THE HEARSAY RULE IN CIVIL PROCEEDINGS, SOME PROBLEM AREAS

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I have been asked to deal with the hearsay rule in civil proceedings.

Being a judge for the Province of Quebec, my experience is limited to the law as applied there. However, it is now settled by the decision of the Supreme Court in the case of the Royal Victoria Hospital vs Morrow [1.] that in Quebec:

> ".....the rule excluding hearsay must be accepted in principle....."

and

> ".....in principle the exceptions allowed in English law must be recognized as applicable, in so far as there is no express provision in this regard or any incompatibility with an express rule."

This decision put an end to a period of uncertainty following a split decision by the Quebec Court of Appeal in Southern Canada Power Co. Ltd vs Conserverie de Napierville Ltée [2.] where the majority of the court had held that hearsay was excluded under the provisions of the Code of Civil Procedure in all cases other than the exceptions specifically provided in the code. These principally cover the filing of depositions taken in other pro-

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1. (1974) S.C.R. 501 at pp. 508 and 509,
   also Balazzi vs Park Lane Construction Ltd (1973) C.S. 704
2. (1967) B.R. 907

ceedings when a witness is unavailable, the conservation of evidence which it is feared may be lost and the production of medical reports, of employer's statements as to wages and certain other documents. In addition under the Quebec Civil Code, admissions constitute a distinct form of evidence and therefore are not formally exceptions to the hearsay rule. In matters of pedigree, the Quebec Civil Code contains specific provisions which differ in approach and formulation from the common law exception to the hearsay rule but are similar in purpose and general result. The Quebec rules of evidence governing writings reflect in part its civil law heritage and differ from common law rules (e.g. notarial documents). Finally under Quebec law, in civil proceedings, the exclusion of hearsay evidence may be waived by the parties and indeed is presumed to be waived in the absence of an objection [3].

I understand the contrary to be true at common law [4].

Having pointed out these peculiarities, I propose, after outlining briefly the general context of the subject, to highlight certain common problems of special interest to ourselves as judges because they are frequently raised and present

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3. Nadeau et Ducharme, Traité de droit civil, T. 9, No 196; Roy vs Fortier (1962) B.R. 174; Soccio vs Régie des Alcools du Québec (1972) C.A. 283 at 284 where it was held that the admission of hearsay by an administrative tribunal does not constitute an excess of jurisdiction constituting grounds for a writ of evocation.
4. Baker Acceptance Corporation Ltd vs Tryburski (1968) 1 O.R. 276 at 279; Cowan vs The Queen (1962) S.C.R. 476, 478; Task Force Report, Sec. 10.12, p. 156

some difficulty either because the principles are misunderstood or their application remains ill-defined under the Common Law of England which is applicable in Quebec as well as in other provinces. I will refer to: the definition and purpose of the hearsay rule; the evidence it excludes; evidence as to state of mind including intention; res gestae; exceptions to the rule following Ares vs Venner; expert evidence.

The hearsay rule: definition and purpose.

The proposed Uniform Evidence Act (sec. 1) defines hearsay as "a statement whether oral or recorded, offered in evidence to prove the truth of the matter asserted but made otherwise than in testimony at the proceeding in which it is offered."; "statement" is further defined as "an oral or a recorded assertion and includes conduct that could reasonably be taken to be intended as an assertion." This definition conforms to the prevailing Common Law rule. It is applicable in civil as well as in criminal proceedings. However there are important differences between these proceedings which have a bearing on the application of the rule.

As the report of the Federal/Provincial Task Force on Uniform Rules of Evidence states [5]:

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5. Federal/Provincial Task Force on Uniform Rules of Evidence, p. 147

> "One difference concerns the role of the court. In a civil proceeding, the parties define the issue and it is up to the court to determine that issue on the strength of the evidence proffered by them. In a criminal proceeding, the court is bound to ascertain the truth. This goal is tempered by measures designed to secure fairness to the accused."

In criminal proceedings the Crown must establish the guilt of the accused beyond a reasonable doubt, whereas in a civil trial, the judge must decide the case according to the preponderance of the evidence and balance of probabilities. The degree of certainty to be derived from the evidence is lesser in civil matters. The court is called upon to apply the law as between two parties rather than punish an accused for having infringed the law. In doing so it must be even handed and not deprive a party of his rights and favour the other party by exacting a standard of proof that is beyond the practical possibilities of the parties. These considerations apply to determinations as to the admissibility of evidence as well as to its sufficiency.

In civil trials, the exclusion of hearsay is one of the rules of evidence most frequently raised and perhaps the most difficult to administer both because it frequently departs from the general practice of human affairs and because in particular factual situations, it is difficult to distinguish hearsay from non hearsay and to apply correctly the recognized exceptions to the rule.

In its purpose, it is similar to the best evidence rule in that it seeks to exclude evidence of doubtful reliability. It does so by requiring that evidence be given under oath

in open court by a person who was a witness of the actual event or in the case of opinion evidence that the witness be the person qualified to express and explain such opinion. The rule is said to be based on common sense and transcend any system law. Indeed do we not read in the Gospel according to St. John after the account of the crucifixion of Jesus [6.]:

> " And he that saw it hath given testimony: and his testimony is true. And he knoweth that he saith true: that you also may believe."

Montaigne makes the following observations as to second witnesses [7.]:

> "Les premiers, venant à semer leur histoire, sentent, par les oppositions qu'on leur fait, où loge la difficulté de la persuasion, et vont calfeutrant cet endroit de quelque pièce fausse. L'erreur particulière fait premièrement l'erreur publique, et à son tour l'erreur publique fait l'erreur particulière. Ainsi va tout ce bâtiment, s'étoffant et se formant de main en main de manière que le plus éloigné témoin est mieux informé que le plus voisin, et le dernier informé mieux persuadé que le premier."

Opera lovers will be reminded of Don Basilio's Calumny Song in the Barber of Seville by Rossini in which he vividly describes a whispering campaign.

However as a rule governing admissibility of evidence rather than one as to cogency, it is distinct and different from the best evidence rule. It is a consequence of the adversarial system which relies on oral testimony under oath and the

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6. Gospel according to St. John, c. 19, v. 35

7. Montaigne, Livre II, c. 2

possibility of cross-examination as the principal means of ascertaining the truth. Unlike the best evidence rule, it does not allow for secondary evidence in the event that the witness to the event is not available.

Indeed, the proposed Uniform Evidence Act (sec. 52) and the Task Force Report (p. 150-154) put forward a major change by permitting hearsay evidence in civil matters when the witness to the event is not available. The rule against hearsay becomes an application of the best evidence rule to testimonial proof.

It becomes unnecessary to provide for exceptions to the hearsay rule other than for those circumstances in which evidence is to be admitted without regard to the availability of the declarant. The issue ceases to be one of admissibility to become one of credibility and sufficiency to be weighed by the court in determining whether the burden of proof has been discharged. It is interesting to note that this proposal goes further than the report of the Quebec Civil Code Revision Office which requires as a condition of admissibility of hearsay that "the circumstances surrounding the statement provide sound reason to judge it reliable" (art. 42).

The definition of unavailability is set forth in sec. 52 of the proposed Act. It is a broad one and constitutes a complete departure from the common law which only recognizes death as a cause of unavailability. In criminal trials, section

643 of the Criminal Code also presently allows within a certain frame hearsay testimony if the witness is insane or so ill as to be unable to travel or to testify or is absent from Canada. But that testimony must have been taken in the presence of the accused who must have had the opportunity to cross-examine him. The reasons for the recommendations appear at pp. 151 to 154 of the report. I point out that sec. 52 d) defines circumstances when absence of a witness from the hearing constitutes unavailability. In so doing it adopts the minority view of the Task Force that trial convenience or the practicalities of securing the attendance of witnesses are an appropriate consideration. In my view, this is the proper approach in civil matters.

Sec. 65 and sec. 152 and fol. of the proposed Act declare certain statements to be admissible thereby excluding them from the hearsay rule. Under existing law, some of these are hearsay and are exceptions to the rule, others are not hearsay though, as to the latter, it has often been difficult to define the precise application of the rule.

The present law and proposals for reform are dealt with very fully in the Task Force Report and the purpose of this paper is limited to highlighting a few aspects and problems which frequently arise by way of introduction to further discussion.

The hearsay rule: the evidence it excludes.

The first problem area I propose to touch upon is the very scope of the hearsay rule namely that it only operates to exclude statements by a non witness as proof of the truth of the facts or opinions stated but does not exclude proof of the fact that the statement itself was made. Of course, the latter evidence may nevertheless be excluded if the fact of the statement itself is not relevant to the issue before the court.

For instance in Cuff vs Frazee Storage and Cartage Co. [8], it was decided that a statement made by an employee to the witness that his master was absent was not evidence of such absence but could be admitted if offered as proof that a search was made as to the whereabouts of that person.

This important distinction is often misunderstood or overlooked by counsel. However, it is sometimes difficult to determine whether the statement itself is a relevant fact by way of direct or circumstantial evidence or is introduced to circumvent the hearsay rule. The proposed Act should greatly reduce the difficulties because of the definitions it contains but the problem will still arise as regards the relevancy or cogency of evidence.

The difficulties of the hearsay rule are often encountered in child custody hearings where evidence is presented

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8. (1907) 14 O.L.R. 263

as to statements made by the child. In these cases, it is sought to gain some insight into the child's psychological world including the context in which he is living and his relationship with each of his parents or guardians and his surroundings with a view to determining the arrangements most likely to meet his needs and be in his best interest. Evidence is not easily obtainable by reason of the child's age and because one is dealing with intimate lives and conflicts. Yet the life of a child is at stake.

It may be important to know the child's reactions over a period of time. If the child is of tender years, such statements may be the only means of ascertaining his state of mind.

Is it proper to consider these statements as proof of the child's behaviour and to consider behaviour as a fact that is relevant to determining the child's needs and the response of his surroundings to these needs?

Likewise regarding statements made by the parent to the child as evidence of the conduct of the parent towards the child.

Going a step further are they admissible as indicating the child's perception of his surroundings?

Finally can one or should one draw any inference as to the surroundings from such a statement? For instance, I recently heard a case where the father claimed the mother drank excessively. The paternal grandfather related that the three year old child spontaneously referred to "mommy's bottle". Is this admissible evidence or should it be?

It is interesting that the proposed Uniform Evidence Act (section 4) appears to acknowledge the problem by providing that the court is not required to apply the Act in a proceeding to determine or protect the best interests of a person who needs the protection of the court by reason of his age or physical or mental condition. However in custody cases, while the court must act in the best interests of the child, the protection of the court is not always required. There are many cases where both parents are capable.

<u>Evidence as to state of mind.</u>

This leads me to consider more generally statements presented as evidence of state of mind. Such statements are those placed in evidence to establish good faith, fear, duress, intention or due care. An illustration of the latter is the case where, in a claim for damages arising out of an automobile accident alleging that the defendant was negligent with regard to the state of repair of his car, the defendant was allowed to testify as to a statement made to him shortly before the accident by a competent mechanic that his brakes were in good working order.

Statements by a deceased have been admitted to establish intention to commit suicide, Dame Therrien vs L'Alliance et L'Assurance-Vie Desjardins [9.]. In that case, the court also refers to the fact that the statements were made in the presence of the Plaintiff and were testified to by herself against her interest and that they were so proximate as to constitute res gestae. In Home vs Corbeil [10.], the Ontario Court of Appeal admitted statements of the deceased husband to prove intention and the possibility of a reconciliation between estranged spouses in a claim by a widow.

In both the latter cases, the declarant was deceased and hence unavailable to testify. These statements satisfy the basic principles underlying the exceptions to the hearsay rule as set forth by Jessel M.R. in Sugden vs Lord St. Leonards [11.] adopted by Lord Pearce in his dissenting reasons in Myers vs Director Public Prosecutions and by the Supreme Court of Canada in Ares vs Venner [12.]:

> ""Now I take it the principle which underlies all these exceptions is the same. In the first place, the case must be one in which it is difficult to obtain other evidence, for no doubt the ground for admitting the exceptions was that very difficulty. In the next place the declarant must be disinterested; that is, disinterested in the sense that the declaration was not made in favour of his interest. And, thirdly, the declaration must be made before dispute or litigation, so that it was made without

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9. (1972) C.S. p. 213
10. (1956) 2 D.L.R. (2d) 543
11. (1876) 1 P.D. 154 at p. 240
12. (1970) S.C.R. 624

> bias on account of the existence of a dispute or litigation which the declarant might be supposed to favour. Lastly, and this appears to me one of the strongest reasons for admitting it, the declarant must have had peculiar means of knowledge not possessed in ordinary cases."

However, should such evidence be considered as hearsay at all when the relevant fact to be established is a state of mind which can only be ascertained by the behaviour of the person including both his acts and his words? [13.]

I suggest that such statements are direct evidence and not to be regarded as hearsay. Therefore the death or other cause of unavailability of the declarant is irrelevant to their admissibility.

Both examples given dealt with evidence of intention. It has been disputed whether such statements should be allowed as circumstantial evidence to prove that the intended purpose

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13. See Lord Moulton in Lloyd vs Power Duffryn Steam Coal Ltd (1914) A.C. 733 at 751 and 752:

 " Now it is well established in English jurisprudence, in accordance with the dictates of common sense, that the words and acts of a person are admissible as evidence of his state of mind. Indeed, they are the only possible evidence on such an issue. It was urged at the Bar that although the acts of the deceased might be put in evidence, his words might not. I fail to understand the distinction. Speaking is as much an act as doing. It must be borne in mind that there is nothing in the admission of such evidence which clashes with the rooted objection in our jurisprudence to the admission of hearsay evidence."

has been carried out [14]. In the United States the Supreme Court has admitted statements made prior to the fact [15] but ruled inadmissible statements made after the fact as these would be declarations of memory pointing backward to the past. The statements would not be subject to cross-examination. Their admission in evidence would open the door to self-serving evidence and virtually emasculate the hearsay rule [16].

These considerations do not of course apply to informal admissions which necessarily occur after the fact and by definition are against interest. Their admissibility was recognized by the Supreme Court in Royal Victoria Hospital vs Morrow [17] under Quebec law and the same holds true at common law.

That judgment however excluded from evidence statements made by a physician prior to the treatment on which the plaintiff's action in damages was based on the ground that there could be no admission before the fact. One is left however with the question as to whether the statements might not have been put forward as expressions of intent. This is one

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14. Denied in Cuff vs Frazee Storage and Cartage Co. (1907) 14 O.L.R. 264; admitted R. vs Workman & Huculak (1963) 1 C.C.C. 297 (Alta C.A.) aff. (1963) S.C.R. 266
15. Mutual Life Ins. Co. vs Hillman (1892) 145 U.S. 285
16. See Shepard vs United States (1933) 290 U.S. 96
17. (1974) S.C.R. 501

illustration of the pitfalls which exist in the application of the hearsay rule.

In dealing with the admissibility of statements as evidence as to state of mind as well as in any assessment of the reliability and weight to be given to evidence the court must have regard to the state of scientific knowledge as it exists today and the additional insight which has been gained into human behaviour, its motivations and the means available to ascertain it and to deal with it. In family matters, one should be reminded of the statement of the Privy Council in the case of McKee vs McKee [18.]:

> " It is the law of Ontario (as it is the law of England) that the welfare and happiness of the infant is the paramount consideration in questions of custody..... to this paramount consideration all others yield."

In that case, this principle was applied to decide whether the court should accept jurisdiction.

Res gestae.

Evidence as to state of mind is often categorized as coming within the res gestae. The Task Force Report (p. 233-234) contains a very apt criticism of res gestae and the confusion which this term covers and indeed fosters. Its diverse uses have been pointed out by the Privy Council in Ratten vs The Queen [19.] in which a telephone call by the victim of a

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18. (1951) A.C. 352 at 365
19. (1972) A.C. 378 at 388-389

murder shortly before the crime stating "get me the police please" was admitted in evidence to establish the time of the call and the emotional state of the victim. The Privy Council makes the following analysis:

> " In the context of the law of evidence (res gestae) may be used in at least three different ways:
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> 1."When a situation of fact (e.g. a killing) is being considered, the question may arise when does the situation begin and when does it end. It may be arbitrary and artificial to confine the evidence to the firing of the gun or the insertion of the knife, without knowing in a broader sense, what was happening."
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> 2."The evidence may be concerned with spoken words as such (apart from the truth of what they convey). The words are then themselves the res gestae or part of the res gestae, i.e., are the relevant facts or form part of them."
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> 3."A hearsay statement is made either by the victim of an attack or by a bystander - indicating directly or indirectly the identity of the attacker. The admissibility of the statement is then said to depend on whether it was made as part of the res gestae.""

Mr. Justice Pigeon in the case of Royal Victoria Hospital vs Morrow states that res gestae is not truly an exception to the hearsay rule as the statement is itself part of the facts in issue. He gives as an example slanderous statements. One may be reminded of the answer of Jesus to the High Priest as related in the Gospel of St. John [20].:

> "20 Jesus answered him: I have spoken openly to the world: I have always taught in the synagogue, and in the temple, whither all the Jews resort: and in secret I have spoken nothing.

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20. Gospel of St. John, c. 18, v. 20 and 21

21 Why asketh thou me? ask them who have heard what I have spoken unto them: behold they know what things I have said."

Reverting to the Ratten case, in the last example given by their Lordships, the statement is placed in evidence as to the truth of its content and, if allowed, constitutes an exception to the hearsay rule whereas in the first two the opposite is true. For the statement to be allowed in evidence as to the truth of its contents, the circumstances must be such that the declarant was so involved, was under such pressure that the possibility of fabrication or distortion to the advantage of the maker can be disregarded. An example of such a case is the statement of an engineer made a few seconds or at the most two minutes after an accident "I should not have done it" [21.]. The Ontario Court of Appeal has held that such statements must be involuntary and contemporaneous [22.].

These decisions evidence a strict interpretation of the exceptions to the hearsay rule.

Exceptions to the hearsay rule: Ares vs Venner.

On the other hand, the Supreme Court of Canada in Ares vs Venner [23.] took the position that new exceptions might

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21. Davies vs Fortior (1952) All E.R. 1359
22. Jarvis vs London Street Rlwy, 48 D.L.R. 61;
    Phillips vs Ford Motor Co. of Canada, 18 D.L.R. (3d) 641 at 656;
    also the Quebec Court of Appeal in Maurice vs André Gagnon Construction Ltd (1975) C.A. 756;
    Saskatchewan Court of Appeal in Regina vs Drinnan, 45 C.C.C. (2d) 134, 144-145;
    Allan Richard Penney vs Her Majesty The Queen (1979) 2 S.C.R. 1014-1015
23. (1970) S.C.R. p. 608

be recognized to the hearsay rule having regard to the principles underlying existing exceptions. It declared admissible hospital records to establish the nurses findings as to the condition of the patient.

The decision has been criticized on the ground that the witnesses of the events were available since the nurses were present at trial and that the decision went too far in admitting opinion evidence. As to the first objection the reasoning of the Supreme Court appears to be that the nurses would have no further recollection than what they had stated in their notes and that there was a certain presumption that the hospital record was the best evidence and it would be up to a party contesting this evidence to call the witnesses to the stand. In the context of modern hospital administration, I fail to see that this is an unreasonable holding, on the contrary. As to whether the hospital records contained opinion evidence, this is a moot question [23a.]. The nurses notes do mention the colour of the patient's toes. In his subsequent judgment in Cargill Grain Ltd vs Davie Shipbuilding [24.], Mr. Justice Pigeon states that the Ares case held to be admissible documents which "were records in which facts observed by an employee in the performance of his duties were recorded immediately" and he refused to admit in evidence the figures arrived at by a deceased employee as to the weight of steel delivered, contained in a document, because the document did not comprise a recording of any data nor did

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23a. J. Douglas Ewart: Documentary Evidence: the Admissibility at Common Law of Records made pursuant to a business duty (1981) 59 Can. Bar Rev. 73

24. (1977) 1 S.C.R. p. 659 at p. 670

it provide the calculations made but only a conclusion which could not be verified. In other words, it contained an opinion but none of the facts on which the opinion was based. The implication is that if these conditions had been met, the recorded opinion would have been admissible [25]. In addition the circumstances were such that proof could still be made by other methods notwithstanding the death of the person who prepared the document.

The Ares decision was not an isolated one. In 1920, the Quebec Court of Appeal in the case of C.P.R. vs Quinn [26] acknowledged that such a report could be admissible but refused to overrule the trial judge because the maker was not identified in all cases and their contemporaneous nature was not established. In 1936, the Ontario Court of Appeal allowed the production of the report made by a cardiologist to the patient's family doctor [27]. More recently the Alberta Supreme Court, Appeal Division, allowed production of railway records to make proof of damages to railway cars [28]. A question has been raised as to whether this common law exception could be invoked where a statutory exception is not available because the statutory formalities, such as notice to the parties, have not been complied

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25. Sec. 153 of the Uniform Evidence Act would allow such evidence subject to proof that the opinion was given in the usual and ordinary course of business; See also Regina vs Graham, 55 C.C.C. (2d) 266, 269-272; Regina vs Stockdale, 55 C.C.C. (2d) 191
26. 22 B.R. 428
27. Palter Cap. Co. Ltd vs The Great West Life Ins. (1936) O.R. 341; Also Omand vs Alberta Milling Co. (1922) 69 D.L.R. 6; Ashdown Hardware Co. vs Singer et al (1952) 1 D.L.R. 33; Canada Atlantic Railway vs Moxley (1889) 15 S.C.R. 145; Conley vs Conley, 70 D.L.R. (2d) 352
28. C.P.R. vs Calgary (1971) 4 W.W.R. 241, 260-261; See also Regina vs Lal, 51 C.C.C. (2d) 336, 341-344; Setak Computer Services Corporation Ltd vs Burroughs Business Machines Ltd et al (1977) 15 O.R. (2d) 750, 754, 755, 758, 760, 761

with or because the records contain statements of opinion not covered by the statutory exception [29]. In Regina vs Penno, [30] inventory sheets were held admissible by the B.C. Court of Appeal under both exceptions, production at preliminary hearing being held to constitute sufficient notice under sec. 30(7) of the Canada Evidence Act.

Expert evidence.

Another area where problems frequently arise is that of opinion evidence which relies in whole or in part on hearsay. It is well established that such hearsay does not make proof but is admissible as evidence of the basis upon which the opinion is given. Consequently, the relevance of the opinion to the case will depend on the extent to which the factual basis for the opinion is established by other evidence in the record [31].

There is however a grey area as regards the admissibility of evidence as to fact which is based on hearsay but is obtained by means which are recognized scientifically or in a particular field of expertise [32]. Any factual statement contains a certain element of opinion as a witness can only testify as to his own perceptions. Modern science and technology have developed means to extend human perception. Depending upon the field of knowledge these means are more or less accurate. Whether

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29. Reference may be made to the discussion chaired by Mr. Justice Krever as part of the programme held by The Law Society of Upper Canada on December 13, 1975 entitled Emerging Problems in Evidence, pp. 31-43 of the edited proceedings; Also J. Douglas Ewart: Documentary Evidence; the Admissibility at Common Law of Records made pursuant to a business duty (1981) 59 Can. Bar Rev. 52
30. 76 D.L.R. (3d) 529, 534; Conley vs Conley (1968) 70 D.L.R. (3d) 352; Setak Computer Services Corporation Ltd vs Burroughs Business Machines Ltd et al (1977) 15 O.R. (2d) 750, 755; Maw vs Dickey et al. (1974) 52 D.L.R. (3d) 178, 189, 194, Ont. Surr. Ct; R. vs Bloomfield, Cormier and Ettinger (1973) 10 C.C.C. (2d) 398, N.B. C. of A.
31. Sopinka and Lederman, Law of Evidence in Civil cases, Butterworths, 1974, pp. 316-324
32. E.g. psychiatric evidence Wilband vs The Queen (1967) S.C.R. 14, 21; R. vs Lupien (1970) S.C.R. 263

they are sufficiently reliable to provide evidence must be decided in each instance and differing conclusions may be reached according to the evidence presented in each case. One example of such a grey area is that of surveys. In City of Saint John vs Irving Oil Co. [33.], the Supreme Court declared admissible the opinion of a real estate expert based on a survey of real estate sales for the purpose of establishing the real value of a property. In Regina vs Murphy [34.], evidence of an opinion poll was refused. Likewise in Regina vs Times Square Cinema [35.].

Conclusion.

This overview of a few of the more controversial aspects of the application by the courts of the hearsay rule indicates a tendency to revert to the basic reasons for the rule and to look to the underlying principle in applying the rule to modern circumstances. The Supreme Court has pointed the way to some degree by making it clear that in Quebec, the exceptions to this rule are not limited to those specifically provided for by statute but include the exceptions at Common Law. In the Ares case, the Supreme Court has stated that the existing exceptions are not limitative and that recourse to basic principles must be had in deciding whether hearsay is to be excluded in a given case.

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33. (1966) S.C.R. pp. 581, 593; See also article by N. Vidmar and J.W.T. Judson: The Use of Social Science Data in a Change of Venue Application: A Case Study (1981) 59 Can. Bar Rev. 78
34. (1969) 4 D.L.R. (3d) 289, 294-5
35. (1971) 3 O.R. 688, 694, 699; 4 C.C.C. (2d) 229, Ont. C.A.; Also R. vs Prairie Schooner News Ltd and Powers (1970) 1 C.C.C. (2d) 251

Both the courts and authors, while generally recognizing the validity of the rule, have decried its strictures which in certain cases have deprived the courts of relevant and indeed important evidence. With the disappearance of the jury trial in civil matters in Quebec, its growing infrequency elsewhere and the greater degree of sophistication of modern juries, the need for this rule to govern the admissibility of evidence is no longer the same at least in civil matters. It also runs counter to the general trend in the administration of justice towards a more individualized application of the law to each case. This requires a departure from specific rules applied uniformly to all cases and a move towards the exercise of judicial discretion. Possibly we are overreaching ourselves with a touch of false pride in the belief that man is capable of overcoming all difficulties. But undoubtedly such is the trend of our times. The proposals for legislative reform in the law of evidence are very much in this direction and are a necessary response to a conscious need given the expanded means of scientific investigation and the increasing complexity of gathering evidence [36].

The proposed Uniform Evidence Act reverts to the underlying reason for the rule namely ensuring the reliability of evidence. In civil matters, it retains the rule as an application of the best evidence rule and admits hearsay evidence as secondary evidence leaving the determination of the reliability

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36. For a contrary view, see that of Morris Shumiatcher reported in the National of April 1982 published by the Canadian Bar Association.

and weight to be given to such evidence to the trier of fact. This is indeed a radical departure but it is one towards which the Supreme Court itself has shown the way and which one of its members has personally favoured [37].

Even if the provisions of the proposed Uniform Evidence Act concerning hearsay were not adopted, I suggest it behoves the courts in civil matters to be guided in the application of the hearsay rule by the purpose underlying both the rule itself and its exceptions in the context of contemporary knowledge and conditions, namely to maintain the reliability of evidence, while having regard to the difficulties of obtaining evidence. In applying both these criteria, I suggest that one should be reminded that the standard of proof or degree of certainty is not the same in civil as in criminal matters.

Charles D. Gonthier
Justice, Superior Court

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37. Paper by the Hon. Mr. Justice McIntyre entitled "The Hearsay Rule: Possible Reform" presented at the 1980 Evidence Conference, Faculty of Law, University of British Columbia published in "Recent Developments in the Law of Evidence", Butterworths 1980

QUESTIONS

1. In the light of the judgment in Ares vs Venner (1970, S.C.R. p. 608), is it open to the courts at Common Law to broaden existing exceptions to the hearsay rule e.g. by considering the first witness to be unavailable in circumstances other than death (J. Douglas Ewart: Documentary Evidence: the Admissibility at Common Law of Records made pursuant to a Business Duty (1981) 59, Can. Bar Rev. 52)?

2. Is the difficulty of procuring evidence an appropriate criteria for receiving hearsay evidence (p. 154 Task Force Report)? Should reliability be the sole criteria?

3. Since a civil case is to be decided on the preponderance of evidence, should the standard of reliability governing the admissibility of evidence be determined on a similar basis and be less strict than in criminal trials?

4. Should proof of state of mind be allowed as circumstantial evidence of fact (p. 236-7 Task Force Report)?

5. Should an ex post facto statement as to intent be admitted (p. 236-7 Task Force Report)?

6. Res gestae:

   a) Must the statement be contemporaneous or merely closely associated with the event (p. 237-8 Task Force Report)?

   b) What of a continuing condition or state of fact (p. 240-1 Task Force Report)?

   c) Must declarant be under the emotional stress of the event or is spontaneity sufficient (p. 239 Task Force Report)?

7. Business records: Do they make proof of opinions as well as facts (p. 465-6 Task Force Report) (Cargill Grain Ltd vs Davie Shipbuilding Ltd 1977, 1 S.C.R. 659, 670-1) (Op. cit. Ewart, p. 61, 72)?

8. Can the Common Law exception as to business records be invoked where the requirements of a statutory exception have not been complied with? (Sec. 30 of Canada Evidence)

9. What criteria should govern the admissibility of surveys?