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— Franks & Zalev - This Week in Family Law

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Contents

Judge Not Lest Ye Be Vaccinated

J.N. v. C.G., 2023 CarswellOnt 1538 (C.A.) — Tulloch, Thorburn and George JJ.A

Allow us to apologize in advance. We do not generally like to do long Newsletters. And we generally do not like to do "single case" Newsletters. And this is both. But it is a very important decision from the Ontario Court of Appeal. Or at least *we* think it is.

We reported on the decision below in the 2022-09 (March 7, 2022) edition of the Newsletter. When released, the decision caused quite a stir. Unsurprisingly, the decision below was appealed.

For those of you with short memories (alright — it was about a year ago), the parties could not agree on whether to vaccinate their two youngest children (who were 10 and 12 years old at the time of the decision below) against COVID-19. Pursuant to Minutes of Settlement, the children lived primarily with the Mother, and she had sole decision-making authority, except with respect to the issue of vaccination. The Father wanted the children vaccinated. The Mother did not. The parties' eldest child, who resided primarily with the Father, was vaccinated of his own volition. A more comprehensive summary of the facts can be found in our 2022-09 (March 7, 2022) Newsletter.

The Father applied to the Court for sole decision-making authority on the issue of whether to vaccinate the parties' two youngest children. Each party attached to their affidavits information they say supported their position. The Father relied on information from Health Canada and the Canadian Paediatric Society which supported the vaccine's safety, effectiveness and the importance of children being vaccinated. The Mother relied on information from the internet published by individuals who questioned the safety of vaccines, as well as a Pfizer Fact Sheet setting out potential side effects, and several medical articles. Both parties consented to the court below reviewing these unsworn materials.

A Voice of the Child Report ("VOC Report"), was also prepared by a "well-respected" social worker confirming that neither child wanted the vaccine. The Father argued that the VOC Report should be given little weight because the children had been severely influenced by the Mother (which was not confirmed by the social worker in her report).

The court below denied the Father's motion. In doing so, the Court refused to take judicial notice of the safety and efficacy of the vaccine because information on the vaccine was a "moving-target" and there was no "consensus or consistency" as to its safety and efficacy. Therefore, according to the court below, the safety and efficacy of the vaccine was not properly the subject of judicial notice as set out by the Supreme Court of Canada in *R. v. Find*, 2001 CarswellOnt 1702 (S.C.C.), as further clarified by the Court of Appeal for Ontario in *R. v. J.M.*, 2021 CarswellOnt 3180 (C.A.) at paragraph 31:

> [31] . . . Judicial notice applies to two kinds of facts: (a) those that are so notorious or "accepted", either generally or within a particular community, as not to be the subject of dispute among reasonable persons (*R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 71; *Reference Re Alberta Statutes*, [1938] S.C.R. 100, at p. 128; Sopinka, at §19.18); and (b)

> those that are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy (*Quebec (Attorney General) v. A.*, 2013 SCC 5, [2013] 1 S.C.R.61, at para. 238; Sopinka, at §19.16). The sources may include both large bodies of scientific literature and jurisprudence: *R. v. Paszczenko*,2010 ONCA 615, 103 O.R. (3d) 424, at paras. 65-66.

Below, His Honour further commented that courts should be reluctant to take judicial notice that "the government is always right", citing Canada's bleak history of forced sterilization in Inuit women, residential schools, Motherisk, Japanese internment camps during WWII and the Thalidomide tragedy (somewhat taking judicial notice of all of these events without actually considering the test for judicial notice. Oops).

Notwithstanding his refusal to take judicial notice of the safety and efficacy of the vaccine, the court below seemed to accept that the Mother's sources — her internet sources — were "qualified and reputable", that the Mother "demonstrated a clear understanding of the science," and that she raised "legitimate concerns about the vaccine". He further found that the Mother's position, bolstered by her online information, was "reasonable and helpful". If only one could believe everything on the internet . . .

In the end, the Court granted the Mother sole decision-making authority over the issue of whether the younger children would be vaccinated (she had sole decision-making authority over other parenting decisions by virtue of the parties' Minutes of Settlement). His Honour was satisfied that the Mother was capable of making these types of decisions for the children based on her history of consistently making "excellent, informed and child-focused decisions". (But as we know from all those investment commercials — past performance is no guarantee of future success.)

The Appeal

The Father appealed the judgment to the Court of Appeal for Ontario, and argued that the Court below made four errors:

1. Accepting and relying on the Mother's online resources as "expert" and credible evidence;

2. Rejecting that the Father's information from Health Canada was credible;

3. Giving significant weight to the VOC Report and finding that the children's views were independently held; and

4. Placing the onus on the Father to show why the children should be vaccinated

The Court of Appeal found that the court below made all of the above errors, set aside the decision below, and awarded the Father sole decision-making authority over the issue of the COVID-19 vaccine.

Improper Reliance on The Mother's "Expert" and Unreliable Evidence

On the first ground of appeal, the Court of Appeal readily concluded that the court below erred in accepting and relying on the Mother's online resources as "expert evidence" questioning the safety and efficacy of the vaccine, but without applying or even *mentioning* the well-known threshold legal test for the admission of expert evidence set out by the Supreme Court of Canada in *R. v. Mohan*, 1994 CarswellOnt 1155 (S.C.C.) and *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 CarswellNS 313 (S.C.C.), and the Court of Appeal for Ontario in *R. v. Abbey*, 2009 CarswellOnt 5008 (C.A.), and *R. v. Abbey*, 2017 CarswellOnt 12134 (C.A.). As the Court of Appeal for Ontario summarized in *R. v. Abbey*, 2017 CarswellOnt 12134 (C.A.):

> [48] . . . Expert evidence is admissible when:
>
> 1. It meets the threshold requirements of admissibility, which are:
>
> a. The evidence must be logically relevant;
>
> b. The evidence must be necessary to assist the trier of fact;

c. The evidence must not be subject to any other exclusionary rule;

d. The expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfil the expert's duty to the court to provide evidence that is:

i. Impartial,

ii. Independent, and

iii. Unbiased.

e. For opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose, and

2. The trial judge, in a gatekeeper role, determines that the benefits of admitting the evidence outweigh its potential risks, considering such factors as:

a. Legal relevance,

b. Necessity,

c. Reliability, and

d. Absence of bias.

Instead, His Honour had only applied the common law test for the admission of online materials as set out in *ITV Technologies Inc. v. WIC Television Ltd.*, 2003 CarswellNat 4812 (F.C.) and *Sutton v. Ramos*, 2017 CarswellOnt 7799 (S.C.J.). While these cases are certainly useful (and should be noted!) with respect to the admission of materials from the internet — that test does not apply to purported expert evidence. Rather, these cases stand for the proposition that information obtained from the internet *can* be admissible if accompanied by "indicia of reliability," including, but not limited to:

a) whether the information comes from an official website from a well-known organization;

b) whether the information is capable of being verified; and

c) whether the source is disclosed so that the objectivity of the person or organization posting the material can be assessed.

As the Court reminds us, the above test "is not a substitute for the admissibility of expert evidence" (at para. 13), the analysis of which His Honour had failed to conduct. The Court of Appeal also concluded that the court below had not even properly applied the internet admissibility criteria:

[13] . . . Few of the materials presented by the [Mother] even meet the criteria set out in the internet reliability cases cited by the motion judge. Indeed, the Federal Court in ITV Technologies stressed, at para. 18, that "little or no weight should be given" to information found online without "careful assessment of its sources, independent corroboration . . . and assessment of the objectivity of the person placing the information on-line". The motion judge did not adequately heed this warning.

[14] For example, among the documents filed by the [Mother] were articles from 'Total Health' and 'Contagion Live', both of which purport to be medical journals. One document is titled, "Are people getting full facts on COVID vaccine risks" which quotes one Dr. Robert Malone, who claims to have invented the mRNA vaccine. Dr. Malone is, in fact, quoted several times; the motion judge concluding that "[w]ith [Dr. Malone's] credentials, he can hardly be dismissed as a crackpot or fringe author". Other people cited in this article are described by the motion judge as "well known leaders in their fields" and as "qualified and reputable sources". **The difficulty is, it is not entirely clear how anyone could conclude, from**

> **what the [Mother] filed, that Dr. Malone actually invented the mRNA vaccine or that any of those cited in the article are "well known leaders" in their respective fields. There was no basis to draw either of these conclusions.**
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> [15] As the [Father] points out, one author in particular, Dr. Tess Lawrie, simply penned an open letter posted on a website called 'The Evidence-Based Medicine Consultancy Ltd.', which appears to be a self-publication. **The motion judge's description of Dr. Malone, Dr. Lawrie and the other authors cited by the [Mother] — as leaders in their fields — seems to be based on nothing more than their ability to either create a website or be quoted in one. There is no apparent or verifiable expertise.** [emphasis added]

In sum, the Mother's evidence was not from a qualified, unbiased and independent expert, and did not meet the reliability criteria for the admission of online materials:

> [17] In my view, the motion judge fell into error by not assessing whether each document presented by the [Mother] was reliable, independent, unbiased and authorized by someone with expertise in the area. Instead of engaging in an analysis of the evidence presented, he embarked on a lengthy discussion about whose materials were more thought-provoking, which has no bearing at all on whether the [Mother's] materials were admissible and should be given any weight.
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> [18] The motion judge also ignored the fact that, notwithstanding the well-known side effects (which are detailed in the Pfizer Fact Sheet filed by the [Mother]), the vaccine has been approved for children ages 5 and older by all regulatory health agencies, including Health Canada and the Center for Disease Control and Prevention. The motion judge seemed to find justification for the [Mother's] position that the children should not be vaccinated (either because the vaccine is unsafe, or because not enough is known about it) because of Pfizer's knowledge about potential side effects, which it is required to disclose by law. By doing so the motion judge treated the [Mother] as an expert in assessing pharmaceutical disclosure, while essentially dismissing those who are best positioned to interpret this information, public health authorities, who know how to factor the possibility of side effects into the approval process.
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> [19] The information relied upon by the [Mother] was nothing but something someone wrote and published on the Internet, without any independent indicia of reliability or expertise, which, even if admissible, should have been afforded no weight at all. This was a palpable and overriding error and I would, therefore, give effect to this ground of appeal.

No Meaningful Analysis of the Father's Material

On the next ground of appeal, the Court of Appeal concluded that the judge below made a palpable and overriding error by failing to conduct a meaningful analysis of the Father's material, which included information from Health Canada and the Canadian Paediatric Society. With respect to the information from Health Canada, the Court concluded that this should have been admitted under s. 25 of the Ontario *Evidence Act*, R.S.O. 1990, c. E.23, the statutory public documents exception to the hearsay rule (which is similar to the provisions of most provincial evidentiary statutes):

> Copies of statutes, official gazettes, ordinances, regulations, proclamations, journals, orders, appointments to office, notices thereof and other public documents purporting to be published by or under the authority of the Parliament of the United Kingdom, or of the Imperial Government or by or under the authority of the government or of any legislative body of any dominion, commonwealth, state, province, colony, territory or possession with the Queen's dominions, shall be admitted in evidence to prove the contents thereof.

While this section only deals with admissibility, and not the weight to be afforded to these materials, the court below was obligated to at least explain why Health Canada's information on the safety and efficacy of the vaccine was untrustworthy. Instead, he simply relied on stated historic misdeeds of the Canadian government to support the view that he should not take judicial notice of the fact that the "government is always right." But these "false equivalencies" were no substitute for a meaningful review of what would otherwise be reliable information.

For those interested (and, we suppose for those *not* interested given you are stuck reading it), the Health Canada documents would also have been admissible under the common law public documents exception to the hearsay rule. As noted by the Ontario Court of Appeal in *R. v. P. (A.)*, 1996 CarswellOnt 3150 (C.A.):

> [14] At common law statements made in public documents are admissible as an exception to the rule against hearsay evidence. This exception is "founded upon the belief that public officers will perform their tasks properly, carefully, and honestly." Sopinka et al. *The Law of Evidence in Canada* (1992), p.231. Public documents are admissible without proof because of their inherent reliability or trustworthiness and because of the inconvenience of requiring public officials to be present in court to prove them. Rand J. commented on the rationale for the public documents exception to the hearsay rule in *R. v. Finestone* (1953), 107 C.C.C. 93 (S.C.C.) at 95:
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> > The grounds for this exception to the hearsay rule are the inconvenience of the ordinary modes of proof and the trustworthiness of the entry arising from the duty, and that they apply much more forcefully in the complex governmental functions of today is beyond controversy.
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> [15] **A "public document" means " . . . a document that is made for the purpose of the public making use of it, and being able to refer to it."** *Sturla v. Freccia* (1880), 3 App. Cas. 623 (H.L.) at 643. English and Canadian cases have generally prescribed four criteria for the admissibility of a public document without proof.
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> > i. the document must have been made by a public official, that is a person on whom a duty has been imposed by the public;
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> > ii. the public official must have made the document in the discharge of a public duty or function;
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> > iii. the document must have been made with the intention that it serve as a permanent record, and
> >
> > iv. the document must be available for public inspection. [emphasis added]

With respect to the information from the Canadian Paediatric Society, the Court of Appeal concluded that it clearly met the criteria set out in *ITV* and *Sutton* — it is a well-known organization, it is objective, its sources can be assessed, and the information in its documents is capable of verification. The motion judge should have addressed it and explained why he accepted the Mother's information instead.

In sum, the court below erred in failing to conduct any meaningful review of the Father's materials — or the laws of evidence — and by simply accepting the Mother's "questionable and unreliable internet printouts with no independent indicia of reliability of expertise".

Voice of the Child Report

On the third ground of appeal, the Court of Appeal concluded that the motion judge erred by giving any weight to the purported views of the children as set out in the VOC Report. The Court of Appeal thought it "obvious" that those views had been influenced by the Mother.

The Court of Appeal first set out the applicable legal principles in considering the weight to attribute to a child's stated wishes:

> [32] It is well settled that when determining how much weight to give a child's wishes, a court is to consider: 1) whether the parents are able to provide adequate care; 2) how clear and unambivalent the wishes are; 3) how informed the expression is; 4) the age of the child; 5) the child's maturity level; 6) the strength of the wish; 7) how long they have expressed their preference; 8) the practicalities of the situation; 9) parental influence; 10) overall context; and 11) the circumstances of the preference from the child's point of view: *Decaen v. Decaen*, 2013 ONCA 218, 303 O.A.C. 261, at para. 42.

The Court of Appeal then went on to cite concerning statements the children made to the social worker:

> [33] While the motion judge found that the children's views were "strongly held and independently formulated" — and while he noted the children's ages, the fact they lived with the [Mother], and that both parties were good parents — he ignores some rather salient aspects of the report, such as the 12-year-old child indicating to the social worker that her "mother had advised that the [vaccine] is experimental" and had provided her with "research from scientists", and that the 10-year-old said to the social worker that "in every case the vaccine had been tested on animals the animals had died", that the vaccine "was just the test one and he did not want the test one", and that his mother had told him he could not be vaccinated without her permission. **In other words, the motion judge failed to consider how informed the expression was and, notwithstanding a conclusory finding that the children's views were "strongly held and independently formulated", he failed to even acknowledge, let alone factor into his analysis, the [Mother's] obvious influence.** [emphasis added]

In the Court's view — and to us — these statements clearly demonstrated that the children had been influenced by their Mother. As a result, the Court of Appeal was of the opinion that the children's views should not have been given *any* weight. But while we certainly agree that the children's views had been influenced by the Mother, does it *necessarily* follow that those views should not be given any weight? What of *L. (N.) v. M. (R.R.)* (2016), 88 R.F.L. (7th) 19 (Ont. C.A.), an alienation case, where the Court of Appeal approved this line of thinking from the trial judge:

> [34] . . .
>
> **The wishes of an alienated child may be warped and misconceived, but they are nonetheless real.** The father says that the children's wishes should be disregarded, because they are not truly the children's own wishes. **At this point, does that really matter? The expressed wishes are strong, consistent, and long lasting**, and they have been acted on by the children in defiance of the authority of both parents, the arbitrator, the police, and this court's order . . .

In a similar vein, see *O.M.S v. E.J.S.* (2023), 80 R.F.L. (8th) 253 (Sask. C.A.).

Warped and influenced views matter with respect to the rejection of a parent but not on the question of vaccinations? We're not sure those positions are reconcilable. Here, however, it would not have made much of a difference.

Reverse Onus

On the final ground of appeal, the Court concluded that the motion judge erred by placing the onus on the Father to explain why the children *should be* vaccinated, instead of on the Mother to explain why the children *should not* be vaccinated.

In doing so, the motion judge departed from *numerous* decisions of the Superior Court of Justice related to the pandemic which accepted government recommendations at face value and placed the onus on the parent wishing to *depart* from these recommendations. For example, in relation to in-person school attendance, several courts concluded that the parent who did not want a child to attend in-person classes was required to explain why and offer evidence in support of their position: for example, see *Chase v. Chase* (2020), 46 R.F.L. (8th) 77 (Ont. S.C.J.) and *Zinati v. Spence* (2020), 47 R.F.L. (8th) 70 (Ont. S.C.J.). And in relation to travel, a parent wishing to travel with children against government recommendations was required to explain why the travel was necessary: for example, see *Yohannes v. Boni*, 2020 CarswellOnt 11203 (S.C.J.) and *Gillespie v. Jones* (2020), 39 R.F.L. (8th) 135 (Ont. S.C.J.).

In relating to vaccines, other judges have placed the onus on the objecting parent to establish why the child should not be vaccinated, not on the parent wishing to follow government recommendations: *A.C. v. L.L.* (2021), 63 R.F.L. (8th) 134 (Ont. S.C.J.); *Saint-Phard v. Saint-Phard* (2021), 63 R.F.L. (8th) 92 (Ont. S.C.J.); *A.S.N. v. K.E.K.*, 2021 CarswellBC 3988 (S.C.); *V.L.M. v. B.S.F.* (2022), 70 R.F.L. (8th) 187 (N.B. Q.B.).

While the motion judge was not bound by these authorities, he ought to have "cogently" explained why he was departing from decisions that had addressed health-related parenting decisions in the same or similar circumstances. His failure to properly

explain this, and reversing this onus, was an error. In one of the most important conclusions of the reasons, the Court of Appeal has this to say:

> [45] Stated otherwise, **judicial notice should be taken of regulatory approval, and regulatory approval is a strong indicator of safety and effectiveness**. That being the case, **where one party seeks to have a child treated by a Health Canada-approved medication, the onus is on the objecting party to show why the child should not receive that medication**. The motion judge erred by reversing that onus.
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> [46] **The [Mother], as the parent seeking not to have the children vaccinated, had the onus to establish that, despite Health Canada's opinion as to the vaccine's safety and effectiveness, they should not be.** That onus was not satisfied. [emphasis added]

Remedy

Rather than send the matter back for another hearing, the Court of Appeal granted the Father sole decision-making authority over the issue of whether to vaccinate the younger children.

Final Thoughts

The one thing the Court of Appeal does not decide is the issue of judicial notice which attracted much attention in the pandemic. Some courts have taken judicial notice of the safety and efficacy of vaccines for children: *I.S. v. J.W.*, 2021 CarswellOnt 2128 (S.C.J.); *A.B.S. v. S.S.*, 2022 CarswellOnt 2426 (S.C.J.); *Warren v. Charlton* (2022), 70 R.F.L. (8th) 388 (Ont. S.C.J.); *C. v. H.* (2021), 68 R.F.L. (8th) 417 (Ont. S.C.J.); *O.M.S. v. E.J.S.* (2021), 61 R.F.L. (8th) 341 (Sask. Q.B.), rev'd *O.M.S v. E.J.S.* (2023), 80 R.F.L. (8th) 253 (Sask. C.A.); *P.R. v. S.R.* (2022), 68 R.F.L. (8th) 328 (P.E.I. S.C.). Some courts have gone further and taken judicial notice that being vaccinated against COVID-19 is in the best interests of a child, unless there is a compelling reason otherwise: *D. Jr. v. T.*, 2022 CarswellOnt 2668 (Ont. S.C.J.); *Rashid v. Avanesov*, 2022 CarswellOnt 8034 (S.C.J.); *Davies v. Todd*, 2022 CarswellOnt 5158 (C.J.); *A.P. v. L.K.* (2021), 53 R.F.L. (8th) 403 (Ont. S.C.J.).

Here, the Court of Appeal recognized the approaches taken in the case law, but it did not deal squarely with the issue of whether it is appropriate for courts to take judicial notice of such "facts":

> [21] . . . I need not decide whether judicial notice should be taken of the public health and government information adduced by the [Father], as the motion judge fell into error in other respects, including by treating government approval of the vaccine as irrelevant.

Alternatively, we could assume that, despite not addressing the issue head on, it is implicit in the Court of Appeal's decision that judicial notice may be taken that vaccines are safe and effective; the Court is clearly aware of lower court decisions in which such notice was taken, but did not engage with the issue. Given that judicial notice is the ***one*** exception to the general rule that cases must be decided on the evidence presented by the parties in open court [*R. v. Find*, 2001 CarswellOnt 1702 (S.C.C.), at para. 48; *R. v. J.M.*, 2021 CarswellOnt 3180 (C.A.) at para. 31] we might expect the Court to strongly caution lower courts against this practice if it was problematic.

The Court of Appeal does go so far as to say that judicial notice may be taken of regulatory approval — which would then be a "strong indicator" of the safety and effectiveness of a vaccine. But the Court did not take the next step. That is, a court can take notice of regulatory approval, but it cannot then take notice that a vaccine is safe and effective based on that approval:

> [43] In my view, this statement, while generally accurate, is inapposite in this case, where the "expert opinion" in question is the approval of medical treatment by Health Canada, the national body tasked with determining that treatment's safety and effectiveness. In *O.M.S v. E.J.S.*, 2023 SKCA 8, the Saskatchewan Court of Appeal, at para. 48, writes that:
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> > [I]n a family dispute, it is both unnecessary and, in most cases, unhelpful, for the parties and court to look for more than the approval of a drug, such as the Pfizer vaccine, together with any medical advice that may reasonably be required as to the risks and benefits to the child at issue, as the basis to conclude that it is in the child's best interests to

> administer the drug. It is unnecessary because a parent is not obliged to prove, and a court is not obliged to consider or decide, that an approved drug is safe or efficacious when used in accordance with and to the extent specified in the approval - just as they need not consider whether medical advice from the family doctor meets that mark. In most cases at least, additional evidence is unhelpful because, absent sufficient evidence to the contrary, parents and courts are entitled to decide that a child should be treated with approved medications in accordance with the approval, subject, of course, to any child-specific medical concerns that may be in play, or other relevant factors.
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> [44] Recall the two primary rationales for the public documents exception to the hearsay rule: the impracticality of traditional modes of proof, and the expectation that public servants perform their duties with a degree of diligence and care. It is not the subject of dispute among reasonable people that Health Canada has, in the area of safety and efficacy of medical treatment, "special knowledge . . . going beyond that of the trier of fact": *R. v. Marquard*, [1993] 4 S.C.R. 223, at p. 243. ***Requiring that opinion to be tendered* viva voce *in every case via live, human experts would be - especially in family court — unnecessarily burdensome.*** [emphasis added]

This is, respectfully, a distinction without a difference.

And there you have it. One long Newsletter about one case. Some vaccination issues. Some judicial notice issues. And a semi-revival of the statutory and common law public documents exception to the hearsay rule. We told you it would be interesting. We hope you agree.