

weight is to be attached to that evidence'.⁵³⁹ The submission of secondary evidence has always been the norm for electronic evidence, and proving the integrity of the data is essential where authenticity is in issue.⁵⁴⁰ It is superfluous to debate whether the electronic data constitutes a copy or an original, it is more important to establish the reliability of the data.⁵⁴¹

In South African law, the rule of evidence is that '... no evidence is ordinary admissible to prove the contents of a document except the original document itself'.⁵⁴² Section 14 of the ECT Act states a data message will satisfy the requirement of originality if the integrity of the information is established. To assess the integrity, consideration must be given to whether the information is complete and unaltered and the purpose for which the information was generated.⁵⁴³

Chasse suggests the best evidence rule should be abolished. Both these rules are centered on authenticity.⁵⁴⁴ Thus, electronic records should only have to satisfy the authenticity requirement. The removal of the best evidence rule will alleviate many problems associated with electronic evidence, such as searching for the original or another format as good as the original.⁵⁴⁵ The focus should be on whether an adequate protocol or standard was used.⁵⁴⁶ Such as 'original', 'copy' and 'best evidence' should be forgotten.⁵⁴⁷ It has been submitted that the ECT Act should provide that, at authentication stage, the integrity of the data message be considered. If necessary, at this stage an expert may explain why the content of the data message is to be trusted.⁵⁴⁸ Mason also points out that it is important to ascertain whether that specific item of electronic evidence in question is to be trusted or not.⁵⁴⁹ Reference to protocols or standards should not be binding on the court, but should rather have persuasive value as in terms of the Canadian Uniform Electronic Evidence Act.⁵⁴⁹ If the best evidence rule is removed, the public and private sectors should know the best possible methods of producing and storing records with



⁵³⁹ [2001] EMLR 654 at para 85.

⁵⁴⁰ Mason S (2010) 312.

⁵⁴¹ Mason S (2010) 318.

⁵⁴² *Barclays Western Bank Ltd v Creser* 1982 (2) SA 104 (T) at 106.

⁵⁴³ Section 14(2) of the Electronic Communications Act.

⁵⁴⁴ Chasse K (2010) 174.

⁵⁴⁵ LRCI Consultation Paper 57 (2009) 74.

⁵⁴⁶ Van der Merwe D et al (2008) 128.

⁵⁴⁷ Van der Merwe D et al (2008) 128.

⁵⁴⁸ Mason S (2010) 86.

⁵⁴⁹ Section 6 of the Uniform Electronic Evidence Act.

the minimum amount of uncertainty regarding their legal rights.⁵⁵⁰ Industry standards would serve as a guideline for the public and private sectors.

Section 15(1)(b) of the ECT Act serves as a qualification of the best evidence rule, and stipulates that if a data message was the best evidence that could be reasonably expected to obtain, the requirement of originality is also met.⁵⁵¹ What is reasonable will depend on the circumstances of each case. An original of an electronic document may be interpreted to mean a reproduction in printed form, or a copy of an electronic document, whichever form is adopted should provide as much certainty as possible under the circumstances.⁵⁵²

5.2.2.2 The Hearsay Evidence Rule

The Uniform Electronic Evidence Act does not modify the common law, thus the admission of an electronic record may depend on the hearsay evidence rule.⁵⁵³

In Canadian law the courts follow a principled approach to the hearsay rule, namely that if an electronic record does not fall under an exception to the hearsay rule, it must be necessary and reliable to become admissible.⁵⁵⁴ The necessity of an electronic record is usually proven by demonstrating the need to preserve information beyond human capacity.⁵⁵⁵ An electronic record can satisfy the requirement of reliability by adducing proof of the integrity of the electronic record or storage system.⁵⁵⁶

In England, the Criminal Justice Act and the Civil Evidence Act virtually abolished the hearsay rule.⁵⁵⁷ Both pieces of legislation allow for the admissibility of hearsay evidence upon satisfaction of certain conditions.

Evidence in electronic format is mostly considered to be hearsay.⁵⁵⁸ However, the emphasis is placed on showing the reliability, integrity and trustworthiness of the electronic

⁵⁵⁰ LRCI Consultation Paper 57 (2009) 74.

⁵⁵¹ Hofman J (2010) 683.

⁵⁵² LRCI Consultation Paper 57 (2009) 74.

⁵⁵³ Section 2(1) of the Uniform Electronic Evidence Act.

⁵⁵⁴ *R v Khelawon* [2006] SCC 57.

⁵⁵⁵ Gregory JD (2002) 330.

⁵⁵⁶ Currie RJ & Coughlan S (2010) 272.

⁵⁵⁷ Section 1(1) of the Civil Evidence Act and Section 114(1) of the Criminal Justice Act.

⁵⁵⁸ Mason S (2010) 338.

South African can be considered a frontrunner in the area of electronic evidence in Africa because of the recent adoption of technology-related statutes.⁵⁹⁷ However, Hofman stated that South African law is missing procedures for the collection, storage and presentation of electronic evidence in court.⁵⁹⁸ Such procedures can be introduced in terms of the court rules or practice notes. The emphasis should be on the importance of such procedures as it essentially deals with the chain of custody of the evidence, which would ensure the integrity of the electronic evidence, even during litigation. This would provide judicial confidence regarding the treatment of electronic evidence in legal proceedings.

The ECT Act is, in certain respects, sufficient to regulate the admissibility and evidential weight of electronic evidence. However, the ECT Act and the South African law of evidence require some streamlining to assure efficiency and predictability of producing electronic evidence (even as modern technology develops).⁵⁹⁹ South Africa should adopt a more inclusionary approach to the regulation of electronic evidence, which based on principled flexibility⁶⁰⁰ and technological neutrality⁶⁰¹.

The South African legislature should adhere to international standards and the South African Bureau of Standards also has an important role to play.⁶⁰² However, this approach should not be overstressed. The tendency in other countries, such as Canada, is to not prescribe special rules for electronic evidence and treat such evidence on the same basis as other form of evidence.⁶⁰³ Any reform should be part of the general reform of the South African law of evidence.⁶⁰⁴

Final word count: 26 335.

⁵⁹⁷ Van der Merwe D et al (2008) 290.

⁵⁹⁸ Hofman J (2006) 30.

⁵⁹⁹ LRCI Consultation Paper 57 (2009) 72.

⁶⁰⁰ Currie RJ & Coughlan S (2010) 268.

⁶⁰¹ LRCI Consultation Paper 57 (2009) 74.

⁶⁰² Van der Merwe D et al (2008) 290.

⁶⁰³ Hofman J (2010) 702.

⁶⁰⁴ Hofman J (2010) 702.

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