

# The Reliability-Based Approach to Hearsay

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One of the most damaging effects of the hearsay rule is the way in which it undermines our confidence in the ability of the criminal justice system to arrive at the correct result. If the jury has been deprived of relevant information, how can we be sure that the guilty have been convicted and the innocent acquitted? Of course, the rationale for the hearsay rule is that it excludes unreliable evidence — information more likely to mislead than enlighten — but it is notorious that the rule excludes much else besides. Under the traditional approach to hearsay, however, reliability is irrelevant: if a piece of evidence falls within the scope of the rule, and no exception applies, then the evidence is inadmissible, no matter how reliable it may happen to be.<sup>1</sup>

This traditional approach to hearsay is now in the process of being abandoned. One of the most interesting features of the *Evidence Act 1995* (Cth) (*Evidence Act*) is hidden away in section 65(2)(c). The Act — which is intended to provide the basis for uniform evidence legislation in all Australian jurisdictions<sup>2</sup> — is largely based on the Australian Law Reform Commission's landmark evidence reports;<sup>3</sup> section 65(2)(c) is not.<sup>4</sup> It provides that a hearsay statement can be admitted in criminal proceedings if it was "made in circumstances that make it highly probable that the [statement] is reliable".<sup>5</sup>

This might seem like a radical departure from the common law. In fact, ever since the seminal judgment of Mason CJ in *Walton v R*,<sup>6</sup> the common law in Australia has been moving in precisely the same direction. As I show in the first part of this article, Mason CJ's suggestion that a trial judge has a discretion to admit reliable hearsay has not only been endorsed by two other members of the High Court, it has actually been acted on by several Australian trial courts and courts of criminal appeal. What is more, it is entirely consistent with the development of the hearsay rule in two other important common law jurisdictions, namely Canada and the United States.

However, although these moves towards a more flexible approach are to be welcomed, the new common law and statutory exceptions should not be seen

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1 For a restatement of the hearsay rule in light of its extension to implied assertions, see Palmer, A. "Hearsay: A Definition that Works" (1995) 14 *U Tas LR* 29.

2 Substantially identical legislation has also been passed in New South Wales: *Evidence Act 1995* (NSW).

3 Australian Law Reform Commission (ALRC) (1985) *Evidence Interim Report* No 26, and ALRC (1985) *Evidence Final Report* No 38.

4 Although it is consistent with the dissenting recommendations of Kirby J (as he then was): *Evidence Interim Report*, id, pars 723-9.

5 The *Evidence Act* actually uses the word "representation". Nothing turns on this.

6 (1989) 166 CLR 283.

as a surreptitious means of abrogating the hearsay rule entirely. The hearsay rule is, no doubt, a blunt instrument, but the dangers against which it guards are real. The requirement of reliability must therefore be taken seriously. But what does it actually entail? How exactly is it that a court is supposed to determine whether or not a particular piece of hearsay is sufficiently reliable to be admitted under the new exceptions? Now that the decisive steps towards a reliability-based approach to hearsay have been taken, it is to these nuts and bolts issues that the courts will have to turn their attention. This article is intended to assist them when they do so. Its primary focus is on the question of how, in the context of criminal proceedings, the reliability of otherwise inadmissible hearsay should be determined. In attempting to answer the question, the article takes advantage of the fact that courts in Canada and the United States have already had to grapple with the question of what it is that makes hearsay reliable.

The various matters which a court might take into account in determining the reliability of a piece of hearsay evidence are considered in three parts. In the second part of the article I look at the "circumstances" in which a hearsay statement is made as evidence of its reliability. This part is fairly uncontroversial. The third and fourth parts of the article are not. In part three I consider whether a court determining the reliability of a hearsay statement, should take into account the declarant's creditworthiness and the existence of evidence corroborating the hearsay statement. While both of these matters are clearly relevant to the reliability of an out of court statement, their consideration is inconsistent with the concept of a *circumstantial* guarantee of reliability. In the fourth and final part of the article, I look at three further factors which the courts should arguably take into consideration when deciding whether or not to admit an otherwise inadmissible hearsay statement. These are the availability of the declarant for cross-examination; the question of whether there is a "necessity" for the evidence; and the fact that the evidence may be vital to the defence of an accused person.

### *1. The Emergence of the Reliability-Based Approach*

The hearsay rule contained in Part 3.2 of the *Evidence Act* is essentially a modified common law hearsay rule. One of the most significant modifications is in the definition of hearsay, which is contained in section 59(1) of the Act. In an apparent attempt to exclude implied assertions from the ambit of the hearsay rule, the rule has been defined as follows: "Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation". The exceptions have been divided into two categories: exceptions for "[f]irst-hand" hearsay", contained in Division 2 of Part 3.2 of the Act, and "[o]ther exceptions to the hearsay rule", contained in Division 3. Section 65(2)(c), with which we are concerned in this article, is one of the "first-hand" hearsay exceptions.

"First-hand" hearsay is effectively defined by section 62(1) as "a representation made by a person who had personal knowledge of an asserted fact". Section 62(2) goes on to provide that

a person has personal knowledge of the asserted fact if his or her knowledge of the fact was, or might reasonably be supposed to have been, based on

something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact.

Section 65 contains those "first-hand" hearsay exceptions which apply in criminal proceedings when the maker of the previous representation is not available to give evidence. The other exceptions essentially represent codifications of well-recognised categories of common law exceptions. Although section 65(2)(c) appears to be a departure from the common law, it is now possible to argue that it too represents a codification of an existing common law exception.

The starting point for such an argument is the judgment of Mason CJ in *Walton v R*.<sup>7</sup> In *Walton*, the accused was charged with the murder of his former de facto wife, from whom he had separated in February 1985. After the separation he had begun living with one Cindy Bragg; she became the key prosecution witness at his trial for the murder of the deceased. She testified that he had discussed with her a plan to murder the deceased in order to gain custody of their two children and to obtain the proceeds of an insurance policy over her life. She testified that on 4 December 1985 the accused told her that he had arranged to meet the deceased at the Elizabeth Town Centre at 7 pm on the evening of 5 December. She testified that the accused returned home at about 11.30 pm that evening covered in blood and gave her a detailed account of how he had met and killed the deceased.

Three other witnesses testified that the deceased had told them that she intended to meet the accused at the Elizabeth Town Centre on the evening of 5 December.<sup>8</sup> Of present interest is the evidence of one Rhonda Bowett. She testified that she was at the deceased's home on 4 December when the phone rang. The deceased answered it, saying "[h]ello, I was about to call you". There was some conversation and the deceased then called out for her three year old son, M, saying "M, daddy's on the phone". M then had a short conversation with the caller, during which Bowett heard him say "[h]ello daddy". There was evidence that M called the accused, and no-one else, "daddy". The deceased then resumed her conversation with the caller, agreeing to meet him or her at the Elizabeth Town Centre on the following evening. When she finished the conversation the deceased told Bowett that the caller was the accused.

Provided it was permissible to prove that the caller was the accused, Bowett's evidence was clearly of the highest value in corroborating the evidence of Bragg that the accused had arranged to meet the deceased on the evening in question. There was of course ample evidence to prove this: not only had the deceased expressly asserted that the caller was the accused, this could also be inferred from M's greeting of "[h]ello, daddy". But to use M's greeting for this purpose would have been to use it as an implied assertion. As the hearsay rule makes no distinction between express and implied assertions, both the deceased's

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7 Ibid. For comment on this aspect of the case see, inter alia, Odgers, S, "*Walton v The Queen — Hearsay Revolution?*" (1989) 13 *Crim LJ* 201 at 214; Pattenden, R, "Conceptual Versus Pragmatic Approaches to Hearsay" (1993) 56 *Mod LR* 138 at 154-6; and Hunter, J, "Unreliable Memoirs and the Accused: Bending and Stretching Hearsay — Parts One and Two" (1994) 18 *Crim LJ* 8, 76.

8 The admissibility of this evidence is discussed in Palmer, above n1.

express assertions that the accused was the caller and M's implied assertions to the same effect were inadmissible unless an exception applied. None did.

Mason CJ said, however, that the characterisation of evidence as hearsay to which no exception applies does not necessarily mean that the evidence is inadmissible. Before deciding whether or not to admit the evidence, the trial judge must, in some cases, "balance the competing considerations". These include the following:

When the dangers which the rule seeks to prevent are not present or are negligible ... 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 hearsay rule.<sup>9</sup>

Thus the judge may decide to admit the evidence notwithstanding that it is hearsay and that no exception applies. Applying this approach, Mason CJ concluded that "it would clearly have been open to the trial judge ... to admit the evidence of M's statement for the purpose of identifying the maker of the telephone call".<sup>10</sup> Mason CJ's comments were specifically directed at implied assertions, in respect of which he thought the danger of insincerity to be less.<sup>11</sup> For this reason, he never considered whether the deceased's express assertions as to the identify of the caller could have been admitted under his suggested approach. He did add, however, that "in very rare cases it may be that such an approach will be appropriate also for an express assertion, for the same reasons".<sup>12</sup> In fact, apart from *Walton* itself, nearly all of the cases discussed in this article do involve express assertions.

Mason CJ's comments in *Walton* have since been endorsed by Gaudron and McHugh JJ.<sup>13</sup> Although Deane and Toohey JJ have not gone so far as to endorse a general reliability-based approach to hearsay, they too favour some flexibility in the application of the hearsay rule.<sup>14</sup> Other members of the High Court have been more equivocal.<sup>15</sup> It has, however, been at the trial and intermediate appellate levels where support for the reliability-based approach to hearsay has been the most enthusiastic.<sup>16</sup> This is hardly surprising, since it is these courts which are most frequently confronted with the possible consequences of excluding apparently reliable evidence on the grounds that it is technically hearsay to which no exception applies.

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9 Above n6 at 293.

10 *Id* at 295.

11 *Id* at 293.

12 *Ibid*.

13 *R v Benz* (1989) 168 CLR 110 at 144; McHugh J endorsed the comments again in *Pollitt v R* (1992) 174 CLR 558 at 621.

14 See above n6 at 308 and *Pollitt v R*, *id* at 594-5 per Deane J; and *id* at 610 per Toohey J.

15 See the comment of Wilson, Dawson and Toohey JJ that "[t]he unlikelihood of concoction or distortion is not sufficient of itself to render a hearsay statement admissible": above n6 at 304. See also Brennan J's comment that "[t]here is an attraction in the notion that the admissibility of hearsay should be governed by a judicial assessment of its reliability, but there are countervailing arguments": *Pollitt v R*, *id* at 573-4.

16 See *R v Daylight* (1989) 41 A Crim R 354; *R v Miladinovic* (1992) 60 A Crim R 206; *R v Astill* (1992) 62 A Crim R 148; *R v Radford* (1993) 66 A Crim R 210.

It is certainly arguable then that section 65(2)(c) of the *Evidence Act* is merely a restatement of an exception which has already been recognised at common law. But even if it is a little premature to hail the emergence of a new reliability-based approach to hearsay at common law, the enactment of section 65(2)(c) is surely likely to tip the balance towards recognition. What this means is that the courts of a particular jurisdiction should be able to adopt the reliability-based approach to hearsay without first having to wait for their Parliament to enact its own version of the Commonwealth legislation. Any court feeling reluctant to do so should feel emboldened by the fact that in Canada the reliability-based approach to hearsay at common law has received a most explicit and authoritative judicial endorsement.

In *R v Smith*,<sup>17</sup> Lamer CJ, delivering the unanimous judgment of the Supreme Court of Canada, declared that "hearsay evidence is now admissible on a principled basis, the governing principles being the reliability of the evidence, and its necessity".<sup>18</sup> The court thereby elevated the underlying explanation or rationale of the rule — as identified by Wigmore — into an overriding principle of admissibility.<sup>19</sup> Wigmore's work appears also to have influenced the drafting of the United States Federal Rules of Evidence. The structure of the hearsay rule under the Federal Rules is similar to that at common law: that is, an exclusionary rule subject to a series of specific exceptions. In addition to the specific exceptions, however, there is also a general residual exception. This exception is contained in Rule 803(24),<sup>20</sup> which allows for the admission of:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that

- (A) the statement is offered as evidence of a material fact;
- (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
- (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.<sup>21</sup>

Condition (A) is simply a requirement of relevance. Condition (C) gives the court the power to reject hearsay evidence notwithstanding that the other conditions may be satisfied. The criterion of reliability is found in the Wigmoreian

17 (1992) 94 DLR (4th) 590.

18 *Id* at 603-4; see Carter, P, "Hearsay: Whether and Whither" (1993) 109 *LQR* 573. The new approach to hearsay was first signalled by the court in *R v Khan* (1990) 59 CCC (3d) 92. The common law in New Zealand appears to be heading in the same direction, with Cooke P declaring in *R v Baker* [1989] 1 NZLR 738 at 741 that "it may be more helpful to go straight to basics and ask whether in the particular circumstances it is reasonably safe and of sufficient relevance to admit the evidence notwithstanding the dangers against which the hearsay rule guards".

19 See *Wigmore on Evidence* (3rd edn, 1940) §1420.

20 The exception is repeated in Rule 804(b)(5). However, as Rule 803 applies whether or not the declarant is available as a witness, and Rule 804 applies only when the declarant is unavailable as a witness, Rule 804(b)(5) appears to be otiose: see *Huff v White Motor Corp*, 609 F 2d 286 at 291 n4 (1979).

21 There is also a requirement of notice.

phrase "equivalent circumstantial guarantees of trustworthiness". Thus, section 65(2)(c) of the *Evidence Act* as well as the Canadian and Australian moves towards a reliability-based approach to hearsay at common law, merely bring the law in those jurisdictions to a point achieved in the United States some 20 years ago.

There remains the question, though, of whether what Mason CJ suggested in *Walton* is better viewed as a discretion or as a general residual exception. The fact that he talked about the judge not excluding the evidence "by a rigid and technical application of the hearsay rule",<sup>22</sup> rather than in terms of a new exception to that rule, suggests that he had in mind a judicial discretion to admit otherwise inadmissible hearsay evidence. This is certainly how Kirby P (approvingly) interpreted his remarks in *R v Astill*.<sup>23</sup> The language used by the Canadian Supreme Court in *Smith* is also generally more consistent with the recognition of a discretion than an exception, apart from its comment that "whether a necessity of this kind arises ... is a question of law for determination by the trial judge".<sup>24</sup> By this the court may simply have meant to make the obvious point that necessity is a question for the judge rather than the jury, but the comment also suggests that a decision on this matter could be subject to appeal on the grounds that the judge had made an error of law.

This, of course, points to the most significant difference between a discretion and an exception. Appellate courts are traditionally reluctant to interfere with a judge's exercise of his or her discretion in all but the clearest cases. If the emerging common law "discretion" turns out to be an exception, however, it would be far easier for appellate courts both to overturn a decision to admit or exclude evidence in a particular case, and to develop clear criteria which must be satisfied in order for the exception to apply. The recognition of the discretion in the form of a general residual exception operating on the principles identified later in this article would therefore be preferable for three reasons.

First, it would make the "discretion" more predictable in its operation, thus promoting certainty and minimising inconvenience in trial preparation. Second, it would reduce the risk of injustice arising from the unregulated admission of hearsay evidence. This need not be at the expense of flexibility. The United States Supreme Court has, for instance, recently acknowledged that in applying the residual exceptions "the courts have considerable leeway in their consideration of appropriate factors".<sup>25</sup> The rules can be flexible. Finally, it would maintain consistency between the jurisdictions where the *Evidence Act* and its derivatives apply, and those where the common law continues to apply. For these reasons it is preferable, in my view, to regard the development initiated by Mason CJ's judgment in *Walton* as the development of a new general exception to the hearsay rule. It is to the principles upon

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22 Above n6 at 293.

23 *R v Astill*, above n6 at 158.

24 Above n17 at 605.

25 *Idaho v Wright*, 111 L Ed 2d 638 at 656 (1990). See also *US v Carlson*, 547 F 2d 1346 at 1354 (1976) ("wide latitude of discretion"); *US v Hooks*, 848 F 2d 785 at 796 (1988) and *US v Guinan*, 836 F 2d 350 at 354 (1988) ("considerable discretion").

which this, and the exception contained in section 65(2)(c) of the *Evidence Act*, should operate that I now turn.

## 2. *The Circumstances in Which the Statement was Made*

In *Walton*, Mason CJ did not specifically state that a court determining the reliability of a hearsay statement should have regard to the "circumstances" in which the statement was made. Section 65(2)(c) of the *Evidence Act* on the other hand, is very clear on this point: it requires a court to ask itself whether the statement was made "in circumstances that make it highly probable that [it] is reliable". The Federal Rules of Evidence and the Supreme Court of Canada's judgment in *Smith* also require courts to look for a "circumstantial guarantee of trustworthiness".<sup>26</sup> The idea behind a circumstantial guarantee of trustworthiness is that hearsay is reliable when the circumstances are such as to "substantially negate the possibility that the declarant was untruthful or mistaken".<sup>27</sup> If these possibilities can be negated then it can be said that "the dangers which the rule seeks to prevent are not present or are negligible".<sup>28</sup> A circumstantial guarantee of trustworthiness is, in effect, a substitute for cross-examination.<sup>29</sup> Indeed the Supreme Court of Canada has suggested that for hearsay to be considered reliable the circumstances should be such that the evidence could not reasonably be expected to change significantly if the declarant was available to give evidence and was subjected to cross-examination.<sup>30</sup> This is obviously a fairly demanding test. So what should the courts be looking for?

### A. *Factors Negating Insincerity*

No doubt the first question courts will ask themselves is whether the declarant had any motive to lie, or in Wigmore's rather more formal language, whether "the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed".<sup>31</sup> If a plausible motive to lie can be advanced then the statement will usually lack the necessary degree of reliability because we will be unable to say that the evidence could not reasonably be expected to change significantly if the declarant was available for cross-examination. But the suggested motive will only have this effect if it is plausible in the circumstances. To be plausible it should both provide a

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26 See Rules 803(24) above, and *R v Smith*, above n17 at 604. The phrase is Wigmore's, although Wigmore usually in fact talked about a "circumstantial probability of trustworthiness": see above n19 and §1422.

27 Above n17 at 604.

28 Above n6 at 293 per Mason CJ.

29 Above n17 at 604; see also above n19.

30 *Id* at 607. The same standard is implicit in comments made by the United States Supreme Court in *Idaho v Wright*, above n25 at 657.

31 Above n19 and §1422.

genuine reason for the particular person in question to lie on the occasion in question,<sup>32</sup> and be consistent with the person's actual behaviour.<sup>33</sup>

Perhaps most clearly lacking a motive to lie is the "disinterested witness—a mere bystander with no axe to grind".<sup>34</sup> Equally, a person who makes a statement contrary to their interests can generally be assumed to have no motive to lie.<sup>35</sup> This is, after all, the justification for the exception for declarations against interest. But we must be careful not to construe a person's interests too narrowly: a person might, for example, falsely claim to have committed a crime in order to intimidate or impress another person.<sup>36</sup> There is, on the other hand, clearly a motive to make a self-serving statement, such as a self-exculpatory statement,<sup>37</sup> or a statement made by one alleged party to a crime incriminating another alleged party.<sup>38</sup> The law has long recognised that accomplices form an unreliable class of witness.

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- 32 For example, in *US v White*, 611 F 2d 531 at 538 (1980) it was argued that the declarant might have falsely claimed not to have received a social security cheque in order to receive a double payment. The court found this implausible, asserting that the declarant's wealth (he had \$44 000 in the bank) made it unlikely that he would file a false claim for such a small amount. In *US v Barlow*, 693 F 2d 954 at 962 (1982) the court rejected the idea that the declarant had any motive to falsely inculpate the defendant by giving grand jury testimony inconsistent with the defendant's alibi on the dual grounds that the defendant was her boyfriend and she had been given immunity from prosecution. See also *State of Kansas v Kuone*, 757 P 2d 289 at 292–3 (1988) and *US v Guinan*, above n25 at 355–6.
- 33 For example in *US v Vretta*, 790 F 2d 651 at 659 (1986) the defendant claimed that the declarant, with whose kidnapping and murder he was charged, might have falsely claimed to have received threats from the defendant in order to exert pressure on the defendant (to whom he owed money) and to ingratiate himself with officials investigating the deceased's business activities. The court pointed out that the deceased had told a number of people about the threats, including people who were not investigating him and in respect of whom the alleged motive did not apply.
- 34 *US v Boulahanis*, 677 F 2d 586 at 588 (1982). There the declarant had witnessed a fight in which he had played no part and which involved people with whom he had no connection. Not surprisingly, no motive to lie could be found and his statement was admitted.
- 35 See, eg, *Huff v White Motor Corp*, above n20 at 292, where the statement was against the declarant's pecuniary interests in that it was inconsistent with the facts he was alleging in a legal action in which he was plaintiff.
- 36 As was found to be the case in *US v Hinkson*, 632 F 2d 382 at 386 (1980) where the court found a third party confession to a murder to be unreliable and refused to allow the person who had actually been charged with the murder to lead evidence of it. The murder had allegedly happened as part of the activities of a motorcycle gang of which both defendant and declarant were members. The court thought that the confession, made to a casual acquaintance hundred of miles from the place where the murder occurred, was an act of "braggadocio". The motive to lie was found in the fact that the declarant "gloried in parading his motorcycle gang member image".
- 37 See, eg, *US v Hooks*, above n25 at 796, where the statements were made in the course of an investigation into an alleged tax fraud.
- 38 See, eg, *US v Bailey*, 581 F 2d 341 at 350 (1978) where statements incriminating the accused in a bank robbery were made by his alleged accomplice during negotiations for a reduction in the accomplice's charges; see also *US v Fernandez*, 892 F 2d 976 at 982–3 (1989). But see *US v Yonkers Contracting Co*, 701 F Supp 431 at 437 (1988) where the court found the grand jury testimony of a witness who had been given immunity from prosecution reliable on the basis that the declarant was unlikely to have falsely incriminated his friends and long term business associates. The only basis for distinguishing this case from cases like *Bailey* would seem to be that in *Yonkers* the declarant was a "white collar" criminal.



Motive to lie was the key consideration in *R v Smith*.<sup>39</sup> There the accused was charged with the murder of a woman with whom he had travelled from Detroit to London, Ontario. The Crown case was that he had abandoned her at their hotel after she had refused to smuggle cocaine back to the United States, had then returned and picked her up, and driven her to a place where he killed her and dumped her body. To prove its case the Crown relied on evidence of several phone calls made by the deceased to her mother in Detroit shortly before she was murdered. The first two were traced to her hotel room. In them she asserted, respectively, that the accused had left her; and that he had not returned, so that she needed a ride back to Detroit. The third call was made from a pay telephone in the hotel lobby. In it she asserted that the accused had returned so that she no longer needed a ride home. Although the court held that there was no known reason why the deceased might have lied in the first two phone calls, the third call was different. Here the possibility of insincerity could not be discounted because of the fact that the deceased's mother had suggested in an earlier call that she would arrange for one "Philip" — a man whom the deceased certainly disliked and possibly feared — to pick her up and drive her home. The deceased may thus have said that the accused had returned in order to avoid a ride with Philip. The third call was, therefore, insufficiently reliable to be admitted.<sup>40</sup>

Even if a plausible motive to lie can be advanced, however, the circumstances might be such as to suggest that the motive would not have been acted on. Or in Wigmore's words, "even though a desire to falsify might present itself, other considerations, such as the danger of easy detection or the fear of punishment, would probably counteract its force".<sup>41</sup> This guarantee of reliability is theoretically provided whenever the declarant could be subjected to criminal prosecution if he or she lied. Thus the courts in *US v Boulahanis*,<sup>42</sup> *US v Yonkers Contracting Co*,<sup>43</sup> and *US v Carlson*,<sup>44</sup> all admitted grand jury testimony of witnesses who for various reasons were unavailable at trial, emphasising that the testimony was given on oath and subject to prosecution for perjury.<sup>45</sup> Similarly, in *US v White* the court admitted a Treasury claim form filled out by a person whose social security cheque had allegedly been stolen by the defendant, because, among other reasons, the declarant was aware at the time of filling out the form that he was subject to criminal prosecution for a false statement. The court claimed that, as with an oath, the circumstances were such as to "impress upon the declarant the seriousness of the statement and the importance of telling the truth".<sup>46</sup>

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39 Above n17.

40 *Id* at 606. See also *R v Miladinovic*, above n16 at 213, where Miles CJ declared himself unable to think of any reason why one of the parties to an alleged conspiracy to supply heroin should have said, during the course of a telephone conversation with another of the alleged conspirators, that "Mick Miladinovic is here at my place". He therefore admitted the statement for the purpose of proving that the accused, Miladinovic, was in fact at the house.

41 Above n19 and §1422.

42 Above n34 at 588.

43 Above n38 at 437.

44 Above n25.

45 See also *US v Bailey*, above n38 at 350 and *US v Hooks*, above n25 at 796 where the courts referred to the lack of an oath as a reason for not admitting the evidence.

46 Above n32 at 538.

Again, even though it might be possible to suggest a plausible motive to lie, the circumstances might be such that the declarant would probably not have had the opportunity to concoct or distort what they assert to have happened. The declarant might, for example, still have been so involved in the event as to be unable to construct a detached narrative of it. This is, of course, one of the justifications for the reception of statements forming part of the *res gestae*.<sup>47</sup> If the lapse of time between a perception and the reporting of the perception is small then those same considerations apply to statements which do not form part of the *res gestae*.<sup>48</sup> Another justification for the *res gestae* exception is the belief that spontaneous assertions are more reliable than assertions made as a result of coercion or in response to leading questions. This too is relevant to the reliability of statements falling outside the *res gestae*.<sup>49</sup> Thus, in *R v Khan* the child declarant had been left alone with the family doctor while her mother undressed in an adjoining room. Shortly after leaving the doctor's surgery she spontaneously informed her mother that she had been assaulted by the doctor. The Supreme Court of Canada cited the fact that the story had emerged naturally and without prompting as a reason for holding the statement to be reliable.<sup>50</sup>

*R v Khan* belongs to a class of cases — child sexual abuse cases — where another question will often be relevant to the reliability of the hearsay statement: whether the statement reveals “knowledge well beyond the ordinary familiarity of a child [of the declarant's] age”.<sup>51</sup> If a statement reveals the possession of knowledge beyond that to be expected, then the mere fact that the statement was made provides some evidence of its truth. As the Supreme Court of Wisconsin noted, “a young child is unlikely to fabricate a graphic account of sexual activity because it is beyond the realm of his or her experience”.<sup>52</sup> Of course, before the court could find that the child did possess

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47 See *Ratten v R* [1972] AC 378 at 389, 391 and *R v Andrews* [1987] 1 AC 281 at 301.

48 Thus in *US v Medico*, 557 F 2d 309 at 316 (1977) the registration number of a getaway car used in a bank robbery was relayed from the youth who saw the number to a customer standing outside the bank to an employee inside the bank, who wrote the number down. The narrow time frame reduced the likelihood that either the youth or the customer might have fabricated the number. As an illustration of the advantages of the reliability-based approach to hearsay, this result should be compared with that in *R v McLean* (1968) 52 Cr App R 80. In that case the English Court of Appeal felt compelled to quash a conviction because the trial judge had admitted evidence from a bystander who had written down the registration number of a car dictated to him by the victim of a violent robbery. For another case in which lapse of time was held relevant to reliability see *US v Vretta*, above n33 at 659.

49 See, eg, *Huff v White Motor Corp*, a wrongful death action based on the theory that the defective design of a truck caused the death of its driver. The deceased volunteered a story inconsistent with this theory when visited by friends in hospital. Again, the fact that the story was volunteered was held relevant to its reliability: above n20 at 292. See also *US v Boulahanis*, above n34 at 588; *US v Hooks*, above n25 at 797; and *US v Fernandez*, above n38 at 983.

50 Above n18 at 101–2, 106; see also *State of Arizona v Robinson*, 735 P 2d 801 at 811 (1987). But note that the United States Supreme Court has declined to hold that the hearsay statement of a child in a sex abuse case can only be admitted if it was made in accordance with certain procedural safeguards, such as the video-recording of the statement and the avoidance of leading questions. While the failure to follow such safeguards is undoubtedly relevant to the reliability of such a statement, it is not dispositive of the issue: *Idaho v Wright*, above n25 at 654.

51 *State of Wisconsin v Sorenson*, 421 NW 2d 77 at 86 (1988).

52 *Id* at 86; approved on this point by the United States Supreme Court in *Idaho v Wright*,

knowledge unusual for a child of his or her age, it would need to have some idea of what it is normal for a child of that age to know. While this is a matter of which a court might be tempted to take judicial notice, a safer course might be to allow a child psychologist to give expert evidence about whether the knowledge revealed in the statement is in fact unusual for a child of that age.<sup>53</sup> The court should also be alert to the possibility that there may be an explanation, consistent with the accused's innocence, for how the child came to have the knowledge in question. If there is such an explanation, then the mere fact of the child possessing unusual knowledge should not constitute a circumstance which makes it likely that the statement is reliable.

Finally, a court might be prepared to consider a hearsay statement reliable if the declarant has already been subjected to cross-examination by the party against whom the statement is tendered.<sup>54</sup> If this has happened, then the statement has already been probed for the dangers of insincerity and mistake. The court might, therefore, be prepared to conclude that the circumstances in which the statement was made mean that the evidence could not reasonably be expected to change significantly if the declarant was subjected to further cross-examination.

### B. *Factors Negating Mistake*

Although in *Walton* Mason CJ referred only to the danger of concoction or insincerity, the possibility of mistake is equally relevant to the reliability of a hearsay statement. The Supreme Court of Canada were therefore right to insist that a hearsay statement can only be declared reliable when the circumstances are such as to substantially negate both the possibility that the declarant was untruthful and the possibility that the declarant was mistaken.<sup>55</sup> When considering the possibility of mistake, it is necessary to distinguish between first and second-hand hearsay.<sup>56</sup> If the declarant actually perceived (or claims to have perceived) the event or fact in question, then there are really only two possible causes of

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above n25 at 656. The child, aged seven, had described specific acts of sexual assault, and had demonstrated the act of sexual intercourse with anatomically-correct dolls. Perhaps even more compelling, given that the child was only three, was the evidence in *R v Khan* where the child declarant casually mentioned to her mother shortly after they left their doctor's surgery that the doctor had asked her if she wanted candy, told her to open her mouth, and then "put his birdie in my mouth, shook it and peed in my mouth". The mother gave evidence that birdie was the child's word for penis. The Supreme Court of Canada thought that it was unlikely that a child of three and a half could tell such a story unless it were true: above n18 at 101-2, 106.

53 This course was followed in *State of Arizona v Robinson*, see above n50 at 811.

54 In *Ohio v Roberts*, 65 L Ed 2d 597 at 610-12 (1980) the United States Supreme Court held that the preliminary hearing evidence of a witness who was unavailable at trial was sufficiently reliable to be admitted because the defendant, against whom the evidence was being tendered, had had the opportunity to cross-examine the witness at the preliminary hearing. In fact, the witness had been called by the defendant so that, in formal terms, defendant's counsel had only been able to carry out an examination in chief. But the court noted that the examination bore all the hallmarks of cross-examination: in particular, counsel had asked the witness leading questions in order to challenge her veracity and accuracy.

55 Above n17 at 604.

56 For convenience we can adopt the definition of first-hand hearsay contained in section 62(1) of the *Evidence Act*.

mistake. First, the declarant's perception might have been inaccurate; and second, the declarant's memory of the perception might have been inaccurate.

If, on the other hand, the declarant is only reporting what someone else claims to have perceived, then the possible causes of mistake are greatly increased. Indeed, if the declarant claims no personal knowledge of the event or fact in question, it is difficult to see how the possibility of mistake could possibly be negated. For that reason, the *Evidence Act* is right to insist that a hearsay statement will not be admissible under section 65(2)(c) unless it is based on the declarant's personal knowledge.<sup>57</sup> The common law should demand no less.<sup>58</sup>

The circumstances in which the event or fact was perceived are also clearly relevant to the possibility that the declarant was mistaken.<sup>59</sup> If, for example, a hearsay identification statement was offered in evidence, the court would need to consider all of the factors which would have been explored in cross-examination if the declarant had been available as a witness, and which would have been mentioned by the judge when directing the jury about the dangers of that particular piece of identification evidence.<sup>60</sup> These include matters such as the adequacy of lighting, the distance at which the person was perceived, the length of time for which the person was observed, and the familiarity (or lack of it) of the declarant with the person identified.

Mason CJ's failure in *Walton* to consider the circumstances in which the child impliedly asserted that the caller was the accused, means that his finding that this assertion was reliable is open to serious objection. As Wilson, Dawson and Toohey JJ were surely right to point out, the reliability of the child's greeting as an assertion of identity was greatly reduced by the fact that it "followed immediately upon the assertion by his mother that the person to whom he was about to speak was 'daddy'".<sup>61</sup> The fact that the child believed that the person to whom he was about to speak was the accused clearly increased the risk of a mistaken identification.

As regards the possibility of a mistake in memory, it seems obvious that the shorter the lapse of time between a person's perception of an event and their narration of it, the less likely it is that any mistake will have arisen due to a failing of memory.<sup>62</sup> For this reason, courts in the United States are more likely to

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57 This is because the exception is limited to "first-hand" hearsay.

58 Personal knowledge — or the lack of it — is frequently cited in the United States, as a factor lending reliability to a hearsay statement. See, eg, *US v Carlson*, above n25 at 1354, *US v Medico*, above n48 at 315; *Huff v White Motor Corp*, above n20 at 292; *US v Colson*, 662 F 2d 1389 at 1392 (1981); *US v Barlow*, above n32 at 962, *US v Yonkers Contracting Co*, above n38 at 437.

59 In *R v Smith*, for example, the third call in which the deceased asserted that the accused had returned so that she no longer needed a ride was considered to be unreliable by the Supreme Court of Canada because the circumstances in which she claimed to have seen the accused left open the possibility of mistake. This possibility arose from the fact that the deceased went straight from a taxi — which had refused to take her to Detroit — to the hotel lobby where she made the call. It is questionable, then, whether she had had the time to accurately observe the accused's return; and even if she had, she could not possibly have spoken to him to see whether he now intended to give her a ride: above n17 at 606.

60 See, eg, *Dominican v R* (1992) 173 CLR 555 at 562–3.

61 Above n6 at 306.

62 See ALRC Report No 26, above n3, pars 421 and 665 and the research referred to therein.

admit a hearsay statement under the residual exceptions when the lapse of time between a perception and the statement of the perception is small.<sup>63</sup>

### C. "Near Miss" Evidence

According to Wigmore one of the justifications for the existing hearsay exceptions is that they satisfy the criterion of reliability.<sup>64</sup> In other words, evidence falling inside the scope of an existing exception can generally be assumed to be reliable. This fact suggests another method of determining the reliability of evidence falling outside the scope of the existing exceptions. This is to ask whether the evidence in question possesses any of the features which supposedly make evidence falling within the scope of an exception reliable. Indeed, the terms of the residual exceptions in the Federal Rules of Evidence seem to require just such a comparison. Rule 803 (24) allows for the admission of "[a] statement not specifically covered by the any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness".<sup>65</sup> This comparison can most easily be made when the evidence in question narrowly misses being admissible under a particular exception.

Of course, one view might be that the evidence should not be admitted precisely because it does so narrowly miss falling within the scope of an existing exception. But this view depends on an assumption that the often rigid and technical requirements of the various exceptions to the hearsay rule provide an accurate method of distinguishing between reliable and unreliable hearsay. As anyone at all familiar with the hearsay rule knows, any such assumption is nonsense. Indeed, the exceptions are notorious for arbitrarily excluding evidence to which their ostensible rationale clearly applies.<sup>66</sup> Certainly, a consensus now seems to have emerged among courts in the United States that "near miss" evidence should be admitted under the residual exceptions in the Federal Rules.<sup>67</sup> As one court observed, the opposing theory "puts the federal evidence rules back into the straightjacket from which the residual exceptions were intended to free them".<sup>68</sup>

A "near miss" approach was also taken in two of the post-*Walton* decisions in Australia. In *Daylight*,<sup>69</sup> the accused was charged with the murder by stabbing of a Japanese tourist. He wished to lead evidence of two statements made by the deceased soon after the stabbing. In both of the statements — one to a police officer and one to a nurse — the deceased asserted that his attacker was a "white man". The accused, on the other hand, was "of partly Aboriginal origin,

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63 See, eg. *US v Iaconetti*, 406 F Supp 554 at 559 (1976), *US v Medico*, above n48 at 316; *Huff v White Motor Corp*, above n20 at 292; *US v White*, above n32 at 538; *Robinson v Shapiro*, 646 F 2d 734 at 743 (1981); and *US v Vretta*, above n33 at 659.

64 See above n19.

65 See above n20.

66 For example, the limitation on the exception for declarations against interest to declarations against pecuniary or proprietary (but not penal) interest. See the *Sussex Peerage Case* (1844) 11 Cl & Fin 85, 8 ER 1034. This limitation is reversed by section 65(b) of the *Evidence Act*.

67 See *Huff v White Motor Corp*, above n20 at 291, *US v Popenas*, 780 F 2d 545 at 547, *US v Guinan*, above n25 at 354 and *US v Fernandez*, above n38 at 981.

68 *In re Japanese Electronic Products Antitrust Litigation*, 723 F 2d 238 at 302 (1983).

69 Above n16.

and is of fairly dark complexion".<sup>70</sup> These statements were clearly relevant to the accused's defence of identity. The evidence did not form part of the *res gestae*, however, because it constituted a narrative of, rather than an incident in, the stabbing. Nevertheless, Thomas J thought that the rationale of the *res gestae* exception, as expounded by Lord Wilberforce in *Ratten* applied to it:

It does not appear to be evidence capable of being concocted or distorted; there is approximate contemporaneity; there is no disadvantage to the accused in its admission, and of course, no advantage to the maker.<sup>71</sup>

It is, however, important if the reliability of "near miss" evidence is to be evaluated by comparison with the exception which is narrowly missed, that the courts should focus on the rationale of the exception rather than on its technical requirements. Thomas J seems to have done this in *Daylight*, Miles CJ did not in *Miladinovic*. In that case Miles CJ appears to have fallen into what might be called the "telephone fallacy": the idea that a statement is reliable merely because it is made over the phone. Thus he referred to the telephone exception suggested by Deane J in *Walton* and argued that: "the same approach should be made both to the reference by the caller to the name of the person to whom he speaks and the name of the person whom he states to be with him".<sup>72</sup>

There is a significant difference, though, between these two kinds of statements. Necessity aside, the rationale advanced for the admission of statements of identification made during the course of a telephone conversation is that they are reactive and spontaneous rather than assertive.<sup>73</sup> But the statement in question — "Mick Miladinovic is here at my place" — was clearly assertive. Any analogy with the phone exception was therefore misleading.

### 3. Looking Beyond the Circumstances

On their face, the terms of section 65(2)(c) of the *Evidence Act* restrict the reliability inquiry to the "circumstances in which the representation was made". The residual exceptions in the Federal Rules of Evidence and the approach endorsed by the Supreme Court of Canada do the same. The Federal Rules talk about "equivalent *circumstantial* guarantees of trustworthiness" and the Supreme Court declared that "the criterion of reliability ... is a function of the *circumstances* under which the statement in question was made".<sup>74</sup> Mason CJ

70 The facts were, thus, a sort of *Sparks v R* [1964] AC 964 in reverse. In that case, the three year old victim of an indecent assault — who was not competent to give evidence — had stated that her attacker was a "coloured boy". The accused was white. The statement was held to be inadmissible. For another set of similar facts see *R v Townsend* [1965] Crim LR 367.

71 *Daylight*, above n16 at 357.

72 *Miladinovic*, above n16 at 213. For a brief statement of the facts in this case, see above n40.

73 See *Walton v R*, above n6 at 308 per Deane J; *Pollitt v R*, above n13 at 566–7 per Mason CJ, at 595–6 per Deane J, at 611–2 per Toohy J and at 621–2 per McHugh J. Although there is disagreement as to both its existence — see the comments of Dawson and Gaudron JJ, above n12 at 605 — and its scope, there is no doubt that the exception can only come into play if the contents of the conversation would be relevant and admissible — other than via the telephone exception — if the identity of the other party to the conversation could be established.

74 Above n17 at 604 (emphasis added).

did not so limit his suggested approach in *Walton*. He talked more generally about cases where "the dangers which the rule seek to prevent are not present or are negligible", and stated that there might be "*other aspects* of the case lending reliability and probative value to the impugned evidence".<sup>75</sup>

It is, then, arguable that more may be taken into account when determining the reliability of a hearsay statement for the purposes of the common law exception than merely the circumstances in which the statement was made. In particular, courts might also wish to consider the creditworthiness of the declarant, and the existence (or lack) of evidence which provides independent corroboration of the truth of the statement in question. The problem is not that these matters are irrelevant to reliability, but that taking them into account is inconsistent with the idea of a circumstantial guarantee of trustworthiness. Despite this, American and Canadian courts have in fact taken these matters into consideration when determining the reliability of hearsay evidence for the purposes of exceptions which are, ostensibly at least, based on the theory of circumstantial proof of reliability. The fact that conceptual purity has at times been abandoned in these jurisdictions suggests that creditworthiness and corroboration might also be taken into account when determining the admissibility of a hearsay statement for the purposes of the reliability-based exception in the *Evidence Act*. It is arguably open, therefore, to Australian courts to take creditworthiness and corroboration into account whether they are applying the common law or the statutory exception. The purpose of this part of the article is to consider whether they should do so.

#### A. *The Declarant's Creditworthiness*

The idea of a "circumstantial guarantee of trustworthiness" is to focus on the circumstances in which a particular statement was made, and to eschew any consideration of the credit of the person who made it. If we are not relying on the declarant's credit, then cross-examination is unnecessary, even superfluous; and the evidence can safely be admitted without it.<sup>76</sup> But although the theory of circumstantial proof of reliability requires courts to avoid any consideration of the declarant's credit, courts have not always found it easy to maintain this distinction. In *R v Khan*, for example, McLachlin J said that many considerations would be relevant to the criterion of reliability including "demeanour, the personality of the child, [and] the intelligence and understanding of the child".<sup>77</sup> These are clearly matters of credit rather than circumstance. Similarly, in *R v Smith* the court noted — as further justification for its finding that one of the calls was insufficiently reliable to be admitted — that the deceased had shown herself to be capable of deceit by the fact that she was travelling under an assumed name and using a credit card which she knew to be stolen or forged.<sup>78</sup> Again these are matters relating to the deceased's credit. And in the United States courts have repeatedly asserted that consistency of the statement in question with other statements made by the

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75 Above n6 at 293 (emphasis added).

76 See above n19.

77 Above n18 at 105.

78 Above n17 at 606.

declarant is relevant to the statement's reliability.<sup>79</sup> Consistency too is a matter of credit rather than circumstance.

Clearly, the credit of the declarant is relevant to the reliability of a statement. But should the court be allowed to consider it? A conceptual reason for forbidding any reliance on the credit of the declarant is to maintain a distinction between witnesses, whose assertions are accepted or rejected on the basis of their credit, and non-witnesses, whose assertions are accepted or rejected on the basis of the circumstances in which they were made. A practical reason for maintaining this distinction is to avoid what could be a very time consuming collateral issue. If the credit of the declarant is relevant to the reliability of an out of court statement, and hence to its admissibility, then presumably the courts would have to allow the parties to call evidence on a voir dire showing that the declarant was, or was not, a person whose statements should be accepted as truthful. Except in limited circumstances, the law does not allow parties to lead evidence buttressing the credit of their witnesses, or undermining that of their opponents. Why should it allow the parties to do so when the "witness" is an absent declarant?

A simple answer is that whereas the jury are able to assess the demeanour of a witness for themselves, and whereas a witness' credit can be attacked in cross-examination, no comparable mechanisms exist in the case of out of court declarants. One solution, therefore, would be to admit the evidence, but to allow the party against whom it is led to impeach the credit of the declarant. This approach is sanctioned by section 107 of the *Evidence Act* which applies in cases where the hearsay statement of a declarant who has not been called as a witness is admitted to evidence. It makes admissible "evidence about matters as to which the [declarant] could have been cross-examined if he or she had given evidence".<sup>80</sup>

Nevertheless, it seems an odd result that a court should admit a hearsay statement as reliable when there is clear evidence that it was made by someone utterly unworthy of credit. Yet this is precisely the result which could be achieved if the courts are required to disregard the declarant's credit in deciding whether or not to admit his or her statement. It may be preferable, then, to allow the courts to consider a person's credit as one of the factors going to the reliability of any assertion made by them. This is what the court did in *US v Fernandez*, where the evidence concerned was the grand jury testimony of a

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79 See, eg, *US v Carlson*, above n25 at 1354, *State of Arizona v Robertson*, above n50 at 811, *State of Kansas v Kuone*, above n32 at 292 and *US v Yonkers Contracting Co*, above n38 at 437.

80 It does so by creating an exception to the "credibility rule" in section 102. For commentary on the exception see ALRC Report No 26, above n3, par 721 and ALRC Report No 38, id, par 131. The effect of the exception is similar to s55A of the *Evidence Act* 1958 (Vic), s94 of the *Evidence Act* 1977 (Qld), and s18J of the *Evidence Act* 1910 (Tas). It also has a parallel in Rule 806 of the United States Federal Rules of Evidence, which provides that "When a hearsay statement ... has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked, may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness". Rule 806 was considered adequate safeguard against the dangers of admitting the statements of declarants whose credit had been impugned in *US v Vretta*, above n33 at 659-60; see also *US v Bailey*, above n38.



person whom the court described as "an almost comically unreliable character".<sup>81</sup> In declining to hold the evidence admissible, the court commented that:

The government proposes the nice distinction between the truthfulness of an isolated statement and the over-all credibility of a particular witness .... A distinction exists, but the government cannot seriously argue that the trust due to an isolated statement should not be coloured by compelling evidence of the lack of credibility of its source.<sup>82</sup>

It is submitted that the declarant's credit should be a matter on which the court allows evidence when determining the admissibility of a proffered statement. The court in *Fernandez* was therefore right to sacrifice conceptual purity in order to ensure that only truly reliable statements are admitted under the residual exceptions. As the concern is with avoiding the admission of unreliable hearsay, it is arguable that the question of creditworthiness should only be considered by the court if the party opposing the admission of the hearsay statement proposes to lead evidence of the declarant's lack of creditworthiness. If the court does decide that the statement is sufficiently reliable to warrant admission, then it should still be open to the party against whom the statement is led to show that the statement should be given little weight because of the declarant's lack of creditworthiness. Section 107 of the *Evidence Act* permits this in relation to statements admitted under section 65(2)(c); so should the common law.

### B. Corroboration

If consideration of the credit of the declarant is inconsistent with the Wigmorean theory of the "circumstantial" guarantee of trustworthiness, taking the existence of corroborative evidence into account utterly contradicts it. But it seems clear that the reliability of an out of court assertion is enhanced by the fact that there is other independent evidence which "corroborates" the assertion. That is, evidence which independently establishes the truth of that which has been asserted. Were it otherwise, then all rules which require a trial judge to direct the jury to look for corroboration would be entirely without point.

Thus in *R v Khan*, the court noted that the child's statement about what the doctor had done to her was corroborated by other real evidence. In particular, a wet spot on the child's clothing was found to have been produced by a mixture of semen and saliva, the mixture being such as to suggest that the two substances had been mixed before they came into contact with her clothing.<sup>83</sup>

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81 Above n38 at 983. The declarant, one Espinosa, had told the FBI agent who had been investigating the offence with which the defendant had been charged, that he, Espinosa, had been employed by the CIA, the KGB, and by the Cuban and Israeli intelligence services; he admitted being under the influence of various medications; and he lied to the grand jury about the fact that he had been granted immunity from prosecution. See also *US v Colson*, above n58 at 1392, where the court referred to the fact that the declarant was a "twice convicted felon" in deciding that his statements had been properly excluded.

82 *US v Fernandez*, *ibid.*

83 Above n18 at 106. See also *State of Arizona v Robinson*, above n50 at 811, where the court noted that the child declarant's allegations of sexual abuse were corroborated by the testimony of another child who also claimed to have been abused by the defendant, by physical evidence and by changes in her behaviour of a type often exhibited by abused children. See also *State of Kansas v Kuone*, above n32 at 292, where the child's allega-

Similarly, in *R v Miladinovic* Miles CJ held that the apparent reliability of the evidence was enhanced by the fact that the declarant was attempting to arrange a meeting between one Cox and the person he identified as the accused, an arrangement was in fact made, and a car registered in the accused's name was seen at the designated time and place. Furthermore, the accused's voice was identified from the tape of the conversation by two witnesses who knew him well.<sup>84</sup>

In the United States too, the existence of corroborating evidence was, until recently, considered to be relevant to the reliability of a hearsay statement.<sup>85</sup> In *Idaho v Wright*, however, a majority of the Supreme Court took the opposing view, declaring themselves to be "unpersuaded ... that evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears 'particularized guarantees of trustworthiness'".<sup>86</sup> Their reasoning was that:

the use of corroborating evidence to support a hearsay statement's "particularized guarantees of trustworthiness" would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination would be of marginal utility.<sup>87</sup>

The majority offered as an example a statement made under duress. Such a statement might happen to be consistent with other evidence even though the circumstances under which it was made make it unlikely that the declarant was telling the truth. In such a case, the court said, cross-examination of the declarant would be highly useful.<sup>88</sup> In the case before it, therefore, the court held that a two year old girl's statement that she had been sexually abused by her mother and father should have been excluded as insufficiently trustworthy, despite the fact that there was evidence showing both that she had been abused, and that she had been in the custody of the defendants when the abuse occurred.<sup>89</sup>

tions were corroborated both by behavioural changes and by the fact that blood was found in her underpants at a time before she had begun to menstruate.

84 Above n16 at 213; for the other facts of the case, see above n40.

85 For cases where the existence of corroborating evidence was referred to as a reason for holding a hearsay statement to be reliable see *US v White*, above n32 at 538, *Robinson v Shapiro*, above n63 at 743, *US v Barlow*, above n32 at 962-3, *US v Vretta*, above n33 at 659 and *US v Yonkers Contracting Co*, above n38 at 437. For cases where the lack of corroboration was referred to as a reason for holding a statement to be unreliable see *US v Hinkson*, above n36 at 386 and *US v Hooks*, above n25 at 797. See also Schwab, G, "Idaho v Wright: Is It a Step in the Wrong Direction in Determining the Reliability of Hearsay Statements for the Confrontation Clause?" (1992) 52 *Ohio State LJ* 663 at 666-71.

86 Above n25 at 656-7. The issue arose in the context of the Confrontation Clause of the Sixth Amendment of the United States Constitution, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him". The clause has, however, been interpreted in such a way as to allow the admission of hearsay evidence which has adequate indicia of reliability; this has been held to mean that the evidence must either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness": see *Ohio v Roberts*, above n54 at 608.

87 *Idaho v Wright*, id at 657.

88 Ibid.

89 Id at 658-9. In other cases, corroboration might be provided by the fact that the child

The minority, on the other hand, thought that it was "a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence".<sup>90</sup> The majority approach was simply seen as a requirement that courts disregard material which is undeniably relevant to the reliability of a hearsay statement. It is submitted that the minority view is to be preferred. This is not to suggest that a statement bearing no circumstantial indicia of reliability should be considered reliable merely because it happens to be corroborated by other evidence at the trial.<sup>91</sup> It is to suggest, however, that the existence of corroborating evidence — or the lack of it, where corroboration might reasonably have been expected if the statement were true — is a factor to be taken into consideration when determining the reliability of hearsay evidence.

#### 4. *Three Further Factors*

Creditworthiness and corroboration are so intimately connected to the question of what it is that makes hearsay reliable that it is difficult to see how any rule that required Australian courts to ignore these two factors could possibly be justified. The three factors considered in this section of the article, on the other hand, are rather more tangentially connected to the question of reliability. The first factor — the availability of the declarant as a witness — is arguably an alternative grounds for admitting otherwise inadmissible hearsay. The second factor discussed — necessity — is a possible additional requirement of admissibility. And the third factor — the fact that the evidence is led by the defence — constitutes a possible ground for applying the requirement of reliability less stringently, and perhaps even dispensing with it altogether.

##### A. *When the Declarant is a Witness*

One of the oddities of the hearsay rule is that it applies when the out of court declarant is available as a witness. The effect of this is that a witness' prior consistent and inconsistent statements are only admissible — if they are admissible at all — for the purpose of buttressing or impeaching the witness' credit. This is an oddity because the chief rationale of the hearsay rule is that

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possessed "esoteric knowledge" about the accused. This is presumably what the minority had in mind when they referred to the possibility of a child's statement mentioning that the assailant had a scar on his lower abdomen: *id* at 661. If the child was able to accurately describe something like this about the accused, then, absent some innocent explanation by the accused of how the child might have come by this knowledge, its possession would constitute a fact which strongly supported the reliability of the child's statement. For discussion of "esoteric knowledge" in the context of the corroboration rules see Birch, D, [1988] *Crim LR* 301 at 302-3 and [1988] *Crim LR* 702; and Mirfield, P, "An Alternative Future for Corroboration Warnings" (1991) 107 *LQR* 450 at 454-62.

<sup>90</sup> *Idaho v Wright* at 661.

<sup>91</sup> This seems to have happened in *US v Guinan*, above n25 at 356, where the defendant was charged with tax evasion offences. His estranged wife testified before a grand jury about her husband's financial affairs; in deciding that her testimony was properly admitted at his trial, the court relied almost entirely on the fact that her testimony was corroborated by other evidence relating to his bank accounts and other financial details. The decision in *US v Garner*, 574 F 2d 1141 at 1144-5 (1978) is open to the same objection. But see also *US v Bailey*, above n38 at 349, where a statement was held to be insufficiently reliable despite the existence of corroboration.

the statements of out of court declarants cannot be tested by cross-examination, yet declarants who are available to give evidence can be cross-examined. As Learned Hand J once pointed out, if the jury decides that the truth is not what the witness says now but what the witness said before, they are still deciding the truth on the basis of what they have seen and heard in court.<sup>92</sup>

This fact is recognised in section 60 of the *Evidence Act*, which provides that where an out of court statement is admissible for a non-hearsay purpose, it can also be used for the purpose of proving its truth. This is a departure from the common law position that evidence admitted for a non-hearsay purpose cannot be used for a hearsay purpose. Section 66(2) of the Act creates a further exception in criminal proceedings when the declarant is called as a witness, for representations made when "the occurrence of the asserted fact was fresh in the memory of the person who made the representation".<sup>93</sup> This would allow the use of the most reliable of a witness' prior consistent and inconsistent statements for the purpose of proving the truth of the matter stated.<sup>94</sup>

A similar reform is under way at common law. The vehicle for achieving this has again been the judgment of Mason CJ in *Walton*, but the true architect of this reform is probably Kirby P. Commenting on Mason CJ's judgment, Kirby P stated in the case of *R v Astill* that "[a]lthough often asserted to be the crux of the problem, reliability is not the final, nor always the decisive, factor in admitting hearsay evidence".<sup>95</sup> In *Astill*, the appellant had been convicted of the manslaughter of his girlfriend's baby. The mother, T, had gone out shopping. She had originally intended taking the baby, but three visitors — the appellant, one Jimmy Hughes, and one Anthony Trajkovski — were staying at the flat, and Hughes invited T to leave the baby with him. She did so. During the course of the afternoon the baby received the injuries from which she died later that day, the cause of death being reported as blunt trauma to the abdomen. The circumstances were such that the attacker must have been one or more of the three men. The principal Crown witness was Trajkovski, who stated that he had seen the appellant go into the room in which the baby was crying, and that he had then heard sounds of screaming and banging coming from the room.

The appellant's defence was that he had slept for most of the afternoon after injecting heroin, and that the attacker must have been one or other or both of Hughes and Trajkovski. In particular he sought to deflect responsibility onto Hughes, by showing that Hughes had been given the major responsibility for the care of the baby. He wished to support his defence by asking T about three phone calls she had made to the flat during the course of the afternoon.

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92 *Di Carlo v US*, 6 F 2d 364 at 367-8 (1925).

93 Section 64(3) does the same for civil proceedings. The rationale for these exceptions is explained in *id*, pars 688 and 693.

94 This would be consistent with the position under the Federal Rules of Evidence, Rule 801(d)(1) of which provides that the hearsay rule does not apply to a witness's prior inconsistent statements, provided those statements were made under certain specified conditions. In addition, prior inconsistent statements not made under those conditions are occasionally admitted under the residual exceptions: see, eg, *US v Leslie*, 542 F 2d 285 at 289-91 (1976). The Supreme Court of Canada has recently recognised a common law exception of similar scope: see *R v KGB* [1993] 1 SCR 740.

95 Above n16 at 158.

Had she been allowed, T would have testified<sup>96</sup> that Trajkovski answered the first call and informed her that the appellant was in bed asleep, and that Hughes had just fed the baby, who was crying. The second time, Hughes answered the phone and said "I don't know what's wrong with her, she keeps crying all the time. I've tried everything, I've given her a bottle, she won't drink the bottle", adding that he had fed her and that she had finally gone to sleep when he had laid down with her. Trajkovski answered the final call and said "I don't know what's wrong with her ... She keeps wobbling".

This evidence was helpful to the accused in a variety of ways. The mere fact that he had never once answered the phone was consistent with his contention that he had been asleep all afternoon.<sup>97</sup> But the content of the calls was also relevant. It suggested, variously, that Hughes had been given, and had accepted the major responsibility for the child, and had been fairly continuously involved with her care; that at some point she had kept crying despite his efforts; and that the appellant had been asleep.<sup>98</sup> If accepted, the evidence made it more likely that the attacker was Hughes rather than the appellant. In the circumstances of the case, Kirby P said:

where both the makers of the statements and the person attempting to repeat them in court, were each present in court and available for cross-examination, the interests of justice would have been better served by allowing Ms T to give evidence of the contents of the telephone conversations. Any resulting problem could then have been addressed by cross-examination, submissions of counsel and directions to the jury. In this way, the reliability or unreliability of the evidence could have been established<sup>99</sup>

The approach suggested by Kirby P has since been endorsed by the Victorian Court of Criminal Appeal in *R v Radford*.<sup>100</sup> Phillips CJ and Eames J quoted Kirby P's comments, approvingly and at length, in support of what they called "the common sense view":

that where the makers of the hearsay statements are witnesses before the jury, and so too were those who sought to give evidence of having heard

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96 We know how she would have testified because the trial out of which the appeal arose was in fact the appellant's second trial for this offence. In the first, aborted, trial the Crown made no objection to the line of questioning.

97 This was, according to Kirby P, a non-hearsay use of the evidence: above n16 at 158. If, however, T's conclusion that the appellant had never answered the phone was not based on her identification of the speaker's voice but on an assertion by the speaker that they were either Trajkovski or Hughes, then the evidence would have been hearsay, although possibly admissible under the extension of the telephone exception suggested by Deane J in *Pollitt v R*, above n13 at 596.

98 Above n16 at 152 per Kirby P.

99 Id at 158. Carruthers J, in a short judgment agreeing with Kirby P, upheld the appeal on two grounds, one of which was that the parties to the telephone conversations were all Crown witnesses, and therefore available for cross-examination: id at 160-1. For the same reason, Kirby P held that the appellant should also have been allowed to elicit evidence from Hughes' mother about certain statements Hughes had made to her at the hospital where the child was taken: id at 160.

100 *R v Radford*, above n16.

those statements then the weight and reliability of the issues are capable of being tested before the jury.<sup>101</sup>

This makes perfect sense. A finding of reliability under the reliability-based exceptions is intended to act as a substitute for the cross-examination of the declarant. If the declarant can be cross-examined then the substitute is unnecessary. What the "common sense view" is most likely to result in is the admission of a witness' prior inconsistent statements. In most cases it would be the opponent of the party calling the witness who wished to have the witness' prior inconsistent statements admitted. If the witness turned out to be hostile, however, the party calling the witness might seek to have the prior statements admitted. In both situations it is important that the party against whom the hearsay statement is admitted has the opportunity to cross-examine the witness about the prior inconsistent statement, notwithstanding that he or she may be the party's own witness. The Federal Rules of Evidence specifically provide for this: "If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination".<sup>102</sup>

If this procedure is followed, it is hard to see how the admission of a witness' prior inconsistent statements as evidence of the truth of that which they assert could give rise to any of the dangers against which the hearsay rule guards.

### B. A Requirement of Necessity?

Given that section 65 of the *Evidence Act* only applies when the declarant is unavailable to give evidence, a requirement of necessity is effectively built into the structure of the new reliability-based exception contained in section 65(2)(c).<sup>103</sup> In *Walton*, however, Mason CJ mentioned no such requirement. The issue is whether he should have.<sup>104</sup> Certainly, there are necessity requirements in both of the equivalent Canadian and American exceptions. The advantage of such a requirement is that it may ensure that the admission of otherwise inadmissible hearsay evidence remains exceptional. However, five years after *Walton* there is no evidence that the floodgates have opened to admit all manner of hearsay which seems to indicate that a requirement of necessity may be unnecessary. A stringently applied test of reliability might, in any case, constitute a better method of controlling the admission of hearsay.

The dangers associated with the imposition of a requirement of necessity, on the other hand, are real. First, it effectively amounts to an unwelcome revival of the best evidence rule.<sup>105</sup> That is, only when more probative direct evidence is unavailable will the hearsay evidence be admitted.<sup>106</sup> But if the

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101 *Id* at 235.

102 Rule 806.

103 Section 4 of Part 2 of the Dictionary sets out the circumstances which, for the purposes of the Act, constitute a witness not being available to give evidence.

104 He has been criticised for not doing so by Carter, P, "Hearsay: Whether and Whither" (1993) 109 *LQR* 573 at 590.

105 See Rein, A, "The Scope of Hearsay" (1994) 110 *LQR* 431 at 442.

106 Compare with Rules 803(24) and 804(b)(5) of the Federal Rules, which require that the hearsay statement be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts". Courts in the

evidence is reliable, then there is, ipso facto, no reason to exclude it, whether or not it happens to be hearsay and whether or not there happens to be a "necessity" for its admission. Second, and more significantly, the imposition of a requirement of necessity could introduce a degree of inflexibility to the new reliability-based exception which is at odds with its purpose of bringing flexibility to the hearsay rule. Ideally then, reliability would be left as the sole criterion of admissibility, but if a criterion of necessity is to be imposed, it should be a flexible one, in keeping with the approach underlying the new exception. This point was made in *Smith*, where the Supreme Court of Canada emphasised that necessity must "be given a flexible definition, capable of encompassing diverse situations. What these situations will have in common is that the relevant direct evidence is not, for a variety of reasons, available".<sup>107</sup>

Examples of the "diverse situations" which the requirement should, it is submitted, be capable of encompassing include the following: where giving evidence might cause undue trauma to the declarant, for example in a child abuse case;<sup>108</sup> where the declarant is incompetent to testify, including cases where the incompetence is due to his or her young age;<sup>109</sup> where the witness can no longer remember the events to which their earlier statement related;<sup>110</sup> and where a witness gives testimony inconsistent with their prior statements.<sup>111</sup> It is even arguable that a "necessity" can arise in relation to a witness' prior consistent statements. In *State of Arizona v Robinson*, for example, the court held that in child sexual abuse cases the child's initial revelation may, because of the vivid and clear way in which it is expressed, be the most powerful evidence, more powerful even than the child's testimony in court.<sup>112</sup> Finally — and foreshadowing the next section — courts should be prepared to hold that a necessity exists when the evidence in question is vital to the defence of an accused person.

### C. Hearsay Led by the Accused

Although the hearsay rule applies equally to both prosecution and defence evidence, an air of unfairness hangs over cases like *R v Blastland*,<sup>113</sup> *In Re Van Beelen*<sup>114</sup> and *Sparks v R*.<sup>115</sup> In those cases exculpatory evidence was

United States have stressed that evidence need not be "essential" in order to meet this requirement. Thus it need not be the only evidence capable of proving or disproving a particular fact; it is enough that it is "more probative" than other available evidence: see *US v Vretta*, above n33 at 658.

107 Above n17 at 604.

108 As in *State of Kansas v Kuone*, above n32 at 293; and see also *R v Khan*, above n18 at 105.

109 As in *R v Khan*, id at 101.

110 As in *Khan v College of Physicians and Surgeons of Ontario* (1992) 9 OR (3d) 641, approved by the Supreme Court of Canada in *R v KGB*, above n94 at 798; the proceedings arose out of the same incident as those in *R v Khan*. This example falls within Wigmore's second category of necessity: where we "cannot expect, again or at this time, to get evidence of the same value from the same or other sources" (emphasis added): see above n19 and §1421.

111 As in *R v KGB* above n94 at 799, where the Supreme Court of Canada held that the criterion of necessity was satisfied because "it is patent that we cannot expect to get evidence of the same value from the recanting witness". See also *US v Garner*, above n91.

112 Above n50 at 812; see also *US v Iaconetti*, above n63 at 559.

113 [1986] AC 41.

114 [1974] 9 SASR 163.

115 [1964] AC 964. See also *R v Thomson* (1912) 7 Cr App R 276, *R v Townsend*, above n70,

excluded by a rigid application of the hearsay rule. It is no doubt for this reason that section 65(8) of the *Evidence Act* creates a special exception for hearsay evidence led by an accused person. The exception provides that

The hearsay rule does not apply to:

- (a) oral evidence of a previous representation adduced by a defendant if the evidence is given by a person who saw, heard or otherwise perceived the representation being made; or
- (b) a document tendered as evidence by a defendant so far as it contains a previous representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

The emerging common law exception may be another means of giving effect to the view that the law of evidence should not be applied in such a way as to hamper an accused person in their defence. Certainly, it has been used in that way in three of the Australian cases which have adopted the approach suggested by Mason CJ in *Walton*. In each of the cases concerned, the courts justified the admission of evidence favouring the defence specifically by reference to the requirement that an accused person must receive a fair trial.

Thus the trial judge in *Daylight* emphasised, even more than the apparent reliability of the evidence, his belief that to "deprive the accused of the right to present this piece of evidence to the jury ... defies any notion of fair play".<sup>116</sup> The evidence was, he said, "admitted directly on the basis of fairness to the accused".<sup>117</sup> Similarly Kirby P in *Astill*, emphasised the need for fairness to an accused person, with the suggestion that an accused person is entitled to a trial in which "important evidence, central to his defence, is placed before the jury so that they can decide whether the Crown has proved its case after due reflection upon such evidence as is available to support the accused's defence".<sup>118</sup> A similar view underlies the decision of the Victorian Court of Criminal Appeal in *R v Radford*.<sup>119</sup>

In *Radford*, the applicant was convicted of several offences arising out of the theft of a firearm. He claimed that on the afternoon of the day on which the offences occurred he met by chance one Daryl Parker, in a Dandenong hotel. Parker had separated from his wife, Margaret White, and apparently had suspicions about the nature of the relationship between the applicant and his estranged wife. The substance of the applicant's defence was that he had been unconscious or asleep during the events of the night, and had therefore played no part in them. Indeed, he claimed that he could not remember anything between the time at which he had left his half-full glass of beer and Parker in order to go to the toilet, and 5 am the next morning. He claimed that while he

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*R v Turner* (1975) 61 Cr App R 67 and *R v Harry* (1986) 86 Cr App R 105.

<sup>116</sup> *R v Daylight*, above n16 at 356.

<sup>117</sup> *Id* at 357.

<sup>118</sup> *R v Astill*, above n16 at 159, 160. Although Smart J decided the appeal on the basis that all this evidence formed part of the *res gestae*, he agreed with Kirby P that "the court should not take a technical approach in relation to material which is capable of having an exculpatory operation in favour of an accused": *id* at 165. One of the grounds Carruthers J advanced for upholding the appeal was, likewise, the very simple fact that the content of the telephone conversations was relevant to the accused's defence: *id* at 160-1.

<sup>119</sup> *R v Radford*, above n16.



was in the toilet Parker had spiked his drink with twelve tablets of Rohypnol. The motive suggested for this was to take advantage of the applicant's drugged state in order to implicate him in the events which took place during the course of that evening, events which included the terrorising of Parker's estranged wife and her family.

Unfortunately for the applicant, the only evidence of his ingestion of Rohypnol was a statement by Parker to his estranged wife's mother, Nora White, that "I've been with Rod in the pub and put 12 Rohies in his drinks ... I doped him up". This statement was testified to without objection by Nora White during the committal. She was too ill to give evidence at trial, so her deposition was read out to the jury, without objection, in accordance with section 55AB of the *Evidence Act 1958* (Vic). At the trial Margaret White also said in cross-examination, again without objection from the Crown, that she was aware that Parker had told someone that he had placed 12 Rohypnols in the applicant's drink. And both the Crown and the defence called expert witnesses to testify about the likely effect of this amount of Rohypnol on the average person.<sup>120</sup> It therefore came as something of a surprise to both sides when the judge directed the jury that there was no evidence of the ingestion of Rohypnol by the applicant.

Although no objection had been made to any of this evidence at trial, on appeal the Crown sought to uphold the judge's direction. One of the issues which therefore arose was the evidentiary effect of hearsay evidence admitted without objection. The court indicated that in the circumstances of the case the jury would have been entitled to act on the evidence as truth of that which Parker had asserted. But what if the Crown objected to the admission of the evidence at the re-trial? Phillips CJ and Eames J referred to the comments of Mason CJ and Deane J in *Walton* about the need for the hearsay rule to be applied flexibly, and continued:

Given the fact that the prosecutor had decided not to call Parker and the further fact that even had Radford been able to locate and to call Parker (who had apparently disappeared), it was unlikely that Parker would have been a co-operative witness (it is also unlikely that he could have been cross examined by Radford) then it may be said that the approach adopted by the prosecutor here, in not seeking to exclude the hearsay evidence, was fair to Radford.<sup>121</sup>

What is unclear is whether this was merely intended as an injunction to the prosecutor about the conduct of the re-trial. Given that the court immediately went on to comment that the views of the court in *Astill* were "entirely consistent with the views which we have adopted herein",<sup>122</sup> however, it seems more likely that the court intended to say that fairness required the admission of the evidence, whether or not the prosecutor objected. This could be justified on the dual grounds of necessity, in that Parker, the only person who knew whether or not he had placed Rohypnol in the applicant's drink, was unavailable and would in any event, have been uncooperative; and of fairness to the accused, which could be seen as overriding any requirement of reliability.<sup>123</sup>

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120 As to which, see Freckelton, I and Selby, H (eds), *Expert Evidence* (1993) at 64.380-64.430.

121 *R v Radford*, above n16 at 234.

122 *Id* at 236.

123 Although Harper J primarily upheld the appeal on the basis that the verdicts were unsafe

What is most interesting about *Radford* is that it goes far beyond both *Daylight* and *Astill* in the importance it places on the need for fairness to an accused person. It suggests that the principle that the accused should not be prevented from leading evidence relevant to his or her defence may be strong enough to override the requirement of reliability altogether. In *Radford*, for example, Parker's statement had no circumstantial guarantee of trustworthiness, nor was Parker available as a witness. The court nevertheless suggested that fairness to the accused required its admission.

## 5. Conclusion

Parallel developments in the fields of statute and common law mean that Australia is now witnessing what was proclaimed in Canada to be "the triumph of a principled analysis over a set of ossified judicially created categories".<sup>124</sup> The movement towards a reliability-based approach to hearsay clearly has profound implications for the operation of the hearsay rule. Indeed, it may not be going too far to suggest that it spells the end of the rule as we know it. What is important at this stage, however, is that the criterion of reliability be developed with full regard to the need to ensure that only reliable hearsay is admitted under the new approach. The greatest difficulty will no doubt be in deciding what matters to take into account when determining the reliability of a particular piece of hearsay, and it is this difficulty which this article has primarily addressed.

It has argued that the circumstances in which the particular hearsay statement was made should be such as to substantially negate the possibilities of both insincerity and mistake. It has also suggested that the need to ensure that only truly reliable hearsay is admitted under the new approach should take precedence over the desire for conceptual purity. Courts should, therefore, take all relevant factors into account when determining the reliability of a particular hearsay statement, even if taking those factors into account is inconsistent with the theory of a circumstantial guarantee of trustworthiness. What this means in practice is that courts should take into account the declarant's creditworthiness and the existence of evidence corroborating the truth of the hearsay statement.

It also examined three further factors, each connected to the reliability inquiry in a less direct way. It argued that as a finding of reliability is really a substitute for cross-examination, the availability of the declarant as a witness means that the substitute is unnecessary. In other words, a witness' prior statements should in many cases be admitted without there being any need for an inquiry into their reliability. It also argued that while a criterion of necessity is inherent in the fact that section 65(2)(c) only applies when the declarant is unavailable as a witness, no such limitation should be imposed on the common

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and unsatisfactory, given the weaknesses in the prosecution case, he also held that the judge had erred in directing the jury that there was no evidence of the ingestion of Rohypnol. He also seems to have been concerned with the need for fairness, commenting, that in the circumstances of the case, it would have been "extraordinary, and unjust" if the accused could not rely on Parker's statement: *id* at 257.

124 Above n17 at 602.

law exception. If any such limitation is imposed it is further argued that it should be a flexible one, capable of encompassing diverse situations. One such situation is when the evidence in question is vital to the defence of an accused person. In such cases the hearsay rule should be applied flexibly for the exclusion of such evidence may mean the accused is denied a fair trial.

Finally, it is interesting to reflect on the irony of the fact that with meaningful statutory reform of the hearsay rule finally under way, such reform has suddenly become less urgent. Indeed, the parallels between the reforms brought about by the *Evidence Act* and those under way at common law are in many cases striking. Section 65(2)(c) and the case law developing around Mason CJ's judgment in *Walton* have both created an exception to the hearsay rule for reliable evidence. In different ways, sections 60, 66(2) and *Astill*, all allow the admission of a witness' prior statements. Finally, section 65(8) and *Radford* both declare that the hearsay rule should be applied less rigidly to evidence led by the accused. While the reforms brought about by the *Evidence Act* should be applauded, the five years since *Walton* have thus demonstrated the remarkable capacity of the common law for self-regeneration.