

THE EVIDENCE (AMENDMENT) ACT, 1995

Act no. 12 of 1995, the Evidence (Amendment) Act, 1995 has been in force since March 30, 1995. The Memorandum of objects and reasons appended to the Bill reads as follows:

"This Bill seeks to amend the Evidence Act in order to make provisions governing the admissibility of hearsay evidence in civil and criminal proceedings by the creation of new exceptions to the hearsay rule and the retention of existing exceptions, whether established at common law or by statute.

The new exceptions provided for in the Bill relate to the admission in evidence of -

- (a) written statements, by agreement of parties to criminal proceedings;
- (b) first hand hearsay statements in civil proceedings, whether documentary or oral, and first hand documentary statements in criminal proceedings;
- (c) documentary statements relating to business, etc.;
- (d) computer-generated statements which constitute hearsay evidence.

The Bill also makes provisions in respect of -

- (a) the admissibility of computer-generated statements which do not constitute hearsay;
- (b) the legal effect, in civil proceedings of evidence adduced to show consistency or inconsistency of a witness and to test the credibility of persons not called as witnesses whose statements are admitted in evidence.

The court is also empowered to exclude any evidence where the court is of the opinion that the prejudicial effect of the evidence outweighs its

probative value."

The Act amends the Evidence Act ("the principal Act") by inserting as Part 1A sections 31A to 31L, under the general rubric "Hearsay and Computer-generated Evidence". It combines provisions to be found in the English Criminal Justice Act, 1967 and Civil Evidence Act, 1968.

Definition

Section 31B defines "document" as follows:

" "document" includes, in addition to a document in writing -

- (a) any map, plan, graph or drawing;
- (b) any photograph;
- (c) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom;
- (d) any film (including micro-film), negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom."

Written statements in criminal proceedings

Section 31C renders written statements admissible in criminal proceedings, provided the following conditions are satisfied:

- (1) The statement purports to be signed by the maker.
- (2) A Notice of intention to tender the statement and a

copy of the statement are served on all parties at least 21 days before the hearing.

- (3) None of the other parties objects by service of a counter-notice requiring attendance of the maker of the statement within 10 days of service of the copy of the statement.
- (4) The Notice of intention to use the statement is accompanied by a declaration by the maker of its truth to the best of his knowledge and belief and acknowledging his liability to prosecution in the event it is knowingly false.

Service of the Notice may be dispensed with if the parties agree before or during the hearing that the statement be tendered (section 31C(3)). Even where the statement is rendered admissible by service of the Notice the Court may, of its own motion, require the attendance of the maker to give oral evidence (section 31C(6)) and, even where a counter-notice has not been filed, the Court may permit evidence to be led contradicting the evidence in the statement (section 31C(6)) and additional evidence in rebuttal of the contradicting evidence (section 31C(7)).

"First hand" hearsay in criminal proceedings

In criminal cases a statement made by a person in a document shall be admissible evidence of any fact in respect of which his direct oral evidence would have been admissible, provided it is proved that that person

- (a) is dead;
- (b) is unfit, by reason of his bodily or mental condition, to attend court;
- (c) is abroad and his attendance impracticable;
- (d) cannot be found;
- (e) is prevented from attendance by threats of bodily harm and protection cannot reasonably be provided;

This is a very broad provision which, once the preconditions are satisfied, will make admissible a wide range of documents such as, for instance, medical reports. The generality of the section is to some extent qualified by the provisions of section 31J, to which we shall come in due course.

"First hand" hearsay in civil proceedings

In civil cases statements, whether made orally or in a document or otherwise by any person (whether called as a witness or not) shall be admissible as evidence of any facts stated therein, provided that the party intending to tender the statement serves at least 21 days notice thereof on every other party to the proceedings (section 31E (1) & (2)). The Court may, however, dispense with the notice requirement (section 31E(6)). Every party so notified shall have the right to require the maker of the statement to be called as a witness, but the party intending to rely on the statement shall not be obliged to do so if it is proved that the maker of the statement is dead, unfit etc. (section 31E (3) & (4)). An oral statement made admissible under this section may only be proved by the direct oral evidence of the maker or a person who actually heard the statement being made (section 31E (5) - in other words, only first hand hearsay is admissible, not second or third hand). However, where the person who made the statement is being called as a witness, evidence of the statement will only be admissible with the leave of the court (section 31E (7)).

Business documents

Section 31F deals with an area of notorious inconvenience, the high water mark of which was the House of Lords decision in Myers v D.P.P. [1964] 1 ALL ER 877 and our Court of Appeal in R. v Homer Williams (1969) 13 WIR 520. The section renders admissible documents created in the course of a trade, business or profession or other occupation from information supplied by a person with personal knowledge of

the matters dealt with and received in the course of a trade, business, profession or other occupation (section 31F (2)). In criminal proceedings, the evidence is only admissible if it is proved to the satisfaction of the court that the person who supplied the information is dead, etc. An additional condition in this section is that the supplier of the information "cannot reasonably be expected, having regard to the time which has elapsed since he supplied the information and to all the circumstances, to have any recollection of the matters dealt with in the statement." (section 31F (3) (f)). Section 31F (3A) has all the hallmarks of an amendment made during the course of the passage of an Act through the legislation process and is worthy of full quotation:

"(3A) In estimating the weight, if any, to be attached to a statement admissible in criminal proceedings as evidence by virtue of this section, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular, to the question whether or not the person who supplied the information recorded in the statement did so contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not that person, or any person concerned with making or keeping the record containing the statement, had any incentive to conceal or misrepresent the facts."

In civil cases, the further condition of admissibility of business documents is service of a notice 21 days before the hearing. Again, any other party may require the attendance of the maker of the statement unless that person is dead, etc. and under this section the Court may, if it thinks it appropriate, dispense with the notice requirement (section 31F (3) (5) (6) & (7)).

Computer evidence

Statements in documents produced by computer are now

admissible in evidence, whether they constitute hearsay or not, provided the following conditions are satisfied:

- (1) The computer was operating properly and not subject to any malfunction or alterations to its mechanism that might affect the validity or accuracy of the contents of the document (section 31G(a)).
- (2) There is no reasonable cause to believe that the accuracy or validity of the document has been adversely affected by any improper process or procedure or by inadequate use of the computer or that there was any error in the preparation of the data from which the document was produced (section 31G(b)).
- (3) The computer was properly programmed (section 31G(c)).
- (4) Where two or more computers were involved, the above conditions are satisfied in respect of each one and it is established that the use of more than one did not introduce any factor that might have adversely affected the validity or accuracy of the document. (section 31G(d)).

Previous inconsistent statements in civil proceedings

Section 31I provides that previous inconsistent statements proved against a person by virtue of sections 15-17 of the principal Act shall be admissible in evidence of any fact stated therein of which direct oral evidence would be admissible. This is a clear departure in civil cases from the usual rule that such statements are never evidence of the facts stated, which will therefore continue to govern criminal cases (R. v Birch (1924) 18 Cr. App. Rep. 26).

Credibility

The provisions permitting the admission in evidence

of hearsay statements, whether oral or documentary, may obviously create special problems with regard to the assessment of credibility. Section 31J provides that where evidence is given of a statement of a person not called as a witness pursuant to sections 31D, 31E, 31F and 31G, any evidence relevant to his credibility which would have been admissible had he been called as witness will also be admissible. Evidence may also be given, with the leave of the Court, of any matter which could have been put to the maker of the statement in cross examination as relevant to his credibility, as well as evidence tending to prove a previous inconsistent statement by the maker.

Miscellaneous

- (1) Section 2 of the Act repeals section 8 of the principal Act (dealing with competence of husbands and wives of parties to give evidence in proceedings in consequence of adultery).
- (2) Section 31A preserves the admissibility in evidence of any statement which would have, before the Act, been admissible in evidence of any fact stated.
- (3) Section 31K makes it an offence for a person to make in any statement tendered in criminal proceedings a wilful false statement, punishable by a fine and/or up to 7 years imprisonment (the equivalent of section 4 of the Perjury Act).
- (4) Section 31L expressly preserves the power in the Court to exclude evidence in respect of which in the opinion of the Court the probative value is outweighed by the prejudicial effect.

Forms

The Act provides for the service of Notices and Counter-notices in various circumstances. The forms appended to this paper are drafts adapted from those prescribed under the English rules and may prove useful.

C. DENNIS MORRISON
MAY 13, 1995

**NOTICE OF INTENTION TO TENDER IN EVIDENCE
HEARSAY STATEMENT MADE IN A DOCUMENT**

[Title as in action]

Take notice that at the trial [or hearing] of this action [or on the reference or inquiry or the assessment of damages herein, as the case may be] the plaintiff [defendant] intends to tender in evidence the statement made in the following document, namely [identify the document, e.g., letter, memorandum, invoice, report, transcript or as may be, dated [or under date] the day of , 19].

A copy [or transcript or relevant part] of the said document is annexed hereto.

And further take notice that the particulars relating to the said statement are as follows [set out such of the following particulars as are not apparent on the face of the said document or part thereof] that it was made:

- (1) by - [state full name]
- (2) to - [state full name]
- (3) on the day of , 19 [[at (approximately) o'clock] in the noon]
- (4) at - [state the place]
- (5) in the following circumstances [state fully the circumstances in which statement was made].

[And further take notice that the said cannot [or should not, as the case may be] be called as a witness at the trial [or hearing] because [state the reason relied on, e.g. that he is dead or beyond the seas or as may be]].

Dated the day of , 19 .

(Signed)

Attorneys-at-law for

To [all other parties].

Filed ...

**COUNTER-NOTICE REQUIRING
PERSON TO BE CALLED AS A WITNESS**

[Title as in action]

Take notice that the defendant [plaintiff] requires you to call as a witness at the trial [or hearing] of this action [or the reference or the inquiry or the assessment of damages herein, as the case may be] - [state full name], particulars of whom are contained in your Notice dated the
day of , 19 .

And further take notice that the defendant [plaintiff] contends that the said
can [or should, as may be] be called as a witness at the trial [or hearing] of this action [or as may be].

Dated the day of , 19 .

(Signed)

Attorneys-at-law for

To [the party who served the Notice].

Filed by ...

NOTICE OF INTENTION TO TENDER IN EVIDENCE
HEARSAY STATEMENT MADE ORALLY

[Title as in action]

Take notice that at the trial [or hearing] of this action [or on the reference or inquiry or the assessment of damages herein, as the case may be] the plaintiff [defendant] intends to tender in evidence the following statement, namely [state the substance of the statement or, if material, the words used].

And further take notice that the particulars relating to the said statement are as follows: that it was made:

- (1) by - [state full name]
- (2) to - [state full name]
- (3) on the day of , 19 [[at
(approximately) o'clock] in the noon.]
- (4) at - [state the place]
- (5) in the following circumstances [state fully the circumstances in which statement was made]

[And further take notice that the said cannot [or should not, as the case may be] be called as a witness at the trial [or hearing] because [state the reason relied on, e.g. that he is dead or beyond the seas or is unfit by reason of his bodily [or mental] condition to attend as a witness or despite the exercise of reasonable diligence it has not been possible to identify [or find] him or as may be]].

Dated the day of , 19 .

(Signed)

Attorneys-at-law for

To [all other parties]

Filed by ...

NOTICE OF INTENTION TO TENDER IN EVIDENCE
HEARSAY STATEMENT CONTAINED IN A RECORD

[Title as in action]

Take notice that at the trial [or hearing] of this action [or on the reference or inquiry or the assessment of damages herein, as the case may be] the plaintiff [defendant] intends to tender in evidence the statement contained in the following document, namely [identify the document, e.g., cash ledger or other book of account or short-hand note-book or as may be, dated [or under date] the day of , 19].

A copy [or transcript or relevant part] of the said document is annexed hereto.

The nature of the record containing the statement appears on the face of the said document [if this is not so, describe the nature of the record, or part of which, containing the said statement].

And further take notice that the particulars relating to the said statement are as follows:

- (1) The said record was compiled by [state full name] who at the time was employed as and [part of] whose duties as such - included the writing up [or entering or recording or as may be] the said record.
- (2) The information from which the said record was compiled was originally supplied by [state full name].
- (3) The said information was supplied to the said {the compiler} by [state full name] who at the time was employed as and [part of] whose duties as such - included supplying information for the compilation of the said and similar records.

(4) The said record [or part thereof] was compiled

(a) on the day of , 19 [at
 [approximately] o'clock] in the
 noon

(b) at - [state the place where]

(c) in the following circumstances [state fully
the circumstances in which such record or part
was compiled].

[And further take notice that the said

 [and the said , and
the said] cannot [or should not] be
called as a witness at the trial [or hearing] because [state
the reason relied on, e.g., that he is dead or beyond the seas
or as may be]]

Dated the day of , 19 .

(Signed)

Attorneys-at-law for

To [all other parties].

Filed ...