The Queen v Benz: The Hearsay Rule Going . . . Going . . . !

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On February 9, 1989, the High Court of Australia handed down its decision in *Walton v The Queen*,[1] a case that dealt with several important aspects of the hearsay rule. In a comprehensive comment on the case, Stephen Odgers suggested that *Walton* was a "landmark decision" and that it signalled the High Court's willingness to take " . . . a more flexible approach to the hearsay rule, a willingness to apply it as a principle rather than as a strict rule."[2]

Walton dealt, inter alia, with the question as to whether implied assertions, not intended to be assertive, were caught by the hearsay rule and, if so, whether such evidence should nonetheless be admitted. The Crown wished to establish that the day before her death, the deceased had a telephone conversation with the accused wherein she agreed to meet him at a specific place on the following day. A witness who was with the deceased and overheard her conversation proposed to give evidence that the deceased put her young son on the telephone and he began his conversation by saying "Hello daddy". Other evidence established that the boy only referred to the accused as "daddy" and accordingly, this evidence identified the accused as the caller.

The majority of the High Court (Wilson, Dawson and Toohey JJ) concluded that the evidence of what the boy said on the telephone was inadmissible hearsay which could not be used to identify the accused as the caller.[3] The Chief Justice, however, while classifying the evidence as hearsay, concluded that it should be admitted. In doing so he said this:[4]

> The hearsay rule should not be applied inflexibly. When the dangers which the rule seeks to prevent are not present or are negligible in the circumstances of a given case there is no basis for a strict application of the rule. Equally, where in the view of the trial judge those dangers are outweighed by other aspects of the case lending reliability and probative value to the impugned evidence, the judge should not then exclude the evidence by a rigid and technical application of the rule against hearsay. It must be borne in mind that the dangers against which the rule is directed are often very considerable, as evidenced by the need for the rule itself. But especially in the field of implied assertions there will be occasion

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1 (1989) 63 ALJR 226.

2 Odgers, S J, "Walton v The Queen — Hearsay Revolution?" (1989) 13 *CLJ* 201.

3 Above n1 at 235.

4 Id at 229-230.

> upon which circumstances will combine to render evidence sufficiently reliable for it to be placed before the jury for consideration and evaluation of the weight which should be placed upon it, notwithstanding that in strict terms it would be regarded as inadmissible hearsay.

Justice Deane agreed with the conclusions reached by the Chief Justice on this issue but approached the matter in a somewhat different manner.[5] He focussed on the fact that witnesses who hear telephone conversations usually only hear one side of the conversation and if the hearsay rule is to be strictly applied, it would likely exclude evidence as to the identity of the other party to the call derived from contemporaneous statements of the party who is overheard. To him, this result made little sense:[6]

> The hearsay rule should not, however, be inflexibly applied but should be qualified where the circumstances are such that its inflexible application would confound justice or common sense or produce the consequences that the law was unattuned to the circumstances of the society which it exists to serve. There is plainly something to be said for the view that, at least in some circumstances, the hearsay rule should be qualified so as not to preclude the receipt of evidence of contemporaneous statements made by one party to a telephone conversation (either in the course of the actual conversation or immediately before or after it) which disclose that the other party to the conversation was the person against whom it is sought to lead otherwise relevant and admissible evidence of that part of the conversation which was overheard.

Following *Walton*, it was predictable that in future cases, counsel would rely on the language of the Chief Justice and of Deane J while seeking to persuade courts to take a more relaxed approach to the application of the hearsay rule than had been exhibited in earlier decisions.[7] What was less predictable however, was that the High Court would have another opportunity to consider similar aspects of the hearsay rule so soon after delivering its judgment in *Walton* and that, to some extent, it would reinforce the direction toward flexibility indicated in the *Walton* decision. In some respects, *The Queen v Benz*[8] goes even further than *Walton* in suggesting a liberalization of the application of the hearsay rule and justifies Mr Odgers' prediction that the High Court is prepared to take a "radical solution" to the problem of hearsay evidence.[9]

The High Court handed down its decision in *Benz* on December 14, 1989. The Court considered three aspects of the hearsay rule: implied assertions, res gestae, and declarations as to family relationships, all arising from the same piece of evidence.[10]

The accused, Cheryl Murray and Karen Benz, are mother and daughter. They were convicted by a jury of the murder of one Ronald Taber a man with whom Murray had been living. Taber's body was found in the Albert River in

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5 Id at 236.

6 Ibid.

7 See for example *Myers v DPP* [1965] AC 1001; *Re Gardner* (1967) 13 FLR 345; *Re Van Beelan* (1974) 9 SASR 163; *R v Blastland* [1985] 3 WLR 345.

8 (1989) 64 ALJR 94.

9 Above n2 at 216.

10 *Benz* is also an important decision on the law of identification. See Odgers, "*Benz*" (to be published in the *Criminal Law Journal*).

Queensland downstream of the Mundoolum Bridge. The evidence established that Taber had died as a result of drowning although he had also suffered extensive injuries to his head and stab wounds to his chest and throat. The Crown alleged that Murray and Benz had inflicted some of the injuries at the deceased's home and then taken him by car, a blue Ford Laser hatchback, to the bridge, stabbed him and then dumped his body in the river. There was evidence of blood stains of the same blood group as the deceased in his bedroom, on the bridge and on a piece of plastic sheeting found in the river near his body. A piece of carpeting had been replaced in the deceased's bedroom in an amateurish fashion. The blue Ford Laser hatchback was found abandoned and burning in the neighbourhood of the deceased's home on the same morning that the alleged murder took place. There was also evidence that Taber and Murray had not been getting along well.

In addition, a witness, one Saunders, was called by the Crown to give important evidence which became the subject matter of the appeals. Saunders testified that on his way home from work at 2.45 am some five nights prior to Taber's body being found, he stopped on the Mundoolum Bridge to give assistance to two women who were standing near the middle of the bridge. He also observed a blue Laser or Pulsar hatchback motor vehicle parked at one end of the bridge.

The women had their backs to Saunders which made a positive identification impossible although he gave some evidence as to identification. At one point, the younger woman on the bridge turned to him and when he asked if everything was all right, she replied that it was OK, her mother was just feeling sick. The Crown tendered this evidence to establish that the two women on the bridge were mother and daughter and this, together with the other evidence, established the accused as Taber's murderers.

The two accused were convicted but their appeals to the Criminal Court of Appeal of Queensland were successful. That Court held that the evidence given by Saunders as to the statement made by the younger woman was inadmissible hearsay as to her relationship with the older woman. Although this evidence had been admitted at trial without objection, the Court concluded that it ought to have been excluded. In the result, the Court directed an acquittal for Benz and a new trial for Murray.

The Crown sought special leave to appeal to the High Court of Australia and the matter was heard by the Chief Justice and by Deane, Dawson, Gaudron and McHugh JJ. In a 3:2 decision, (Mason CJ and Dawson J dissenting) special leave to appeal was refused. Each of the judgments addressed the admissibility of the evidence of Saunders as to the identity of the women on the bridge and it is submitted that the judgments of three members of the Court went even further than the judgments of the Chief Justice and Deane J in *Walton* in softening the rigidity of the approach to the application of the hearsay rule.

Gaudron and McHugh JJ in a joint judgment[11] held that the evidence of Saunders as to the statement made by the younger woman on the bridge was an implied assertion that the older woman was her mother and was therefore

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11 Above n8 at 105.

hearsay. However, they suggested that such evidence could possibly be admitted under a "general exception" to the hearsay rule based on a high degree of reliability.

> The statement by the younger woman 'It's all right, my mother's just feeling sick', impliedly asserted that the other woman on the bridge was her mother, and was tendered to prove that fact. It was relied on 'testimonially' to establish the relationship of the two women. It was, therefore, a hearsay statement to which the rules governing the admissibility of hearsay statements applied . . . . There is, however, much to be said for the view that the rationale of the exceptions to the rule which prohibits the admission of hearsay evidence is that evidence falling within the exceptions has a high degree of reliability and can be acted upon safely . . . . If this is the rationale of the exceptions to the hearsay rule then, notwithstanding the decision in *Myers v Director of Public Prosecutions* [1965] AC 1001, a strong case can be made for developing and applying the common law rules of evidence by reference to the principle that hearsay evidence will be admitted when it appears to have a high degree of reliability. However, although counsel for the Crown said that there were a 'number of bases' upon which the statement made to Mr Saunders was admissible, he did not argue that the statement was admissible under a general exception to the hearsay rule. He contended that it was within the res gestae exception to the hearsay rule. It is profitless, therefore, to examine whether the statement or part of it was sufficiently reliable to be admissible under a general exception to the hearsay rule.[12]

The judgment went on to consider whether the evidence was admissible under the res gestae exception to the hearsay rule viz that the statement was a part of the transaction or occurrence. It reasoned that the statement would be admissible on this basis but only if the "transaction" was first established by other evidence, viz that the two women on the bridge whoever they were, had killed Taber and were in the course of disposing of his body when seen by Mr Saunders. Once that finding was made, the statement as to identity could be used as part of the res gestae. Accordingly, Gaudron and McHugh JJ concluded that the jury should have been expressly directed as to the limited way in which it could have used the statement and not having been so directed, it might have used the statement for an improper purpose. In the result, they concluded that the Court of Criminal Appeal was correct in setting aside the convictions and that special leave to appeal should be refused.

Deane J agreed with the result reached by Gaudron and McHugh JJ. He reasoned that the statement of the younger woman as to her relationship with the elder was hearsay. As the Court of Criminal Appeal had not specifically addressed the issue as to its admissibility as part of the res gestae, special leave to appeal should be refused as no matter of "general principle or general public importance" was in issue. His Honour also concluded that had the matter been properly argued before the lower court, it would likely have decided that the convictions ought to have been set aside in any event. He reasoned that the evidence in question was not evidence against Murray and only evidence against Benz which could identify her as the person who made

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12 Id at 107.

the statement had there been other evidence in this respect. In the absence of such evidence, there was reasonable doubt as to Benz's guilt.[13]

The Chief Justice in dissenting, concluded that special leave to appeal should be granted as the High Court could not allow an error of principle on the part of the Court of Criminal Appeal to remain on the law of evidence.[14] The statement of the younger woman constituted an implied assertion which was hearsay but which ought to be admitted as part of the res gestae. He reasoned that given the circumstances in which the statement was made, there was an irresistible inference that the two women on the bridge had just "dumped" the body into the river and so the transaction which was the substance of the criminal charge was ongoing at the time. He found that the statement was a "spontaneous utterance" made in response to a stranger who had suddenly appeared on the scene and, as such, was likely trustworthy and reliable at least in part.[15]

The Chief Justice concluded that the res gestae doctrine is a recognized exception to the hearsay rule and is part of the law of Australia. That the rule required further clarification, however, was evident from the following passage from his judgment:[16]

> . . . I acknowledge the force of the criticisms made of the doctrine of res gestae, perhaps best expressed by Morgan, 'A Suggested Classification of Utterances Admissible as Res Gestae' (1922) 31 Yale Law Journal 229, in these terms:
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> > "The marvellous capacity of a Latin phrase to serve as a substitute for reasoning, and the confusion of thought inevitably accompanying the use of inaccurate terminology, are nowhere better illustrated than in the decisions dealing with the admissibility of evidence as 'res gestae'."
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> But the doctrine is well established in the common law in its application to the hearsay rule and the statement of the younger woman falls within the doctrine. There is perhaps some novelty in the character of the statement in that it bears upon the relationship between the perpetrators of a criminal offence. However, this factor is not a reason for excluding it from the operation of the res gestae rule.
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> The fact that the doctrine has been much criticised does not entail the conclusion that it has generated decisions that are incorrect. On the contrary, the criticism most often voiced, of which the passage already quoted is an example, is that the doctrine lacks a theoretical and principled foundation. In this respect it may require reexamination on some appropriate occasion, just as the hearsay rule itself invites reexamination: see *Walton v The Queen*.[17]

The Chief Justice also concluded that the statement in question was admissible as a statement of belief as to family relationships which falls outside of the scope of the hearsay rule. He relied on the authority of the House of Lords in *Lloyd v Powell Duffryn Steam Coal Co Ltd*[18] where the

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13 Id at 98.
14 Id at 94.
15 As to the Chief Justice's view that different degrees of reliability could be attributed to different parts of the same statement, see below.
16 Above n8 at 97.
17 [1914] AC 733.

statement of a deceased father as to the paternity of his child and his intention to support that child was admitted in proceedings brought by the child for compensation by a dependent under the *Workmen's Compensation Act* 1906. His Honour, in analysing the *Lloyd* decision reasoned as follows:[19]

> Although acknowledgments of paternity stand in a special position, there is no reason for restricting the decision in Lloyd to issues of paternity. In principle the decision is capable of applying to statements affirming the relationship of parent and child made by either party to that relationship. Such a statement evidences the belief of the speaker that the relationship exists, so long at least as the statement is not made in such circumstances as to indicate that it may not express the genuine belief of the speaker. As a matter of everyday life people behave and speak in a way that reflects their beliefs as to their relationships with other persons. Our experience of human affairs shows that these expressions of belief are, generally speaking, reliable, at least in the case of close relationships such as parent and child, brother and sister. There is, accordingly, a strong foundation for receiving utterances reflecting the speaker's belief in his or her close relationship and for regarding the admission of that evidence as standing outside the operation of the hearsay rule.

Finally, the dissenting judgment of Dawson J would have admitted the statement of the younger woman on the bridge not for the purposes of proving the truth of the implied assertion contained therein but solely for the purpose of establishing the fact that the younger woman referred to the elder as her mother thereby suggesting that the two women on the bridge were in fact, the two accused.[20] He viewed the statement by the younger woman as a verbal act relevant to the identity of the two women on the bridge. As such, the statement was verbal conduct not narrative and was admissible following the same reasoning adopted by the Privy Council in *Ratten v R.*[21]

Alternatively, Dawson J would have admitted the statement under the res gestae exception to the hearsay rule but that was unnecessary having regard to his conclusion that the evidence was simply not hearsay.[22]

Implied Assertions and the Res Gestae Exception

The judgments of the Chief Justice, Gaudron, McHugh and Deane JJ all classify the part of the younger woman's statement relating to her mother as constituting an implied assertion tendered for the purposes of proving the truth of its contents. As such, it was hearsay and prima facie inadmissible unless admissible under an exception to the rule.

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18 Above n8 at 96-97.
19 Id at 102.
20 [1972] AC 378.
21 Above n8 at 105.
22 Reform of the hearsay rule has been advocated elsewhere: see Maguire, "The Hearsay System: Around and Through the Thicket" (1961) 14 *Vand L Rev* 741; Murray, "The Hearsay Maze: A Glimpse at Some Possible Exits" (1972) 50 *Can B Rev* 1; Tribe, "Triangulating Hearsay" (1975) 87 *Harv L Rev* 957; Weinstein, "Alternatives to the Present Hearsay Rules" (1967) 44 *FRD* 375; *Evidence*, Australian Law Reform Commission, Report No38 (AGPS); *Ares v Venner* [1970] SCR 608; Delisle, *Evidence Principles and Problems* (2nd edn, 1989) p352 et seq.

The joint judgment of Gaudron and McHugh JJ offers the tantalizing suggestion that such assertions should be admissible under a new exception to the hearsay rule which they refer to as a "general exception". Admissibility would depend on a case by case determination as to whether a sufficiently high degree of reliability existed in the circumstances so as to justify admission. Presumably such circumstances would include the likelihood of errors in perception, language and memory, and the likelihood of concoction. It might even be enlarged to include matters of necessity and convenience.

The adoption of a "general exception" of this kind would, in essence, spell an end to the hearsay rule as we now understand it. The old rule and its many specific exceptions would be replaced by a new rule which is based on common sense and judicial discretion.[23]

This "radical idea" offered by Gaudron and McHugh JJ was clearly obiter dicta as the ratio of their judgment centred on whether the statement in question was admissible under the res gestae exception. In the result, they concluded that it was not. However, their interest in the "general exception" concept, suggests a willingness to consider the application of the hearsay rule on basic principles and their reasoning in this respect is reminiscent of the judgment of Chief Justice Mason in *Walton.*

The Chief Justice did not deal with the "general exception" concept in his judgment in *Benz.* He would have admitted the statement in question as part of the res gestae. He differed in result from Gaudron and McHugh JJ on this issue as he concluded that the nature of the "transaction or occurrence" had already been established by other evidence so that the statement was admissible in order to establish the identity of the women on the bridge. However, the Chief Justice's judgment in *Walton* suggests that he too might favour an approach to the hearsay rule which is based on flexibility and the "general exception" concept would certainly satisfy that criteria.

During the course of considering the statement in question under the res gestae exception, the Chief Justice drew a distinction between that part of the younger woman's statement which referred to the elder woman as her mother and that part which related to 'her mother's' state of health. The Chief Justice said this:[24]

> However, the statement in the present case though hearsay because it involved an implied assertion about the speaker's relationship with her mother, was in that respect evidence which appeared to be reliable. It was a spontaneous utterance, made in response to the sudden and unexpected arrival of a stranger upon the scene, an event which must have taken the younger woman by surprise. Her response in this situation should be treated as trustworthy and reliable, there being nothing to suggest otherwise, except to the extent that the assertion that the other woman was sick may on one view be taken to have been an invention to explain the presence of the two women on the bridge and the failure of the other woman to move from her position at the edge of the bridge. But the truth or falsity of that assertion, itself not in issue, provides no reason for thinking that the description given of the other woman was also invented.

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23 Above n8 at 97.
24 Ibid.

The Chief Justice concluded that the portion of the statement relating to the familial relationship between the women on the bridge ought to be admitted as part of the res gestae. It derived its circumstantial guarantees of trustworthiness from its spontaneity resulting from a "sudden and unexpected" confrontation by a stranger. However, the Chief Justice casts doubt on the reliability of that part of the statement which related to the state of health of the older woman on the basis that it might have been an "invention" concocted to explain why the two women were on the bridge in the middle of the night. Accordingly, spontaneity appears to support the reliability of part of the statement but not necessarily all of it. The question remains as to the proper direction that a trial judge should give to a jury when circumstances such as these arise.

It is my view that if a trial judge determines that a statement was made as part of the res gestae viz in the penumbra surrounding the actual event giving rise to the criminal charges in question, then the entire statement should be admitted for consideration by the jury. The trial judge should not engage in the exercise of weighing various parts of the same statement with a view to admitting some portions of the statement but not others. In the circumstances, it is even problematic to anticipate how the trial judge could usefully comment on the weight of the evidence as it is difficult to conceptualize how spontaneity resulting from a "sudden and unexpected" confrontation could suddenly end part way through an utterance thereby rendering one part of the statement less reliable than another. The safer course is to leave the entire statement to the jury which can weigh it as it sees fit.

Declaration as to Family Relationships

The absence of comment by the Chief Justice on the "general exception" doctrine suggested in the judgment of Gaudron and McHugh JJ should not be taken as a lack of enthusiasm on his part for reform of the hearsay rule. Indeed, that part of his judgment which deals with the admissibility of the younger woman's statement as an ". . . acknowledgment . . . affirming the relationship of parent and child made by either party to that relationship" is even more remarkable than the enthusiasm that he expressed for reform in *Walton*.[25] The Chief Justice classified this evidence as evidence of a declarant's belief that a family relationship existed in circumstances that appeared to be genuine and as such, the evidence falls outside the scope of the hearsay rule.[26]

As authority for this view, the Chief Justice relied on the decision of the House of Lords in *Lloyd v Powell Duffryn Steam Coal Co Ltd*.[27] As previously indicated, that case dealt with an application by a child for compensation as a dependent pursuant to the provisions of the *Workmen's Compensation Act* 1906. The child alleged that she was the child of her deceased father who was killed in an accident arising out of and in the course of his employment. In order to establish paternity and dependency, the child's mother gave evidence that the deceased was the father of the child and that

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25 Ibid.
26 Above n17.
27 See the judgment of Lord Bridge of Harwich in *R v Blastland* [1985] 3 WLR 345.

shortly prior to his death, he told her that he intended to marry her in sufficient time before the child was born. The deceased's room-mate also testified that the deceased had told him that the mother was in trouble and that it was a case of getting married and that he wanted to provide a home for himself and for the mother. The employer respondent did not contest the issue of paternity but did contest the issue of dependency.

The evidence of both the mother and the room-mate was ruled admissible by the House of Lords. While the judgments in *Lloyd* have been criticized for their diversity,[28] the speech of Lord Moulton has been taken to best express the ratio:[29]

> . . . the argument before your Lordships was based on a wholly different ground, namely, that the state of mind of the deceased, so far as it bore on his acceptance of his position as the father of the child and his intention to fulfil his duties as such, was relevant to the issue of dependency, and that the evidence in question was admissible as being proper to determine his state of mind. I am of opinion, my Lords, that on this ground the evidence was admissible. It can scarcely be contested that the state of mind of the putative father and his intentions with regard to the child are matters relevant to the issue, whether there was a reasonable anticipation that he would support the child when born. It may be that an intention on his part so to do might be implied from the fact of his paternity and his recognition of it. But whether this be so or not, the attitude of mind of the putative father is that from which alone one can draw conclusions as to the greater or less probability of his supporting the child when born, and therefore evidence to prove that attitude of mind must be admissible if it be the proper evidence to establish such a fact. Now, it is well established in English jurisprudence, in accordance with the dictates of common sense, that the words and acts of a person are admissible as evidence of his state of mind.

In his decision in *Benz*, Chief Justice Mason said this about the decision in *Lloyd*:[30]

> But there is authority in the House of Lords, for the proposition that statements acknowledging paternity do not come within the scope of the hearsay rule: *Lloyd v Powell Duffryn Steam Coal Co Ltd* [1914] AC 733. I acknowledge that the speeches in that case do not enunciate an agreed basis for that conclusion, perhaps because the paternity of the child seems to have been conceded at the hearing of the appeal: see at 736. Nonetheless, it is apparent that the House of Lords, having held that the statements were not declarations against interest, considered that they were not affected by the hearsay rule. That conclusion accorded with the earlier decision of the House of Lords in the case of *The Aylesford Peerage* (1885) 11 App Cas 1.
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> Two strands of thinking emerge from their Lordships' reasons. First, there was the view that statements acknowledging paternity, as well as acts pointing to paternity evidenced the belief of the parents as to the paternity of the child. In the words of Lord Atkinson, the significance of the statements "consists in the improbability that any man would make these statements, true or false, unless he believed himself to be the father of the

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28 Above n17 at 751.
29 Above n8 at 96.
30 See for example, *Walton v The Queen* and *R v Blastland*, above.

> child" (at 741). Secondly, there was the view that in questions of status, the statements were part of the res gestae: per Lord Shaw of Dunfermline, at 748. Lord Moulton (at 752) appears to have embraced both views, thus regarding the statements as evidencing the belief of the speaker, and suggesting that the evidence was admissible because it was part of the res gestae.

The belief of the father in *Lloyd* as to his paternity and his stated intention to make a home for himself and the mother was crucial evidence relevant to the central issue as to whether he would likely support the child after she was born. It constituted an express assertion as to intent and clearly, where intention is relevant, statements of intent fall outside of the scope of the hearsay rule and are admissible.[31] For the Chief Justice to suggest that *Lloyd*'s case stands for the broader proposition that "statements acknowledging paternity do not come within the scope of the hearsay rule" is, with respect, squeezing more out of *Lloyd*'s case than it contains.

It is respectfully submitted that the admissibility of the statement in question on the basis of the trustworthiness of a spontaneous exclamation as to familial relationship is supportable in itself without the need to rely on the authority of *Lloyd*'s case. The willingness of the Chief Justice to enlarge the authority of *Lloyd* without it being necessary to do so, argues well for further liberalization of the hearsay rule in circumstances where logic so dictates. In *Benz*, the Chief Justice has provided even stronger evidence than he did in *Walton* that the hearsay rule is in for a major judicial overhaul.

Conclusion

All seven judges presently sitting on the High Court of Australia sat on either *Walton* or *Benz*. Four of them,(the Chief Justice and Deane J in *Walton* and the Chief Justice, Gaudron and McHugh JJ in *Benz*) have all delivered judgments suggesting that the time is right for a new approach to be taken to the hearsay rule. As Mr Odgers put it, ". . . the idea of treating the hearsay rule flexibly stands in contrast to the traditional rigid application of the rule and (closed) exceptions." Following the *Benz* decision, it is reasonable to conclude that the "idea" has taken hold.

Those advocating a move toward flexibility in applying the rules of evidence thereby relying on the sound common sense of the judiciary will applaud the decisions in *Walton* and *Benz*. Such a move is in keeping with the current popularity of the rules of equity and the enlarged concept of judicial discretion. No doubt, this phenomenon will be popular with most academics and judges.

On the other hand, with flexibility and judicial discretion comes uncertainty in predicting the outcome of litigation. Practitioners who are responsible for advising clients on such matters will likely be less enthusiastic about cases such as *Walton* and *Benz*. The High Court will have to consider these competing interests before it decides that the hearsay rule is ". . . going . . . going . . . gone!"

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31 Above n2 at 216.