DOCUMENTARY EVIDENCE: THE ADMISSIBILITY AT COMMON LAW OF RECORDS MADE PURSUANT TO A BUSINESS DUTY

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Introduction

Notwithstanding the regularity with which documents are admitted into evidence, the legal rules governing their admissibility remain *terra incognita* to most participants in the legal process. The purpose of this article is to endeavour to chart a small portion of this territory, more to encourage further exploration than to offer a definitive survey.

Indeed, this article will focus upon only one of the many doctrines under which documents are admitted into evidence, namely the common law exception for records made in the course of a business duty.[1]

Complex as this doctrine is, at a fundamental level it simply operates as an exception to the hearsay rule. Since a document can only indicate to the court that which someone else "told" it, all documents, if offered as proof as the truth of their contents, contain at least simple hearsay.[2] Frequently double and multiple hearsay problems arise, particularly when the information on the record has been assembled, or perhaps even created, by a mechanical device or a computer.[3]

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[1] Concerning the admissibility of business records, reference should also be made to s. 30 of the Canada Evidence Act, R.S.C., 1970, c. E-10, and corresponding provincial enactments. Concerning the records of financial institutions, see s. 29 of that Act, and corresponding provincial provisions.

[2] "It is settled law that evidence of a statement made to a witness by a person who is not himself called as a witness is hearsay and inadmissible when the object of the 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 the statement, but the fact that it was made." Per Dickson J., in *The Queen* v. *O'Brien* (1977), 38 C.R.N.S. 325, at p. 327, 35 C.C.C. (2d) 209, at p. 211 (S.C.C.), and see the *locus classicus*, *Subramaniam* v. *Public Prosecutor*, [1956] 1 W.L.R. 965 (P.C.).

[3] The special issues which arise, or which the courts perceive as arising, when computer-kept evidence is tendered in court are discussed, *infra*.

Much of the perceived complexity in this area of the law can be avoided if the rationales for the hearsay rule,[4] and the basic rationales which underpin the exceptions to it,[5] are kept in mind. As abstract doctrine many of the concepts discussed in this article may seem abstruse; as manifestations of the more general hearsay issues, they fit quite logically into the broader pattern.

Although there seems to be a tendency on the part of counsel to seek a panacea to "business record" problems in section 30 of the Canada Evidence Act,[6] and similar provincial enactments, there are many situations in which reliance upon the common law provisions is preferable.[6a] Accordingly, the following analysis is offered as a guide for those willing to depart from the increasingly-beaten statutory path.

I. *The Development of the Common Law Exception and its Rationale.*

The common law courts in England first began to grapple with the admissibility of business records in the 1600's. Wigmore[7] traces the origins of the present common law exception to two distinct sources. The first was a doctrine which permitted the reception in evidence of the shop books of traders and craftsmen when, as parties to an action, they were prohibited from testifying. Abuses of this

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[4] Essentially these are based on the inability to test the evidence by cross-examination, the absence of the sanction of an oath when the repeated declaration was made, and, where oral rather than documentary evidence is involved, the natural tendency for a story to change in the telling. As these rationales will vary in significance depending upon the particular circumstances (a routine bank record as opposed to a comment by a stranger in a bar), the forcefulness of their applicability can provide a persuasive basis for acceptance or rejection of the proferred evidence, as the case may be.

[5] A perusal of the authorities fully supports the generalization that there are two basic rationales for exceptions to the hearsay rule: (i) necessity, and (ii) a circumstantial guarantee of trustworthiness. It is the second of these which will be the more persuasive; counsel seeking to admit the document will stress the extent to which the circumstances of its creation render cross-examination superfluous; opposing counsel will, of course, stress the opposite view.

[6] *Supra*, footnote 1.

[6a] For example, oral statements are admissible under the common law exception but not under the statutory provisions. And, note particularly the ease with which documents in possession and documents constituting an admission by a party, are admitted into evidence. And, where the maker of the document is available to testify, consider the use of the document to refresh his or her memory, or its admissibility as past recollection recorded if the witness has no present memory of the matters recorded.

[7] 5 Wigmore, Evidence (Chadbourn Revision, 1974), ss 1517-1518. All ensuing references to this work are cited as Wigmore. See also McCormick's Handbook on the Law of Evidence (2nd ed., 1972), s. 305, hereinafter McCormick.

exception, combined with theoretical objections to the self-serving nature of the books, resulted in statutory limitation in 1609, and even more restrictive judge-made limitations thereafter. By the end of the 1600's this exception ceased to have a common law existence.[8]

The second, and subsequent development, allowed the introduction of books regularly kept by third persons (including clerks of a party) who were dead at the time of trial, "their death and the regularity of the books being more or less explicitly recognized as the grounds of admission".[9] By 1832 this exception was firmly established, covering all entries made by a person, since deceased, in the ordinary course of business, whether that person was a party, a party's clerk or someone entirely unconnected with a party.

While only the rationale of necessity can be said to have underpinned the party's shop book exception, the regular entries exception was additionally based upon the circumstantial guarantee of trustworthiness which arose from the circumstances of their making. The habituality inherent in the making of a regular series of entries was itself felt to offer some guarantee of trustworthiness. In England, where the entry was only admissible if made pursuant to a duty, the existence of that duty was felt to additionally buttress the reliability of the entry. Finally, the fact that these entries were relied upon in the course of business, and that any errors could be expected to bring censure to the clerk, were given considerable weight in the determination that they should be admitted.

Notwithstanding the absolute necessity brought about the death of the entrant, and the strong circumstantial guarantee of trustworthiness arising from the business usage of the entries, the common law evolved seven strict requirements for admissibility under this exception.[10] To be admissible, the record[11] must have

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[8] Although s. 29 of the Canada Evidence Act, *supra*, footnote 1, may be traceable to it: see Wigmore, pp. 430 to 433.

[9] Wigmore, p. 428.

[10] For a good analysis of the Canadian position, see S.N. Lederman, The Admissibility of Business Records: A Partial Metamorphosis (1973), 11 Osgoode Hall L.J. 373, at pp. 375-382. See generally, Wigmore, ss 1517-1518, 1521-1535; Cross, Evidence (4th ed., 1974), pp. 469-472; McCormick, pp. 721-734; *Myers* v. *Director of Public Prosecution*, [1965] A.C. 1009, [1964] 2 All E.R. 881, [1964] 3 W.L.R. 153, per Lord Morris of Borth-y-Gest, at p. 1027 (A.C.).

[11] Wigmore, p. 448, points out that in England this exception would cover *oral* statements made in the course of business, but such statements are not the subject of this article. See also *Palter Cap Co. Ltd* v. *Great West Life Assurance Co.*, [1936] O.R. 341, [1936] 2 D.L.R. 304 (Ont. C.A.), at pp. 319-320, *Rex* v. *Buckley* (1873), 13 Co. C.C. 293 (oral report of a police constable to his inspector admitted into evidence), and *Regina* v. *Laverty* (1979), 9 C.R. (3d) 288 (Ont. C.A.).

been (i) an original entry,[12] (ii) made contemporaneously with the event recorded,[13] (iii) in the routine,[14] (iv) of business,[15] (v) by a person since deceased,[16] (vi) who was under a duty to do the very thing and record it,[17] (vii) and who had no motive to misrepresent.[18]

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[12] McCormick, p. 721, citing Wigmore, ss 1532, 1558. Wigmore cites no Commonwealth authority for this proposition, noting simply that "the general rule requiring production of the original of a writing applies no less to entries offered under this exception than to other entries" (s. 1532). He adds that the rule is "of course" satisfied when the original is accounted for as lost or otherwise unavailable". See also *The Queen* v. *Cotroni, Papalia* v. *The Queen* (1979), 45 C.C.C. (2d) 1, 7 C.R. (3d) 185 (S.C.C.) and *C.P.R.* v. *City of Calgary*, [1971] 4 W.W.R. 241 (Alta S.C.-A.D.), at pp. 257 to 258.

[13] *Price* v. *Torrington, (Earl)* (1703), 1 Salk 285; *Champneys* v. *Peck* (1816), 1 Stark 326; *Doe D. Patteshall* v. *Turford* (1832), 3 B.&Ad. 890; *Smith* v. *Blakey* (1867), L.R. 2 Q.B. 326; *The Henry Coxon* (1878), 3 P.D. 156; *Polini* v. *Gray* (1879), 12 Ch. D. 411; *Hart* v. *Toronto General Trusts* (1920), 47 O.L.R. 387; *McGillivray* v. *Shaw* (1963), 39 D.L.R. (2d) 660. Lederman, *op. cit.*, footnote 10, at p. 381, questions the need for a strict contemporaneity rule governing the admissibility of a declaration in the course of duty when such a rule is not felt necessary in connection with declarations against interest. However, as Wigmore notes, at s. 1526, the rule fixes no precise time; each case must turn on its facts. In *John Francis Halpin* (1975), 61 Cr. App. R. 97, [1975] Q.B. 907, [1975] 3 W.L.R. 260 (C.A.), at p. 263, it is said to go to weight, not admissibility.

[14] *Dickson* v. *Lodge* (1816), 1 Stark 226; *Doe* v. *Turford, ibid.*, at p. 898; *Barton* v. *Dundas* (1865), 24 U.C.Q.B. 275; *Poole* v. *Dicas* (1885), 1 Bing N.C. 649, 652.

Wigmore, at s. 1522, notes that in these circumstances, although the desire to state falsely may casually subsist, more powerful motives to accuracy overpower and supplement it. Thus, the very habituatlity of the recording process, as well as the reliance placed on it in business operates to ensure accuracy. So too do the likelihood that an error will be detected, and the fact that where the routine recording is the subject of a duty to a superior, the risk of censure will motivate the recorder to accuracy.

[15] In *Conley* v. *Conley et al.*, [1968] 2 O.R. 677, (1968), 70 D.L.R. (2d) 352, the Ontario Court of Appeal cited with approval the statement of Wigmore, at s. 1522, on this point. He defined business as "a course of transactions performed in one's habitual relations with others and as a natural part of one's mode of obtaining a livelihood." See *Champneys* v. *Peck, supra,* footnote 13, at p. 326 and *R.* v. *Cope* (1835), 7 Car. & P. 726.

[16] *Cooper* v. *Marsden* (1973), 1 Esp. 1; *National Fire Insurance Company* v. *Rogers,* [1924] 2 W.W.R. 186, [1924] 2 D.L.R. 423; *Myers* v. *Director of Public Prosecutions, supra,* footnote 10, per Lord Morris of Borth-y-Gest, at pp. 1027-1028 (A.C.). See the discussion *infra* concerning the impact of *Ares* v. *Venner,* [1970] S.C.R. 608, (1970), 14 D.L.R. (3d) 4, (1970), 12 C.R.N.S. 349.

[17] Not only must there be a specific duty to do the act *and* record it, but as well only those parts of the record which were made pursuant to that precise duty will be admitted. *Chambers* v. *Bernasconi* (1834), 1 C.M. & R. 347, at p. 368 aff'ing (1831), 1 C. & J. 451. The maker must have had personal knowledge of a recorded fact before it can be admitted: *Setak Computers* v. *Burroughs* (1977), 15 O.R. (2d) 750, at p. 755 (H.C.); *Brain* v. *Preece* (1843), 11 M. & W. 773; *R.* v. *Chapham* (1829), 4 C. & P. 29. The matter was concisely put by Blackburn, J. in *Smith* v. *Blakey, supra,* footnote 13, at p. 333: "The duty must be to do the very thing and

Footnote 18, see next page.

II. *Myers and Ares: the Rules Restated.*

These common law requirements have come under judicial scrutiny in a number of recent cases in Canada, including the celebrated decision of the Supreme Court of Canada in *Ares* v. *Venner*,[19] which appears to have expanded the scope of this exception.[20] This expansionary approach must be contrasted with the extremely restrictive approach of the House of Lords to the exceptions to the hearsay rules, as reflected in *Myers* v. *Director of Public Prosecutions*.[21]

In the *Myers* case, it was alleged that the accused sold stolen cars after disguising them to resemble wrecked cars for which he had legitimate papers. At trial the Crown was allowed to introduce microfilm reproductions of cards filled out by workmen in the

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then to make a report or record of it." See also *R.* v. *Worth* (1843), 1 Q.B. 132; *Polini* v. *Gray, supra,* footnote 13; *Palter Cap Co. Ltd* v. *Great West Life Assurance Co., supra,* footnote 11; *Dominion Telegraph Securities Ltd* v. *Minister of National Revenue,* [1947] S.C.R. 45; *Conley* v. *Conley et al., supra,* footnote 15, citing with approval the comment of Wigmore, at s. 1524: "[The] requirements are very strict. First, there must have been a duty to do the very thing recorded. Secondly, there must have been a duty to record or otherwise report the very thing. Thirdly, the duty must have been to record or otherwise report it at the time." As well, the duty must have been owed to someone other than the recorder: *Massey* v. *Allen* (1879), 13 Ch. D. 558, 49 L.J. Ch. 76; *O'Connor et al.* v. *Dunn* (1877), 2 O.A.R. 247. See also *Regina* v. *Laverty, supra,* footnote 11, discussed *infra*. And the record must relate to an act which had been completed at the time of the recording; statements of intention, regardless of the duty to make them, are not admissible under this exception: *Rowlands* v. *De Vecchi* (1882), 1 Cals & E. 10. Lederman, *op. cit.*, footnote 10, at p. 380, n. 29, indicates that *R.* v. *Buckley* (1873), 13 Cox C.C. 293, which may be considered contrary to this position, is of doubtful authority.

[18] *Poole* v. *Dicas, supra,* footnote 14; *Polini* v. *Gray, supra,* footnote 13; *The Henry Coxon, supra,* footnote 13. However, in *Conley* v. *Conley, supra,* footnote 15, the Ontario Court of Appeal admitted the notes of a deceased private investigator, notwithstanding the fact that he had been hired by one of the parties to the litigation to obtain evidence for use therein. Subsequently, Lacourciere J. (as he then was), in *Northern Wood Preservers Ltd* v. *Hall Corp. (Shipping), 1969 Ltd et al.*, [1972] 3 O.R. 751, excluded certain log entries because "[a]lthough the recording was contemporaneous to the event and made in pursuance of a duty to record, there may have been present some motive to misrepresent". His Lordship cites Phipson on Evidence (11th ed., 1970), para. 1152 and Cross, Evidence (3rd ed., 1967), p. 409.

[19] *Supra,* footnote 16.

[20] See the comment of Zuber J.A. in *Regina* v. *Laverty, supra,* footnote 11: "It remains only to determine whether [the] notes qualify as an exception to the hearsay rule pursuant to the common law as a record or a declaration in the course of a business duty *either in its classic form or as enlarged by Ares* v. *Venner,* [1970] S.C.R. 608." Italics added. See also *Setak Computers* v. *Burroughs, supra,* footnote 17, at pp. 755-756. *Contra, see Woods et al.* v. *Elias et al.* (1978), 21 O.R. (2d) 840 (Ont. Co. Ct).

[21] *Supra,* footnote 10. For an early Canadian equivalent, see *National Fire Insurance Company* v. *Rogers, supra,* footnote 16, a decision which Wigmore, s. 1530, n. 2) calls "a banner one for perverse pedantry in this field".

automobile factory which showed that the serial numbers stamped on the engine blocks of the disguised cars matched those of certain stolen cars. The Court of Criminal Appeal[22] upheld the decision at trial, Widgery J. indicating that "reliance is not being placed upon the credit of an individual workman but on the manufacturer's system of record-keeping and on the inherent probability that such records as a whole are correct rather than incorrect".[23] His Lordship added:[24]

> In our view the admission of such evidence does not infringe upon the hearsay rule because its probative value does not depend upon the credit of an unidentified person but rather on the circumstances in which the record is made . . . .

This eminently reasonable approach, even though it held the records admissible only to affirm the *viva voce* evidence of the car owners, was overruled by a majority of the House. The majority's approach is shown in the concurring opinion of Lord Morris of Borth-y-Gest who stated:[25]

> There was every reason in the present case to suppose that the workmen or mechanics concerned would make correct entries. They could have no other purpose than to do so . . . . Furthermore, neither they nor their employers could have any concern in regard to the criminal proceedings save that of assisting the course of justice . . . . The existing exception to the hearsay rule which admits evidence of declarations in the course of duty is, however, subject to the firmly established condition that the death of the declarant must be shown.

The dissenting opinions of Lord Pearce and Lord Donovan, who would have admitted the records on the basis of necessity and the circumstantial guarantee of their accuracy, were not in vain. The substantive rule of the majority was overturned by The Criminal Evidence Act, 1965,[26] while the reasoning of the minority was adopted by the Supreme Court of Canada in *Ares* v. *Venner*.[27]

In *Ares* v. *Venner*, an action for negligence against a doctor, the trial judge admitted as proof of the statements therein certain notes made by nurses who had attended the plaintiff. In so doing he noted that although not called, the nurses were present during the three days of trial. He further found the notes to be "generally

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[22] *Regina* v. *Myers*, [1965] A.C. 1001, [1964] 1 All E.R. 877, [1964] 3 W.L.R. 145.

[23] *Ibid.*, at p. 1007 (A.C.).

[24] *Ibid.*, at p. 1008 (A.C.).

[25] *Supra*, footnote 10, at pp. 1027-1028.

[26] 13 & 14 Eliz. 2, c. 20.

[27] *Supra*, footnote 16. Perhaps not in its entirety: see *Woods et al.* v. *Elias et al.*, *supra*, footnote 20.

trustworthy''.[28] The Appellate Division of the Alberta Supreme Court[29] held that the trial judge erred in admitting the notes, Johnson J.A. stating:[30]

> In the present action where the crucial finding of the trial judge was ''The classic signs or symptoms of circulatory impairment manifested themselves clearly and early'' the accuracy of these records was of supreme importance.
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> These records, far from being a simple record of instrument readings or medical dosages, are the nurses' assessment of phenomena. They involve the nurses' ability to observe, and equally important, to record their observations accurately. Having inscribed their findings, there would still remain the degree to which an observed condition was present, when such words as ''blue'', ''bluish pink'', ''cool'' and ''cold'' were used. All of these could be fruitful areas for cross-examination. Untested by cross-examination, it cannot be said that the evidence meets the test of ''Circumstantial Probability of Trustworthiness'' and should not have been admitted without the nurses being called to verify it and be available for cross-examination. There is no question of the unavailability of these nurses. As the learned judge said in the passage from his judgment which I have quoted earlier, these nurses were subpoenaed by the Plaintiff, were present throughout the trial and were not called.

Hall J., writing for the Supreme Court of Canada, did not deal directly with these objections. Instead he simply referred to the trial Judge's reliance upon Wigmore and the cases of *Omand* v. *Alberta Milling Co.*,[31] *Ashdown Hardware Co.* v. *Singer, Belzberg and Klunner*,[32] and *Canada Atlantic Railway* v. *Moxley*.[33]

The argument made by Wigmore is that hospital records *should* be admitted on the basis of necessity, since calling the witnesses would seriously inconvenience the hospital, and on the basis of reliability, since the records are made and relied upon in affairs of life and death.

In the *Omand* case,[34] reports concerning the quality and quantity of flour purchased by the government were admitted as proof of the facts therein. The basis for this was necessity, arising from the ''sheer impossibility of memory'', as well as the circumstantial guarantee of trustworthiness arising from (i) complete disinterestedness, (ii) the duty to test, (iii) the duty to record the test at the time and (iv) the liability to punishment or reprimand for

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[28] *Supra*, footnote 16, see the opinion of Hall J., at p. 355 (C.R.). Mr. Justice Hall also notes at pp. 355-356 that the trial judge relied upon Wigmore's separate treatment of the admissibility of hospital records, in which Wigmore *argues for* their admissibility. Wigmore on Evidence (3rd ed., 1940), Vol. VI, para. 1707.

[29] (1969), 70 W.W.R. 96.

[30] *Ibid.*, at p. 105.

[31] [1922] 3 W.W.R. 412, 69 D.L.R. 6, 18 Alta L.R. 383.

[32] [1952] 1 D.L.R. 33, (1951) 3 W.W.R. (N.S.) 145, aff'd [1953] 1 S.C.R. 252, [1953] 2 D.L.R. 625.

[33] (1899), 15 S.C.R. 145.

[34] *Supra*, footnote 31.

failure to perform the duty. In *Ashdown,*[35] *Omand* was followed, with the result that the plaintiff was allowed to adduce its ledger accounts as *prima facie* proof that the goods in question were delivered. In *Moxley*, the plaintiff was allowed to introduce the defendant's books containing statements of the repairs needed to one of the railway's engines. Gwynne J. stated:[36]

> . . . these entries, having been made for the express purpose of calling attention of the mechanical department to something required to be done and having been caused to be made in the book by the driver of the engine whose duty it was to make the entries or have them made, were admissible in evidence.

Without commenting upon these authorities Hall J., adopts the minority view in *Myers* indicating that further exceptions to the hearsay rule can be countenanced, then simply enunciates the following new exception:[37]

> Hospital records, including nurses notes, made contemporaneously by someone having a personal knowledge of the matter then being recorded and under a duty to make the entry or record, should be received in evidence as *prima facie* proof of the facts stated therein. This should, in no way, preclude a party wishing to challenge the accuracy of the records or entries from doing so. Had the respondent here wanted to challenge the accuracy of the nurses' notes, the nurses were present in Court and were available to be called as witnesses . . . .

Notwithstanding the clarity and conciseness with which this passage decided the particular question raised in *Ares*, the impact of this statement on the general common law doctrines remains less than clear. As least in Ontario the courts seem to be prepared to acknowledge that *Ares* expanded the existing common law doctrines,[38] albeit without articulating the ambit of that expansion. However, one County Court judge has refused to accept this expansionary impact, arguing that *Ares* deals with past recollection recorded rather than with entries made pursuant to a business duty.[39] And, although the judgment of Hall J. indicates that the Supreme Court wished to deal with the issue of the notes' admissibility, it is reasonably clear that the ruling on this point was *obiter*.[40]

Nonetheless, in light of the present expansionary approach which the courts are bringing to admissibility issues, it would appear

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[35] *Supra,* footnote 32.

[36] *Supra,* footnote 33, at p. 163.

[37] *Supra,* footnote 16, at p. 363.

[38] *Supra,* footnote 20.

[39] *Woods et al.* v. *Elias et al., supra,* footnote 20.

[40] *Supra,* footnote 16. After noting that counsel made a less than absolute objection to the note's admissibility, and that they were referred to in both the direct and cross-examination of the doctor, Hall J. stated at p. 359 (C.R.): ". . . despite this, I think it desirable that the Court should deal with the issue . . . ."

that the *Ares* decision will have the effect of expanding the general common law principles governing entries made pursuant to a duty, rather than merely enunciating a separate hospital records exception. In *Setak Computers* v. *Burroughs*, Griffiths J. remarked:[41]

> Although the statement [in *Ares*] refers only to hospital records, it may be inferred that this decision settles the law applicable to records of other businesses made in similar circumstances.[42]

As is customary in this branch of the law, the clear declaration of Griffiths J., is hedged by the concluding words "made in similar circumstances". Whether the courts will limit the expansionary impact of *Ares* by such general comments remains one of the many issues open for argument in this area.

Returning to the *Ares* decision, and assuming that it will apply generally to the common law doctrine under discussion, three areas of impact can be isolated:

(i) the decision removes the requirement that the maker of the record be dead;[43]

(ii) the decision may, in certain circumstances, permit the introduction of opinion evidence through business records, although this would appear to be predicated upon the maker being available if required; and

(iii) the decision may remove the requirement that the record relate to an act which the recorder was duty-bound to perform and record, and did in fact perform.

In declaring the records in *Ares* admissible, Hall J., articulated only three requirements instead of the traditional seven:[44] "[i] made contemporaneously, [ii] by someone having a personal knowledge of the matter then being recorded, and [iii] under a duty to make the entry or record." However, if *Ares* is to be blended into the existing common law provisions, rather than treated as being a complete usurpation of them, the key areas of silence in that case should not be taken as implicitly overruling the pre-existing provisions. It is suggested that the most realistic assessment of the impact of *Ares* is as follows:

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[41] *Supra*, footnote 17, at p. 755.

[42] Concerning the impact of the *Ares* beyond hospital records, see *C.P.R.* v. *City of Calgary*, *supra*, footnote 12; C.M. Powell, Documentary Evidence, in Salhany and Carter, Studies in Canadian Criminal Evidence (1972), p. 293, at p. 305; and *Regina* v. *Laverty*, *supra*, footnote 11. Note also that the cases referred to by Hall J., all deal with business and governmental records, rather than hospital records.

[43] See *Setak Computers* v. *Burroughs*, *supra*, footnote 17, at p. 755; *C.P.R.* v. *City of Calgary*, *ibid*.

[44] See texts accompanying footnotes 11 to 18.

Traditional Rules	*Impact of Ares*
1. An original entry.	1. No effect; not in issue in *Ares*.
2. Made contemporaneously with the event recorded.	2. Required expressly.
3. In the routine.	3. No effect; consider the nature of hospital records and the comment of Griffith J.
4. Of business.	4. No effect; a hospital falls within the traditional common law concept of a business.
5. By a person since deceased.	5. Overruled; the adoption of the dissent in *Myers* clearly suggests the general abandonment of the requirement, rather than its displacement by the *presence* of the maker.
6. Who was under a duty to do the very thing and record it.	6. (a) The duty requirement is retained explicitly. (b) Personal knowledge of the maker is required, thus similarly excluding hearsay while broadening the exception to include knowledge and observation, rather than just the recording of an *act*. (c) *Ares* permits opinion, which the common law exception appears to exclude.[45] But, the quantum of the leap from the common law position suggests that the court clearly intended to impose a condition that the maker be available.
7. Who has no motive to misrepresent.	7. The continuation of this requirement would appear to flow implicitly from the nature of the record being considered in *Ares*.

[45] See *infra*, section III (e).

Thus, apart from the opinion issue, which is discussed below, *Ares* can be said to change the common law in just two ways:

(i) removal of the death requirement;

(ii) records of knowledge and observations, rather than simply of acts which the maker has performed, may be admissible.

Read in this way, *Ares* could result in a more realistic, but hardly dramatically different, approach to business duty records at common law.

III. *Applications of the Rules.*

Perhaps the most important consequence of the decision of the Supreme Court in *Ares* v. *Venner* will not be the specific relaxations therein enunciated, but rather the shift from exclusion towards expanded admissibility.[46] Although the lower courts sometimes seem loath to apply the existing rules in novel situations, much less to expand the rules, it would appear that the *Ares* approach is starting to predominate.

Given the present state of the law, it would be unwise for counsel to opt against tendering relevant documentary evidence without at least endeavouring to persuade the trial judge to admit it. But, opposing counsel should not surrender unconditionally; if introduction would do violence to the premises behind the rules, as opposed to just the bald application of the rules themselves, then arguments for exclusion should be favourably received.

(a) *The nature of the duty.*

The nature and ambit of the duty requirements are two of the most important considerations in the application of this exception to the hearsay rule. The nature of the duty will be considered here; its ambit in the next sub-section.

Although the courts have treated the existence of a precise duty as a strict requirement of admissibility, they have not restricted that duty to the employment context. Voluntarily assumed responsibility, if it can be aptly characterized as a duty to a third party, rather than just "good practice", has been held to be sufficient. Although unarticulated, it may be that the master's power of censure over his servant, which originally grounded the rule, is felt to be adequately replaced by the obligations of a professional to his colleagues or his clients.

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[46] Although the Supreme Court does not hear many appeals involving cases of documentary evidence, *Ares* would not appear to be atypical. In a case involving public documents, *Finestone* v. *The Queen* (1953), 17 C.R. 211, the court certainly showed no reticence in ruling admissible the documents in question.

In *Palter Cap Co. Ltd* v. *Great West Life Assurance Co.*,[47] the Court of Appeal for Ontario considered the admissibility of certain documents and reports prepared by a medical specialist to whom a patient had been referred by a general practitioner. The fact that the documents were prepared in the course of the practice of a specialist who had since died was not sufficient to support admissibility. Instead the court heard evidence concerning the nature of a specialist's obligation to a referring physician. Masten J.A., with whom Mulock C.J.O., concurred, stated:[48]

> It is quite true that originally [the specialist] was under no obligation to undertake the work, but having undertaken it he was bound not only to exercise his skill in making the examination, but also [according to the evidence] was under a duty in the ordinary course of practice in the profession to report the results to [the referring physician] as the family doctor of Palter so that he might have the advantage of [the specialist's] diagnosis and advice in the subsequent treatment of the patient.

Masten J.A. sums up the matter in these words:[49]

> The distinction to be observed is that while the duty of an employee to keep his employer informed generally of his conduct of the business on which he is employed, does not suffice to make such reports admissible in evidence after the death of the employee, yet the rule is otherwise where as here a professional man is employed to do one particular thing, *viz.*, to make an examination as a specialist, the results of which examination it was his duty to report to the patient's physician.

In an opinion concurring on this issue, dissenting on others, Macdonnell J.A., stated:[50]

> Was it then the duty of [the specialist] "to do the very thing", namely, to examine Palter? No doubt it may be said that he might have refused to do so. But that does not conclude the matter; he did in fact undertake to make the examination and the question is whether in making it, he was performing a duty. "Duty" in the reported cases is obviously not limited to the narrow meaning of statutory or public duty, or duty for the violation of which a man may be punished. It includes acts required of a man in what may be called his professional duty.

Considerably more recently the concept of professional obligation was canvassed by Shapiro, Surr. Ct. J., in *Maw* v. *Dickey et al.*[51] In that case, involving the issue of whether a will had been made under any undue influence, His Honour ruled that a solicitor's notes, made during an interview concerning the drafting of the will, were admissible. The learned judge noted that the deceased's solicitor was highly experienced at the time of the interview; further, according to

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[47] *Supra*, footnote 11.

[48] *Ibid.*, at p. 311.

[49] *Ibid.*, at pp. 312-313.

[50] *Ibid.*, at p. 320.

[51] (1974), 52 D.L.R. (3d) 178.

his secretary, he always questioned clients about their wills to be sure of their intentions and was always "careful".

His Honour ruled in these terms:[52]

> Under these circumstances, might not a careful and experienced solicitor consider that he might at some later date be called upon in Court or otherwise, to relate the circumstances surrounding the drawing and execution of the will. What better way to refresh his memory than from notes he would make at the time of the interview. The duty he owed to his client was to properly support, at a later date if necessary, the will—once he was sure it expressed the sane and intended wishes of his client. I therefore find a specific duty on the part of this solicitor to ask questions in order to satisfy himself that his client had testamentary capacity and to satisfy himself that he truly understood the desires and intentions of the client.
>
> I further find in this case that this solicitor then had a duty to reduce to some permanent form the above information and impressions . . . . I so admit the exhibit.

While this would seem to be a wider interpretation of the duty issue than that accorded in *Palter Cap Co. Ltd,* it seem quite reasonable and soundly grounded in authority.[53] Nonetheless, it would appear to open the door to a substantial volume of documentary evidence, particularly if it is accurate to interpret *Ares* v. *Venner* as eliminating the death requirement of this exception to the hearsay rule. Of course, the matters discussed below under the "ambit" of the duty, as well as the requirement that there be no motive to misrepresent, will limit the extrapolation of the finding that there was a duty to *support* the will. However, counsel may well find a goldmine of potential evidence in a solicitor's notes, which would, under this exception, be admitted without cross-examination. It must be remembered however, that the issue of weight is always open for argument, and ultimately is a matter for the trier of fact.

(b) *The ambit of the duty.*

Although a document cannot be admitted under this exception unless it was made pursuant to a duty to a third person, not all documents made in the discharge of such a duty are admissible. The authorities establish with some clarity that there must have been a duty to make the very document in question; preliminary or personal notes made in the course of discharging a duty will not be admissible.

In *Conley* v. *Conley et al.,*[54] the Court of Appeal for Ontario held that the notes of a private investigator hired to make observations in connection with a divorce action were admissible

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[52] *Ibid.,* at p. 190.

[53] The case also contains a very helpful review of a large number of cases concerning the admissibility of a solicitor's notes.

[54] *Supra,* footnote 15.

under this exception. The investigator was the employee of a detective agency, the owner of which testified that:

(i) the investigators reported to him every day, turning in their notes made during the investigation;

(ii) it was the investigator's responsibility to provide him with the notes made in the course of the investigation; and

(iii) the investigator in question had prepared notes in the course of the investigation and presented them to him.

However, that same court gave an indication of the limits of this exception in the more recent case of *Regina* v. *Laverty*.[55] In that case, the court considered the admissibility of notes made by an investigator from the Fire Marshall's office in the course of an investigation into the cause of a fire. The notes included observations and opinions concerning the place where the fire started, which was a central issue in the case. It was not disputed that the investigator had a duty to prepare a report based on his findings, but it was argued that the notes in question were made for personal use prior to the preparation of a report intended for submission to the Fire Marshall and would not have been part of that report had the investigator lived to discharge his duty.

The court held that these notes had been properly excluded by the trial judge, Zuber J.A., stating for the court:[56]

> The trial judge found and it is obvious that [the investigator's] notes were merely an aide memoire-notes of a somewhat random character that he kept for himself and from which he may or may not have prepared some further report; but the notes in question are not records or declarations that he was under a duty to make. (See Wigmore, *Evidence* (Chadbourn Revision 1974), s. 1524.)
>
> In the view of the common law a declaration made or a record kept pursuant to a duty had a certain circumstantial guarantee of authority which is not present when the record or declaration falls outside the duty.

Although in *Laverty* the notes were excluded as being made for personal purposes in the course of a duty, rather than in the fulfillment of a duty to make them, a document *necessarily created* in the fulfillment of a duty to produce a different document may be admissible. In *Palter Cap Co. Ltd,*[57] for example, the evidence established that the specialist was duty-bound to report to the referring physician. Hence, his report to that physician was admissible. But the court held that in addition, a screen tracing of the patient's heart (Exhibit C) and electro-cardiograph pictures (Exhibit B) were admissible under this exception.

Masten, J.A., with whom Mulock C.J.O., concurred, noted:[58]

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[55] *Supra,* footnote 11.

[56] *Ibid.,* at p. 292.

[57] *Supra,* footnote 11. Discussed, *supra,* in section III (a).

[58] *Ibid.,* at p. 314.

> In the present case it was established that [the specialist] should make the investigations and tests recorded in exs. "B" and "C". He could not make his report unless he did so, and the very act of making these investigations and tests involved the creation of the records "B" and "C". Using the words of Vaughan Williams, L.J.,[59] the making of these examinations and tests "was therefore a step in obtaining the ultimate result".

Agreeing that these two exhibits were admissible on this basis (but later determining that they should be excluded on another ground), Macdonnell J.A., stated:[60]

> As for the electro-cardiograms and screen tracing, in one sense it was not [the specialist's] duty to take them; he might make his examination in whatever way he thought best. On the other hand it was his duty to adopt what he considered proper means to ascertain the patient's condition and the means he chose were these electrograms and tracing. In *Mellor* v. *Walmesley*, [1905] 2 Ch. 105, where the civil engineer's field notes were admitted, Vaughan Williams, L.J., said (p. 168):—"Here the duty of the surveyor was to report not only the ultimate result of his survey, but also to record everything without which he could not arrive at that ultimate conclusion." The electro-cardiograms and tracing would appear to be admissible on the same footing.

The distinction which flows from these authorities would appear to be that notes made simply *in relation to* a duty will not be admissible;[61] instead, to be admissible they must have been made in the fulfillment of a duty, or as a necessary step in that fulfillment. The rationale set out by Zuber J.A., in *Laverty*, when applicable, would appear to be a solid foundation for an argument opposing admissibility. Thus, it is the circumstances of the note's creation, rather than its contents, which governs here; however reliable the nature of the contents, the notes will only be admissible if they were made pursuant to a particular duty to a third person. A general duty to keep an employer advised of a situation will not suffice to ground admissibility.[62]

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[59] In *Mellor* v. *Walmesley*, [1905] 2 Ch. 105, 74 L.J. Ch. 475. In that case, Vaughan Williams L.J. also noted that in *Doe D. Patteshall* v. *Turford, supra*, footnote 13, notes of measurements made by a surveyor as the basis for his report were admitted, it being "recognized that not only the ultimate performance of a duty ought to be recorded, but that the facts necessary for the performance of that duty ought also be recorded". For an example of different circumstances leading to a different result, see *O'Connor* v. *Dunn* (1877), 2 A.R. (Ont.) 247, in which a surveyor's notes were excluded because, per Moss C.J.A.: "When the book is examined, it appears to be a sort of diary in which Mr. Gibson was in the habit of writing from day to day, various topics in which he took an interest and likewise to contain entries headed 'Surveying Account'. It bears no resemblance to a book of field notes, ordinarily so called."

[60] *Supra*, footnote 11, at pp. 320-321.

[61] 61 See also *Massey* v. *Allen*, *supra*, footnote 17; *Chambers* v. *Bernasconi*, *supra*, footnote 17; and *Dominion Telegraph Securities Ltd* v. *Minister of National Revenue*, *supra*, footnote 17.

[62] See *Smith* v. *Blakey*, *supra*, footnote 13, in which a client's report on receipt of a shipment of shoes was excluded because his general duty to report did not include a specific duty to report the receipt of shoes.

(c) *Limits on the duty: reported performance or reported observation.*

As this exception to the hearsay rule developed, it was clearly limited to the recording of acts performed by the maker of the record. In *Conley* v. *Conley*,[63] the Court of Appeal for Ontario quoted as authoritative, the following passage from Wigmore:

> Its requirements are very strict. First, there must have been *a duty to do the very thing recorded.* Secondly, there must have been *a duty to record or otherwise report the very thing* . . . .

This was put particularly forcefully in *Polini* v. *Gray*:[64]

> The principle has never been challenged in any case, and it is this, that it must be an entry, not of something that was said, not of something that was learned, not of something that was ascertained, by the person making the entry, but an entry of a transaction done by him or to him, and of which he makes a contemporaneous entry.

However, the courts now seem to be tempted to admit records of observations, rather than just acts completed by the recorder.

The leading authority in favour of the expansion of the exception beyond the recording of acts done by the recorder is, of course, *Ares* v. *Venner*.[65] In that case, observations and opinions of the nurses were held admissible, although there was no discussion of the advisability of extending the exception. Nonetheless, Hall J.'s statement that admissibility is conditioned upon the maker having had personal knowledge and having had a duty to make the record, is clearly different from the previous requirement that the maker have had a *duty to do the thing recorded.* And, although the Court of Appeal in *Conley* (which preceded *Ares*), cited a strict standard, it would seem that the record of the acts done by the investigator would include his observations of the spouse he was assigned to watch. *Conley* suggests that where the duty is to observe, and observing is the *act* that is performed, the rule may be stretched well beyond its original scope and intent even while apparently being given a strict, literal interpretation.

The *Ares* decision was applied by Griffiths J., in *Setak Computers* v. *Burroughs*,[66] in determining whether minutes of a meeting were admissible under the common law exception. In setting out the state of the law before *Ares*, however, he does not mention the requirement that the recorder must have had a duty to do the thing recorded. While this may weaken his interpretation of the state

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[63] *Supra*, footnote 15.

[64] *Supra*, footnote 13.

[65] *Supra*, footnote 16, discussed, *supra*, in section II.

[66] *Supra*, footnote 17.

of the law after *Ares*, it would appear that the following passage from his judgment, accurately states the existing law:[67]

> In my opinion, the common law exception applies only to writings or records made by a person speaking from personal observation or knowledge of the facts recorded.

Applying this test to the minutes tendered in evidence, Griffiths J., further held:[68]

> In my view, the minutes here do not meet this requirement of the common law exception; the authors of the minutes did not have personal knowledge of all the facts recorded. At most it can be said that [the authors] had personal knowledge that the statements attributable to those who attended the meeting, which were duly recorded in the minutes, were in fact made, and it is on this narrow basis only that I would admit the minutes under the common law as modified in *Ares* v. *Venner*.

It is interesting that considerably earlier, in *Palter Cap Co. Ltd*, the majority of the Court of Appeal was prepared to admit a medical history under this exception.[69] The rationale would have been that the history was a necessary step towards the creation of the required report, and therefore was admissible. However, before too much reliance is placed upon this, it should be noted that the medical history, while perhaps a necessary step, was a step of a very different kind from the electro-cardiogram and tracing which were admitted under this doctrine. It is questionable whether even a liberal reading of *Ares* would permit the admission of medical history, unless only, as per *Setak*, as evidence that the patient said certain things. Given that the only issue in *Palter Cap Co. Ltd*, was the date of the examination, that case is doubtful authority for the proposition that a medical history can be admitted to prove the truth of the facts narrated therein.

(d) *Transmitted duty: a possible expansion.*

Although the courts have restricted the scope of admissibility to records made by the person who did, or possibly observed, the act in question, there is room to expand this exception without doing violence to the concepts upon which it is built. It can be argued that if one individual has a duty to do a certain act, and a second has a duty to record it, then the record made is admissible even though it relates to an act of someone other than the recorder. If this is so, and if it is remembered that this exception applies to oral reports,[70] as

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[67] *Ibid.*, at p. 755.

[68] *Ibid.*

[69] *Supra*, footnote 11. Macdonnell J.A. held the report inadmissible since in his opinion, there was no duty to make it nor was it a necessary step to fulfill the duty which existed (at p. 321).

[70] See *supra*, footnote 11.

well as to written records, then the scope for creative applications of the doctrine should be quite wide.

In approaching this issue, it must first be decided whether *Ares* provides a general thrust towards widened admissibility, or instead has replaced one set of strict criteria with another. Before *Ares*, one of the tests was the existence of a duty to do the very thing and record it. *Ares* speaks instead of the recorder being required to have personal knowledge of what is recorded. If that is read as an absolute requirement, the transmittal of information in the circumstances outlined above will preclude the application of the exception. Yet, it would appear to be more in line with the spirit of *Ares* to argue that the test is evolving towards one of reliability, however achieved, rather than a fixed set of indicia of reliability.

The argument in favour of admitting records made in these circumstances is set out by Wigmore as follows:[71]

> The conclusion is, then, that where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by other persons in the regular course of business, of a transaction lying in the personal knowledge of the latter person, there is no objection to receiving that entry under the present exception . . . provided the practical inconvenience of producing on the stand the numerous other persons thus concerned would in the particular case, outweigh the probable utility of doing so.

In his usual trenchant manner, Wigmore asserts that:[72]

> Such entries are dealt with in that way in the most important undertakings of mercantile and industrial life. They are the ultimate basis of calculation, investment and general confidence in every business enterprise. . . . It would seem that expedients which the entire commercial world recognizes as safe could be sanctioned, and not discredited by, the courts of justice . . . . The merchant and the manufacturer must not be turned away because methods in which the entire community places a just confidence are a little difficult to reconcile with technical judicial scrupples on the part of the same persons who as attorneys have already employed and relied upon the same methods. In short, courts must here cease to be pedantic and endeavour to be practical.

Although a different approach was employed, and no reference was made to Wigmore, the decision of the British Columbia Court of Appeal in *Regina* v. *Penno*[73] is at least consistent with the argument for the admissibility of this type of record. In that case, which involved the identification of goods allegedly taken from a store, the Crown called two store employees who had taken the store's inventory. One testified that she had viewed the tags on the goods and called out certain numbers to the other; the latter testified that she had recorded the numbers on an inventory sheet. Neither checked

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[71] Pp. 451-451. And see also the useful and concise views of McCormick, p. 742.

[72] *Ibid.*

[73] (1977), 35 C.C.C. (2d) 266.

the other's work. The Crown sought to introduce that sheet to prove that the goods in question had come from that store.

In reasoning, which is at best difficult for the uninitiated[74] to follow, the court ruled that the inventory sheet was not hearsay and was therefore admissible. Additionally, and perhaps out of an abundance of caution, McFarlane J.A. for the court declared that:[75]

> I agree with the argument of counsel for the Crown that admissibility of the inventory sheet itself in the present case is in accord with the principles enunciated by the Supreme Court of Canada in *Ares* v. *Venner* . . . .

While it is not at all clear that the court was alluding to the doctrine of transmitted duty, the admissibility of the inventory sheet under the common law exception would clearly come within the ambit of Wigmore's urgings. Counsel in other jurisdictions might be well advised to seek to introduce such records as exceptions to the hearsay rule, rather than as not being hearsay, while using *Penno* to support the desirability of their being admissible.

Wigmore would certainly approve of the more direct approach adopted by the Court of Appeal in England in *John Francis Halpin*.[76] Although that case dealt with the admissibility of documents under the "public records" exception to the hearsay rule, the reasoning employed is certainly capable of broader application.

In *Halpin*, the Crown sought to prove that the accused and his wife were in effect the sole shareholders and directors of a company named *P and P Ltd* at a given time. To do so, the Crown tendered the files from the company's register containing statutory returns made by the company under the Company's Act, 1948.[77] Because that Act did not provide for the admissibility of these returns, they could be admitted into evidence only pursuant to the common law "public records" exception. The stumbling block in the way of the application of that exception to the particular documents was the fact that, as Geoffrey Lane L.J. noted, under the public records exception:[78]

> . . . it was a condition of admissibility that the official making the record should either have had personal knowledge of the matters which he was recording or should have inquired into the accuracy of the facts.

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[74] The exchange of judgments between the Supreme Court of Canada and the British Columbia Court of Appeal in *O'Brien* (*supra*, footnote 2 (S.C.C.), and see the B.C.C.A.'s reply, unreported, December 16th, 1977) on the hearsay issue suggests that there are many who require initiation in the ways of our most western province.

[75] *Supra*, footnote 73, at p. 271.

[76] *Supra*, footnote 13.

[77] 11 & 12 Geo. 6, c. 38.

[78] *Supra*, footnote 13, at p. 265 (W.L.R.).

In *Halpin,* of course, the officials who maintained the companies register would not have personal knowledge of the information contained in the returns filed by various companies.

Nonetheless, the court held that the returns were admissible, reasoning thusly:[79]

> But the common law should move with the times and should recognize the fact that the official charged with recording matters of public import can no longer, in this highly complicated world, as like as not, have personal knowledge of their accuracy.
>
> What has happened now is that the function originally performed by one man has had to be shared by two: the first having the knowledge and the statutory duty to record that knowledge and forward it to the registrar, the second having the duty to preserve that document and to show it to members of the public under proper conditions as required.
>
> Where a duty is cast upon a limited company by statute to make accurate returns of company matters to the registrar . . . the necessary conditions, in the judgment of this court, have been fulfilled for that document to have been admissible. All statements on the returns are admissible as *prima facie* proof of the truth of their contents.

In asserting that the *Halpin* reasoning should be applied to the situation under discussion, it must be recognized that there are two distinguishing features about that case. The first is that the duties were imposed by statute, rather than by a business or professional obligation. But given the weight which the courts have long accorded to the latter, there is no apparent reason to suggest that it is entitled to less weight than a statutory obligation in the circumstances in question.

The second distinction is that in *Halpin* it appears that the registrar was essentially providing a storage facility. Thus the company was not reporting to the registrar, who then created his own record, but rather was filing a record which the registrar kept. The possible danger of an error or misrepresentation in transposition was therefore not present. While this would exist in the transmitted duty situation under discussion, the answer, in Wigmore's words is that:[80]

> It would seem that expedients which the entire commercial world recognizes as safe could be sanctioned, and not discredited by, the courts.

If the business world is prepared to rely upon the accuracy of these documents, and in effect rely upon the standards of accuracy it imposes upon its employees, then so too should the courts. As long as it is remembered that we are considering admissibility, rather than weight, this reliance upon the duty principle, expanded, but not modified in any way, seems entirely appropriate.

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[79] *Ibid.*

[80] P. 452.

(e) *The admissibility of opinion evidence.*

This exception to the hearsay rule was originally confined to the records of routine business transactions recorded by the person who performed the transactions. As outlined in the preceding two sections, it would appear to be consistent with the principles underlying this exception to extend it to encompass observations of the recorder, and the transmitted duty class of records. However, the admissibility of opinion evidence under this exception, which was argued, but not decided in *Laverty,*[81] is quite another matter.

On first impression, one would think that opinion evidence is not appropriately introduced in documentary form. Although cross-examination can be dispensed with when routine business transactions are recorded by essentially anonymous clerks, it is difficult to conceive of an opinion which could not usefully be clarified on cross-examination. Apart from the effect of amplification of the opinion and its basis, in assessing any opinion offered in evidence the trier of fact will generally be influenced by the impression given by the expert on the witness-stand. In a sense, the thoroughness, intelligence and personality of the expert may be equivalent to the system under which a regular entry was made: the characteristics of each will strongly influence the weight given to the proferred evidence. While a variety of individuals can testify about a firm's record-keeping system, only the expert can, by testifying, provide the information about himself or herself which is so useful in assessing the opinion placed before the courts.

In Canada, there do not appear to be any reported examples of opinion evidence being accepted in evidence under this exception to the hearsay rule. As noted above, the point was argued, but not decided, in *Laverty*. Support for the admissibility of such evidence may be found in McCormick:[82]

> It has been suggested that entries in the form of opinions are not admissible if the declarant was not an expert making a statement concerning a matter within his expertise and as to which he would be competent to express an opinion if testifying in person. In general, the opinion rule should be restricted to governing the manner of presenting courtroom testimony and should have little, if any, applicability to out-of-court statements.

It is certainly implicit in the foregoing that McCormick considers opinions offered in a document by someone who is not an expert to be admissible; he explicitly suggests that expert opinion is admissible. Persuasive as McCormick is on all matters of evidence, the fact

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[81] *Supra,* footnote 11.

[82] Pp. 721-722. See also Wigmore, p. 464: "To apply the much misused opinion rule in this connection can hardly ever be justified." No authority is cited to support this view.

that he cites no common law authority for either proposition is significant. Given the roots of this exception to the hearsay rule, and the widespread dangers inherent in opinion evidence which is not tested by cross-examination, it would seem highly inappropriate to admit opinions under the exception.

Reference in this connection must be made to *Ares*,[83] in which the written opinions of nurses were admitted under this exception. It should first be noted that the opinions were far from scientific or technical; indeed they were perhaps closer to observations than to opinions as such. According to the report of the case, the notes contained such references as "blue", "bluish pink", "cool" and "cold".[84] But more significantly, it is clear from the judgment of Hall J., that the notes were held admissible only because the nurses were available to testify. After ruling the notes admissible, he states:[85]

> This should, in no way, preclude a party wishing to challenge the accuracy of the records or entries from doing so . . . the nurses were present in court and available to be called as witnesses . . . .

Thus, it cannot be argued that *Ares* supports the admissibility, under this exception to the hearsay rule, of the recorded opinion of a deceased or otherwise unavailable witness.

(f) *Computer evidence at common law.*

The prevailing perception in Canada and most other jurisdictions is that special legislative provisions are required to cope with the particular problems said to be inherent in documents made or kept by a computer. Apart from the widespread distrust of computers, there would appear to be little reason why this is so. Bookkeeping machines have been common for decades, yet it was only the appearance of the computer which created a great stir in legal circles. Evidence obtained from stop-watches and radar devices is regularly admitted without proof of their reliability, yet evidence derived from computers which are regularly relied upon in vast commercial enterprises, is treated with great suspicion.

Looking at the seven common law criteria[86] for admissibility, whether as modified by *Ares* or not, there would appear to be no

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[83] *Supra*, footnote 19.

[84] In *Setak Computers* v. *Burroughs*, *supra*, footnote 17, at p. 755, Griffiths J., states: "In the *Ares* case, the nurses were recording observations they had made of the plaintiff as a patient and the entries thereof described matters within their personal knowledge." At pp. 761-762, in dealing with admissibility of certain minutes under s. 36 of the Ontario Evidence Act, R.S.O., 1970, c. 151, he specifically declares that opinion evidence is not admissible.

[85] *Supra*, footnote 16, at p. 363 (C.R.N.S.).

[86] See *supra*, section I.

reason for excluding computer-kept records. Nor would there appear to be any basis for requiring any special evidence about the functioning of the computer.

Since the first appearance of this exception to the hearsay rule, it has been the presumed accuracy which flows from the creation of a business system and the reliance placed on the records by the business community, rather than evidence of the actual reliability of the particular entrant (who is generally anonymous), which has justified admissibility. If the record keeping system utilizes a computer, rather than a series of clerks, it is hard to see why there should have to be an examination of the workings of the computer when the common law requires no evidence of the actual abilities of a human being employed to discharge the same function. The required circumstantial guarantee of trustworthiness flows from the presumption that businesses will create *systems* which ensure the reliability of their records. The nature of those systems, whether they involve computers, or human beings, does not affect the deployment of that presumption.

Although no Canadian court appears to have grappled with this issue, the Supreme Court of Mississippi ruled computer-kept records admissible under a similar[87] common law exception in *King* v. *Murdock Acceptance Corp.*[88] In that case, in which computer print-outs were offered as proof of the balance owing in a civil suit, the court remarked that:[89]

> The rules of evidence governing the admission of business records are of common law origin and have evolved case by case, and the court should apply these rules consistent with the realities of current business methods. The law always seeks the best evidence and adjusts its rules to accommodate itself to the advancements of the age it serves.

After noting that computer records were being admitted under general business-record statutes, the court ruled:[90]

> . . . we hold that print-out sheets of business records stored on electronic computing equipment are admissible in evidence if relevant and material without the necessity of identifying, locating and producing as witnesses the individuals who made the entries in the regular course of business if it is shown (1) that the electronic computing system is recognized as standard equipment,

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[87] The exception employed was a derivative of the party's shop book rule, which, as noted in section I above, had ceased to have a common law existence in England by the 19th century. As it developed in Mississippi, it essentially became the equivalent of the business duty rule: see Colin Tapper, Evidence From Computers (1974), 8 Geo. L. Rev. 562, at p. 576, n. 79.

[88] (1969), 22 So. 2d 393. This case is discussed in a very lucid and helpful review of the common law's adaptability by Colin Tapper, *op. cit., ibid.*

[89] *Ibid.*, at p. 397.

[90] *Ibid.*, at p. 398.

> (2) the entries are made in the regular course of business at or reasonably near the time of the happening of the event recorded and (3) the foundation testimony satisfies the court that the sources of information, method and time of preparation were such as to indicate its trustworthiness and justify its admission.

Similar in tone to the clear enunciation of principle in *Ares*, there would appear to be no reason why the *King* approach could not be introduced in Canada by a similarly innovative court. The main obstacle, which lies in the requirement that the maker of the record either have performed the act recorded or have personal knowledge of it, can in most business situations be countered by the transmitted duty doctrine discussed above.

Reading the common law requirements literally appears to make them directly applicable to the situation in which raw data is fed into a computer and then processed to create a record, as well as to the simple computer-stored record situation. A computer-created record would be made in the routine of business by a computer under a duty to do the very thing, that is, calculate or compile and record it (the print-out or other product). This analysis involves substituting a computer for the common law's person, but given the importance of the system rather than its components, that does not seem to be an excessive leap of faith.