

JERSEY LAW COMMISSION
TOPIC REPORT NO. 4 - September 2000
THE BEST EVIDENCE RULE IN CIVIL PROCEEDINGS

To be laid before the States by the President of the Legislation Committee pursuant to the Proposition to establish the Commission approved by the States on 30 July 1996

THE JERSEY LAW COMMISSION

The Jersey Law Commission was set up by a proposition laid before the States of Jersey and approved by the States Assembly on 30 July 1996.

The Commissioners are;

Advocate Keith Baker, Chairman

Mr David Lyons, English Solicitor

Mr David Moon, Solicitor

Advocate Alan Binnington

Mr. Clive Chaplin, Solicitor

Advocate John Wheeler

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REPORT

THE BEST EVIDENCE RULE IN CIVIL PROCEEDINGS

To the President of the Legislation Committee of the States of Jersey

Part I Introduction

1.1 The Commission received comments from only four persons following the publication of its consultation paper No. 3 on The Best Evidence Rule in Civil Proceedings in October 1999 (“the Consultation Paper”). However, general comment has been favourable and therefore there are few amendments to the conclusions and recommendations set out in the Consultation Paper.

1.2 The respondents to the Consultation Paper were generally agreed that Jersey should adopt the third of the choices outlined therein, specifically that Jersey should introduce statutory reform along the lines of the UK’s Civil Evidence Act, 1995. Notwithstanding the general acceptance of that proposal, concern was expressed by one respondent that local practitioners were not necessarily best placed to be aware of any difficulties that had been encountered within the UK following the implementation of the Civil Evidence Act 1995, and enquiries were consequently made of the UK Judiciary in that respect. A further source of concern was that, if legislation equivalent to the Civil Evidence Act 1995 were

adopted by Jersey, the Court would have no ability to exclude hearsay evidence, even if satisfied that it would be of no assistance whatsoever to the matters in issue, thereby wasting Court time to the prejudice of other cases.

Part II The Commission's Proposals

2.1 Within the Consultation Paper the Jersey Law Commission expressed the provisional opinion that the hearsay rule in civil proceedings should be abolished by enacting legislation along the lines of the UK Civil Evidence Act, 1995.

2.2 The responses received to the Consultation Paper have been in favour of adopting that proposal, subject to advice from the UK Judiciary concerning their experience of any difficulties with the practical working of the English legislation, and certain reservations concerning the need to provide the Court with the means to exercise its discretion to prevent irrelevant evidence being adduced, in the interests of saving Court time.

2.3 To ascertain whether any practical problems had become of concern to the U.K. courts since the implementation of the Civil Evidence Act 1995, the Jersey Law Commission wrote to the Honourable Sir Robin Jacob one of Her Majesty's High Court Judges. In his response the Honourable Sir Robin Jacob confirmed that having consulted certain of his fellow Judges on an informal basis no particular problems had been encountered since the implementation of the Civil Evidence Act, 1995.

2.4 With regard to the second of the points raised by the respondents, the Law Commission appreciates that circumstances may arise where discretion to exclude hearsay evidence upon which it would place no weight may usefully be exercised by the Court, and indeed, that discretion may be seen as a logical extension of the provisions contained within Section 4 of the Civil Evidence Act 1995, which provides guidance to the Court "In estimating the weight (if any) to be given to hearsay evidence in civil proceedings...".

2.5 However, in view of the response received from The Honourable Sir Robin Jacob, that potential problem would not appear to have presented difficulties to the U.K. courts and the Law Commission would not expect that the situation within Jersey would be significantly different.

2.6 Furthermore, as stated within the Consultation Paper, since the Royal Court has tended to look to English common law decisions on the question of evidence, and hearsay in particular, the Law Commission takes the view that the advantages of mirroring the English legislation as closely as possible outweigh those to be gained by diverging from that legislation by conferring the power to exclude evidence upon the Court. The advantages of adopting the Civil Evidence Act, 1995, were set out in the Consultation Paper and can be summarised as follows:-

- (1) the convenience for evidence collection from England
- (2) assistance that may be gained from professionals there;
- (3) the ability to consider judicial decisions based upon similar statutory wording;

(4) to facilitate a similar outcome to a case whether or not it has cross border aspects;

(5) speed of drafting and therefore implementation of a new law.

2.7 The Law Commission is consequently of the view that, as far as possible Jersey should adopt legislation equivalent to the Civil Evidence Act 1995.

2.8 The respondents to the Consultation paper were in agreement concerning the question of the abolition of the hearsay rule in relation to criminal proceedings. They felt that this step should not be taken until the proposed changes in relation to hearsay evidence in civil cases have been implemented and seen to work. Having considered the views of the respondents the Commission agrees that they should not at this time recommend the abolition of hearsay in criminal cases for the reason advanced by the respondents and further until it is apparent that its abolition works satisfactorily in the U.K. and elsewhere.

2.9 The attention of the Law Commission was additionally drawn to the draft Electronic Communications (Jersey) Law 2000, Article 9 of which provide for the admissibility of electronic signatures and records subject to certain conditions being met. That legislation, if enacted, will serve to remove many of the difficulties outlined within the Consultation Paper, and to that extent its adoption is supported by the Jersey Law Commission.

Part III Conclusions and Recommendations

3.1 Legislation equivalent to Sections 1 to 9 and 11 to 14 of the Civil Evidence Act, 1995, should be enacted within Jersey, with suitable amendments to reflect the differences between the jurisdictions. The Commission believe that the Sections which will principally require amendment are 6(3), 7, 12, and 14 which refer to the English court system and legislation.

KEITH BAKER, Chairman

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September 2000

APPENDIX A PERSONS WHO COMMENTED ON THE CONSULTATION PAPER

The Bailiff of Jersey

Sir Philip Bailhache

H. M. Attorney General

M. C. St. J. Birt Esq., Q. C.

Messrs Crills, Advocates

Advocate W. Grace

Civil & Criminal Procedure Sub-Committee
The Law Society of Jersey

Advocate R. Michael of

APPENDIX B ACKNOWLEDGEMENTS

The Topic Commissioner for this case was Jurat Donald Le Boutillier and he joins with the other Commissioners in thanking Advocate Anthony Dessain for acting as topic practitioner and Christopher Austin for research and drafting.

The address of the Jersey Law Commission of PO Box 87, St Helier, Jersey, JE4 8PX and its Internet pages are within the Jersey government's website
<http://www.lawcomm.gov.je>