹

Dealing with exceptions to the hearsay rule Wigmore argues that there are two considerations that allow admission of hearsay evidence as exceptions - circumstantial probability of trustworthiness and necessity for the evidence. Necessity suggests that either "the person whose assertion is offered may now be dead, or out of the jurisdiction, or insane, or otherwise unavailable for the purpose of testing."² Circumstantial probability of trustworthiness suggests that "under certain circumstances the probability of accuracy and trustworthiness of statement is practically sufficient, if not quite equivalent to that of statements tested in the conventional manner."³

APPROACHES TO THE HEARSAY PROBLEM

An important approach to the hearsay problem is that of Tribe in his article, "Triangulating Hearsay".⁴ This approach has been commented on favourably by numerous American writers. What Tribe postulates is that when X testifies to a certain event or situation

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1. ibid.
 2. op cit para 1421 p 253.
 3. ibid.
 4. 87 Harvard Law Review 957 (1974)

the jurors must firstly infer that X really believes what he has said. Secondly the jurors must infer that X's belief is not mistaken. The triangulation suggests that the jurors face two problems in making such inferences. If they are to accept that X believed what he said they must be sure that both he and they interpreted the word in the same way. Secondly the jurors must decide whether a sincere belief is mistaken. Thus with the first problem there are questions of ambiguity and insincerity; with the second there are questions of false memory and inaccurate perception. These problems exist whenever jurors assess a witness' testimony. The most important safeguard to minimize these dangers is the opportunity to cross-examine. Ideally, cross-examination should remove ambiguity, expose insincerity, and point out factors which will lead jurors to suspect the witness' memory or ability of observation.

"In practice, cross-examination rarely destroys a witness' testimony, but it often leads to the qualification of unqualified assertions, indicates motives to deceive, and suggests to the jurors the kind of critical stance they should take towards the testimony."¹

Tribe's argument then suggests that if X had heard about the event or situation from A and then testifies

1. op cit p 352.

further problems arise. The juror will have to infer from X's testimony that X believe he heard A make the statement, from the fact that A made the statement A's belief about the event or situation, and from A's belief, the fact that the event or situation occurred. The inferences about the meaning, veracity and accuracy of A's statement have none of the safeguards which exist when jurors evaluate "in-court" statements. The jurors cannot view the out-of-court declarant's demeanour, do not have the sanction of the oath to assist them, and will not see this declarant tested by cross-examination. Lempert & Salzburg¹ point out that added to this is the problem of transmittal.

"The failure to hear the single word "not" may transform a statement from one of exculpation into an admission of guilt or liability. ... [C]ross-examination appears likely to be less effective in testing mistaken reports of out-of-court statements than it is in testing most other mistaken testimonial claims... All the witness must do is testify to his good hearing and what was heard. If asked how what he has heard may be reconciled with other facts in the case, the witness may reply that he knows nothing beyond what some - perhaps unidentified - other has said."²

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1. ibid.
 2. ibid.

Morgan postulates a somewhat similar approach to hearsay dangers.¹ He submits that if the trier infers that a witness perceived X he must make the following further inferences. Firstly the trier must infer that the witness actually said what he seemed to have said; secondly that he had expressed a proposition which the trier would have intended had the trier used the same words; thirdly, that the witness believed what he had perceived; fourthly, that the witness is remembering the incident and not reconstructing an experience or indulging his imagination; and fifthly that witness' perception of X corresponded with the objective fact. Now if a witness says that A told him that X had occurred the following occurs with respect to the trier. The trier must go through the above five steps to find out whether A had spoken those words, and once he has done this he has done nothing more than find that A made the statement in the presence of the witness. The witness is now asking the trier to rely on A's use of language, his sincerity, his memory, and his perception and then the trier must treat A in all respects as he treated the witness in the direct evidence situation.

"[A] is not now speaking under oath, subject to penalty for perjury, at a public hearing in the presence of the trier, and subject to cross-examination by Adversary... In short, for this purpose Witness is merely the means of getting to Trier the statement of [A],

1. op cit 177 (Hearsay Dangers).

and [A] is the real witness upon the issue of the occurrence or existence of X."¹

Morgan calls these dangers inherent in hearsay testimony the four hearsay risks.

Maguire catalogues four weaknesses in testimony that will not be exposed without cross-examination.

"First, risk of faulty perception. Second, risk of defective, confused, or distorted memory. Third, risk of a general propensity or particular inclination to express and communicate inexactly such memory or other mental or physical state as does exist. A convenient term for this third item is failure or lack of sincerity. Fourth, ... risk that ... although striving to convey a correct account, may be incapable of exact verbalization."²

A discussion that gives a slightly different perspective to the hearsay dangers is that of Stewart, "Perception, memory, and hearsay " A Criticism of present Law and the Proposed Federal Rules of Evidence."³ He argues that the crucial question in hearsay concerns the actual determinents of perception,

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1. ibid.
 2. Maguire "The Hearsay System : Around and Through the Thicket". 14 Vand L. Rev. 741 (1961) at p 744.
 3. 1970 Utah Law Review 1,8.

narration, memory and sincerity. Further, the exceptions to the hearsay rule have been founded on subjective and unsystematic study of human testimony.

"Inconsistent perceptions and memories of the same events by different people arise out of complicated neurological, psychological, and physiological processes... At a basic level, the individual must be selective in both informational input from the environment and the retention of that input. Innumerable stimuli bombard each individual at any given moment."¹

He submits that human cognitive processes are not equivalents of a photographic process. The degree of correspondence between testimony of an event and reality may differ radically due to a number of factors. He concludes that cross-examination is vital to the integrity of the fact finding process because :-

"Blunt though it may be for the discovery of subconscious distortion, cross-examination is the principal legal instrument for testing the accuracy of a witness's perception, memory and communication."²

Cross-examination causes witnesses to explain

1. ibid.
2. ibid.

ambiguous, unclear or inconsistent testimony; personality traits that influence cognitive function may be exposed, suggestive influences may be disclosed and the witness's "mental act"¹ at the time of perceiving the event. A witness who gives hearsay testimony is not obliged to enter into particulars, resolve inconsistencies or contradictions. All he has to do is to assert that he was so informed and leaves responsibility with the dead or unavailable out-of-court declarant.

Lilly also point to the so-called hearsay dangers which he calls defects in perception, memory, sincerity or veracity and transmission.² He submits that :-

"[T]he assumption underlying the hearsay rule is that cross-examination reveals these infirmities; accordingly, the lack of opportunity for adequate cross-examination is the fundamental reason for excluding hearsay evidence ... [T]here now is consensus that it is the untested nature of hearsay that justifies its exclusion. This rationale, of course, is consistent with a major tenet of the adversary system : cross-examination is essential for ensuring accuracy and discovering truth."³

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1. ibid.
 2. An Introduction to the Law of Evidence (1978) p 129.
 3. Lilly op cit p 159-160.

This is also the view of Maguire¹ who also sees the value of cross-examination as the centre piece of any discussion of hearsay.

"Acuity of the witness's sight or hearsay can be inquired into and tested on cross-examination or otherwise. The vital fact of his presence within seeing or hearing distance can be probed. His attention or inattention at the crucial moment lies open to inquiry. Effective exploration of interest or bias with respect to the particular issue or parties litigant is frequently possible..."

To sum up these propositions regarding the hearsay problem or hearsay dangers, there are dangers of perception, memory, sincerity or veracity and transmission when the court is obliged to rely on an out-of-court declarant and these dangers or inconsistencies cannot be exposed because the declarant is not subject to cross-examination before the court. Cross-examination is believed to be able to test the memory of the declarant, perceive his bias, truthfulness and like issues. Finally, the declarant is not before the court and the trier of fact cannot observe the declarant's demeanour and appearance, particularly under the effects of cross-examination.²

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1. "The Hearsay System : Around and Through the Thicket" 14 Vand L. Rev. 741 (1961) at 747.
 2. See also Gardiner - Criminal Evidence p 192; Cempert & Salzburg op cit p 520, 521.

These then are the approaches postulated by a spectrum of American writers on the hearsay problem. Based on this groundwork it is now necessary to consider on the one hand the approaches that reject fundamental changes to the hearsay rule, and on the other the approaches that argue for fundamental reform or complete abolition of the rule.

THE ARGUMENT AGAINST LIBERALISATION

The authors Lempert & Salzburg are widely regarded as innovative thinkers in the field of hearsay evidence. Lempert & Salzberg justify a conservative approach to the hearsay rule. The authors point to the hearsay dangers as exposed by Tribe, Morgan and others. Their argument centres particularly on the effect of reporting of an out-of-court statement. They submit that there are three dangers in reported testimony : the normal difficulties in perceiving speech, the natural tendency of people to translate what they actually hear into what they wish to hear, the danger of perjury. The authors accept that these dangers exist whenever perceptions are reported, but argue that the dangers are greater with reports of statements than with reports of visual stimuli. Small mistakes in overhearing the statement may radically change the meaning intended by the maker.

They argue that cross-examination is less likely to be effective in testing reports of statements than reports of more complex events because statements are more often than not directed at just one person while events are often observed by many people. Thus to test a misreported statement is more difficult than an erroneous observation, because the trier is able to test the misreported observation through other witnesses. It will finally be particularly difficult to prove perjury when statements are attributed to some unknown or unavailable declarant.

"We believe that the probability that an out-of-court statement will be significantly distorted when recounted

in court, though not great, is not negligible."¹

The authors submit a second reason for opposing liberalisation. They argue that the admission of hearsay more generally will alter the balance of advantage in litigation, especially in criminal cases. They argue that the balance of advantage at present lies with the state in criminal cases, and with wealthy organisations in civil actions. These organised parties are more likely to have easier access to hearsay than their opponents. They also submit that the hearsay here is likely to be suspect, too, because the information might have been gained by the organisations' agents on a selective basis, with leading questions and from witnesses of doubtful credibility. Any change that might disadvantage certain parties should be opposed, and although there are at present disadvantages there is no need to exacerbate them. Liberalisation will also make it easier for those bearing the burden of proof, namely prosecutors, to prove their cases because it makes it easier to introduce evidence to prove the case.

They also argue that most proposals for reforming the rule place emphasis on increased judicial discretion. This they submit is compounding the dangers.

"Put simply, we do not trust trial judges. If we thought that the country's trial judges were almost

1. op cit p 520.

always highly capable and completely impartial we might reluctantly support hearsay reform ... Unfortunately, the trial bench in this country is not uniformly excellent ..."¹

The final reason for opposing reform is that the authors believe the current system of hearsay rules is working fairly well. They submit that it is very seldom that the exclusion of evidence through the working of the rule works injustice. That is because the rule is applied in a more liberal fashion than it is written.

Presently, too, hearsay evidence is suspect. If the rule were to be altered or abolished this attitude might change, ultimately resulting in admission of such evidence "for what it is worth". Lawyers' attitudes might also change, and over time an ever increasing percentage of trial evidence would become hearsay.

"At the very least such a change would decrease the appearance of fairness; it is likely to lead to substantial injustice as well."²

The authors' final word against reform is that those who would rather not risk convicting innocent people would oppose most reform, and those who believe the

1. *ibid.*
2. *ibid.*

integrity and competence of the police, prosecutors and judges is always high will believe in reform of what would be seen as an archaic impediment.

More generally, arguments against abolition return to the value of cross-examination. It may be argued that although cross-examination has not been empirically proved to expose inaccurate perception, poor memory, insincerity and mistransmission, it is shown that cross-examination causes witnesses to express doubt, supply additional information and sometimes modify or repudiate evidence-in-chief. The value of cross-examination is thus a central feature of the adversary system, though not necessarily "the greatest legal engine ever invented for the discovery of truth."¹

"... attempts to abandon or nullify the rule against hearsay evidence are unlikely to be successful so long as the basic tenets of the adversary proceeding are retained. Because the adversarial posture demands the opportunity for cross-examination, the hearsay rule - which protects that right by rejecting "interested" evidence not within an exception - is not easily forsaken."²

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1. Wigmore S 1367 at 129.
 2. Lilly op cit p 270.

The Advisory Committee's Note as an introduction to the Federal Rules of Evidence further emphasise the basis of cross-examination being the rationale behind the rule. The Committee argues that cross-examination has become a vital feature of the Anglo-American system. The belief that cross-examination exposes defects in perception, memory and narration is fundamental to this system.¹

The patch-work of exceptions that exists along with the hearsay rule has been particularly singled out for attack by those proponents of radical reform of the rule. Defenders of the exceptions argue that the exceptions are the result of evolutionary development that began contemporaneously with the hardening of the hearsay rule. They argue that because they arose out of practical accommodation they lack consistency. The most coherent defence of the exceptions is that the ultimate question when viewing the exceptions is whether the search for truth is advanced by admitting the hearsay in question. This depends on three things : the degree of probable reliability of the evidence, the court's need for the evidence, the extent to which the judge or jury can be made aware of the infirmities in the evidence. Justification for a particular exception need not rest on the high probable reliability of the evidence, but on whether it is sufficiently reliable to assist the search for truth.

Wigmore has the following to say in defence of the patchwork quilt of exceptions.

1. Salzburg and Redder - Federal Rules of Evidence Manual (1982) p 547.

"These two principles - necessity and trustworthiness - are only imperfectly carried out in the detailed rules under the exceptions. It would be strange if it were otherwise in a legal system formed as ours is, partly on precedent and partly on principle, at the hands of judges of varying disposition and training ... Nevertheless [the principles] play a fundamental part."¹

1. op cit para 1423 p 254.

PROPOSALS FOR REFORM

Criticisms of the rule against hearsay and proposals for reform are naturally numerous and widespread amongst American writers, lawyers and judges. The criticism most often expressed is that the rule excludes useful evidence and hampers the search for truth. There has been a proliferation of exceptions that have created a system of unmanageable complexity.

"The fact is, then, that the law governing hearsay today is a conglomeration of inconsistencies, developed as a result of conflicting theories. Refinements and qualifications within the exceptions only add to its irrationality. The courts, by multiplying exceptions, reveal their conviction that relevant hearsay evidence normally has real probative value, and is capable of valuation ... by ... triers of fact."¹

Morgan and Maguire have submitted that the hearsay rule would look like "an old fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists" if reduced to picture form.²

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1. Morgan - "The Intorductory Note to Chapter VI, Hearsay Evidence, American Law Institute, Model Code of Evidence" (1942) quoted in Dallas County v Commercial Union Assurance Co. 2868 F 2nd 388.
 2. "Looking Backward and Forward at Evidence" 50 Harv L. Rev. 909 (1937) at 921.

Morgan¹ argues that in an ideal situation all evidence that requires the trier to rely on the language, memory, observation or sincerity of a person not subject to the normal conditions placed on a witness should be put into the category of hearsay. Further, the hearsay rule should be treated as an exception applicable only when the declarant is available but not present for cross-examination. The judge would then have the discretion to admit all other evidence depending on probative value. Realistically, however, he submits that the rational basis for the rule should be the "presence of substantial risks of insincerity and faulty narration, memory and perception."²

"If the courts would recognise that much of the evidence which they now admit as non-hearsay is, analytically, within the hearsay concept, they might be persuaded to admit other evidence which, though customarily denominated hearsay, in fact raises the hearsay dangers to no greater extent than evidence now admitted under the hearsay exceptions."³

Maguire⁴ dealing with the four hearsay dangers submits that with respect to "ambiguity of inference",

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1. "Hearsay Dangers and the Application of the Hearsay Concept", 62 Harv. L. Rev. 177 (1948) at 218.
 2. ibid.
 3. ibid.
 4. "The Hearsay System : Around and Through the Thicket" 14 Vand L. Rev. 741 (1961) at 762-766.

that drawing inferences from conduct does not require specialised intelligence and in any event this factor is a weakness in all testimonial evidence. With respect to "adequate perception", Maguire argues that testimony should only be excluded on this ground if there was no adequate opportunity for perception of the behaviour. With respect to "adequate memory" Maguire argues that memory links easily with that of personal perception and testimony should be excluded on a similar basis to that for adequate memory only. Dealing with "sincerity" Maguire submits that too little attention is here given to the burden of proof. It should be on the party objecting to the testimony to establish the intention of the person making the statement and what that person's intended inference was. Maguire also creates a new definition of hearsay that places stress on untested perception and memory as being the major basis for exclusions of testimony.¹

As has been noted above, many discussions on the merits of the hearsay rules and its exceptions centre on the inability of the jury to perceive the dangers of hearsay testimony.² The arguments with respect to the hearsay dangers and the value of cross-examination in correcting impaired testimony, it will be argued, is equally applicable to non-jury trials.³ However certain United States writers in urging greater

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1. at 769, 770.
 2. See for example : The Theoretical Foundations of the Hearsay Rules 93 Harv. L. Rev. 1768 (1980).
 3. See below CONCLUSION

reform than that carried out in the Federal Rules argue that there should be far wider admissibility in non-jury trials.

"Though the rule against hearsay is formally applicable to bench trials, it is in fact little used in the absence of a jury. The appropriateness of applying the hearsay prohibition to bench trials has been questioned on the ground that the hearsay rules reflect a concern with attributes peculiar to the jury, a position flowing comfortably from the analysis that focuses on jury perception."¹

The editors of the Harvard Law Review go on to argue that the variety of methods used to admit hearsay in bench trials arose because judges found

"... the inconsistency between the treatment of hearsay and other evidence too glaring to tolerate, reinforcing the conclusion that the hearsay rules and debate are in fact directed more toward issues of evaluation than towards questions of admission."²

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1. Notes in "The Theoretical Foundations of the Hearsay Rules" 93 Harv. L. Rev. 1768 (1980) at p 1806-1807.
 2. ibid.

Davis¹ also submits that in non-jury cases apparently useful hearsay is admitted "for what it's worth". In practice, in fact, evidence is admitted without ruling on admissibility until all the evidence is before the court. Davis argues that the position in non-jury cases should be to allow this practice to continue and to allow findings to be based on hearsay inadmissible before a jury if it is "the kind of evidence on which reasonable persons are accustomed to rely in serious affairs."²

Davis submits that the three most important questions about hearsay in all trials are (a) what evidence should be admitted or excluded under the hearsay rule; (b) whether or when to circumvent the rule by admitting hearsay "for what it is worth" if it might have some probative value and (c) how to evaluate this admitted hearsay. In non-jury cases, he argues, the first question is the least important, the second the most important.

A useful comment is made on this issue in Builders Steel Co. v Commissioner.³

"In the trial of a non jury case, it is virtually impossible for a trial judge to commit irreversible error by receiving incompetent evidence ... We think that experience has demonstrated

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1. "Hearsay in Non-Jury Cases" 83 Harv L. Rev. 1362 (1970).
 2. ibid.
 3. 179 F2d 377, 379 (8th Cir 1950).

that in a trial ... where no jury is present, more time is ordinarily lost in listening to arguments as to the admissibility of evidence ... than would be consumed in taking the evidence proffered..."

A further case worth considering, dealing with a non-jury situation, is that of United States v United Shoe Machinery Corp.¹ Here the judge admitted thousands of documents, many of which may have contained hearsay, without ruling on admissibility. The judge argued that "the trial judge is not required to exclude every type of hearsay evidence which would be excluded in other types of cases."²

Davis argues thus that these practices are not radical aberrations but merely generally accepted practice in non-jury trials.

Two further approaches can be taken to the wider admission of evidence normally classed as hearsay. The first is that of reliability, the second necessity. Reliability, as a justification for the admission of hearsay, holds that if a hearsay statement has circumstantial guarantees of trust-worthiness equal to those which apply to the normal hearsay exceptions, that such hearsay statement should be admitted even if it did not meet the requirements of an existing hearsay exception. This principle was enacted in the Federal Rules of evidence

1. 89 F.Supp 349 (D. Mass 1950).
2. at 355.

rules 803 (24) and 804(b)(b) which will be discussed later.

Necessity as a justification holds that the costs of excluding hearsay are great and where the declarant is unavailable the hearsay evidence should be admitted.

A case that is often cited to illustrate both these justifications and in addition show the way approaches to hearsay should be going is Dallas County v Commercial Union Assurance Co Ltd.¹ In this case the tower of a court house had collapsed causing damage in excess of \$100,000. The county sued the insurer under the policy which provided for recovery for lightning damage. The insurer defended on the basis of structural defects having caused the collapse. The county produced evidence of charred timbers. To rebut this the insurers introduced a copy of the local newspaper from some sixty years previously reporting a fire in the court house while the building was still under construction. On appeal the issue was whether this story had been properly admitted. The appellate court looked at Wigmore's criteria for creating a new hearsay exception - necessity and circumstantial guarantees of trustworthiness. The court felt that witnesses might be uncovered, but assumed it to be improbable that anybody with a clear recollection of the facts could be found. The court felt, further, that it would be impossible for a witness to have a better recollection than the reliability of the contemporary article. The

1. 286 F 2d 388 (5th Cir 1961).

court felt that there were circumstantial guarantees of trustworthiness in that the reporter would have no motive to falsify. The court held

"We do not characterize this newspaper as a 'business record', nor as an 'ancient document', nor as any other readily identifiable and happily tagged species of hearsay exception. It is admissible because it is necessary and trustworthy, relevant and material, and its admission is within the trial judge's exercise of discretion in holding the hearing within reasonable bounds."¹

CRITICISM OF THE EXCEPTIONS

The system of exceptions to the hearsay rule has also come in for considerable criticisms. It is argued that the exceptions are the result of conflicting theories, and that refinements to the exceptions and qualifications only add to the complexity and irrationality of the rule.

It is also argued that the basis for the exceptions to the rule in the eighteenth and nineteenth centuries was not a substitute for cross-examination but mere convenience. The real basis was nothing more than a situation in which ordinary men would tell the truth or, at most, an absence of a motive to falsify.

1. at 397.

"Modern textwriters and judges have purported to find for each exception some sort of necessity for resort to hearsay and some condition attending the making of the excepted statement which will enable the jury to put a fair value upon it and will thus serve as a substitute for cross-examination ... In most of the exceptions, however, the adversary system is disregarded. There is nothing in any of the situations to warrant depriving the adversary of an opportunity to cross-examine; but those rationalizing the results purport to find some substitute for cross-examination. In most instances one will look in vain for anything more than a situation in which an ordinary man making such a statement would positively desire to tell the truth; and in some the most that can be claimed is the absence of a motive to falsify."¹

Wigmore criticises the exceptions, suggesting that the two principles that should underlie the exceptions, namely necessity and trustworthiness, have been incompletely applied.

1. The Introductory Note to Ch VI Hearsay Evidence, American Law Institute Model Code of Evidence (1942) quoted in the Dallas County case.

"In these principles is contained whatever of reason underlies the exceptions. What does not present itself as an application of them is the result of mere precedent or tradition or arbitrariness. It is the proper office of an expounder of the law of evidence to note this element of living principle and to distinguish its applications from rulings which are merely arbitrary. It is through the failure to do this strictly that a general appearance of unreason and unpracticalness has been given to the hearsay rule and its exceptions."¹

Wigmore suggests further that needless obstructions of the truth by the hearsay rule are due mainly to the inflexibility of the exceptions, and to the enforcement of the hearsay rule when admissions of evidence, presumably of high probative value, could do no harm, and would in fact assist in discovering the truth of the matter.²

Wigmore's final comment on the future of hearsay is :-

"What the times now demand is an attempt to simplify the use of the hearsay rule, so that the logical quiddities, which do not affect substantially the psycho-

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1. op cit para 1423 at p 255.
 2. See Wigmore's postulated hearsay rule at op cit para 1427 pg 264.

logical value of the testimony,
disappear forever."¹

Finally the desire for considerable reform to the hearsay rule is often expressed in similarly bold statements as the following by McCormick.²

"Even bolder in conception are those decisions which seem to sanction the practice that when a statement does not fall within an existing exception it still may be admitted if the judge finds that there is a necessity for its use and that it was made under circumstances showing exceptional trustworthiness. These courageous judges have marked the way, and we may eventually see our hearsay canon restated in this fashion : a hearsay statement will be received if the judge finds that the need for and the probative value of the statement render it a fair means of proof under the circumstances."

The main arguments for reducing the scope of hearsay exclusions, or giving the court greater discretion to admit hearsay of high probative value is that the present rules are based on an unrealistic assessment of the stupidity of jurors and trial judges, or at least of their inability to perceive the reduced value of hearsay testimony as opposed to direct evidence.

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1. op cit para 1427 at p 264.
 2. "Law and the Future : Evidence" 51 Nw U.L. Rev. 218 (1956).

FEDERAL RULES OF EVIDENCE

The most useful introductory comment on the Federal Rules is that made in the Special Introductory Note : The Hearsay Problem to the Advisory Committee's Note on Rule 801 of the Federal Rules.

"The approach to hearsay in these rules is that of the common law i.e. a general rule excluding hearsay, with exceptions under which evidence is not required to be excluded even though hearsay. The traditional hearsay exceptions are drawn upon for the exceptions, collected under two rules, one dealing with situations where availability of the declarant is regarded as immaterial and the other with those where unavailability is made a condition to the admission of the hearsay statement. Each of the two rules concludes with a provision for hearsay statements not within one of the specified exceptions "but having comparable circumstantial guarantees of trustworthiness". This plan is submitted as calculated to encourage growth and developments in this area of the law, while conserving the values and experience of the past as a guide to the future."¹

1. Quoted in Federal Rules of Evidence Manual op cit p 549.

Rule 801 is the definition section of the rules relating to the hearsay rule. It gives as the definition of "statement" "(1) an oral or written assertion or (2) non-verbal conduct of a person, if it is intended by him as an assertion." The rule defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."¹ Thus the definition excludes non-assertive conduct. Rule 801(d) contains refinements of the common law hearsay rule. Admissions by party opponents made by the party or his representative are not hearsay. The subsection also excludes from the definition of hearsay prior statements by a witness if the prior statement is inconsistent, is consistent but offered to rebut charges of recent fabrication, improper influence or motive or the statement is one of identification of a person made after perceiving him. The inconsistent statement must have been given under oath, subject to penalties for perjury at a trial, proceeding or in deposition.

The definition found in Rule 801 obviously differs substantially from the common law definition, except for the definition of hearsay itself.² Each of the statements in R801(d) falls within the common law definition of hearsay. The rationale behind allowing this extended admission of previously hearsay statement is that the witness is present at the trial

1. Federal Rules of Evidence Manual op cit p 495-6.
2. ibid.

for cross-examination and there are adequate guarantees of trustworthiness. Rule 801(3)(2) dealing with admissions basically codifies the common law.

Rule 802 defines the hearsay rule and states that "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."¹

Rule 803 lists 23 exceptions to the hearsay rule that operate even though the declarant is available as a witness. In addition Rule 803(24) provides a catch-all section.² The most important exceptions are present sense impressions; excited utterances; then existing mental, emotional or physical condition; and records of regularly conducted activity.

Rule 803(b) deals with records of regularly conducted activity and provides a useful example of the American approach compared with the English³ and South African⁴ approaches. The rule states :-

"A memorandum, report, record or data compilation, in any form, of acts, events conditions, opinions, or diagnosis, made at or near the time by, or from information transmitted by a

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1. ibid.
 2. Discussed below.
 3. See above.
 4. See below.

person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances or preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.¹

The person who thus provides the basic information for the entry must have personal knowledge of the event or act that is thus recorded. This person is not, however, required to testify. All that is necessary is that the custodian, or a qualified witness, state that it is the business practice to base such entries upon information supplied by the person who has personal knowledge. It is further required that the person who supplies the information from personal knowledge and the person who makes the entry act in the regular course of business.

The authors of the Federal Rules of Evidence Manual suggest that the wording of the definition of a business

1. ibid.

record in the exception's to might be read as abolishing "the business duty" concept for the person making the report.¹ They argue, however, that it was never the intention of the Advisory Committee of Congress to abolish this concept and state that "the only correct approach is to continue to follow the business duty concept."²

An illustration of the use of this exception in practice is shown by the case of United States v Pent-R-Books Inc.³ The evidence in this case consisted of entries made by addressees indicating that a second mailing of objectionable material had been received. The entries were made by third parties and not Postal Service employees but the entries were found in Postal Service records. The Court held that the manner in which the records came into the administrative files was "an inherently reliable standard operating procedure" and held further that the "second mailing envelopes taken from the administrative files were properly found to be business records kept by the Postal Service and were admissible as such".

Rule 801(b) applies satisfactorily to computer records. In Rosenberg v Collins 624 F2d 659 (5th Cir 1980) for example the Court noted that computer data compilations may qualify as business records if kept in the ordinary course of business. It was, however,

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1. ibid.
 2. ibid.
 3. 538 F2d 519 (2d Cir 1976)

noted in United States v Scholle 553 F2d 1109 (8th Cir 1977) that :-

"the complex nature of computer storage calls for a more comprehensive foundation ... Assuming properly functioning equipment is used, there must be not only a showing that the requirements of ... [Rule 803(b)] have been satisfied, but in addition the original source of the computer program must be delineated, and the procedures for input control including tests used to assure accuracy and reliability must be presented."

It would seem therefore that the position with respect to computer records has not yet been satisfactorily finalised, but it would seem that more than just compliance with 803(b) will be necessary.¹

By far the most important development from the point of view of reforming the hearsay rule or at least liberalising its application is Rule 803(24). This reads as follows :-

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

1. This has useful implications for any South African approach (see below).

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 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."¹

This exception was obviously the most controversial when first proposed. In fact the Advisory Committee had proposed an even wider exception allowing the Court discretion to develop new exceptions as long as there were circumstantial guarantees of trustworthiness present at least equivalent to those justifying the traditional exceptions. Eventually the present compromise was reached in which sufficient notice had to be given to the opposing party if hearsay was sought to be introduced.

1. Federal Rules of Evidence Manual op cit p 577.

The Advisory Committee's note on Rule 803 indicates that the intention of the rule and especially exception 24 was to allow for other grounds to be developed. This obviously still applies under the enacted exception. The Committee stated :

"The exceptions are phrased in terms of non-application of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration.¹

Dealing specifically with the justification for the catch all exception (24) the Committee stated :-

"[It does] not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate a trustworthiness of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area ..."²

Finally, the Report of the Senate Committee on the Judiciary on Rule 803 (24) stated :-

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1. Federal Rules of Evidence Manual op cit p 624.
 2. ibid p 638.

"It is intended that the residual exceptions will be used very rarely, and only in exceptional circumstances. The Committee does not intend to establish a broad licence for trial judges to admit hearsay statements that do not fall within [the other exceptions]. The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule ... Such major revisions are best accomplished by legislation. It is intended that ... the trial judge will exercise no less care, reflection and caution than the courts did under the common law in establishing the now recognized exceptions to the hearsay rule."¹

A useful example of the application of this exception is found in Robinson v Shapiro 646 F2d 734 (2d Cir 1981). Here an employee was killed while removing debris from an apartment building. The Court held that testimony by a co-worker that the deceased told him what the building superintendent said about the conditions under which they had to work was properly admitted. The Court emphasised the following facts when invoking Rule 803(24). The deceased and superintendent were unavailable. The conversation occurred immediately the deceased returned from speaking to the superintendent, there was an absence of

1. *ibid* p 643.

motive for the deceased to lie, and there was circumstantial evidence about the condition of the building which could have prompted the superintendent to speak as he did.

There has however been considerable variation in the way American courts have interpreted the catch-all section.¹ It is apparently not clear at this stage what view of the provision will ultimately prevail.² The better view regarding the provision would appear to be as follows :-

"Exception (24) ... [provides] a rule to prevent arbitrary results due to codification. It is expected that the key characteristic of evidence allowed under this section will be that of trustworthiness. The requirement of notice in advance should counteract abuse of discretion."³

And further :-

"Its salient feature is found in its frank recognition that no list of exceptions can account for the nuances or the endlessly varied contracts from which hearsay evidence may spring ...

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1. See Lempert & Salzburg op cit p 500; Federal Rules of Evidence Manual op cit p 619.
 2. See discussion in Cempert & Salzburg op cit p 503, 504.
 3. Cotchett, Elkind - Federal Courtroom Evidence (1983) p 160.

[A] trial judge now can make a realistic appraisal of the variables that should determine admissibility. Thus, the Rule not only accommodates previously unencountered, unforeseen situations, but also helps courts identify circumstances in which the criterion of a new exception might be justified. This latter useage provides a convenient bridge between past and future."¹

Turning now to Rule 804, this deals with hearsay exceptions where the declarant is unavailable. Unavailability includes the declarant who is exempted from testifying by the court on the ground of privilege, persists in refusing to testify concerning his statement, testifies to lack of memory of the subject matter of his statement, is unable to be present or testify due to death or existing physical or mental illness or infirmity or is absent and the proponent of this statement is unable to procure his attendance by process or other reasonable means.

The exceptions that fall under Rule 804 are former testimony, statement under belief of impending death, statement against interest, statement of personal or family history and most importantly, under 804(b)(5), other exceptions. The exception are basically similar to common law provisions, excepting 804(b)(5).

However, the statements against the interest provision is an important example of the way the Federal Rules

1. Lilly op cit p 273, see also Gardiner op cit p 217-8.

have subtly altered the common law. At common law the statements must be against a pecuniary or proprietary interest of the declarant when made. However, as pointed out by Lempert and Salzburg for example¹, difficulties arise in determining just when a statement is sufficiently against the interest to qualify under this exception, and the strict limitation on the extent of the exception has been criticised. In *Donnelly v United States*² Justice Holmes argued that evidence which suggested that a person other than the accused had confessed to the murder for which the accused was to die should be admitted.

"In confession of Joe Dick, since deceased, that he committed the murder for which the plaintiff in error was tried, coupled with circumstances pointing to its truth, would have a strong tendency to make anyone outside a court of justice believe that Donnelly did not commit the crime ... The exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against the interest as a confession of murder, it is far more calculated to convince than dying declarations, which would be let in to hang a man; and when we surround the accused with so many safeguards, some of which seem to me excessive, I

1. op cit at p 487-488.
2. 228 US 243 (1913).

think we ought to give him the benefit of a fact that, if proved, commonly would have such weight.."¹

Rule 804(b)(3) has altered the common law to allow admission of statements against penal interest provided corroborating circumstances show trustworthiness if this statement is offered to exculpate the accused.

804(b)(5) Follows that of 803(24). The commentary above with regard to R803(24) applies equally to these provisions. The rule does proceed on a different theory however : hearsay which meets a specified standard may be admitted if the declarant is unavailable.²

It is worth noting two cases that have given rise to controversy in dealing with 804(b)(5). The first is United State v Lyon.³ This involved one man who built bombs in shoe boxes. Mrs Lorts told the police that she had given a shoe box to Lyon. Lyon subsequently jumped bail and remained free for eleven years. By the time the trial occurred Mrs Lorts had forgotten the incident and her description of it. The trial judge admitted the police transcription of this interview with her under 804(5)(b). This admission under 804(b)(5) was approved on appeal. the appeal court noted that :-

"[t]rustworthiness was guaranteed by Smith's detailed testimony about how he

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1. at 277-278.
 2. See Advisory Committee's Note p 674 of Federal Rule of Evidence Manual op cit.
 3. 567 F2d 777 (8th Cir 1977).

took Mrs Lorts' statement and transcribed it."¹

The appeal court also noted that the shoe box bore the signatures of Mrs Lorts and Smith and that it conformed to the description of the box given to Smith by Mrs Lorts. Cempert and Salzburg argue that the court was unfaithful to both the letter and substance of 804(b)(5). The authors argue that "trustworthiness" does not relate to Lorts' statement; all it means is that the statement was accurately reported. Dealing with the signatures the authors argue that the court is looking for circumstantial guarantees of trustworthiness but the guarantees are not similar to those of other exceptions because those of the others "suggest the special reliability of statements standing alone".² Here Mrs Lorts statement was likely to be true because it was consistent with other evidence.

The other case is Turbyfull v International Harvester Co.³ In this case plaintiff was severely burned while assisting defendant's mechanic, Anderson. Three hours after the incident Anderson's supervisor told him to write down everything he knew about the incident. Anderson died before trial. The trial judge admitted the statement for the defendant under 804(b)(5), because the statement was offered to prove a material fact, it was more probative than other evidence which the defendant could reasonably have obtained. Guarantees of trustworthiness were present

1. at 784.
 2. op cit p 501.
 3. 486 F Supp 232 (E.D. Mich 1980) see also Kaplan : "Interesting Cases" 66 Iowa L. Rev. 931 (1981).

because Anderson wrote the statement while the circumstances were fresh in his mind.

It has been suggested that this exercise of discretion in fact complies with the letter of the law but undercuts the law because it should then allow any uncoerced statement made soon after the event to be admissible.¹ In fact Anderson may have been under pressure thinking that he might be dismissed from his employment if he made it appear as if he was somehow involved in the accident.

CONCLUSION

Perhaps the most succinct comment on the hearsay reform problem is the following by Weinstein

"The current tendency is clearly towards much freer admissibility of hearsay. But without frank recognition of the rapid change in our attitudes towards the exclusionary rules we abandon the possibility of providing reasonable procedural protections. In addition to the tendency to ignore hearsay dangers by providing a narrow definition of hearsay and by expanding the exceptions ... there is ... a tendency to admit hearsay where there can be no serious doubt of the credibility of the ... declarant ... So quickly has the exclusionary power

1. Lempert & Salzburg op cit p 502 especially note 12.

... waned that there are few cases today where the outcome of a well-tryed case would have been different had it not been for the hearsay rule, where a good court was prevented from admitting persuasive hearsay."¹

More detailed conclusions will be drawn about American reforms and their suitability in a South African context in the general conclusion to this thesis. Suffice it to say at this stage that it is submitted that American reforms have great value in a South African context.

American writers, legislators and courts recognise the inherent dangers involved in hearsay testimony. They recognise the inherent value in testing evidence by cross-examination and that this means of testing evidence is generally unavailable with respect to hearsay evidence. This fact, too, has been expressly recognised by the Advisory Committee in the Federal Rules of Evidence.

The Federal Rules have assembled the law against hearsay together in two comprehensive sections. The Rules have recognised the value asserted by American writers of cross-examination that is now present in much hearsay and have thus come to terms with the inherent hearsay dangers. But the Federal Rules have also recognised many of the inconsistencies in the rule that existed before reform and have dealt accordingly with these in the numerous exceptions.

1. Weinstein - "Probative Force of Hearsay" 46 Iowa L. Rev. 331 (1961).

Most importantly, perhaps, the Federal Rules have dealt with criminal and civil law as one body because of their carrying out less radical reform than that carried out in England. The Federal Rules have included two liberalising sections to prevent the law stagnating or becoming arbitrary due to codification. It is clearly hoped thereby to allow gradual reform, or at least the acceptance of indisputably trustworthy evidence not covered by the present rules and exceptions. It is thus now for the courts to decide, within the narrow bounds of the discretion allowed them under 803(24) and 804(b)(5), to allow acceptance of this trustworthy evidence.

There can be no doubt that the American experience, and most particularly the Federal Rules of Evidence has an important role to play in any contemplated reform in South Africa. As will be suggested later this American system is preferable to that of England. The reasons for this suggestion are set out in the general conclusion below.

CHAPTER FOURROMAN, GERMANIC, MEDIEVAL AND ROMAN-DUTCH
APPROACHES TO HEARSAY EVIDENCEINTRODUCTION

The approach of this chapter is to deal progressively with Roman Law of hearsay, Germanic and Medieval hearsay law, and with Roman-Dutch law on hearsay. Although the Roman and Roman-Dutch Law on hearsay do not apply in South Africa, it is hoped that by addressing historic approaches to hearsay, a further perspective from which to view the hearsay problem will be obtained.

However, this chapter is a very general overview of these approaches, because as will be pointed out in the conclusion, these approaches were found to have little to offer any systematic modern approach to the hearsay problem. They offer a further perspective but add little to analyses methods.

SECTION 1ROMAN LAW APPROACHES TO HEARSAY

Admission of hearsay evidence in Roman law had none of the complex restrictions on it that modern English or American Law has. Rules relating to admission did, however, grow in time and the general trend was to admit hearsay, but to disparage its value.

In classical Roman law complete freedom of admission of evidence existed.

"The classical lawyers, following the republican tradition, show only a mild interest in the law of evidence ... Parties may produce evidence of their discretion ... Rules of evidence do not exist. The judge decides at his discretion whether the assertions of the parties are true or not."¹

It seems certain in Cicero's time, however, an approach to admission of hearsay was being developed. The witness was required to testify as to what he knew and what he had heard.² Strachan-Davidson quotes the following situation from Cicero :-

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1. Schultz - Classical Roman Law (1951) p 23.
 2. Cicero ad Herennium IV 35.47 quoted in Strachan-Davidson - Problems of the Roman Criminal Law Vol II (1912) p 123.

"We have an amusing instance of a cross-examination of such a hearsay witness by Lucius Crassus. Silus had been damaging Crassus' client Piso by alleging 'what he said that he had heard against him'. "It is possible, Silus, that the man from whom you heard this spoke under the influence of anger;" Silus asserted. "It is possible, too, that you did not understand him rightly"; he nodded emphatically, and so gave himself away. "Possibly, likewise, you never heard at all."¹

It seems certainly in Cicero's time that while the jury could be warned of the dangers of accepting the truth of a hearsay statement, the juror was not protected from the influence of hearsay and could give to the hearsay whatever value he wished.

"In speaking on the side of common report we shall say that such report does not commonly spring up of itself without there being some basis of fact, and that there is no reason why any one should invent such stories ... On the opposite side we shall show that many rumours are false ..."²

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1. Cicero de Oratori II 70.285 quoted in Strachan-Davidson op cit p 123.
 2. Cicero ad Herenium II 8.12 quoted in Strachan-Davidson ibid.

Thus in general hearsay evidence, or testes de auditu was admitted freely, but its value could be attacked as being of less value than direct testimony.

"Illa vox vulgaris audivi re quid
innocenti res noceat oramus"¹

Dealing specifically with civil procedure, in early Roman Law the essence of the taking of evidence was the unfettered discretion. There was judicial freedom in the evaluation of the evidence.² This applied, too, with the procedure apud indicem.

"There were no strict rules of evidence. Hearsay was admissible, though recognised as less weighty than direct testimony. Documents were of course admitted, and even written statements, under oath or not, by persons not produced as witnesses."³

Even with the development of the cognitio under the Empire, taking of evidence was governed by free admission and valuation of evidence.

By the time of Justinian, however, certain important changes occurred in the acceptance of evidence especially in the cognitio procedure and after litis

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1. Cicero pro Planc. 23.57 quoted in Greenidge - The Legal Procedure of Cicero's Times (1971) p 483 Footnote 8.
 2. Dannenbring Roman Private Law (1968) p 352.
 3. Buckland op cit p 637.

contestatio. Oral evidence was basically now distrusted and various enactments affected the weight to be attached to oral evidence. Another of the principal changes was that hearsay was basically excluded.¹ In the post-classical procedure selection and production of evidence was for the court and no longer for the parties.

"We do not desire that frivolous testimony, based upon what has been heard while people are passing, should, under any circumstances, be valid; or that the evidence of those who state that they met certain persons accidentally, and heard them say that they had received money from someone, or that they were indebted to another. Statements of this kind seem to us absolutely suspicious, and deserving of no attention whatsoever."²

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1. Buckland - A Textbook of Roman Law (3 ed) (1966) p 627 quoting Justinian Nov 90.2.
 2. Justinian Nov 90.2 quoted in Spiller - A Manual of Roman Law (1986) p 41.

SECTION IIGERMANIC AND MEDIEVAL APPROACHES TO HEARSAY *oath.*

In the early Germanic period the principal means of giving evidence was an oath calling on the gods to take vengeance should the affirmation or denial of the truth of a statement be false. The person taking the oath could be assisted by oath-helpers in serious cases, but these oath helpers generally added nothing to the evidence. Other means of evidence were the ordeal and the *judicium Dei* par excellence or trial by battle. However :-

"Evidence by chance eye-and-ear witnesses was not admitted. There were two exceptions : first, where a person had been present at a legal transaction, say the transfer of land, as a formal witness; secondly in border disputes where a long-existing state of affairs was in dispute."¹

In the period of the Frankish empire evidence on oath remained the principal manner of giving evidence. Again oath-helpers supplied assistance. Chance eye-and-ear witnesses were allowed to testify. Increasing use, too, was made of documentary evidence. However, as in the early-Germanic period no rules existed dealing with hearsay evidence at all.

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1. Hahlo - The South African Legal System and Its Background (1968) p 356.
 2. Hahlo op cit at p 477.

In the early Middle Ages the old procedures remained in that the oath supported by oath helpers, the ordeal and trial by battle remained the principal means of evidence. After the twelfth century, and under Roman Law influence and the influence of Church lawyers civil and criminal procedures developed which affected the admission of evidence.

"Oath-helpers became absolute, ordeals and trial by combat were prohibited, first by the Church ... Instead, evidence by eye and ear witnesses and the production of documents became the normal means of proving one's case."²

Rules of evidence, however, retained a very general nature and developments were away from procedural formalism rather than creating new rules such as a rule against hearsay. There is no evidence, even after the twelfth century, that any rules relating to hearsay developed. Presumably, though under the influence of Roman law, and specifically post classical Roman Law, some doubt must have been cast, albeit generally, on the probative value of hearsay evidence.

2. Hahlo op cit at p 477.

SECTION IIIROMAN-DUTCH LAW APPROACHES TO HEARSAY

According to Schmidt the law of Holland dealing with procedure and evidence was laid down in two ordinances of the 16th century. These were firstly the "Ordonantie over de Procedeeren van de Crimineele Saaken in de Nederlanden" of 1570, which dealt with criminal matters, and the "Ordonantie op 't stuk van de Justitie binnen de Steden en teh platte landen van Holand en West Friesland" of 1580, which dealt with civil matters.¹

He does note that :-

"In sowel siviele as strafsake is getuies aangehoor en ovdervra, maar die prosedure het van die huidige in Suid-Afrika verskil deurdat die rol van die regter of kommissaris by ondervraging belangriker was en dié van die partye of hul verteenwoordigers minder belangrik. Kruisondervraging was onbekend (die stel van strikvrae is nadruklik afgekeur) asook die streng toelaatbaarheidsvereistes wat vandag gestel word. Relevantheid is wel vereis, maar hoorsê was toelaatbaar hoewel min waarde daaran geheg is."²

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1. Bewysreg (2 ed) (1982) p 13; also de Wet - 1958
48 THRHR.
 2. ibid.

I have been unable to find any details of the two ordinances mentioned above. However, the Roman-Dutch law writers supply a satisfactory overview of the law with respect to hearsay evidence. The general rule is that hearsay evidence was admissible but that little value would be attached to such evidence.

Voet states in 22.3.4 entitled "Rumour or hearsay" that :-

"This much is clear that public rumour and broadcast reports are in themselves ... neither complete nor incomplete evidence. They only provide a kind of token by which in criminal matters the judge may direct his further tracking down of the truth ... Then again the passage of law cited below (Dig 22.5.3.2) has it that other evidence is assisted and strengthened by a public rumour which supports it. For the rest rumours is so much a grasper at which is made up and is evil, as it is a messenger of the truth."¹

In the same passage Voet quotes a statement by Quintilian (Institutes of Oratory Bk 5 Ch 3) as follows :-

"One set of persons calls rumour and reports the common belief of the civic

1. The Selective Voet (Vol I) (trans Gane) (1956) p 727.

body, and, as it were, the testimony of the public. Another set calls it talk, broadcast without any definite originator, which had its start in wickedness and its growth in credulity. Through the guide of enemies who spread false reports such a thing can happen to anybody, even though most innocent."¹

He concludes his comments by arguing that the probative value of hearsay should be decided by the cautious judge, but points to the fact that other commentators feel that judicial discretion should be narrowed in various ways, though he does not specify in which ways.

Van Leeuwen also argues that where a witness cannot show that the testimony is from personal knowledge that testimony amounts only to "half proof". He does qualify this by saying that dying declaration would be complete evidence, or :-

"... where the matter is one which happens beyond living memory, as whether anyone is of a certain descent and lineage; who his parents and ancestors have been, and the like; which can often only be proved by witnesses who have always heard their

1. ibid.

parents declare the same as the truth."¹

Merula at 4.65.10.4 of his *Manier van Procederen* states that witnesses must "daar by voegende levende rederen van hunne wetenschap." He states further in his notes on this statement :-

"Het is noodzakelyk, dat een getuige, zal hy geloof verdienen, redenen van zyn gezegde geven kan, waar daar het waarschyndlyk word, dat hy weet, 't geen hy zegt want geene redenen van wetenschap kunnende gewen, zoo maakt zyn zeggen zelfs geene de allerminste praesumptie"

Despite the fact that Schmidt asserts that cross-examination was unknown it would appear that the value of cross-examination was known. The lack of ability to cross-examine is the principal modern rationale for the rule against hearsay. Roman-Dutch writers were aware that testimony not open to cross-examination was of lesser probative value. Van der Linden suggested that witnesses could be challenged because no opportunity to cross-examine was afforded.³ This presumably could be applied to testimony advanced by witnesses not available for cross-examination.

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1. Commentaries on Roman Dutch Law)-trans Kotze)
(1928) p 483.
 2. *Manier van Procederen* (1783).
 3. Institutes of Holland (5 ed) (trans Juta)
(1926) p 160.

Van der Linden, although opposed to "strik-vragen" suggested that it was valuable :-

"... om den Getuigen nader af te vragen de bijzondere omstandigheden, die hij bij Zijne Verklaaring of verzwegen, of alleen en gros opgegeven zoude mogen hebben - om hem van duistere periodes in zijne Verklaaring uitlegging te vragen - om zoo onderscheide periodes Zijner Verklaaring regen elkander schijnen te strijden, hem van die strijdigheid de oplassing to vragen - om hem specialijk te onderhouden over de redenen van 't geen hij verklaart - en over diergelijke poincten, die een gezondverstand, met prijswaardige cordaatheid werkzaam, zelf overvloedig aan de hand geeft."¹

However, despite the seeming awareness of the importance of cross-examination, the Roman Dutch writers were not aware of the link between hearsay dangers and cross-examination which that has become the major rationale today behind the rule against hearsay.

CONCLUSION

Apart from the fact that Roman and Roman dutch rules

1. Verhandeling over de Judicielle Practijcg (1978) 3.4.12.

about hearsay evidence do not form part of South African Law, it is submitted that those rules hold little value for the analysis of a consideration of the retention of the hearsay rule. Comments on hearsay, where they exist, consist of very general statements without analysis of the underlying dangers inherent in hearsay and although hearsay consisted of lesser proof and although the value of cross-examination was appreciated by some writers this did not translate into a constructive approach that showed appreciation of hearsay dangers in a general exclusion of hearsay testimony.

CHAPTER FIVESOUTH AFRICAN LAWDEFINITIONS

South African law definitions are basically identical to those of English and American Law, but it is useful to quote a few examples to lay the foundations for this section.

May defines hearsay as :-

"... evidence of the statements of another person which a witness says he heard."¹

Hoffman and Zeffert define hearsay as follows :-

"... in general it may be said that evidence is hearsay when the court is asked to rely, not upon the personal knowledge of the witness testifying, but upon the assertion of someone else."²

Watermeyer JA in R v Mieler 1939 AD 119 :-

"Statements made by non-witnesses are not always hearsay. Whether or not they

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1. South African Cases and Statutes on Evidence (4 ed) (1962) p 2.
 2. South African Law of Evidence (3 ed) (1983) p 93.

are hearsay depends upon the purpose for which they are tendered as evidence. If they are tendered for their testimonial value (i.e. evidence of the truth of what they assert) they are hearsay and are excluded because their truth depends upon the credit of the asserter which can only be tested by his appearance in the box."

Schmidt¹ follows the definition laid down by Watermeyer J in Estate de Wet v De Wet 1924 CPD 341.

"... evidence of statements made by persons not called as witnesses which are tendered for the purpose of proving the truth of what is contained in the statement."

1. Bewysreg op cit p 451; See also Van Wyk A.J. in "Die Hoorsêreël in Perspektief" 1979 THRHR p 202 and Amicus Curiae in "Hearsay and Horse-sense" 85 SALJ p 178 (1968).

RATIONALE AND REFORM

South African criminal law of hearsay is governed by the "30th May 1961" formulation through section 216 of the Criminal Procedure Act 1977 which means that generally pre-1961 English law decisions on hearsay from the "Supreme Court of Judicature in England" are binding in South Africa.¹ Similarly this "30th May 1961" formulation applies to the civil law of hearsay by virtue of section 42 of the Civil Proceedings Evidence Act 1965.

Thus the basic rationale behind the exclusionary rule is the same as that of English law i.e. that the hearsay testimony is lacking in trustworthiness because it cannot be tested by cross-examination. Therefore the dangers inherent in such testimony cannot be eradicated or at least exposed through such cross-examination.²

Considerable disquiet has, however, been expressed in South African writing on the question of hearsay. Although the level and amount of writing on the subject of hearsay reform has reached nothing like that of England or the United States, it is quite obvious that the rule is provoking increased antipathy.

Hoffman argues that if the rationale for the rule is unreliability untested by cross-examination courts should be permitted to deal with the question as one affecting weight as opposed to admissibility. He quotes a statement by Lord Devlin in Bearmans Ltd v

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1. Hoffman op cit p 3 see also ibid pp 10-13.
 2. See Hoffman pp 93-4, Schmidt p 450-451, May p 21, 1979 THRHR 202 at 203.

Metropolitan Police District Receiver¹ in which the judge argued that while it was required to exclude hearsay because of the fallibility of the jury it was no longer required when a matter is being decided by a judge alone.

Hoffman accepts that certain hearsay evidence is untrustworthy, but argues that there are cases where such evidence is absolutely trustworthy. The major difficulty with the rule is its rigidity in that all hearsay, reliable or not is excluded, the rule may work injustices thereby, and finally that the rule prevents the court from discovering the truth.²

Amicus Curiae argues that the rule is contrary to common sense. He submits that often a statement or document is excluded because it is hearsay even though the statement or document and the circumstances surrounding the making thereof given rise to belief in its accuracy and reliability. He further submits that :-

"[E]ven a trained lawyer, encouraged by his general experience to think that what is plainly fair and sensible will usually be found to conform with the common law, can be led into error by such a conflict between law and logic as the hearsay rule sometimes throws up. Where there is such a conflict he may fail to realize that the persuasive

1. [1961] I ALL ER 384 at 392.
 2. op cit p 94.

assertion offered to him is hearsay; or, if it is suggested to him that it is, he may be misled by his common sense, and his instinct for what is fair, into the belief that, for one reason or another, the statement falls outside the ambit of the exclusionary rule."¹

Van Wyk argues that the hearsay rule is an unwelcome hold over from the jury system. He argues that the law has now moved into a period of renewal and codification.² Paizes and Skeen commenting on the Computer Evidence Act 1983 state the the act is a welcome and necessary "liberation from the stifling effects of the hearsay rule." In the same article the authors comment that the "shackles" of the rule were also removed by section 6(3) of the Admiralty Jurisdiction Regulation Act 1983.³

Schmidt argues that any rule with such a wide variety of exceptions cannot be healthy. He argues that although the exceptions bring relief they are illogical and do not bring the degree of relief needed in all cases. He argues that where evidence shows a guarantee of trustworthiness there is a temptation to admit such evidence "ter wille van billike beregting".⁴ He comments further :-

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1. 1968 (85) SALJ 178.
 2. op cit p 202.
 3. 1983 Annual Survey 440 at 442.
 4. op cit p 461.

"'n Mens sou dus miskien kon verwag dat die toenemende ingewikkeldheid van die moderne lewe sou lei tot 'n toename - al geskied dit geleidelik en versigtig - van uitsonderings op die horsêreel. Teen so 'n ontwikkeling kan daar weinig bewaar wees, want die reg moet met die samelewing tred hou. Per slot van rekening het ons bewysreg tot minstens in die 19 eeu stelselmatig ontwikkel - waarom moet dit daar bevries word?"¹

By far the most comprehensive assault on the hearsay rule that I have been able to find in South African writing is that of Mr. Justice H.C. Nicholas in a paper delivered to the South African Law Conference in 1970.² His basic argument is for the abolition of the rule through legislation because no one could doubt that reform of the hearsay rule was necessary. He argues that we rely on hearsay information in day to day living and we accept it beyond question.

"Outside of Courts, people are, of course, obliged to act on hearsay evidence, because very often they can get no better. The Courts are not, of course, under the same necessity. They have extensive powers of compulsion,

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1. ibid see also generally Coetzer, M.J.F. - "Hearsay Evidence - Should the Rule against Hearsay be relaxed to allow for credibility." 19 TM 164.
 2. Report of the 1970 South African Law Conference.

under which there can be produced before it the best evidence available. It does not follow, however, that the Courts should not have access to the second best as well, and thus be deprived of evidence of a kind on which mankind universally rely ..."¹

The learned judge argues that the exceptions are inconsequential and inconsistent and lack a rational basis. The basic principle underlying the exceptions is a "special necessity" and a "special guarantee" of the evidence's trustworthiness. However, the exceptions themselves do not take account of "the true probative value of hearsay evidence". Evidence of little probative value is admitted, while that of good value is excluded.²

Mr. Justice Nicholas argues that there are three possible approaches to reform of the rule and its exceptions :repair work; codification; or abolition. He asserts that repair work either by statute or judicial activity is unsatisfactory. Codification is unacceptable because it would "perpetuate the excessive rigidity of the present law.", impracticable because no satisfactory codification has been offered, and unnecessary. Abolition would approach the matter "afresh and on the basis of principle".³ He submits :-

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1. op cit p 61.
 2. op cit p 62.
 3. op cit p 65.

"In South Africa, jury trials ... were finally abolished many years ago. With the disappearance of the occasion for the hearsay rule, what necessity remains for its retention? The strongest reason which can be advanced is that hearsay evidence may be unreliable. That, however, is an objection which goes only to the weight of the evidence, which is a matter which can and should be determined by the Court. What advantage has a rule of exclusion, subject to certain arbitrary exceptions none of which have as their basis any real guarantee of truth, over a rule of inclusion, which would admit all relevant evidence, and leave the assessment of its value to the Court? The answer is plainly that there is no advantage discernable."¹

COMMON LAW OR STATUTORY REFORM?

For a considerable period it was believed that reform and development of the hearsay rule and its exceptions could be carried out judicially. There was considerable judicial activity in this field.² However, in

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1. ibid
 2. see eg. Robinson v Randfontein Estates Gold Mining Co Ltd 1924 AD 151; R v Ferguson 1949 (3) SA 69(N); Gibson v Arnold & Co (Pty) Ltd 1951 (2) SA 139 (1).

Vulcan Rubber Works (Pty) Ltd v SAR&H¹ the Appellate division held that the hearsay exceptions were a numerus clausus that could not be developed by, for example, the requirements of necessity. In this case the court overruled Naik v Pillay's Trustee.² In Naik De Villiers JA considered that the rule against hearsay should be relaxed in cases of necessity. In this case it was felt that there could be no ground in logic why declarations in the course of duty, for example, should be admissible where the declarant is dead, but inadmissible where the declarant is seriously ill or cannot be found. This judgement dealt in particular with the exception to the hearsay rule of declarations in the course of duty. De Villiers JA considered that :-

"As the rule springs it necessitates that the principle applies equally to cases where the best evidence is not available, such as the [book-keeper's] grave illness in the present instance."³

The court in Vulcan Rubber stated that :-

"There is no doubt that the exceptions to the rule against hearsay have come into existence mainly because there was felt to be a strong need for such exceptions if justice was to be done. But that is a different thing from

1. 1958 (3) SA 285 (A).
 2. 1923 AD 471.
 3. at 477.

recognising a principle that the rule against hearsay may be relaxed or is subject to a general qualification if the court thinks that the case is one of necessity ..."¹

This would seem to have slammed the door on judicial development, as did Myers v DPP in England.² Despite the fact that subsequent cases, such as Registrar of Insurance v Johannesburg Insurance Co Ltd (1) held that an accountant's report was admissible because :-

"If all the people who know about every small fact which makes up this complex case should have to make affidavits, the matter would have become quite impracticable. In a case like that a Court will relax its rules for the sake of facilitating litigation and in the interest of justice."³

or have held that the exceptions could be developed, it would seem that reform will have to be carried out through the legislature, because the balance of judicial authority has followed the judgement in Vulcan.⁴

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1. at 296.
 2. See Schmidt op cit pp 462-464.
 3. 1962 (4) SA 546 at 547 E.
 4. See however Kroon v J.L. Clark 1983 (2) SA 197 (ECD).

STATUTORY REFORM

There have been four major statutory reforms in recent years. The first is Part VI of the Civil Proceedings Evidence Act 1965 ✓ which applies to criminal proceedings by virtue of section 222 of the Criminal Procedure Act 1977. The second is section 221 of the Criminal Procedure Act 1977 ✓ which deals with admissibility of trade or business records in criminal proceedings. The third is the Computer Evidence Act 1983. The fourth is the new Evidence Amendment Act 1988.

It is not proposed here to deal in detail with the first three of these items of legislation. However certain matters arise out of each of them that do need a degree of attention. Part VI is taken substantially from the English Evidence Act 1938. This 1938 act has long since been repealed by the 1968 English Act. There is little doubt that the same factors that gave rise to repeal in England must have arisen in South Africa. The principal section of the Act is section 34(1) which states :-

"In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall on production of the original document be admissible as evidence of that fact, provided -

- (a) the person who made the statement either -
 - (i) had personal knowledge of the matter dealt with in the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with therein are not within his personal knowledge) in the performance of a duty to record the information supplied to him by a person who had or might have been supposed to have personal knowledge of those matters; and

(b) The person who made the statement is called as a witness in the proceedings unless he is dead or unfit by reason of his bodily or mental condition to attend as a witness or is outside the republic and it is not reasonably practicable to secure his attendance or all reasonable efforts to find him have been made without success."

Criticism was levelled in England about the requirements of "record", "duty" and personal knowledge in the 1938 Act. The provisions were reissued in the 1968 Act and have again created difficulties, through, especially, restrictive interpretation of "record" in S4 of the 1968 Act.¹ The English Act of 1984 has

1. See above and Cross on Evidence (6d) p 494; H v Scherin Chemicals [1983] 1 ALL ER 849; and Savings and Investment Bank Ltd v Gasco Investments (Netherlands) BV [1984] 1 ALL ER 296.

altered the requirements slightly so that provision is made for the situation where the person supplying the information is in fact also the person making the record.

A final section in the Act worth quoting deals with the weight to be attached to evidence admitted under Part VI. The section is self explanatory, but it is a useful section to consider for its possible general applicability for any reform directed statute.

"(1) In estimating the weight, if any, to be attached to a statement admissible as evidence under this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question 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 person who made the statement had any incentive to conceal or misrepresent facts.

(2) A statement admissible as evidence under this Act shall not, for the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroberated evidence is to be treated, be treated as corroboration of evidence given by the person who made

the statement."¹

The second statutory provision to consider is section 221 of the Criminal Procedure Act 1977. Part VI of the Civil Proceedings Evidence Act 1965 is included, as has been stated, in the Criminal Procedure Act by virtue of section 222. Section 221 applies specifically to trade or business records. The document containing the statement must be (or must form part of) a record relating to any trade or business and must have been compiled, in the course of that trade or business from information supplied directly or indirectly, by persons who have or may reasonably be supposed to have personal knowledge of the matters dealt with in the information they supply.² The section was based on the 1965 English Criminal Evidence Act. The 1965 English Act has been replaced by the Police and Criminal Evidence Act 1984.

The third statutory provision is that of the Computer Evidence Act 1983.³ This statute arose basically out of the decision of Holmes J.A. in Narlis v South African Bank of Athens⁴ which held that computerised records are not admissible under section 34 of the Civil Proceedings Evidence Act. The Honourable Mr. Justice J.M. Didcott compiled a report which was

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1. See generally Hoffman op cit 138-141 and Schmidt op cit p 484-485.
 2. See Hoffman op cit p 145-146; Schmidt op cit p 489-450.
 3. For a general discussion on law and the computer see Horwitz - "Computer Abuse - the legal implicatons", Accounting SA, March 1986 p 125.
 4. 1976(2) SA 537(A).

received by the South African Law Commission, which ultimately led to the Computer Evidence Act being enacted. The Law Commission in its final report of April 1982 had the following to say about reform of the law relating to computerised records :-

"The advent of the computer poses new and exciting challenges for law reform ... The law must keep abreast of developments and must recognise the need for reform ... from the study of the matter it appears that South Africa has lagged behind in that the rules of evidence do not provide adequately for the admissibility of computerised records."¹

The Report felt that S34 of the Civil Proceedings Evidence Act was "highly unsuitable to its accommodation of computerised records."² The requirement of personal knowledge of the matter in the authorised statement makes it impossible for admission of computerised records, because computer operators seldom have personal knowledge of the material put into the computer. The report also felt that the requirement that the maker of the statement be called as a witness limited the usefulness of S34 for computerised records.

The act defines computer as follows in S 1 (1)(iii) :-

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1. South African Law Commission - "Report on the admissibility in civil proceedings of evidence generated by computers". pp 2-3.
 2. op cit p 3.

"computer" means any device or apparatus, whether commonly called a computer or not, which by electronic, electro-mechanical, mechanical or any other means is capable of receiving or absorbing data and instructions supplied to it, of processing such data ... of storing such data before or after such processing, and of producing information derived from such data as a result of such processing.

The object of the act was to overcome dangers in the hearsay evidence produced by computers. Thus various safeguards were introduced to ensure the reliability of computer print-outs. Thus the computer print-out must be authenticated by an "authenticating affidavit". This affidavit must identify the print-out and confirm that it is a print out as defined in the act. It must identify the print out and confirm that it is a true copy, reproduction, transcript or interpretation of the information. It must describe in general terms the nature, extent and source of the data and instructions supplied to the computer, and the purpose and effect of the processing of the data by the computer.

The deponent of this affidavit must be someone with knowledge and experience of computers and also of the particular computer system used in the matter. He must have also examined factors affecting the operation of the computer.

This legislation has generally been welcomed.¹ However, potential problems have been pointed out; especially the problem that the deponent to the authenticating affidavit might have "inadequate knowledge of the complete functioning of the particular computer system in question."² It would also be extremely difficult to detect computer malfunctions or errors caused by "current variations or working in an unsuitable environment."³ Criticism has also been levelled at the fact that the Act only applies to civil cases. It has been argued that it should apply to both criminal and civil cases.

The fourth statutory provision is the Evidence Amendment Act 1988 which has just completed its passage through parliament. This Act defines hearsay in section 3 (4) as follows :-

"'hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence."

This definition is clearly based on declarant-orientated exclusionary principles focusing on the credibility of the witness who is not available

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1. Paizes, A 1982 Annual Survey p 440 at 442.
 2. *ibid.* See also Steel, J.T. "Computer Produced Print Out-Reliable As Evidence" (1983) 100 SALJ 505 and Ebden A.J. "Computer Evidence in Court" (1985) 102 SALJ 687.
 3. *ibid.*

to testify. Most commentaries on the hearsay dangers focus on the inability to test the credibility of the out-of-court declarant through cross-examination. This is most clearly shown by American writers' comments on the hearsay dangers. The Act, thus, attempts to focus its attack on this source of danger.

Another important innovation is that the provisions of section 3 apply equally to civil and criminal proceedings.

The statute does not, however, leave its reform of hearsay at this point. Section 3 (1) provides for the admission of such 'hearsay evidence' if :-

- "(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings; or
- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
- (c) the court, having regard to -
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;

- (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
- (vi) any prejudice to a party which the admission of such evidence might entail; and
- (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice."

It is to be noted that subsection (1)(c) obviously intends that all seven issues should be taken into account in determining whether the evidence in question should be admitted in the interests of justice.

The implications of this piece of statutory reform will be discussed in the conclusion of this thesis.

CONCLUSION

The Evidence Amendment Act 1988 will inevitably alter the way hearsay evidence is treated in South Africa. Paizes feels our treatment of hearsay has entangled us in an "unintelligible thicket" because of "a general failure to appreciate that any attempt to define the meaning and scope of hearsay must encompass an examination of the purpose for which a statement is tendered, not only its nature." Further, this entanglement is due to [t]he absence of any comprehensive judicial formulation of the rule" and

finally "[t]he multiplicity of formulations found in textbooks upon the subject."¹

Legislation was undeniably needed in South Africa. Mr Justice Nicholas wrote as long ago as 1970 that :-

"We in South Africa adopted the provisions of the 1938 [English] Evidence Act only in 1962. I venture to hope that on this occasion we in South Africa will not wait a quarter of a century before following the English example."²

Legislation has now arrived, though not of the English type. It is to be welcomed that reform is being undertaken. The legislation has attempted to address both of Paizes' reasons for the entanglement in the "unintelligible thicket".

It will be suggested in the conclusion to this thesis that although the legislation has addressed itself to reform, it has produced the very type of reform that will produce the greatest uncertainty, and injustice, in hearsay admission and allow potentially dangerous evidence to be widely and freely admitted without adequate safeguards.

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1. "Public-Opinion Polls and the Borders of Hearsay" 1982 SALJ 71 at 75-6.
 2. Report of the 1970 South African Law Conference.

CHAPTER SIXCONCLUSIONSINTRODUCTION

In this chapter I will not attempt to review all that has gone before. What I will attempt to do is to come to a conclusion about the retention of the hearsay rule in evidence - in the South African context. In essence I intend to take a stance on this vexed issue. The position I will attempt to support is that limited statutory reform should be undertaken, not of the form undertaken in England, but of the form undertaken in the United States.

TO REFORM OR NOT TO REFORM?

The obvious conclusion from the survey attempted in this thesis is that the hearsay rule and its exceptions, as it stands unalloyed at present, cannot be retained. It is impossible not to conclude that reform is necessary. As I suggested in my introduction, the crisp issue is how much reform must be carried out on the rule. The objections to the rule as it stands may be summarised as follows : (1) the rule is unjust - for example it excludes even prior statements of witnesses (2) the rule causes issues to be decided without "the best evidence" in many cases and excluded hearsay is often very reliable; (3) the rule adds to costs by having to call direct evidence of facts not in dispute; (4) the rule complicates the law and confuses witnesses who cannot

tell their story in the normal way; (5) the exceptions to the rule are complicated and illogically inconsequential.

One only has to look at the comments of writers in England, the United States and South Africa to conclude that some reform is required.

CODIFICATION, ABOLITION OR PARTIAL STATUTORY REFORM

As has been suggested before, the only approach to reform must be by legislative action. There are three possible approaches. The first is codification of the entire law of evidence including the hearsay rule and its exceptions including necessary reforms to the hearsay rule. Cogent objections have been raised, including the excessive rigidity that would result, and the impracticalities involved in codifying such a huge body of law.¹

The second approach is that of the abolition of the rule completely, replacing it with a complete discretion to the trial officer to admit the evidence and thereafter to assess its weight. There are many supporters of this scheme. Many authorities suggest that now the jury has been replaced it should be up to the trial officer to assess weight rather than the rule to prevent admission. This approach may best be put as follows :-

1. See for example Nicholas op cit p 64.

"It is extremely difficult for a jury to give the same attention to considerations of weight that a judge does. It comes easily to a judge to say - 'I must be careful about accepting this because after all the witness is not speaking on oath; he has not been cross-examined; I do not know the circumstances in which the statement was taken and so forth.'"¹

Abolition brings into debate the whole question of the basic reliability or otherwise of hearsay evidence. There are certain "dangers" inherent in hearsay testimony that have been isolated; (1) risk of faulty perception; (2) risk of defective, confused or distorted memory; (3) lack of sincerity through a propensity or desire to express inexactly; (4) risk of inexact verbalisation; and (5) a testamentary escape clause - the witness can escape the effects of what he is saying by stating he is merely relaying what he heard another say. u

These "hearsay dangers" go to the value of the evidence admittedly, but they do have an effect on the trial officer too. If you remove juries from the hearsay equation you are still left with the trial officer; If you allow complete admission and rely on that trial officer to assess weight it is my submission that while you are certainly better off than

1. Devlin L.J. in *Bearmans Ltd v Metropolitan Police District Receiver* [1961] 1 ALL ER 384 at 392.

had you had the jury, you are not so substantially better off that you remove the effects of the hearsay dangers. In essence, removing the jury and basing treatment of hearsay on weight rather than admissibility does not solve the dangers of hearsay testimony. It is my submission that while South Africa has certain very good trial officers, the standard is not uniformly good. In this one must consider that the vast majority of civil and criminal trials are heard by magistrates. Furthermore in criminal matters one has to consider the role of the assessor who is in a similarly "impressionable" position as that of the juryman. Thus, while certain trial officers will readily assess the "weight" to be attached and assess it correctly, others are far more likely to misjudge the weight.

"Put simply, we do not trust trial judges. If we thought that the country's trial judges were almost always highly capable and completely impartial we might reluctantly support hearsay reform ... Unfortunately, the trial bench in this country is not uniformly excellent ..."¹

The formulation "remove juries and therefore abolish the rule" fails, in my submission, to address an even more important issue. The English common law form of trial, based on the adversarial principle, places great emphasis on the right of cross-examination, or

1. Lempert and Salzburg op cit p 523.

put in an American fashion, the right to confrontation. This issue was emphasised by the English Criminal Law Revision Committee Report. The Committee did however feel it could be circumvented. I do not believe it can be so easily sidestepped. Abolition of the hearsay rule means that a certain, probably greatly increased, percentage of all testimony at trial will not be open to cross-examination. This affects the whole principle behind our adversarial system and the right of parties to confront opponents in either a civil or a criminal matter through the technique of cross-examination. The formulation obviously has no effect on this central issue, and in my estimation the whole issue of cross-examination, is a legal right as important as equality before the law, has been either sidestepped or ignored by most writers on the hearsay issue.

These submissions, firstly that removal of juries does not fundamentally alter the difficulties raised by hearsay dangers, and secondly that the right of cross-examination is a right and fundamental to the adversarial system, must mean that abolition of the rule altogether with replacement by judicial discretion as to weight is not an acceptable reform solution. There are however other grounds, alluded to earlier in this thesis, on which the abolition approach must fail. These are firstly that abolition would remove certainty in the law - in preparing for trial the legal representative could never be certain as to what weight would be attached to hearsay evidence. Secondly, abolition would cause the lengthening of trials through investigation of the side issues inherent in hearsay. Thirdly, there would be the dangerous possibility of fabrication of evidence,

particularly in criminal matters - this issue raised considerable difficulties for the Criminal Law Revision Committee and the Bar Council in England.¹ Fourthly, there is the inequality of ability to obtain hearsay evidence - there is inequality in trial system at present to the benefit of the state in criminal matters and larger, wealthy organisations in civil matters and there is no need to exacerbate these inequalities.

In summary, therefore, my submissions on the question of abolition are that the removal of juries does not affect the role of the hearsay rule because of the uneven quality of our judicial officers, and because of the inherent right of confrontation that is fundamental to the adversary process² and which process I do not believe South African writers would see abandoned.

PARTIAL STATUTORY REFORM - ORAL HEARSAY

If we do not codify, or abolish, or leave the situation as it exists at present, the only reform solution is partial statutory reform. This project has looked at English and American reform. We can, thus, draw on developments wrought by the foremost jurists of the common law world.

Do we then approach reform along the lines developed in

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1. supra.
 2. See for example Wilson - Cases and Materials on the English Legal System (1973) p 378 et seq. and Hoffman op cit p 352 et seq.

Britain in the 1968 and 1984 Acts? I do not believe we should for the following reasons. The 1968 Act has removed the rule against first-hand hearsay in civil matters. This has failed to take account of the inherent hearsay dangers, dangers not effected as I have submitted above, by removing juries from the hearsay calculation. The inherent dangers that the English Act has ignored is shown by the fact that they have abandoned the first-hand hearsay exclusions but retained the exclusion on second-hand hearsay. There does not appear to be a theoretical basis behind this dichotomy. What has been done is to reason that second-hand hearsay is more dangerous than first-hand. Surely, however, if the drafters of the Act believed the trial officer would assess weight to be attached to first-hand hearsay and in the words of Lord Devlin¹ warn himself of the dangers inherent in the evidence, the trial officer could be trusted to do the same with second-hand hearsay. What the English drafters have opted for is expediency rather than legal reasoning.

The small number of cases on the act has been taken as an indication that the act is working well. However problems, pointed out herein, inherent in wider admission of hearsay have been addressed recently in England.² The comments apply to criminal trials, but apply with equal force to civil matters with respect to inequalities, already indicated, inherent in

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1. In the Bearmans case supra.
 2. Ashworth, Pattenden - "Reliability, Hearsay at Criminal Trial" 102 (1986) LQR 292 at 328 et seq.

civil trials. The comments are worth quoting in some detail.

"This leads to the question whether defendants' rights are diminished by the movement towards increased admissibility ... almost all the decisions [allowing greater admissibility] ... tend to favour the prosecution, either by admitting evidence for the prosecution which appears although it may technically be hearsay or by excluding evidence for the defence on a somewhat stricter view of reliability."

JMP

The authors further argue that¹ :-

"The decisions made inroads into the principle of orality, and one possible justification for preserving that principle might lie in what the Americans term the "right of confrontation". Defendants should, it is said, have the right to confront the observing witness in court and, usually through counsel, to cross-examine him in order to test the accuracy of his perception, memory and verbal communication of what actually happened. The hearsay rule protects the right of confrontation."

JMP

1. ibid.

The authors conclude by arguing that :-

"... any reform of the hearsay rule, whether clandestinely by the courts or expressly by the legislature, ought to be preceded by an examination of its effect on defendants and on the balance between prosecution and defence in the trial process."¹

It is submitted that these questions have not been properly addressed in the 1968 Act and the dangers of wider admission have been clearly recognised in the 1984 Act which has not effected changes in oral hearsay in criminal matters. The 1968 English approach to civil hearsay should not be followed in South Africa. Merely because a civil claim is involved, rather than a person's liberty does not remove the hearsay dangers and right to confrontation. Furthermore, the extensive notice provisions in the English Act do not effect the theoretical basis for objecting to the English approach.

Finally, obviously, the 1968-style formulation should not be applied to criminal matters. No attempt has been made to do so in England, and it should never be applied in a South African context for the general objections set out above.

It is now necessary to consider the suitability of the

1. *ibid.* For an example see Blastlands [1968] AC 41.

United States approach to hearsay reform. The codification of the law as adopted by the United States on a federal level should not be followed for the reasons set out above. However the United States approach, it is submitted, offers the most viable approach to reform through its two "catch-all" sections - the first where the declarant is available as a witness; the second where the declarant is unavailable. These sections overcome the rigidity that would be inherent if all hearsay were excluded because of the inherent hearsay dangers and lack of ability to cross-examine (right of confrontation) except for the current exceptions. Although the drafters of the United States legislation wish only a narrow view of the two sections to be followed, it is submitted a more liberal approach would have to be indicated by the legislature in South Africa to allow for a relieving impact to be had on the existing law through allowing admission of evidence having "circumstantial guarantees of trustworthiness" or evidence necessary for justice.

Obviously this approach of reform via judicial interpretation of the catch-all sections would come only from the higher courts where judicial officers are generally of undoubted ability, thus removing dangers inherent in open admission. Furthermore, the proposed legislation would have the least possible effect on the inherent right to confrontation because it would be used to admit hearsay only in fairly narrowly defined situations.

Finally, legislation could deal with the difficult question of implied assertion. The Federal Rules include in the statutory definition of "statement" implied assertions. As was suggested in Chapter Two in dealing with John Macquire's approach to this issue

the extension of the definition of hearsay to include such assertion was to be preferred. Thus legislative reform could taken cognizance of the need to extend the hearsay rule to cover implied assertions.

This sort of legislative formulation would answer the most cogent objections raised to the hearsay rule as it present stands - that it excludes reliable evidence of great value, often of more value than the evidence before the court. It would, in essence, facilitate compliance with the "best evidence" rule in situations where rights of participants would be least effected and the hearsay dangers would be least effective. It would require "weight-testing" by judicial officers, but only in strictly limited circumstances.

This United States type approach can be applied equally to criminal and civil matters without running into the dangers inherent in applying the English type civil solution to criminal matters,¹ because of the greater burden of proof resting on the state in criminal matters.

Having made these comments it is perhaps now appropriate to deal with the Evidence Amendment Act 1988. This statute is a very far-reaching reform. As has been suggested earlier, the statute adopts a declarant-orientated definition of hearsay evidence, and establishes various situations in which such hearsay evidence may be admitted.

If it was the purpose of this statute to continue to protect against the hearsay dangers inherent in the type of evidence traditionally excluded by the hearsay

1. The dangers are detailed in Chapter 2 supra.

rules, then, it is submitted, this purpose has failed. In allowing, specifically, such wide discretion to the court to admit hearsay testimony under subsection (1)(C), the act goes much further than the two main English statutes and the "catch-all" provisions of the Federal Rules of evidence. X

The nature of subsection (1)(c) is such that it has turned the traditional approach to hearsay evidence on its head - instead of approaching hearsay evidence on the basis of general exclusion with inclusionary exceptions, it approaches hearsay evidence on the basis of a broad inclusion with certain exclusionary provisions which are at the discretion of the judge. This is what the section in essence amounts to although the wording would at first appear to mean otherwise.

It is, it is submitted, fundamentally flawed to allow the court to have this much discretion over the admission of hearsay evidence. It contradicts one of the fundamental bases for objections to wholesale admission postulated in this thesis, that is, the questionable ability of judicial officers to determine difficult questions of witness credibility, probative-value of evidence and the nature of evidence tendered.

Furthermore, and more dangerously, the statute would allow admission of evidence "for what it is worth". For example, the court might admit hearsay evidence under subsection (1)(c) primarily for its probative value for what it is worth, having paid lip service to the requirements of the subsection; and arguing that "it is in the interests of justice that the evidence is admitted." X It is highly questionable whether the various reasons for excluding hearsay evidence X

discussed throughout this thesis would suddenly disappear because its probative value is such that the judicial officer feels it should be admitted. The evidence would still be tainted by the hearsay dangers and would not be subject to cross-examination, but it would now be before the court as part of the evidence.

It is submitted, thus, that by merely allowing a court to decide on the basis of subsection (1)(c) that evidence should be admitted does not remove the hearsay dangers.

If courts in South Africa were to approach subsection (1)(c) in such a way as to allow the admission of evidence not exposed to hearsay dangers, it would be to act contrary to the obvious intention of the statute as evidenced by the subsection. The courts, thus, have been given wide discretion, and it is submitted that the subsection provides no real safeguards against a judicial officer determined to admit hearsay evidence no matter how dangerous. The subsection also provides no safeguards against inexperienced or poor judicial officers admitting dangerous evidence. The subsection, finally, provides no safeguards against the creation of widespread uncertainty as to what hearsay will be admitted or will not be admitted. The immense difficulties that will now arise in preparing for civil or criminal trials is clearly apparent.

Further important objections can be raised to the legislation. In the 1968 English legislation which allows wide admission, clearly defined notice procedures are established to protect against one party being caught by surprise by the presentation of hearsay in evidence by the other party. In the Federal Rules, which have restricted admission, no

notice procedure is required. The 1988 South African act has no such safeguards against a party being caught by surprise by the presentation of hearsay evidence. }

English law draws a distinction between civil law and criminal law treatment of the admission of hearsay evidence. The reasons for this have been dealt with in detail elsewhere in this thesis. United States does not draw the distinction because its admission of hearsay evidence is considerably more restricted. The very important reasons for the English distinction between civil and criminal admissions have been ignored by this 1988 act. The types of injustices to the defendant in criminal cases, pointed out elsewhere, are thus bound to arise.

If it was the intention of the drafters of the Evidence Amendment Act to protect against the admission of dangerous hearsay evidence it has, it is submitted, failed. In reality, without a clearly defined rule against hearsay evidence based on a general exclusion with limited exceptions, coupled with a provision to allow exceptions to the rule to develop to prevent potential injustices, any law will fail to exclude tainted hearsay evidence.

PARTIAL STATUTORY REFORM - DOCUMENTARY HEARSAY

The arguments advanced above apply to oral hearsay. The same considerations obviously do not apply to documentary hearsay, where there are inherent safeguards, for example in business records. The current approach to documentary hearsay in England, the United States and South Africa is broadly similar. It is submitted that no fundamental reform

is needed with respect to this approach, save that the tidier, more logical approach of the 1984 English Act, or the broader approach of the American legislation, applied to both civil and criminal matters should be adopted.

The new Evidence Amendment Act 1988 applies equally to oral or written hearsay by virtue of section 3(4). It fails to provide safeguards against the admission of dangerous written hearsay, for the reasons outlined above.

MORE HASTE LESS SPEED

It is my final submission that there is an over-eagerness to abandon the hearsay rule and blunder on regardless of the consequences of such an action. It is submitted, with respect, that the new Evidence Amendment Act shows every sign of being a product of such regardless activity. Very little cognizance is taken of the fundamentally sound reasons for the rule and the protection afforded thereby to the various parties against whom the hearsay evidence might otherwise be admitted. There is very little evidence, in South Africa, that cognizance is taken of the hearsay rule's beneficial aspects. A legal system such as ours, based on the English adversarial approach cannot abandon such a rule without attacking the foundations of that approach. As importantly, and hand-in-hand with that concept, is the risk that lies in thinking that the dangers inherent in hearsay untested by cross-examination will dissipate like a mirage if the rule is abandoned.

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