Police accident reports and other accident reports, whether prepared by government employees of an agency or by employees of a business entity, often contain information about an accident recorded by the makers of the report, who has no personal knowledge of the information recorded, much less whether it is accurate or not. The maker of the record is merely recording information supplied by another person. Where the record is offered to prove the truth of the information recorded, a hearsay issue is, of course, present. Are the reports, or the entry therein of such recorded information, admissible under the business records exception to the hearsay rule as set forth in CPLR 4518(a)? This article will provide an answer to when, if ever, such recorded information is in fact admissible under that exception.

CPLR 4518(a) states, in pertinent part, that a judge may admit into evidence any writing or record, which the judge finds “was made in the regular course of any business and that it was the regular course of the business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter....” It will be assumed for purposes of this article that the exception’s three statutory requirements have been satisfied. These three requirements are that the information was recorded as an entry in the report as a routine practice; that the entry was made at or near the time or within a reasonable time thereafter of the time the information was obtained; and the person making the entry had a duty or obligation to record the information. Notably, it is these requirements which provide the “probability of [the report’s] trustworthiness, thereby justifying the admission of the record into evidence without the safeguards ordinarily provided by confrontation and cross-examination.” In that regard, since the entry is routine, the regularity and continuity of making such entries develop habits of precision; the temporal requirement assures that the recollection of the information recorded is fairly accurate; and the existence of the recorder’s duty or obligation to record the information ensures that it is to the recorder’s own interest and thus the employer’s interest to accurately record the information.

In addition to these explicit statutory requirements, the Court of Appeals has read into CPLR 4518(a) an additional requirement that involves an initial concern the need to show that the source of the information is a person with personal knowledge thereof, and that such person is part of a regular business practice in reporting and recording the information. This requirement was first recognized in the landmark decision of Johnson v. Lutz and developed in subsequent decisions. An understanding of Johnson v. Lutz is crucial to answering the question posed and attempted to be answered in this article.

Johnson v. Lutz was an action to recover damages for the wrongful death of the plaintiff’s intestate, who was killed when his motorcycle collided with the defendants’ truck. At the trial, conflicting testimony was presented regarding how the accident occurred. Plaintiff offered into evidence a police officer’s report of the accident under Civil Practice Act § 374-a, the predecessor of CPLR 4518(a). As the police officer had not witnessed the accident, his report was based on statements to him by third persons who were present at the accident scene when he arrived. There was no showing that any of these third persons saw the accident and stated to him what they observed, or stated what some other persons had told them. A unanimous Court, in an opinion authored by Judge Hubbs, held that the trial court correctly excluded the report. Emphasizing that the purpose of the statute was to permit a business record to be received in evidence without the necessity of calling all the persons who had a part in making it, the Court held that the statute did not extend to “voluntary hearsay statements made by third parties not engaged in the business or under any duty in relation thereto.” In the Court’s view, such statements did not have the reliability of statements “made in the ordinary course of business.”

In essence, Johnson v. Lutz provides that the admissibility of the information recorded in a business record under the business records statutory exception to the hearsay rule turns upon, in addition to the requirements of the statute itself, a consideration of “personal knowledge”, i.e., whether the report’s maker had personal knowledge of the information recorded, and if not, whether the maker’s source of the information recorded had personal knowledge thereof and reported to the maker as part of a regular business routine. This reading of Johnson v. Lutz is fully supportable by the Court’s emphasis that the police officer recordmaker was not present at the time of the accident and that he based his recording of information about the accident on “hearsay statements of third persons”, who were not engaged in the maker’s business or under any duty in relation thereto. Of note, the Court’s recognition of this “personal knowledge” requirement was severely criticized by Wigmore. However, this requirement is surely consistent with, if not mandated by, the underlying theory of the business records exception as otherwise there
could be the recording of unreliable information. 11

In answering the question posed, consistent with Johnson v. Lutz, the careful attorney, when attempting to offer into evidence certain recorded information in an accident report, otherwise admissible as a business record, or attempting to preclude its admissibility, should initially inquire as to the source of the information recorded. Several steps of analysis are then present once that determination is made. Indeed, if the source is not identified, the information as recorded will be excluded. 12

This personal knowledge requirement will obviously be present when the person recording the information acquired that information from his or her own observations and/or investigations and made such recording pursuant to the routine of the business in which the person is engaged. This is, as Johnson v. Lutz contemplated, an entry "in the ordinary course of business." 13 Examples of the application of this rule in instances involving accident reports include the police officer’s recording of the officer’s personal observations of the accident or the accident scene, i.e., presence and location of skid marks, location of vehicles, presence of obstructions, weather conditions, 14 provided a proper foundation is laid, 15 and the participant’s recording of how the accident occurred, 16 provided the participant was under a duty to make such recording and such was routinely made. 17

Where the person recording the information in the accident report does not have personal knowledge thereof, the focus will then be upon the person or persons who transmitted the information to the recorder. In that regard, where the maker of the record does not have the requisite personal knowledge, it must be shown that the maker received the information from one with personal knowledge and who is "engaged in the business or under any duty in relation thereto." 18 In other words, where the person with personal knowledge reports to the maker as part of a regular business routine in which they are participants, whether because they are employed by the same business, or, in the absence of co-employee status, because of a relationship under which the person with knowledge routinely reports to the maker as a result of that relationship, 19 the Johnson v. Lutz requirement is satisfied. As expressed in Johnson v. Lutz, it is such duty which provides an assurance of trustworthiness. 20

It is to be noted that where, as in Johnson v. Lutz, the maker received information transmitted by one who is under no business to do so, the information so recorded is not admissible under the business record exception. The fact that the maker of the record was under a duty to record such information as transmitted is not controlling. The maker’s duty ensures only the accuracy of the maker’s entry, i.e., he/she writes down exactly what was transmitted. It is no guarantee at all of the accuracy of the information supplied by that person. 21

Focusing on the status of the person with personal knowledge regarding an accident who transmits information regarding that accident to the maker of the accident report, the requisite Johnson v. Lutz duty has been found to be present where the person was a fellow police officer. 22 Indeed, Johnson v. Lutz expressly contemplates such a situation. 23 Furthermore, several layers of transmission i.e., officer one observes the accident, reports it as part of his regular routine to officer two, who transmits the information as part of a regular routine to employee three who then prepares the record may be present without running afoul of Johnson v. Lutz. 24 The business duty has also been found to be present where the person transmitting the information, although not a police officer, was under a statutory duty to provide the transmitted information. 25

Alternatively, this duty "requirement" could be satisfied where someone within the business has verified the accuracy of the information provided by the "outsider" in accordance with a routine practice to do so. 26

On the other hand, the requisite duty will be absent where the person transmitting the information was a bystander or witness to the accident, as in Johnson v. Lutz. 27 Likewise, it will be absent where the person was a participant in the accident and later was a party to a lawsuit arising out of the accident, 28 or was a close relative of the participant involved in the accident. 29 Notably, in none of these cases were the persons who transmitted the information to the maker of the record doing so as part of a regular business routine in which they were participants. The fact that they may have had a civic duty to aid the police or the investigation was of no evidentiary significance. 30

Where the person transmitting the information had no duty to do so, Johnson v. Lutz plainly holds that the mere entry of the information in the record does not make it admissible under the business records exception. However, Johnson v. Lutz did not state that such information would never be admissible under that exception. In that regard, its reference to the inadmissibility of "hearsay statements" which are transmitted by outsiders, suggested that if the person’s statement transmitting the information to the maker of the record was independently admissible under another hearsay exception, then its recording would be admissible under the business records exception. 31

Subsequent decisions picked up on this suggestion 32 and it is now well established that where the statement by an outsider is recorded in accordance with a regular business routine, and is admissible under another hearsay exception, then the business record exception and that other exception combine to provide a basis for the admissibility of that statement. 33

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admissibility of the statement under this approach is supported by the presumption of reliability that attaches to statements that are admissible under another exception to the hearsay rule. Of course, the maker’s recording of the statement is covered by the business records exception itself, thereby providing reliability thereto.

This Johnson v. Lutz/hearsay approach has been followed in accident report cases. Thus where an accident report regarding an automobile accident includes a damaging statement by one of the drivers who later becomes a party to a lawsuit arising out of the accident, the statement will be admissible under the business record exception as an admission. The fact that the police officer had no personal knowledge of the accuracy of the statement is irrelevant as the officer had a duty to record this type of statement. Similarly, where an accident report contains a statement by a witness to an accident, and it was recorded in accordance with routine procedure, such statement may be admissible under the business record exception as an excited utterance. Other recognized hearsay exceptions may be relied upon, provided their requirements are satisfied.

It should also be noted that where the recorded information in the accident report is being used for a purpose other than the truth of the information, i.e., that it was made, and that the making of the statement is relevant, such entry will be admissible under the business record exception, provided, of course, that its entry was routinely made. Admissibility in these circumstances does not transgress Johnson v. Lutz.

To summarize and answer the question raised, where information recorded in a business record is sought to be admitted for its truth under the business records exception, and the recorded information does not represent the personal knowledge of the maker of the record, the information will not be admissible under the business records exception unless it is established that the maker of the record received the information from a person with personal knowledge thereof and that person reported to the maker of the record as part of a regular business routine in which they are both participants; or, the recorded information in itself meets the requirements of some other hearsay exception. As recognized in this article, whether any of these rules can be satisfied in a given case will depend upon the trial lawyer initially asking who was the source of the information recorded in the accident report. Once the answer to that question is ascertained, the application of the rules in a given case can be determined.

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Notes

3. People v. Kennedy, 68 NY2d at 579, 510 NYS2d at 859, 503 NE2d at 507, supra; Williams v. Alexander, 309 NY at 286 - 287, 129 NE2d at 419, supra.
4. See, Toll v. State, 32 AD2d 47, 49, 299 NYS 2d 589, 591 (3d Dept. 1969) (Cooke, J.); Richardson, Evidence (9th ed) §299. CPLR 4518(a) provides only that "lack of personal knowledge ... shall not affect (the record's) admissibility".
5. 253 NY 124 (1930).
6. CPLR 4518(a) restated, with minor language changes, the provisions of section 374-a.
10. See, 5 Wigmore, Evidence (Chadbourn rev. 1974) §1561(a) at p. 490, §1561(b) at p. 507.
13. See, Johnson v. Lutz, 253 NY at 128, 170 NE at 518, supra; see, Toll v. State, 32 AD2d at 49, 299 NYS2d at 591, supra; Alexander, Practice Commentaries to CPLR 4518, Book 7B, McKinney's Con. Laws of NY, C4518:3, p. 108.
15. See, Corrier v. Spagna, 101 AD2d 141, 147, 475 NYS2d 7, 12 (1st Dept. 1984) (report was inadmissible...
because it could not be determined whether it was based upon eyewitness observations of the police officer making the report or hearsay; Matter of Utica Mutual Ins. Co., 97 AD2d 422, 467 NYS2d 259 (2d Dept. 1983) (entries were ambiguous as to presence of personal knowledge); Campbell v. MABSTOA, 81 AD2d 529, 438 NYS2d 87 (1st Dept. 1981) (diagram of accident scene was inadmissible as vehicle had been moved prior to police officer’s arrival and he made no independent investigation).


17. See, Martin, Capra and Rossi, at § 8.3.3 at pp. 769-770, supra.

18. Johnson v. Lutz, 253 NY at 128, 170 NE at 518, supra.

19. The language “or any duty in relation” to the business suggests that employment of the transmitter and maker by the same employer is not necessarily required.


23. Johnson v. Lutz, 253 NY at 128, 170 NE at 518, supra.

24. See, 2 McCormick, Evidence (4th ed) §290; compare, Stevens v. Kirby, 86 AD2d 391, 395, 450 NYS2d 607, 611 (4th Dept. 1982) (Deputy sheriff to State Liquor Authority would be appropriate, but deputy received the transmitted information from outsiders).

25. See, Lopez v. Ford Motor Credit Co., 238 AD2d 211, 656 NYS 2d 257 (1st Dept. 1997) (police accident report recorded information received from motorist regarding registration of his vehicle, which information was required by statute to be given).

26. See, Martin, “Hearsay Exception and Sources of Information for Business Records”, NY LJ, 10/12/01, p.3, col. 1, at p.5; McCormick, supra at §290; see also, Campbell v. MABSTOA, 81 AD2d 529, 438 NYS2d 87, 29 (1st Dept. 1981).


31. See, Johnson v. Lutz, 253 NY at 128, 170 NE at 518, supra.

32. See, Kelly v. Wasserman, 5 NY2d 425, 185 NYS2d 538, 158 NE2d 241 (1959); Zavlich v. Thompkins Sq. Holding Co., 10 AD2d 492, 200 NYS2d 550 (1st Dept. 1960). However, such distinction was not expressly noted. See, Barker & Alexander, supra, p.880; Prince, Evidence, 16 Syr. L. Rev. 459, 459 - 460 (1965).

33. See, Matter of Leon RR, 48 NY2d at 122, 421 NYS2d at 866 - 867, 397 NE2d at 377, supra, Cover v. Cohen, 61 NY2d at 274, 473 NYS2d at 384, 461 NE2d at 273, supra, Toll v. State, 32 AD2d at 49, 299 NYS2d at 591, supra; Martin, Capra and Rossi, supra, at § 8.3.3, p. 770.

34. See, Ferrara v. Poranski, 99 AD2d 904, 450 NYS2d 596 (2d Dept. 1982); Dempsey v. National Car Rental System, Inc., 87 AD2d 835, 449 NYS2d 270 (2d Dept. 1982); Chemical Leaman Tank Lines, 21 AD2d 556, 251 NYS2d 240 (3d Dept. 1964). This approach was seemingly followed in Clarke v. New York City Transit Auth. 174 AD2d 268, 580 NYS2d 221 (1st Dept. 1992), but, as has been noted, erroneously. See, Martin, Evidence, NY LJ, 6/12/92, p. 3, col. 1.

35. See, Taft v. New York City Transit Auth., 193 AD2d 503, 597 NYS2d 374 (1st Dept. 1993). Of note in this case, the statement was made to an employee who relayed it pursuant to routine procedure to the maker of the report.
