A Primer on Hearsay

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A thorough understanding of hearsay is important for all litigators. This article addresses some of the basic principles of hearsay.

What is Hearsay?

One of the leading cases on hearsay is the Supreme Court of Canada's decision in *R. v. Khelawon*, [2006] 2 S.C.R. 787.

The Court noted that the essential defining features of hearsay are:

1. an out-of-court statement is adduced to prove the truth of its contents, and
2. there is no contemporaneous opportunity to cross-examine the declarant.

Hearsay evidence is presumptively inadmissible. The key concern is the inability to test the reliability of hearsay statements. Moreover, untested hearsay evidence may be afforded more weight than it deserves.

As stated in *R. v. Khelawon*, our adversary system puts a premium on the calling of witnesses who give their evidence under oath, whose demeanour can be observed, and who are subject to cross-examination by opposing counsel.

In *R. v. Baldree*, [2013] 2 SCR 520, the Supreme Court of Canada outlined the following specific concerns with hearsay:

- First, the declarant may have misperceived the facts to which the hearsay statement relates.
- Second, even if correctly perceived, the relevant facts may have been wrongly remembered.
- Third, the declarant may have narrated the relevant facts in an unintentionally misleading manner.
- Finally, the declarant may have knowingly made a false assertion.

The Court indicated that the opportunity to fully probe these potential sources of error arises only if the declarant is present in court and subject to cross-examination.

As an example, in a personal injury trial, a plaintiff cannot simply file a letter from his or her pre-accident employer stating that the plaintiff was an excellent employee who would have been promoted to a senior role were it not for the accident. The information in the letter is hearsay if it is tendered to prove the plaintiff's damages. Without calling the employer as a witness, his or her evidence cannot be tested.

As another example, in a trial involving a dispute over liability for a car accident, the plaintiff cannot say: "A witness, Ms. Jones, told me that she saw the defendant run the red light". If the plaintiff wants to adduce such evidence to prove liability, Ms. Jones must be called as a witness.

Traditional Exceptions to the Hearsay Rule

There are exceptions to the hearsay rule. These exceptions are in place to facilitate the search for truth by admitting into evidence hearsay statements that are reliably made or can be adequately tested.

Hearsay evidence may be admissible under an existing hearsay exception, such as business records, statements against interest, past recollection recorded, and spontaneous utterances.

However, in rare cases, even when evidence falls within a hearsay exception, it may be excluded if the indicia of necessity and reliability are lacking: *R. v. Mapara*, [2005] 1 SCR 358.

Further, even if hearsay fits within an exception, a judge has discretion to exclude it if its prejudicial effect outweighs its probative value: *R. v. Khelawon*.

Principled Exceptions to the Hearsay Rule

Where hearsay does not fall under an existing exception, it may be exceptionally admitted on a case-by-case basis according to the principles of necessity and reliability.

In *R. v. Bridgman*, 2017 ONCA 940, the Ontario Court of Appeal indicated that the more reliable a hearsay statement is, the less important the necessity analysis may become.

As stated by the Ontario Court of Appeal in *R. v. N.Y.*, 2012 ONCA 745, *necessity* is broader than the unavailability of the declarant. It is the availability of the evidence, not the availability of the witness, that is of ultimate significance. If there is similar evidence available from another source, the court will be less likely to admit hearsay evidence.

In *R. v. Srun*, 2019 ONCA 453, the Ontario Court of Appeal noted that the *reliability* requirement may be established in either or both of two ways.

Procedural reliability is established when there are adequate safeguards for testing the evidence despite the fact that the declarant has not given the evidence in court, under oath or its equivalent, and under the scrutiny of contemporaneous cross-examination.

Among the substitutes for traditional safeguards are video recording the statement, administration of an oath, and warning the declarant about the consequences of lying.

Substantive reliability is established where the hearsay statement is inherently trustworthy. In this regard, a trial judge considers the circumstances in which the statement was made and any evidence that corroborates or conflicts with the statement.

The standard for substantive reliability is high. The court must be satisfied that the statement is so reliable that contemporaneous cross-examination on it would add little, if anything, to the process.

As indicated in *R. v. Srun*, procedural and substantive reliability are not mutually exclusive. They may work in tandem in that elements of both can combine to overcome the specific hearsay dangers a statement might present even where each, on its own, would be insufficient to establish reliability.

Narrative

Out-of-court statements are sometimes admitted into evidence as part of the narrative. Narrative evidence is not considered hearsay as it is not given for the truth of its contents.

As explained in *LeBlanc v. R.*, 2018 NBCA 65, narrative evidence is usually evidence necessary to put a context on the unfolding of the story.

In *R. v. Assoun*, 2006 NSCA 47, the Nova Scotia Court of Appeal agreed with the Crown that narrative evidence is admissible for multiple interrelated purposes: to advance the story, to put other evidence into context so that it is understandable, and to assist in evaluating the probative value of evidence and the credibility of a witness.

Conclusion

Hearsay evidence is an out-of-court statement that is adduced to prove the truth of its contents without a contemporaneous opportunity to cross-examine the declarant.

Hearsay evidence is presumptively inadmissible because it cannot be tested through cross-examination. This goes against the principles of our adversary system.

However, there are established exceptions to the rule against hearsay, such as business records. A hearsay statement, because of the way in which it came about, may be inherently reliable, or there may be sufficient means of testing it despite its hearsay form.

In exceptional circumstances, where hearsay does not fall within one of the established exceptions, it can be admitted into evidence if it meets the test of necessity and reliability.