FAREWELL TO HEARSAY — EXPANDING CRACKS IN THE HEARSAY RULE

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[*The strictures of the rule against hearsay continue to be minimised by the device which allows statements proferred for circumstantial purposes to be admitted into evidence. The authors examine whether the use of this device is logically sound, given that the distinction between statements proffered for their truth rather than the circumstantial inferences presented by those statements seems to rely solely on their linguistic effect.*]

INTRODUCTION

In deciding whether to accept evidence objected to as hearsay, courts are much influenced by the language employed by the out of-court-utterer. If the language used either does not contain an assertion, or contains an assertion that is not offered directly for its truth, some courts are led to accept the evidence as non-hearsay — despite the fact that the dangers inherent in hearsay are exacerbated in these cases. This article first examines non-assertive utterances such as greetings, orders and questions and looks at the way in which English, American and Australian courts have dealt with them. Part two deals with out-of-court statements which assert propositions that are circumstantially relevant. Part three deals with those cases where the truth asserted is directly relevant to a fact in issue but the hearsay rule is avoided by viewing the reporting witness as a mere conduit of the utterance. Finally the article deals with declarations of intention as evidence of the subsequent conduct of the utterer.

An examination of the various categories of extra-judicial statements which fall outside of the hearsay definition is particularly apposite given the recent recommendations of the Australian Law Reform Commission (ALRC)[1] to retain the rule against hearsay, subject to certain limited exceptions. The ALRC recommended that the rule against hearsay be preserved in respect of 'representations' of fact, such statements being regarded as inherently unreliable in the absence of cross-examination. Nonetheless, it is the writers' view that the willingness of the courts to draw technical distinctions between assertions of fact or otherwise so as to avoid categorising these utterances as hearsay indicates continuing and growing dissatisfaction with the hearsay rule. Perhaps retention of the rule should be reconsidered.

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[1] Australian Law Reform Commission, Report No. 38 Evidence (1987, A.G.P.S) 162 ff. The substance of the recomendations relating to hearsay have since been adopted by the N.S.W. Law Reform Commission, Report No. 56 Evidence(1988). Moreover the draft rules proposed by the ALRC are similar to the proposed Canada Evidence Act, 1986.

(1) *NON-ASSERTIVE UTTERANCES*

Greetings, warnings, orders or questions do not assert anything expressly, although an assertion may be inferred. For example, 'Hello Tom', 'Look out Tom!', 'Get me Tom', or 'Is Tom there?' might respectively imply that the person addressed is Tom, that Tom was in danger, that the speaker wanted Tom, or that the enquirer wanted to know if Tom was there. Of course, the inference might be wrong. The utterer might be misperceiving, misspeaking or lying. Moreover, the reporting witness might be doing one or more of these things.

The value of testimonial evidence is determined by the witness' ability to perceive correctly, to remember and to report truthfully. That value cannot be conveyed by language itself. It has to be tested by the trier of fact observing the speaker reporting under direct and cross-examination. Even if a statement is in a positive form — 'I saw A shoot B', or 'I truly believe that I saw A shoot B' — the listener has to infer that the witness in fact saw what he or she claimed to have seen. Assertions rely on the inference that the listener makes as to their truth. The only occasions where this is not true is where the law places some objective relevance on the utterance of words regardless of the belief of the speaker, or where the issue is not whether the utterer meant what was said but rather what impact the information had on the listener. It is the significance of the jury's ability to make an inference by judging the utterer's demeanor in the witness box that is the basis of the hearsay exclusion.

Where the out-of-court statement is non-assertive, the finder of fact not only has to believe that the out-of-court declarant was perceiving and reporting accurately, and that the reporting witness is doing the same, they must also believe that the inference that they are drawing from the non-assertive words is the correct inference. Cockburn C.J. in *Bedingfield*[2] accordingly thought that the warning 'Don't Harry!' would be hearsay. This view is supported by the recommendations contained in the 11th Report of the English Criminal Law Revision Committee.[3] Clause 41(3) of its Draft Bill provides that 'a protest, greeting or other verbal utterance may be treated as stating any fact which the utterance implies' for the purpose of determining whether or not evidence is inadmissible hearsay,[4] despite the fact that such statements bristle with hearsay dangers. The following recent cases indicate that the courts are prepared to use the non-assertive language employed to avoid the hearsay rule.

(a) *Greetings*

The South Australian Supreme Court and the High Court in *Walton*[5] were called on to consider, *inter alia*, the admissibility of a greeting. Walton was charged with the murder of his estranged wife. It was the prosecution case that,

[2] (1879) 14 Cox C. C. 341, 342.

[3] Great Britain, Criminal Law Revision Committee 11th Report (Evidence) Cmnd 4991 (1972).

[4] Academic definitions of hearsay either refer to hearsay as an express or implied assertion introduced in court for the truth of the matter asserted or stated. See Buzzard J. H., May R, and Howard, M. N., *Phipson on Evidence* (13th ed. 1982) 334-6; Byrne, D. and Heydon, J. D., *Cross on Evidence* (3rd Aust. ed. 1986) 727-81.

[5] *R. v. Walton* (1987) 46 S.A.S.R. 553; *Walton v. R.* (1989) 84 A.L.R. 59.

on the day before the murder, Walton had arranged to meet the deceased at a shopping centre the following night. This arrangement was made by telephone and was allegedly part of a deliberate plan to kill the deceased. A witness who was present at the time testified that the deceased received the telephone call. The witness testified that after the deceased had spoken for a while she called to her four-year-old son: 'Michael, daddy's on the phone.' The son then went to the phone and was heard to say, 'Hello Daddy' followed by 'Yeah, I've been good.' The deceased resumed the telephone conversation and afterwards informed the witness that it was the defendant who was the caller.

In the South Australian Court of Criminal Appeal King C.J. delivered the leading judgment. He stated that the words used by the deceased directly indicating that the caller was the defendant were inadmissible hearsay. However, the words spoken by the deceased and her son, such as the phrase 'Hello Daddy' which indirectly tended to identify the defendant as the caller were classified as non-hearsay. According to King C.J. these words were

> not admissible by reason of any assertion implicit in them as to the identity of the other party to the telephone call. What is admissible is not any implied assertion but the fact that the words were spoken.[6]

He then went on to say, however, that the fact that the words were used tended to identify the appellant as the caller because it was unlikely that the deceased or her son Michael would have addressed any other caller in the same manner. His Honour thought that in the ordinary course of affairs if a person is identified incorrectly he will disabuse the other person of the false impression. King C.J. conceded that '[t]here may be mistake or misunderstanding or the other party to the conversation may be engaging in deliberate deception as to identity',[7] but he said that these were factors which affected the weight of the evidence and did not affect admissibility.

The High Court dismissed Walton's appeal. Mason C.J. adopted a similar position to that of King C.J. to the extent of holding that the boy's greeting was admissible because the likelihood of concoction was remote. However, he considered that the greeting contained implied hearsay assertions. His Honour nevertheless felt that the hearsay rule should be applied flexibly. In relation to implied assertions, the Chief Justice said that certain circumstances might combine to render such evidence reliable. Factors such as spontaneity made some statements more reliable than statements made at a remote point in time. Accordingly, he would admit the child's statement as evidence showing the identity of the caller. But somewhat surprisingly, the mother's greeting was not admissible for this purpose. It may be that the Chief Justice thought that a child would be less likely or able to dissemble than an adult, but it would not follow from this that a child would more readily detect a fraud. It is therefore difficult to see why his Honour did not consider the child's greeting in the same light as he held the mother's, namely, that the greeting was only admissible to show the deceased's state of mind.

[6] *Ibid.* 557.
[7] *Ibid.*

Wilson, Dawson and Toohey JJ., held that the boy's greeting was hearsay because it asserted by implication that the defendant was the caller. Since this followed on from an assertion by the deceased that the caller was 'Daddy', the probative value of what the child said was doubtful. Hence the child's evidence was inherently unreliable because the child may have been unduly influenced by his mother who could have been mistaken or dissembling. But again somewhat incongruously, the mother's evidence was admissible (and therefore implicitly reliable) because it reflected her belief and showed her state of mind.

The logical inconsistency of this reasoning is apparent. If the mother was mistaken or dissembling, the evidentiary value of her greeting is the same as the child's. On the other hand, Wilson, Dawson and Toohey JJ. agreed with Mason C.J. that the statements made by the deceased were admissible as tending to establish her belief that she was going to meet the defendant, but were not admissible to identify him as the caller. Thus the deceased's greeting was not evidence identifying the defendant but was evidence that she believed she had been speaking to him.

Thus four members of the Court were prepared to admit the greeting to show that the deceased believed she was speaking to the defendant, but not to show that it was the defendant who was making the call. The evidentiary value of the deceased's belief presumably was that if she did not believe it was the defendant who made the call then she would not have gone to the meeting. The greeting helped to prove that the deceased had gone to the shopping centre but not that the defendant had asked her to go there or had met her there.

Deane J. held that the child's greeting was hearsay and should be excluded. The mother's greeting, on the other hand, he held admissible because of its relation to evidence given by an alleged accomplice about the defendant's plans to kill her. The exact reason why Deane J. held that the mother's greeting did not not constitute hearsay is unclear, except that his Honour believed it had already been established by the accomplice's evidence that the defendant was the caller.

It follows from *Walton*'s case that greetings will be inadmissible as implied hearsay if used to identify the person addressed. On the other hand, greetings will not be implied hearsay if used to show the speaker's state of mind — at least if the speaker is an adult. As will be discussed later, there is some logical difficulty in distinguishing between implied assertions indicating state of mind and implied assertions as to existing fact.

In the United States the courts have admitted greetings as 'verbal acts' or circumstantial evidence of the identity of the person addressed. In *United States v. Alvarez*,[8] the Fifth Circuit Court of Appeals admitted evidence of an overheard telephone conversation to identify the person addressed, but held that evidence of direct statements as to a caller's identity was inadmissible hearsay. Other cases have adopted the same approach.[9]

[8] 584 F.2d 694 (1978).

[9] *Takahashi v. Hecht Co.* 64 F.2d 710 (1933); *United States v. Bucur* 194 F.2d 297 (1952); *United States v. Gavagan* 280 F.2d 319 (1960).

(b) *Orders/Instructions*

United States courts have also been willing to admit evidence of directives as not offending the hearsay rule. In *United States v. Shepherd*[10] the Tenth Circuit Court of Appeals permitted testimony that a conspirator had instructed the witness to frighten someone. The court held that

> An order or instruction is, by its nature, neither true nor false and thus cannot be offered for its truth . . . The orders or instructions were offered to show that they occurred rather than to prove the truth of something asserted.[11]

Also in *United States v. Keane*,[12] a fraud case, the Seventh Circuit Court of Appeals permitted evidence of instructions to purchase property as being offered 'solely for the fact that the statement was made.' The Court went on to state that if the evidence were introduced for the purpose of proving an implied assertion that the person issuing the instructions intended the property be purchased, this would be hearsay, but admissible as an exception showing the state of the defendant's mind. In *Butler v. United States*,[13] the District of Columbia Court of Appeals held that testimony concerning a co-conspirator who instructed a witness to report that a car was stolen was not hearsay because it was 'a directive offered to prove that instructions were given.'

Instructions to place bets have generally been treated in the same manner. The basis upon which such evidence has been admitted in Australian cases is as an accompanying explanation to the act of making a telephone call. The words 'I want 10 shillings both ways on Rover for the XYZ handicap' were characterised as 'verbal acts' outside of the scope of the hearsay rule.[14]

In *Ratten v. R.*[15] a telephone operator had received a call from a female in the Ratten household sobbing and hysterically demanding, 'Get me the police, please.' During argument, counsel for the appellant said that these words were

> tendered, if not to establish the truth of the statement, at least to establish the truth of what the jury were invited to infer from the words said by the witness to have been used. This is closely akin to the purpose of establishing the truth of the statement.[16]

But the Privy Council was unanimous in rejecting the appellant's argument. Lord Wilberforce, employing reasoning in accord with that of the American courts, said

> The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called, is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on 'testimonially', *i.e.*, as establishing some fact narrated by the words.[17]

The Judicial Committee was influenced by the fact that the words spoken did not contain a direct assertion; if, rather than an instruction, the words had been 'my

10 739 F. 2d 510 (1984).
11 *Ibid.* 514.
12 522 F.2d 534 (1975).
13 481 A.2d 431 (1984).
14 *McGregor v. Stokes* [1952] V.L.R. 347, 350; *Marshall v. Watt, Struthers, and County* [1953] Tas. S.R. 1.
15 [1972] A.C. 378.
16 *Ibid.* 381.
17 *Ibid.* 387.

husband is trying to kill me', it is clear that that assertion would have been inadmissible on hearsay grounds.

(c) *Questions/Requests*

There have been various cases where the words admitted were phrased in the form of a question, request or inquiry. In *Inc. Publishing Corporation v. Manhattan Magazine, Inc.* [18] the New York District Court, speaking of telephone enquiries, said

> The declarants themselves did not testify; thus in most cases we do not know why they asked what they asked or said what they said. These declarations are not barred by the hearsay rule. An inquiry is not an 'assertion', and accordingly is not and cannot be a hearsay statement.[19]

Solicitations for sexual services have also been held not to constitute hearsay. In *Morgan v. State*,[20] a Texas court held that solicitations were 'operative facts' that indicated prostitution was taking place on the premises; it was not evidence that the acts offered would be performed. The court viewed the offers as similar to contractual offers.

In the United Kingdom the courts have adopted the same reasoning. An offer to apply 'topless hand relief' in *Woodhouse v. Hall*,[21] was regarded by Donaldson L.J. as

> not a matter of truth or falsity. It is a matter of what was really said — the quality of the words, the message being transmitted.
>
> That arises in every case where the words themselves are a relevant fact . . .The relevant issue was did these ladies make these offers?[22]

Conversely, in *R. v. Harry*,[23] the question was whether a defendant could introduce evidence of telephone calls in which the caller had asked for his flatmate in order to prove that the flatmate, and not the defendant, was the main dealer in drugs. The Court of Appeal held that the evidence was being introduced for the truth of an implied assertion that the flatmate was the drug dealer and was therefore inadmissible. Lawton L.J. thought that if the telephone had been answered by an agent then the call could be admitted to show that the premises were being used for the purpose of drug dealing.

In each of the three categories dealt with above the courts to varying degrees have considered that because the words did not directly assert anything they were somehow more reliable. Reporting such statements should, therefore, be viewed as original evidence. The drafters of the United States Federal Rules of Evidence share this view. For them, the reliability of such evidence is the same whether the utterer was 'an egregious liar or a paragon of veracity.'[24] But as writers such as Weinberg have pointed out, the dangers of reliance upon implied assertions are at least as great as reliance upon direct assertions.[25] *Walton*'s case highlights this

[18] 616 F. Supp. 370 (D.C.N.Y. 1985).
[19] *Ibid.* 388.
[20] 596 S.W. 2d 220 (1980).
[21] (1980) 72 Cr. App. R. 39.
[22] *Ibid.* 42.
[23] (1986) 86 Cr. App. R. 105.
[24] Faulknor, J. F., 'The "Hear-say" Rule as a "See-Do" Rule: Evidence of Conduct' (1961) 33 *Rocky Mountain Law Review* 133.
[25] Weinberg, M., 'Implied Assertions and the Scope of the Hearsay Rule' (1973) 9 M.U.L.R.

point. Whilst the mother's conversation which tended to establish her belief that she was talking with the defendant was not hearsay, the words 'Hello Daddy' by a four-year-old child were hearsay. Although it is conceded that the child may have been mistaken, should we rely on the proposition that what people say accurately reflects their state of mind? Might not the mother have been deliberately creating a ruse in order to convince her child and the reporting witness that the defendant still cared for them? Or she may herself have been misunderstood or misspeaking, particularly since the defendant was not the child's natural father. None of these possibilities is unreasonable, but it is unreasonable to expect a jury to draw such incredible distinctions as to what the deceased believed and who the caller was. The trial judge instructed the jury that there was no evidence showing that the defendant was in fact the caller.

It is difficult to understand why these factors only affect the weight of the evidence, while a direct assertion is hearsay. The mere fact that the language employed is unassertive does not mean that it is reliable.

(2) *ASSERTIONS OFFERED TO PROVE SOMETHING OTHER THAN THE ASSERTION*

A corollary to the reasoning used to avoid the hearsay rule when non-assertive statements are employed is that used where an irrelevant assertion is permitted to imply another relevant fact. To define hearsay as statements of fact that are introduced for the truth of the matter, permits the admission of statements of fact that are not introduced for the truth of the assertion. However, as with non-assertive statements, the implication is as much subject to the defects of hearsay as would be words expressly stating the inference: the declarant may have been mistaken, lying or intending to imply something else. This is highlighted by the following statement from *United States v. Brown:*

> the statement 'X is no good' circumstantially indicates the declarant's state of mind toward X and, where that mental state is a material issue in the case, such statement would be admissible with a limiting instruction. Technically it is not . . .hearsay since it is not being admitted for the truth of the matter alleged. We do not care whether X is in fact 'no good' but only whether the declarant disliked him. However . . .the statement 'I hate X' is direct evidence of the declarant's state of mind and, since it is being introduced for the truth of the matter alleged, must be within some exception to the hearsay rule in order to be admissible.[26]

The distinction between the former statement and the latter is that in the former the utterer's feelings are implied whereas in the latter they are directly indicated. In either case, an out-of-court declarant has made an assertion of some nature. The justification for the distinction seems to be based upon an assumption that people are not clever enough to lie indirectly and that nuances of behaviour are more reliable than the spoken word. This reasoning is illustrated by the following cases.

In *Church v. Commonwealth*,[27] the Virginia Supreme Court held that the statement by a small child that sex is 'dirty, nasty and it hurt' was admissible

268; see also, Finman, T., 'Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence' (1962) 14 *Stanford Law Review* 682.

26 490 F. 2d 758, 762-3 (1973).

27 335 S.E. 2d 823 (1985).

because it was not introduced to prove that assertion. 'Rather, it was offered to show the child's attitude towards sex, an attitude likely to have been created by a traumatic experience.'[28]

In *Sean Lydon*[29] a writing 'Sean Rules' was admitted to show that a person named Sean was connected with a gun near which a paper containing those words was found. The writing was admitted not because it was being used to prove that Sean rules, but rather for the inference that the defendant was connected with the gun.

Likewise, a statement may be admitted not to prove that the assertion contained within it is true, but to show that the utterer has made a false assertion. Inferences may then be drawn from that falsity.[30] For example, in *Mawaz Khan v. R*,[31] two accused were charged with murder. Before the trial each made statements to the police offering identical alibis. Witnesses were called who contradicted the alibis. The Privy Council upheld the trial judge's direction to the jury that they were entitled to view the statements made by the co-accused against each other as an attempt to concoct a joint story. Thus the jury were told that if they rejected the truth of the direct assertion contained in each accused's statement, they could infer guilt from the inference that the accused must have jointly fabricated a false alibi.

However, this implied assertion strikes at the heart of the hearsay prohibition because it assumes that the co-accused lied as a result of their guilty consciences. Each of the accused may have been mistaken as to their whereabouts at the time the murder was committed. Alternatively, the co-accused may be lying as to their whereabouts for a reason unconnected with the crime. Further, the police who took down the accuseds' statements may have been lying, or the witnesses who contradicted the co-accused may have been mistaken or lying. Clearly the implied assertion relied upon to justify admission of the statements against each accused can be as unreliable as a direct hearsay assertion.

Difficulties with the rule are also reflected in the contrast between *R. v. Blastland*[32] and *R. v. Szach*[33] which dealt with hearsay tendered to prove a witness' esoteric knowledge. In *Szach*, the hearsay issue was whether the defence ought to be allowed to lead evidence from a receptionist in a legal aid office which indicated that an unidentified person might have been responsible for the murder with which the accused had been charged. The receptionist testified that an unknown person came to the office the day after the murder and asked to see a solicitor. When asked, 'Have you seen a solicitor or is a solicitor willing to act for you?', the man replied, 'Only . . . [the deceased] but when I left him last night he was in no condition to act for anyone.' The trial judge ruled that this evidence was admissible but directed the jury that the conversation could

[28] *Ibid.* 825-6.
[29] [1987] Crim. L. R. 407.
[30] *Mawaz Khan and Amanat Khan v. R.* [1967] 1 A.C. 454; *Attorney-General v. Good* (1825) M'Cle & Yo. 286; 148 E.R. 421.
[31] [1967] 1 A.C. 454.
[32] [1986] A.C. 41. For a detailed discussion of this case see Williams, C.R., 'Issues at the Penumbra of Hearsay' (1987) 11 *Adelaide Law Review* 113.
[33] (1980) 23 S.A.S.R. 504.

not be used as a foundation for concluding that the unidentified person was with the victim on the night of the murder. On appeal, the Supreme Court of South Australia held that the statement had been properly admitted to show that the unkown man knew that the murder victim was incapacitated. The Court approved of the trial judge's warning on the basis that the statement could not be used by the jury as an assertion of truth.

A converse decision was made by the House of Lords in *Blastland*, which also involved evidence from the defence tending to identify a person other than the accused as the murderer. In this case the defence sought to call a number of witnesses to testify that M (a person allegedly seen by the accused in the vicinity of the crime) had, prior to the discovery of the victim's body, told them that a young boy had been murdered. M had been fully investigated by the police following the crime but there was no forensic evidence linking him with the victim, whereas there was significant forensic evidence linking the accused with the victim. M's existence, movements and practices had been put before the jury by way of formal admissions from the prosecution. However, the trial judge refused to admit the statements by M into evidence on the ground that they consisted not only of an implied admission of knowledge of the crime but also of an implied admission to the crime itself. Thus the statements were being offered to prove an implicit acknowledgement of guilt and as such they were hearsay. The House of Lords agreed but went further. Lord Bridge of Harwich, who delivered the leading judgment, said that M's knowledge *per se* was not relevant to whether the accused was guilty of murder except by way of an implication that M was guilty of the murder. There was, however, 'no rational basis whatever on which the jury could be invited to draw an inference as to the source of that knowledge. To do so would have been mere speculation.'[34]

In both *Szach* and *Blastland* the relevance of the statements proffered depends on deductions made by the listener as to the source of the declarant's knowledge. In *Szach*, the Court believed that the hearsay danger could be overcome by directing the jury that the impugned statement could only be used to show the declarant had esoteric knowledge. In other words, the statement could not be used as an assertion of participation in the crime. By going a step further and questioning the relevance of knowledge in the absence of any implication as to participation, the House of Lords has highlighted that there is little difference between an assertion of fact made by the speaker and assertion of fact deduced by the listener. It seems that in *Szach* the Court resiled from a rule so wide as to include non-assertive words. However, logic dictates that the hearsay rule be applied consistently. The fact that it is applied inconsistently suggests an unacknowledged dissatisfaction with the rule.

(3) *CONDUITS OF ASSERTIVE STATEMENTS*

Where third parties act as conduits of assertive information it is unlikely that the courts will regard their testimony as hearsay unless they are conveying information which is itself based upon second-hand knowledge.

[34] *R. v. Blastland* [1986] A.C. 41, 54.

Where a witness testifies as to his or her own out-of-court identification of a party, that evidence will be treated as relevant, original evidence.[35] Police officers or other persons present during an out-of-court identification will also be able to testify that the witness made an identification, provided that the witness is able to give evidence that on a prior occasion a person connected with the crime was identified.[36] Where the witness does not give evidence that any previous identification was made, the evidence of others present during a previous act of identification will be excluded as hearsay.[37] In America, the courts have gone one step further, excluding extra-judicial identification unless the declarant is able to give evidence disclosing the reasons underlying the identification.[38]

By use of the same reasoning, a police officer's identification of a motor-vehicle registration number can be confirmed in testimony by another officer who recorded what the police officer observed.[39] In that instance, the other officer's testimony is tendered merely to show that an identification was made and not to confirm the accuracy of the identification. In either case (identification of a person or object) the witness who made the original identification need only testify that an act of identification took place and need not testify about whom or what was identified. Hence, if the policeman could not remember the registration number of the vehicle he observed, the other officer who recorded that observation while it was still fresh in the observing officer's memory, would not be excluded from testifying that an observation was made and recorded.[40]

Similarly, a photofit picture prepared by a police artist will not be regarded as hearsay.[41] It has been said that photofits are merely

> manifestations of the seeing eye, translations of vision onto paper through the medium of a police officer's skill of drawing or composing which a witness does not possess. The police officer is merely doing what the witness could do if possessing the requisite skill.[42]

Thus, the court regarded the photofit as 'another form of the camera at work.'[43] Provided that the witness is able to vouch for the accuracy of the photofit, that is, to give evidence of how and on what basis it was made, the photofit will be admitted whether or not the witness is able to make an in-court identification.[44]

Provided an interpreter proves that an interpretation was carried out faithfully and accurately, the interpreter can give evidence of a conversation between persons who speak different languages.[45] According to Dixon J., testimony from an interpreter

35 *Alexander v. R.* [1981] 145 C.L.R. 395, 403 *per* Gibbs C.J., 427 *per* Mason J. with whom Aitkin J. agreed.
36 *Ibid.* 407 *per* Gibbs C.J., 434 *per* Mason J. with whom Aitkin J. agreed.
37 *Ibid.*
38 See *United States v. Owens* 789 F. 2d 750, 756-7 (1986), a decision based upon Rule 801(d)(1)(C) Federal Rules of Evidence. Rule 801 (d)(1)(C) requires the declarant to be subject to cross-examination concerning the statement of identification.
39 *Guy v. R.* [1978] W.A.R. 125.
40 *Ibid.*; *Alexander v. R.* (1981) 145 C.L.R. 395.
41 *R. v. Cook* [1987] 1 All E.R. 1049.
42 *Ibid.* 1054.
43 *Ibid.*
44 *Commonwealth v. Weichell* 453 N.E. 2d 1038, 1040-5 (1983); *Alexander v. R.* (1981) 145 C.L.R. 395.
45 *Gaio v. R.* (1960) 104 C.L.R. 419.

is not an *ex post facto* narrative statement of an event that has passed within the rule against the admissibility of hearsay but is an integral part of one translation consisting of communication through the interpreter.[46]

In all these cases, the evidence of the third party recorder is treated by the courts as if it were real evidence. The photofit is akin to a photograph, the identification is akin to a video-recording and the translation is akin to a tape-recording. The justification put forward is based upon the alleged purpose of the tender. Practically, however, a court is enabled to infer from the evidence a relevant fact which it could not admit had it been asserted explicitly. In the motor vehicle registration number case, for example, the recorder of the information is impliedly asserting that the observing police officer saw and identified a particular motor vehicle registration number. The identification of a suspect in a photograph can achieve no practical effect other than connecting the accused with the commission of the crime.

However, the distinction made by the courts regarding assertive and non-assertive statements is often fine. Unless it reflects a police officer's own observations, a sketch by that officer of the scene of a crime or motor vehicle accident will ordinarily be regarded as hearsay because it is based upon information supplied by other witnesses.[47] Under those circumstances, the sketch becomes a pictorial representation of their statements. The distinction between the sketch and the photofit lies, according to the courts, in their intrinsic nature. The photofit is simply a recording confirmed in court by the witness who supplied the information for the recording, whereas the sketch contains assertive statements albeit of a pictorial kind resting for their value upon the credibility of an out-of-court declarant.

(4) *STATEMENTS OF INTENTION*

A declared intention to carry out a plan of action differs from a declared state of mind towards a person or object because the finder of fact is drawn to infer that the planned action was executed. A declaration such as 'X is horrible and I wish he were dead' might provide circumstantial evidence of malice on the part of the utterer towards X, whereas a declaration of intention invites the listener to conclude not only that the utterer held a certain belief but also that the intention was eventually implemented.

The dangers of this type of evidence are twofold. First, the utterer may be mistaken or self-serving. For example, a girl may tell her parents, 'I am going to the beach with Frank tonight.' This statement could be based upon a misperception of the weather, or it could be a deliberate misstatement to confuse her parents about the identity of her companion. Alternatively, others may frustrate or alter her plans. She may become involved in a car accident on her way to the beach or Frank may invite her elsewhere. Nevertheless, similar statements have been admitted into evidence by the courts for the limited purpose of showing the

[46] *Ibid.* 421.

[47] See, regarding documents in general, *Myers v. D.P.P.* [1965] A.C. 1001, and in particular *State v. Randolph* 462 A. 2d 1011 (1983); *Schmidt v. Schmidt* [1969] Q.W.N. 3.

utterer's intention[48], although a statement in the past tense to the effect that 'I went to the beach' would clearly be hearsay.

There seems to be a degree of confusion as to whether this evidence is admitted on the footing that it is an exception to the hearsay rule or whether it is original evidence.[49] American case law tends to treat it as an exception to the hearsay rule[50] and this position has been adopted by the Federal Rules of Evidence.[51] Conversely, in *Walton v. R*[52] the majority of the High Court were of the opinion that it was original evidence. According to Cross[53] there is no practical difference between the two positions. However, this overlooks the use to which the evidence may be put. If admitted as an exception to the hearsay rule, the statement becomes evidence of the truth of the matter therein asserted. If admitted as original evidence the statement cannot be used to prove the matter asserted within it, but can only be used in support of circumstantial inferences associated with the fact that the statement was made. Under the American approach, therefore, there are fewer logical problems with admitting a statement such as 'I am going to the beach with Frank' since the assertion contained within it is not a matter excluded by hearsay rules. But under the Australian approach, the truth of the assertion implied by the declaration must be excluded from the fact finder's consideration. Thus, the finder of fact is precluded from making the deduction that the utterer did go to the beach with Frank. The considerations are limited to determining whether or not the utterer held a certain belief or intended to a certain act.

The futility of such evidence once limited in this manner was self-evident to Deane J. who delivered a dissenting judgment in *Walton*. While the majority decided that evidence of a murder victim's declared intention to meet the defendant at a local shopping centre on the night of her murder was admissible as verbal conduct, Deane J. felt that evidence of the victim's subjective intention was simply irrelevant if made in the absence of the defendant. Because the evidence was not capable of proving that the victim carried out her intentions, it lost probative value.

The majority were not troubled with relevance. Reference was made to an earlier South Australian Supreme Court decision, *R v. Hendrie*,[54] where a murder victim's declared intention to have her bedroom redecorated was admitted against a defendant, a house renovator, who had worked in the victim's house

[48] *People v. Alcade* 148 P. 2d 627, 628 (1944). The statement by a murder victim 'that she was going to dinner that night with "Frank"' was admitted into evidence against Frank who was charged with her murder.

[49] Cleary, E. W. (ed.), *McCormick on Evidence* (3rd ed. 1984) 843; Byrne, D. and Heydon, J. D., *op. cit.* 1000; *Dobson v. Morris* [1986] 4 N.S.W.L.R. 681; *R v. Hendrie* (1985) 37 S.A.S.R. 581; *Walton v. R.* (1989) 84 A.L.R. 59.

[50] E.g. *Mutual Life Insurance Co. v. Hillmon* 145 U.S. 285 (1892); *United States v. Pheaster* 544 F. 2d 353 (1976); *Shepard v. United States* 290 U.S. 96 (1933).

[51] Federal Rule of Evidence 803(3). For a discussion of the effect of this provision against its common law background see Wiseman, T.A., 'Federal Rule of Evidence 803(3) and the Criminal Defendant: The Limits of the *Hillmon* Doctrine' (1982) 35 *Vanderbilt Law Review* 659.

[52] (1989) 84 A.L.R. 59.

[53] Byrne, D. and Heydon, J. D., *op. cit.* 1000. This was also the opinion of Glass J.A. in *Dobson v. Morris* (1986) 4 N.S.W.L.R. 681, 683.

[54] (1985) 37 S.A.S.R. 581.

on prior occasions. The reason advanced for admitting the evidence in *Hendrie* was to explain why the murder victim was in the bedroom with the murderer without apparent struggle, and thereby tended to identify the defendant as the murderer. King C.J. said that the evidence was admissible as 'original circumstantial evidence tending to establish [the victim's] state of mind'[55] which by inference became evidence of the victim's state of mind at the time of her murder. In other words, the evidence was admitted in order to provide a foundation for the inference that the assertion 'I am going to redecorate the bedroom' was true. Had this assertion been made linguistically in present or past tense it would have been excluded by the hearsay rule. Suppose that the victim had received a phone call while together with the murderer in her bedroom. If during the telephone conversation the victim were to mention that she was with the defendant, that statement would be hearsay.

The distinction made by the majority of the High Court in *Walton* and the South Australian Supreme Court in *Hendrie* lies in the perceived reliability of declarations of intention. Wilson, Dawson and Toohey JJ. said that '(o)rdinarily . . . [such statements] are reactive and are uttered in a context which makes their reliability the more probable' (than bald assertions)[56]. King C.J. said that 'their evidentiary value is derived from experience of human behaviour which indicates that people tend to express their intentions or their states of mind.'[57] But what evidence is there to support such a perception? When talking of plans or feelings is a person likely to be more or less truthful and accurate than when talking about objective observation? Should we not be looking for other factors that indicate reliability such as degree of spontaneity or apparent sincerity? Even if we accept that a person is likely to be more truthful and accurate when speaking of his or her intentions, is it reasonable to rely upon such statements when what is sought to be proven requires the co-operation of another? In *Walton*, for example, the statements elicited included a declared intention to meet the defendant. Deane J. thought it would be unfair if a litigant could call upon earlier statements of intention to buttress the case against a stranger to those statements. The unfairness would be exacerbated against an accused charged with murder. Deane J. is supported by the drafters of United States' Federal Rules of Evidence who note that the declared intention exception to the hearsay prohibition should be limited 'so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person.'[58] The practice of the American courts, however, has been to admit such statements subject to a limiting direction to the jury.[59]

The majority in *Walton* noted that the trial judge had directed the jury that they could not rely upon the victim's statements as evidence that she did in fact go to the shopping centre to meet the defendant. Such an instruction, however, is of limited effectiveness if the evidence has little other relevance.

[55] *Ibid.* 585.
[56] *Walton v. R.* (1989) 84 A.L.R. 59, 74.
[57] *R. v. Hendrie* (1985) 37 S.A.S.R. 581, 585.
[58] House Comm. on Judiciary, Federal Rules of Evidence, H.R. Rep No. 650, 93d Cong., 1st session, p.13 (1973) reprinted in Cleary, E.W. (ed), *op. cit.* 843.
[59] For a discussion of the case law see Wiseman, *op. cit.* 684-95.

CONCLUSION

There is something magical about hearsay. With hindsight, casual words or actions before a calamity take on a sad but convincing aspect. Why is this so? Is it because a passed-on word does not challenge us? We must simply believe or not believe. Hearsay is condemned for its unreliability. But in reality it is unreliable because it is readily believable. The purpose of this article has been to illustrate, through an examination of case law, the inherent difficulties of distinguishing between statements and assertions, and between statements which are offered for their truth and those which are not. It is the writers' contention that there is no basis for such a distinction apart from the linguistic effect of the statement under consideration. There is little to distinguish in probative value between a direct or implied hearsay statement. Both are subject to ambiguities in the absence of cross-examination.

The language that is used by the utterer however distracts the court from the dangers. Any piece of evidence can contain a hidden assertion. Take the following example: a gun is found near the scene of a crime with the defendant's fingerprints on it. There would be no doubt that this evidence is admissable, yet it may be an assertion by an out-of-court utterer X. X may have shot the victim and then placed the gun with D's fingerprints near the body. In doing this, X is asserting that D killed V. But because X is not visible, the assertion becomes silent and all that is seen is real evidence from which an inference must be drawn. However, if the asserter is apparent then the evidence indicating the assertion would be inadmissible. It would not be admissible for a witness to testify that her lover left his blind up whenever his wife was at home and that the blind was up on the day in question because implicit in the blind being up is the assertion by the husband that his wife was at home. The courts, however, experience difficulty in seeing why witnesses should be able to report that they heard a primal scream but not that they heard someone say in a frightened voice 'get me the police'.

Given the strained logic employed by the courts, especially in cases like *Ratten*[60] and *Walton*,[61] one may ask whether legal proceedings would be more just and efficient if the rule against hearsay were abandoned altogether. That the courts seem to be more interested in justifying admission of second-hand statements on the basis that linguistically they do not wear the character of a relevant assertion, indicates that the courts do value their probative properties. If, in reality, the practical dangers associated with direct hearsay are the same, direct second-hand assertions ought also to be admitted for their probative value.

To overcome the dangers that justified the original hearsay rule, the trial judge might instead be obliged to give warnings as to the reliability of hearsay evidence. Similar warnings are not unusual for other unreliable sources of admissible evidence such as accomplices[62] and young children.[63] Furthermore, by

[60] [1972] A.C. 378.
[61] (1989) 84 A.L.R. 59.
[62] *Davies v. Director of Public Prosecutions* [1954] A.C. 378.
[63] *Director of Public Prosecutions v. Hester* [1973] A.C. 296.

strictly controlling the test of relevance so that second-hand statements of remote value and grave prejudicial nature are excluded, there is little to support the fear that parties' interests will be compromised or that trials will become unnecessarily long, drawn out affairs littered with hearsay utterances. After all, the law as it stands allows admission of second-hand statements without any warning as to their reliability, and with little regard for time-wasting, upon the dubious assumption that people are less likely to be mistaken or to lie by implication. We submit that a liar is just as likely to give a misleading impression as to be brazenly direct. Therefore, why bother with cumbersome and unattractive logic to distinguish between the two?