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Residual Exception to the Hearsay Rule

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Residual Exception to the Hearsay Rule

INTRODUCTION

The Illinois hearsay rule excludes out-of-court statements which cannot be tested by cross-examination. Exceptions to the rule have arisen where substitute guarantees of trustworthiness accompany certain kinds of evidence. In Illinois, courts rigidly adhere to the system of exceptions, rejecting some reliable hearsay because no established exception exists. Hearsay policy, however, does not mandate this practice.

A residual hearsay exception provides for the admission of evidence outside of the other exceptions when the hearsay is necessary and trustworthy. Recognition of such an exception in Illinois would harmonize local practice with hearsay policy.

This article will examine the policy behind the hearsay rule and its exceptions, and will review Illinois law on admission of hearsay when no specific exception exists. Federal practice will be contrasted with the Illinois position. Finally, this note will consider the effects that recognition of a residual exception would have on Illinois law.

HEARSAY POLICY

All testimony is subject to four infirmities: ambiguity, insincerity, faulty perception and erroneous memory. A statement made

2. The guarantees of these exceptions substitute for the safeguards provided by cross-examination. See notes 16-19 infra and accompanying text.
3. See text accompanying notes 20-48 infra.
4. E.g., Fed. R. Evid. 803(24) and 804(b)(5). See Dallas County v. Community Union Assurance Co., 286 F.2d 388 (5th Cir. 1961).
5. See notes 6-19 infra and accompanying text.
6. Tribe, Triangulating Hearsay, 87 Harv. L. Rev. 957, 958 (1974) [hereinafter cited as Tribe]. By testifying, a witness communicates his impressions of an event to the trier of fact. The infirmities may prevent the trier from accurately learning what transpired. Poor memory or perception may give the witness a mistaken belief as to what occurred. Even where that belief is correct, the witness’s insincerity or imprecise use of language may impede communication of his observations to the trier. Id.
7. Where one attempts to relate his perceptions to another, the words chosen may fail to convey the speaker’s observations, if the words themselves are inaccurate or the listener misinterprets them. See Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177, 186 (1948) [hereinafter cited as Morgan]; Comment, Abolish the Rule Against Hearsay, 35 U. Pitt. L. Rev. 609, 614 (1974) [hereinafter cited as Abolish the Rule].
8. A witness may intentionally misrepresent facts to protect either his or another’s inter-
by a witness while testifying at trial is subject to certain procedural safeguards which minimize the effect of the infirmities. These safeguards are oath, personal presence and opportunity to cross-examine.

Hearsay is an out-of-court statement offered to prove facts asserted in the statement. When a witness relates hearsay, the safeguards can test only for infirmities in the witness’s account. The accuracy of the hearsay declaration itself remains untested. Thus, when an out-of-court statement is offered to prove the truth of the matter asserted therein, the evidence is barred because it has none of the usual safeguards of in-court testimony. The hearsay rule excludes such potentially unreliable evidence.

Exceptions to the hearsay rule have arisen where substitutes for the procedural safeguards assure the absence of infirmities. Since the rationale behind the exclusion of hearsay is that such evidence is untested for these infirmities, the exceptions are consistent with hearsay policy. This approach allows the admission of hearsay where the circumstances surrounding the making of the statement guarantee its trustworthiness. Courts have also recognized excep-
tions where the need for the evidence at trial outweighs the danger of admitting evidence not subject to the normal procedural safeguards. These two principles, under the shorthand expression, "circumstantial probability of trustworthiness and necessity," are behind most exceptions to the hearsay rule.

**ILLINOIS COMMON LAW**

Currently, Illinois has a rigid framework of hearsay exceptions. In deciding whether to admit hearsay, the court's deliberation approximates a search of the exceptions to find a pigeonhole in which the evidence fits. Each exception was originally created to admit hearsay which was either trustworthy or necessary. Nonetheless, the court's primary focus is on whether the hearsay conforms to an established exception, rather than a determination of whether the evidence conforms to the principles.

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20. See notes 21-47 infra and accompanying text.

21. A number of exceptions have been judicially recognized in Illinois. See, e.g., People v. Poland, 22 Ill. 2d 175, 174 N.E.2d 804 (1961) (excited utterances); People v. Basile, 356 Ill. 171, 190 N.E. 307 (1934) (extra-judicial confessions); Stump v. Dudley, 285 Ill. 46, 120 N.E. 481 (1918) (admissions); Shaughnessy v. Holt, 236 Ill. 485, 86 N.E. 256 (1908) (statements to attending physician); Metheny v. Bohn, 160 Ill. 263, 43 N.E. 380 (1895) (evidence of pedigree); Berdell v. Berdell, 80 Ill. 604 (1875) (complaints by prosecuting witness); Sandifer v. Hoard, 59 Ill. 246 (1871) (declarations against interest); Marshall v. Chicago & Great E. Ry., 48 Ill. 475 (1868) (evidence pertaining to local customs); Starkey v. People, 17 Ill. 16 (1855) (dying declarations); Jendresak v. Metropolitan Life Ins. Co., 330 Ill. App. 157, 70 N.E.2d 863 (1947) (evidence of missing person); Wallace v. Lodge, 5 Ill. App. 507 (1880) (declarations regarded as verbal acts). See generally Callaghan's, supra note 14, § 10.02 at 217.

22. People v. McClain, 60 Ill. App. 3d 320, 376 N.E.2d 774 (1978) (unless exception applies, hearsay should be excluded); People v. Cole, 29 Ill. App. 3d 868, 329 N.E.2d 880 (1975) (unless statements come under an exception, they are inadmissible).

23. See note 19 supra.

24. For instance, in deciding whether to admit a statement made shortly before death, the court typically focuses on whether the declarant had a fixed belief of impending death. See, e.g., People v. Odom, 27 Ill. 2d 237, 188 N.E.2d 720 (1963); People v. Tilley, 406 Ill. 398, 94 N.E.2d 328 (1950); People v. Selknes, 309 Ill. 113, 140 N.E. 852 (1923). Similarly, the main
Where the court cannot fit the hearsay declaration into a recognized exception, the evidence is typically rejected. Occasionally, the court considers the reliability of and necessity for the evidence, but its evaluation is restricted to the structure of hearsay exceptions.

Hearsay principles are employed to stretch an existing exception or to create a new exception, but as a matter of practice, inquiry when determining whether to admit a statement made by a patient to his doctor is whether the physician was treating or examining the declarant. See, e.g., Jensen v. Elgin, Joliet & E. Ry., 24 Ill. 2d 383, 182 N.E.2d 211 (1962); Shell Oil Co. v. Industrial Comm'n, 2 Ill. 2d 590, 119 N.E.2d 224 (1954).


26. For example, Mangan v. F.C. Pilgrim & Co., 32 Ill. App. 3d 563, 336 N.E.2d 374 (1975), involved application of the excited utterance exception. The declarant, an eighty-three year old woman, was found on her kitchen floor by relatives. She reported, in response to a question, that she fell after a mouse had startled her. The court found that the account met the characteristics of an excited utterance. The exception requires the statement to be spontaneous and made a short time after the startling event. These limitations are presumed to reduce the likelihood of fabrication. Thus, in deciding to admit the evidence, the court focused on "the overall circumstances lend[ing] trustworthiness to [her] statements." Id. at 574, 333 N.E.2d at 383. The woman was still on the floor and in pain when she made the declaration. In light of these facts, the court concluded she was still excited from the fall when she spoke.

The court fit the declaration into the excited utterance exception by focusing on the fact that the woman still appeared to be under the influence of the startling event when she made the statement. Without this indication of trustworthiness, the evidence was borderline because of the spontaneity requirement and temporal limitation within the excited utterance exception. The court could have used the apparent trustworthiness of the declaration as a policy ground for admitting it outside of the exception. See notes 64-71 infra and accompanying text. The case demonstrates the tendency of Illinois courts to consider trustworthiness only in relation to a specified exception.

27. See People v. Poland, 22 Ill. 2d 175, 174 N.E.2d 804 (1961). In Poland, the court established a new exception for excited utterances by easing the requirements of an existing exception. Under the old res gestae exception, a statement made under the influence of a startling event was admissible only if made by a participant in the occurrence. The court broadened the scope of admissibility by requiring merely that the declaration be made by one whose reflective faculties were influenced by the event. The court reasoned that this effect is sufficient to guarantee trustworthiness.

28. See People v. Poole, 121 Ill. App. 2d 238, 257 N.E.2d 583 (1970). Prior to Poole, Illinois did not allow substantive use of an out-of-court statement identifying a person as a participant in a crime. Id. at 238, 257 N.E.2d at 585. In Poole, the court established a hearsay exception for prior identifications where the declarant is available for cross-examination. Since the memory, perception and sincerity of the declarant may be tested, the reasons for excluding hearsay are not present. See S. Gard, Illinois Evidence Manual § 145, at 78 (Supp. 1978).

Illinois courts do not find trustworthiness and necessity alone a sufficient justification for admitting hearsay. Consequently, no residual exception per se exists under Illinois law.

The restrictive mode of analysis employed by Illinois courts conflicts with hearsay policy. The approach assumes that since the exceptions are based on principles of reliability and necessity, evidence outside of an exception is inconsistent with the principles. This assumption is based on the erroneous proposition that recognized exceptions represent all possible circumstances in which hearsay is trustworthy and necessary. Under this approach, then, probative evidence may be excluded even though it is needed and possesses guarantees of trustworthiness.

The disparity between Illinois practice and hearsay policy is exemplified by two Illinois cases, People v. Pavone and People v. Wright. Each involved the admissibility of prior identifications made by witnesses for the State. In Pavone, the witness at a preliminary hearing had identified the defendant as his accomplice. The witness's statement was trustworthy because it had been made under oath, and because the witness had been subject to cross-examination at the hearing. Further, a compelling need for the evidence existed because the witness was unable to re-identify the defendant at trial. The trial court admitted evidence given by an...
assistant state's attorney that the witness had previously identified the defendant. The appellate court however, held that it should have been rejected for failure to meet the specific requirements of the exception for prior identification. The exception applies only when the witness is unavailable, or when he identifies the defendant in court. Since the witness in Pavone could not identify the defendant at trial, the court held that evidence of the prior identification should not have been admitted.

Similarly, in People v. Wright, the trial court allowed a robbery victim and two police officers to testify that the victim had previously identified the defendant as the man who had robbed him. The circumstances of both the crime and the identification indicate the degree of trustworthiness of the evidence. The victim had an excellent opportunity to observe his attacker, since the two men stood face to face for several minutes during the robbery. Further, the victim identified the defendant only fourteen days after the occurrence, thus assuring a fresh memory of his assailant's features. Finally, defendant's counsel had the opportunity to test the victim's identification through cross-examination at trial. The appellate court ignored these factors and reversed the defendant's conviction because the identification did not show an implied admission with the witness shortly before commission of the offense. The witness's mother testified she saw her son and the defendant drive away in a car about an hour before the burglary. Other evidence established the defendant's presence at the scene of the crime. Fresh shoe prints leading up to the burglarized house matched the shoes which the defendant wore at the time of arrest.

36. Id. at 1002, 358 N.E.2d at 1266.
38. The court, however, viewed admission of the evidence as harmless error because the state presented enough other evidence to convict the defendant. 44 Ill. App. 3d at 1003, 358 N.E.2d at 1267. Accord, People v. Canale, 52 Ill. 2d 107, 285 N.E.2d 133 (1972); People v. Reeves, 360 Ill. 55, 195 N.E. 443 (1935). This finding of harmless error mitigates the lack of a residual exception in Illinois. Where such corroborating evidence bolsters the trustworthiness of hearsay, an appellate court could rule either that the hearsay is admissible or that the corroborative evidence alone is sufficient to sustain the trial court decision. Either way, the result on appeal is very much the same. Nonetheless, under the "harmless error" approach, the hearsay is still technically inadmissible. This technicality discourages the use of trustworthy hearsay at the trial level, where the question of admissibility first arises. Where the case goes no further than the trial level, the "harmless error" approach and a residual exception may thus yield different results. Therefore, the lack of a residual exception continues to have a broad effect, despite the "harmless error" escape hatch.
39. 65 Ill. App. 2d 23, 212 N.E.2d 126 (1965). The defense made no objection to the evidence at trial. Id. at 34, 212 N.E.2d at 131.
40. Id. at 26, 212 N.E.2d at 127.
41. Id. at 25, 212 N.E.2d at 127.
42. Id. at 35, 212 N.E.2d at 132. The court noted that "where the admission of evidence
sion.\textsuperscript{43} For hearsay to be admissible under that exception, the defendant must fail to deny an identification made in his presence.\textsuperscript{44} In \textit{Wright}, the defendant consistently denied that he had participated in the robbery.\textsuperscript{45} Therefore, the court rejected the victim's prior identification to show an admission.

\textit{Wright} and \textit{Pavone} demonstrate the tendency of Illinois courts to construe each hearsay exception narrowly and without regard to whether the evidence should be admissible based on hearsay policy.\textsuperscript{46} In \textit{Pavone}, the prior identification was trustworthy because it had been made under oath and the declarant was available for cross-examination both at trial and at the hearing. In \textit{Wright}, the evidence appeared especially trustworthy on perception and memory grounds, and the declarant was subject to cross-examination at trial. In neither case, however, did the court consider trustworthiness or necessity. Instead, each court focused on the specific exception under which the state offered the evidence,\textsuperscript{47} holding the prior identifications inadmissible despite their apparent trustworthiness and necessity.\textsuperscript{48}

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exist, the evidence is usually rejected. Still, Illinois courts may consider trustworthiness and necessity to justify adding a new exception or expanding the parameters of an existing one. Thus, hearsay policy may be used to rationalize admission of previously inadmissible hearsay, but only where the framework of exceptions can be molded to accommodate the evidence.

This approach raises an obstacle to admission of necessary and reliable hearsay which is not mandated by the policy behind the hearsay rule. Illinois courts are less likely to admit such hearsay than they would be if a residual exception existed. Where a court decides whether to add an exception rather than whether to admit an item of hearsay on pure policy grounds, its focus is broader. In addition to considering the specific item of hearsay, the court must analyze whether that type of evidence usually is trustworthy and necessary. During this extra step of analysis, evidence which meets the policy requirements may be rejected because similar evidence appears untrustworthy or unnecessary. Hence, this approach tends to reject hearsay which could be admitted under a residual exception.

**THE FEDERAL APPROACH**

Federal practice offers an enlightening contrast to the Illinois approach. A decision under the federal residual exception does not alter the framework of the enumerated exceptions. Thus, federal courts have the freedom to evaluate an individual item of hearsay on a case by case basis, without fear that the decision will allow the subsequent admission of unreliable evidence.

*Federal Common Law*

Even before the adoption of the federal rules courts on occasion admitted hearsay evidence solely because it was trustworthy and necessary. This federal common law practice was rooted in Judge Learned Hand’s opinion in *G. & C. Meriam Co. v. Syndicate Publishing Co.* In *G. & C. Meriam*, Judge Hand could not find an established exception to admit a dictionary editor’s hearsay statement which acknowledged the plaintiff as author of the dictionary. The Judge observed that the implausibility of an editor’s falsely admitting the unoriginality of his work guaranteed the trustworthi-

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49. The residual exceptions are found in 803(24) and 804(b)(5) of the Federal Rules of Evidence, which became effective July 1, 1975.

50. 207 F. 515 (2d Cir. 1913) (adopting unreported opinion of District Judge Hand), appeal dismissed, 237 U.S. 618 (1915).

51. *Id.* at 518.
ness of the attribution. Accordingly, even though the evidence did not fit within a recognized hearsay exception, Judge Hand admitted the evidence "on principle." The court in *Dallas County v. Commercial Union Assurance Co.* employed the reasoning of *G. & C. Meriam*. The clock tower of the Dallas County courthouse had collapsed five days after a thunderstorm. Several witnesses testified that lightning struck the building during the storm. The county used the existence of charred timbers in the wreckage to corroborate the eyewitness accounts. The insurance company, however, denied that lightning charred the timbers, contending instead that the damage occurred during a previous fire. The company offered, and the trial court admitted, an unsigned newspaper article dated June 9, 1901, which reported a blaze in the courthouse.

The article did not come within an established exception to the hearsay rule. Nonetheless, the court admitted the report solely on grounds of necessity and trustworthiness. It recognized that the article was needed because the memory of any witness to the fire would not have been as reliable as the newspaper account. The court concluded that the article was trustworthy since it was inconceivable that a small town reporter would fabricate the story.

Subsequent federal decisions relied on this common law residual exception to expand the scope of existing exceptions. In *Sabatino v. Curtiss National Bank*, considerations of trustworthiness and necessity justified a broader interpretation of the Federal Business Records Act. The Act authorized admission of records kept in the course of a regularly conducted business activity. The court found that the extreme care plaintiff's decedent exercised in maintaining his check register provided sufficient guarantees of trustworthiness to bring it within the business record exception, even though the

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52. *Id.*  
53. *Id.*  
54. 286 F.2d 388 (5th Cir. 1961).  
55. *Id.* at 390-91.  
56. *Id.* at 390.  
57. *Id.* at 397-98.  
58. *Id.* at 396.  
59. *Id.* at 397.  
60. See 4 J. Weinstein & M. Berger, *Weinstein's Evidence* § 803(24)[01], at 244 (1976) [hereinafter cited as Weinstein].  
61. 415 F.2d 632 (5th Cir. 1969).  
register was used for personal matters.\(^{63}\)

Another federal policy approach is to admit hearsay which falls in between two exceptions, but meets the specific requirements of neither. In *United States v. Kearney*,\(^{64}\) the court refused to consider whether a policeman's identification of his assailant fit within either the spontaneous utterance\(^{65}\) or the dying declaration\(^{66}\) exception. The court observed, however, that because the circumstances surrounding the identification contained elements of both exceptions, the statement was reliable.\(^{67}\) The policeman's identification had been made within twelve hours of the attack.\(^{68}\) Under the excited utterance exception, a short lapse of time guarantees that the excitement continues to suspend the declarant's reflective faculties. Thus he theoretically remains unable to fabricate.\(^{69}\) Additionally, in *Kearney*, the policeman realized his condition was grave.\(^{70}\) The dying declaration exception is based on the belief that the declarant's awareness of his impending death assures his sincerity. The court concluded that the evidence fit within the "penumbra" of admissibility of the two exceptions.\(^{71}\)

\(^{63}\) 415 F.2d at 637.

\(^{64}\) 420 F.2d 170 (D.C. Cir. 1969).

\(^{65}\) This exception allows the admission of hearsay statements made by one who has observed a startling event. The declaration must follow soon after the event and must relate to the occurrence. \(\text{Wigmore, Evidence in Trials at Common Law, § 1750, at 202 (Chadbourn rev. 1970).}\) The rationale for the exception is that the excitement suspends the power of reflection and hence, the statements are sincere. \(\text{Id. at § 1747. But cf. Stewart, Perception, Memory and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence, 1970 Utah L. Rev. 1, 28 (excitement distorts perception and memory).}\)

In *Kearney* the defendant contended that the identification failed to qualify because it was made twelve hours after the assault. 420 F.2d at 175 n.11. Further, the defendant argued that the statement did not qualify because it was in response to questioning. \(\text{Id. The apparent theory here is that if the declarant is able to answer questions, his powers of reflection must have returned. See Swearinger v. Klinger, 91 Ill. App. 2d 251, 234 N.E.2d 60 (1968).}\)

\(\text{See also Foster, Present Sense Impressions: An Analysis and a Proposal, 10 Loy. Chi. L.J. 299 (1979).}\)

\(^{66}\) This exception allows the admission of hearsay statements made by a declarant who has a fixed belief of impending death. \(\text{Wigmore (Chadbourn rev.), supra note 17, § 1439 at 291. The belief eliminates the declarant's motive to mis-state. Id. § 1438 at 289.}\)

Kearney argued that the statement was not a dying declaration because the policeman lacked "the [requisite] consciousness of a swift and certain doom." 420 F.2d at 175 n.11. (The officer died the day after making the statement.) \(\text{Id. at 171.}\)

\(^{67}\) \(\text{Id. at 174-75.}\)

\(^{68}\) \(\text{Id. at 175 n.11.}\)

\(^{69}\) In *Kearney*, the short period of time also insured that the officer's memory was not mistaken. \(\text{Id. at 175.}\)

\(^{70}\) \(\text{Id.}\)

\(^{71}\) 420 F.2d at 174.
The Federal Rules

Legislative Background

Federal Rules 803(24) and 804(b)(5)\(^7\) codified the approach used in *G. & C. Meriam* and *Dallas County*. The original draft of the residual exceptions authorized the admission of hearsay having guarantees of trustworthiness comparable to those of the enumerated exceptions.\(^7\) The House eliminated the catchalls because they injected too much uncertainty into the law.\(^7\) The House reasoned that Rule 102\(^7\) directs courts to construe the rules to promote growth and development in the law of evidence. Thus, that rule alone would have permitted sufficient flexibility to admit necessary and trustworthy hearsay which did not fit within an established exception.

The Senate feared that this broad interpretation of Rule 102 would result in application of the enumerated exceptions in situations which they were not intended to cover.\(^7\) The Senate reinstated the residual exceptions but imposed additional restrictions on their use.\(^7\) The House accepted the new version in conference.\(^8\)

\(^7\) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

**Fed. R. Evid. 803(24); Fed. R. Evid. 804(b)(5).**

\(^7\) 56 F.R.D. 183, 303, 322 (1972).


\(^7\) This rule provides:

**Purpose and Construction.**

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

**Fed. R. Evid. 102.**


\(^7\) The Senate Judiciary Committee described its action:

[T]he committee has adopted a residual exception for rules 803 and 804(b) of much narrower scope and applicability than the Supreme Court version. In order to qualify for admission, a hearsay statement not falling within one of the recognized exceptions would have to satisfy at least four conditions. First, it must have
Judicial Application

In deciding whether to admit hearsay under the residual exceptions, federal courts concentrate on the trustworthiness of the evidence. The manner in which the hearsay arises is fundamental to its reliability. For example, a transcript of out-of-court assertions has been admitted where the remarks were made under oath,\(^7\) the transcript contained handwritten corrections,\(^8\) or where in-court testimony revealed the care used in taking and transcribing statements.\(^9\) The trustworthiness of an out-of-court statement can also be bolstered in court. For example, the declarant may be available for cross-examination,\(^2\) or he may admit at trial to having made the statement.\(^3\)

Courts have also found the requisite guarantees of trustworthiness where there is an incentive for accuracy. One court admitted shipping invoices because the invoices were used to determine the shipper's fee.\(^4\) A statement made by one co-operating with investigators was held to be sufficiently reliable because fabrication could lead to the loss of expected prosecutorial leniency.\(^5\) The integrity of

\(^7\) Another provision was added in conference which requires that a proponent of hearsay evidence notify his opponent in advance of his intent to employ the residual exception. H.R. Rep. No. 1597, 93d Cong., 2d Sess. 11-12, reprinted in [1974] U.S. Code Cong. & Ad. News 7051, 7065-66.


\(^9\) Copperweld Steel Co. v. Demag-Mannesmann-Bohler, 578 F.2d 953 (3d Cir. 1978); United States v. Williams, 573 F.2d 284 (5th Cir. 1978).

\(^10\) United States v. Lyon, 567 F.2d 777 (8th Cir. 1977).


\(^12\) United States v. Williams, 573 F.2d 284 (5th Cir. 1978); United States v. Leslie, 542 F.2d 285 (5th Cir. 1976).

\(^13\) United States v. Pfeiffer, 539 F.2d 668 (8th Cir. 1976). In Pfeiffer, the Court of Appeals suggested the residual exception as an alternative ground of admissibility in the event the evidence failed to meet the requirements of the business records exception. Fed. R. Evid. 803(6). Some courts have refused to use the residual exception to circumvent the requirements of an enumerated exception. See notes 97-103 infra and accompanying text.

\(^14\) United States v. West, 574 F.2d 1131 (4th Cir. 1978). In West, federal authorities employed a convict, Michael Brown, to buy heroin from the defendant and to supply them with details of the transactions. Brown later testified before a grand jury. In exchange for
Residual Exception

Residual Exception

statements prompted by hopes of leniency nonetheless may be suspect, since an informant may be motivated to make statements which will be rewarded by compassionate treatment even if the assertions differ from the truth.86

Independent corroborative evidence increases the likelihood that the declaration is true. Hence, the statements of an informant were admitted because the transactions in question transpired under the surveillance of government cameras and tape recorders.87 Airline and customs records also have been used to substantiate hearsay allegations.88

Corroboration alone, however, may be insufficient to justify application of the residual exception.89 Some additional inquiry is necessary to assure that the evidence possesses guarantees of trustworthiness equivalent to those in the enumerated exceptions.90 Those guarantees arise from the circumstances surrounding the making of a hearsay declaration which assure the absence of testimonial infirmities.91 Corroborative evidence does not relate directly to the sincerity, memory, perception or communicative ability of the declarant. It is therefore inadequate as sole support for a decision to admit hearsay under the residual exception.92

A federal court applying Rules 803(24) and 804(b)(5) will exclude evidence lacking sufficient guarantees of trustworthiness. Where the sincerity of the declarant is doubtful, hearsay has been deemed unreliable. Hence, statements have been rejected when they were coerced by threats of imprisonment,93 made by one known to lie,94

Brown's cooperation, the authorities released him from prison, lifted a detainer for a parole violation, and did not prosecute a pending drug charge. Brown was murdered before trial. The lower court admitted transcripts of his grand jury testimony under the residual exception. The appellate court affirmed.

86. United States v. Bailey, 581 F.2d 341 (3d Cir. 1978). In Bailey an accused bank robber, John Stewart, agreed to plead guilty and supply the FBI with details of the crime in exchange for a reduced sentence. He named Bailey as his accomplice. When Stewart refused to testify at Bailey's trial, the court admitted his accusation under the residual exception. The appellate court reversed this determination. While West and Bailey apparently present contrary views as to the value of statements given by one bargaining for freedom, the decisions are reconcilable on other factors. The transactions to which Brown testified in West took place under government surveillance. Therefore he could not lie with impunity. Such formidable corroboration did not accompany Stewart's allegations.

87. United States v. West, 574 F.2d 1131 (4th Cir. 1978).
89. See United States v. Bailey, 581 F.2d 341 (3d Cir. 1978).
90. Id.
91. See Tribe, supra note 6, at 961-69.


or motivated by pecuniary interest.\textsuperscript{95} Trustworthiness may also be questioned if potential memory problems exist. Thus, a federal court may reject a statement made a considerable time after the event described.\textsuperscript{96}

Two federal court decisions have used the language of Rule 804(b)(5) to restrict its scope of application.\textsuperscript{97} In both cases, the courts initially found that declarants' incriminating statements failed to qualify under Federal Rule 804(b)(3) as statements against penal interest.\textsuperscript{98} Nonetheless, the hearsay proponents asserted that the remarks satisfied the conditions of the residual exception. In each case, the court rejected this contention,\textsuperscript{99} holding that a statement which is inadmissible as a declaration against interest\textsuperscript{100} cannot be admissible under the residual exception. The courts reasoned that as a consequence of inadmissibility under Rule 804(b)(3), the assertion does not possess guarantees of trustworthiness equivalent to those of another exception, as required by Rule 804(b)(5).\textsuperscript{101}

On their face, these opinions express a fear of employing the residual exceptions to emasculate the requirements of the specific exceptions. This construction of Rules 803 and 804 would render the residual exceptions impotent. However, both courts rejected the

\textsuperscript{95} Pittsburgh Press Club v. United States, 579 F.2d 751 (3d Cir. 1978).

\textsuperscript{96} See United States v. McClendon, 454 F. Supp. 960 (W.D. Pa. 1978) (one and one-half years). Several courts have emphasized the shortness of time between the event and the declaration as a guarantee of trustworthiness. See United States v. Medico, 557 F.2d 309 (2d Cir.), cert. denied, 434 U.S. 986 (1977) (a few seconds); United States v. Leslie, 542 F.2d 285 (5th Cir. 1976) (a few hours); United States v. Iaconetti, 406 F. Supp. 554 (E.D.N.Y.), aff'd, 540 F.2d 574 (2d Cir. 1976) (the same day).


\textsuperscript{98} Fed. R. Evid. 804(b)(3) reads:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true.

A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. (emphasis added).

In each case, the evidence was rejected because of a lack of circumstances indicating trustworthiness.

\textsuperscript{99} United States v. Hoyos, 573 F.2d 1111, 1116 (9th Cir. 1978); Lowery v. Maryland, 401 F. Supp. 604, 608 (D. Md. 1975).

\textsuperscript{100} The exception generally allows admission of statements against the pecuniary or penal interest of the declarant. Specific mention is made of statements which tend to both expose the declarant to criminal liability and exculpate the defendant. The evidence in Hoyos and Lowery was of this type.

\textsuperscript{101} United States v. Hoyos, 573 F.2d 1111, 1116 (9th Cir. 1978); Lowery v. Maryland, 401 F. Supp. 604, 608 (D. Md. 1975). See note 72 supra.
Residual Exception

1979

Residual Exception

625

evidence because it failed to satisfy the 804(b)(3) requirement that "corroborating circumstances clearly indicate the trustworthiness of the statement."102 Other hearsay exceptions in the Federal Rules do not contain similar language.103 Therefore, the reasoning of these cases does not necessarily apply to all specific exceptions. Hearsay failing to meet requirements of another exception need not be rejected for that reason alone. If the trustworthiness of the evidence is established, it may still be admitted under 803(24) or 804(b)(5).

Courts primarily focus on the trustworthiness requirement of the residual exceptions. Nonetheless, they have excluded evidence which failed to comply with the other conditions of Rules 803(24) and 804(b)(5). Testimony from prior proceedings has been excluded as not the most probative104 where no attempt was made to depose or produce other available witnesses.105 Similarly, a signed written statement was rejected because the declarant was present and could have been compelled to testify.106

Failure to notify an adverse party of an intent to use the residual exceptions should warrant exclusion of the evidence.107 Most courts, however, have not applied this requirement strictly. As long as there is an adequate opportunity to meet the evidence, courts hold that the provision is satisfied, even though the hearsay proponent gave no advance notice.108 One court interpreted the failure of the oppos-

102. FED. R. EVID. 804(b)(3).
103. See FED. R. EVID. 803 and 804. Three exceptions specifically preclude admission if the source of information or other circumstances indicate a lack of trustworthiness. FED. R. EVID. 803(6) (records of regularly conducted business activity); FED. R. EVID. 803(7) (absence of entry in record of regularly conducted business activity); FED. R. EVID. 803(8) (public records and reports). These differ from 804(b)(3) in that they do not require a specific finding of trustworthiness.
104. The residual exception requires that "[T]he statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." FED. R. EVID. 803(24)(B) and 804(b)(5)(B).
106. United States v. Mathis, 559 F.2d 294 (5th Cir. 1977).
107. United States v. Ruffin, 575 F.2d 346, 358 (2d Cir. 1978); United States v. Oates, 560 F.2d 45, 72 n.30 (2d Cir. 1977). The residual exception provides:

However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 803(24) and 804(b)(5).
EFFECT OF A RESIDUAL EXCEPTION ON ILLINOIS PRACTICE

Recently, the Illinois Supreme Court considered adopting an evidence code which evolved from the Federal Rules. The Proposed Illinois Rules of Evidence contained residual exceptions identical to Federal Rules 803(24) and 804(b)(5). The court, however, decided not to adopt the proposed code at this time. Nonetheless, recognition of a residual exception in Illinois may still be accomplished, and that possibility should be explored.

Illinois courts could ignore common law precedent and develop a viable residual exception by relying on federal experience. This approach would produce two benefits. First, it would reduce the uncertainty and needless litigation resulting from an attempt to graft a residual exception onto current decisional law. The strong body of precedent developed under Federal Rules 803(24) and 804(b)(5) would provide guidance to Illinois courts as well as to practitioners. Second, adoption of the federal approach would lead to an application of the hearsay rule which effectuates hearsay policy. Lack of trustworthiness, rather than lack of a recognized exception, would compel exclusion of hearsay statements.

By drawing on the federal experience, Illinois would join a growing trend. Courts in several states employ analyses similar to that

110. Preface, PROPOSED ILL. R. EVID. at ii (Final Draft).
111. See note 72 supra.
113. See Preface, PROPOSED ILL. R. EVID. at vii (Final Draft).
114. See text accompanying notes 6-19.
115. Several states have adopted residual exceptions derived from Federal Rules 803(24) and 804(b)(5). The state residual exceptions follow three general patterns. One pattern is based on a preliminary draft of the federal hearsay exceptions. In this form, hearsay was admissible if "its nature and the special circumstances under which it was made offer assurance of accuracy . . . ." NEV. REV. STAT. §§ 51.075 and 51.315 (1975). Some states adopted residual exceptions based on the version promulgated by the United States Supreme Court. This form permitted admission of hearsay having circumstantial guarantees of trustworthiness comparable to those in the enumerated exceptions. MONT. REV. CODES ANN. § 93-3002, R. EVID. 803(24), 804(b)(5) (1977); N.M. STAT. ANN. §§ 20-4-803(24), 20-4-804(b)(6) (1976 and Supp. 1976) (amended 1976; now identical to federal rules. N.M.R. EVID. 803(24), 804(b)(6)); WISC. STAT. §§ 908.03(24), 803.045(6). Most states adopted residual exceptions containing additional restrictions identical to the current federal rules, or with insignificant changes. ARK. STAT. ANN. § 28-1001 Rules 803(24), 804(b)(5) (Supp. 1976) (identical); MINN. R. EVID. 803(24), 804(b)(5) (1978) (in addition to declarant's address, must give present whereabouts in notice to other party); NEB. REV. STAT. §§ 27-803(22), 27-804(2)(e) (1975 & Supp. 1977) (no substantive change); N.D. R. EVID. 803(24), 804(b)(5) (1977) (identical); 1978 OKLA. SESS. LAWS ch. 285 §§ 803(24), 804(b)(5) (if notice requirement not met, evidence shall be rejected);
used in federal courts under the residual exceptions. For example, the New Mexico Appellate Court held admissible a prior identification made to close relatives of the declarant. The court found the statement trustworthy because the declarant would probably not have lied to her relatives.

Despite the benefits of incorporating the federal residual exceptions into Illinois law, identical treatment is improbable. Federal judges traditionally have had discretionary power to admit reliable and necessary evidence. Rules 803(24) and 804(b)(5) were merely a codification of this practice. Thus, much of what federal courts have admitted pursuant to the rules was also admissible at common law.


The Illinois Supreme Court Committee on Rules of Evidence thought that Illinois case law would begin to conform to the Federal Rules of Evidence as a result of adoption of codes similar to the federal rules in other states. The committee advocated joining those states to eliminate the uncertain development of the law. Preface, Proposed Ill. R. Evid. at vii (Final Draft).

116. See State v. Hughes, 120 Ariz. 120, 584 P.2d 584 (Ct. App. 1978) (allegation that declarant's checks were forged inadmissible because self-serving and not most probative available); Johnstone v. State, 92 Nev. 241, 548 P.2d 1362 (1976) (exculpatory statements of couple admissible where they were not aware of affect of statements and therefore had no motive to lie); Wilson v. Leonard Tire Co., 90 N.M. 74, 559 P.2d 1201 (1976) (report by physician inadmissible because hearsay proponent failed to show that evidence possessed circumstantial guarantees of trustworthiness); State v. Maestas, 92 N.M. 135, 584 P.2d 182 (Ct. App. 1978) (prior identification of defendant admissible where made to declarant's close relatives, persons to whom lying would be unlikely); Mitchell v. State, 84 Wis. 2d 325, 267 N.W.2d 349 (1978) (police report inadmissible because declarant not shown to be unavailable); State v. Nowakowski, 67 Wis. 2d 545, 227 N.W.2d 697 (1975) (registration document of campaign committee admissible because filed under oath and notarized by defendant).

117. State v. Maestas, 92 N.M. 135, 584 P.2d 182 (Ct. App. 1978). The appellate court refused to admit the evidence under the exception for present sense impressions because the declaration was made more than three hours after the victim was beaten. Likewise, the identification was held not to be an excited utterance because the lapse of time permitted the declarant to calm down.


In contrast, Illinois has retained the strict common law approach to hearsay which consists of an exclusionary rule and a rigid system of exceptions. It is questionable whether the federal approach could be adopted in Illinois free of the influence of this conservative common law heritage. Although under a residual exception Illinois courts might focus increasingly on trustworthiness, admissibility would probably initially be linked to the established exceptions.\(^{121}\)

One possible transitional approach might be to follow United States \textit{v.} Kearney,\(^{122}\) admitting hearsay containing elements of two exceptions even though it fails to meet the requirements of a single exception.\(^{123}\)

Proponents of an inflexible framework of hearsay exceptions state advantages of the system in terms of administrative ease\(^{124}\) and predictability.\(^{125}\) If no residual exception exists, the determination of admissibility is elementary. The sole inquiry is whether the evidence matches the specifications of an exception. While this abbreviated evaluation may promote the quick resolution of disputes,\(^{126}\) under this practice relevant and trustworthy hearsay is inevitably withheld from the trier of fact.\(^{127}\) The fact finder should not be deprived of an opportunity to weigh all the relevant evidence in the

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Illinois common law has permitted the admission of hearsay only when it fits within a specific exception. \textit{See} text accompanying notes 21-47 \textit{supra}.

\(^{121}\) \textit{See} note 21 \textit{supra} and cases cited therein.

\(^{122}\) 420 F.2d 170 (D.C. Cir. 1969). \textit{See} text accompanying notes 64-71 \textit{supra}.

\(^{123}\) Another possible application of the residual exception is illustrated by Sabatino \textit{v.} Curtiss Nat'l Bank, 415 F.2d 632 (5th Cir. 1969), where the trustworthiness of the evidence justified expanding the business record exception. \textit{See} text accompanying notes 61-63 \textit{supra}.


\(^{127}\) This would frustrate a major purpose of trial, the search for truth. People \textit{ex. rel.} Noren \textit{v.} Dempsey, 10 Ill. 2d 288, 139 N.E.2d 780 (1957); Eizerman \textit{v.} Behn, 9 Ill. App. 2d 263, 132 N.E.2d 788 (1956). \textit{See} Fleshner \textit{v.} Copeland, 13 Ill. 2d 72, 147 N.E.2d 329 (1958); Hruby \textit{v.} Chicago Transit Auth., 11 Ill. 2d 255, 142 N.E.2d 81 (1957).

A court examining only an existing exception is likely to admit less hearsay than a court which is allowed to consider the trustworthiness of the evidence. \textit{See} text following note 48 \textit{supra}. This tendency thwart the search for truth because the trier of fact does not hear all relevant evidence.
Residual Exception

trial. A matter of administrative convenience, however attractive, must not outweigh the rights of the litigants to a full, fair proceeding and a decision based upon all the material factors.128

Admittedly, a residual exception might inject an element of uncertainty into the system of hearsay exceptions.129 The decision to admit hearsay under a residual exception rests on the trial judge’s intuitive determination that the evidence is trustworthy. As a result, practitioners may be unable to predict rulings on admissibility of hearsay accurately.130 Trial preparation with a residual exception might become more difficult than it is under current Illinois practice.

Even in a system of fixed exceptions, though, the question of admissibility is not free from doubt. For example, under the excited utterance exception,131 the lapse of time between the exciting event and the declaration must be short enough to negate the likelihood of fabrication.132 In Illinois, the trial judge has discretion in resolving this issue.133 Any additional uncertainty created by a residual exception should not be a serious problem.

CONCLUSION

Illinois law on admissibility of hearsay still embodies the common law approach of a general ban accompanied by enumerated exceptions. The benefits which recognition of a residual exception would bring Illinois are twofold. First, practice would conform more closely with the policies underlying the hearsay rule. Second, a residual exception would promote administration of justice by allowing admission of hearsay, subject to the requirements of necessity and trustworthiness. Moreover, by joining a growing trend begun by federal courts, Illinois could benefit from the experience of a number of other jurisdictions.

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130. Id.; Walinski and Abramoff, supra note 125, at 382.
131. See note 65 supra.