RES GESTAE REGURGITATED

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I. INTRODUCTION

Few doctrines in the law of evidence have been criticised to the same extent as the *res gestae* rule. Wigmore considered that it ought to be . . . "wholly repudiated, as a vicious element in our legal phraseology . . . an empty phrase . . . encouraging to looseness of thinking and uncertainty of decision".[1] Julius Stone described it as ". . . the lurking place of a motley crowd of conceptions in mutual conflict and reciprocating chaos".[2] These criticisms are not entirely surprising. The doctrine has been applied in a number of different contexts with no clear principle connecting them. Several of the suggested categories of the doctrine can be explained in terms of some other well-established rule of evidence, with the use of *res gestae* terminology simply confusing the matter. Other categories may genuinely indicate some independent principle but, again, it would be better if that principle were isolated rather than hidden in the fog of *res gestae*. Finally, this convenient obscurity allows lawyers and judges to use the doctrine as a last resort justification for admissibility – a shibboleth which encourages looseness of thinking and uncertainty of decision.

II. RES GESTAE

The phrase *res gesta* was familiar in classical Latin literature. Its meaning was quite untechnical, translating simply as 'a fact,' 'a

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1 J.H.Wigmore, *A Treatise on the Anglo-American System of Evidence* (3rd ed., 1940), para. 1767.

2 J.Stone, "Res Gestae Reagitata" (1939) 55 LQR 66, 67.

transaction', 'an event'.[3] The plural form, *res gestae*, indicated the details or particulars of which a transaction might be composed. Applied to the law of evidence it implies that when the circumstances of a particular event are in issue in a trial, evidence relating to any part of that event is relevant and generally admissible.

In a sense this is a mere truism, an application of the fundamental principle that relevant evidence is normally admissible. But the doctrine has been used to go further than this proposition in two ways. First, it has been used by some writers and judges as the test of relevance. Wills, in his text on evidence, asserted that all constituent parts and details of the "transaction in issue" are necessarily relevant to the issue, as are "subordinate incidents, together with such further facts as may be necessary to identify or explain them".[4] In *Attwood v. The Queen*[5] the High Court defined "relevant facts" as "facts and circumstances forming the parts and details of the transaction and the incidents or matters tending to explain, identify or lead up to the occurrences forming the subject of the issue". While this approach provides guidance to some kinds of relevant evidence it is far from comprehensive and therefore potentially misleading. It excludes evidence of later statements made about the transaction, opinions expressed in relation to it, similar fact evidence, evidence relating to the credibility of witnesses, all of which may be highly relevant. For this reason, the increasingly preferred test of relevance is much broader in scope, asking whether the evidence affects the probability of the existence of a fact in issue.[6] Indeed, the High Court in *Attwood* went on to talk of relevance in terms of "tending to make an inference of guilt more probable".[7]

The second, and more important, way in which the doctrine of *res gestae* has gone beyond the truism that the details of a transaction in issue in a trial are necessarily relevant and prima facie admissible evidence is that it seems to make such evidence *automatically* admissible. It appears to constitute an exception to various exclusionary rules of evidence – the hearsay rule, the rule against prior consistent statements, the opinion evidence rule, the similar fact rule – rules which act to render inadmissible evidence which is nonetheless relevant.

It is for this reason that the *res gestae* doctrine is called an inclusionary rule, operating to admit evidence which would otherwise be excluded. To assess the validity of this claim it is necessary to consider each of the exclusionary rules in turn.

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3 Note 1 *supra*, para. 1767.
4 Wills on Evidence (3rd ed., 1938), 3-5.
5 (1960) 102 CLR 353, 360.
6 See, for example, *R. v. Chee* [1980] VR 303, 306.
7 (1960) 102 CLR 353, 360.

III. THE HEARSAY RULE

The third Australian edition of *Cross on Evidence* formulates the hearsay rule thus:

> an oral or written assertion other than one made by a witness while testifying in the proceedings is inadmissible as evidence of the truth of any fact or opinion asserted.[8]

The first point to note is that evidence of an out-of-court statement will not be caught by the rule if it is not tendered for the purpose of proving the truth of any fact or opinion asserted. The High Court in *Ahern v. The Queen*[9] recognised that out of court statements may be used,

> not as proof of the truth of any assertion or implied assertion... but as facts... Utterances for this purpose may be regarded as facts no less than acts and, indeed, in the United States are sometimes called verbal acts.[10]

If relevant to a fact in issue on this non-hearsay basis, and not caught by any other exclusionary rule, evidence of a "verbal act" will be admissible. An example is where a witness ("W") gives evidence of an out of court statement (by "D") for the purpose of proving the state of mind of a person who heard the statement and not to prove the truth of facts asserted in the statement.[11] Another example is where a statement has some relevant legal effect – evidence of the statement would be admissible to prove the legal effect, not to prove the truth of any assertions made in it.[12] Less obviously, evidence of an out-of court statement may be admissible when tendered not for the purpose of proving the truth of any express or implied assertion of fact contained in it but for the purpose of inferring that fact or some other fact via general probability reasoning. Thus, if D says "X exists" and it is highly unlikely that D would (or could) have made such a statement without actually having observed X, then it may reasonably be inferred that D knew of the existence of X.[13]

Given that such out-of court statements relevant for a non-hearsay

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8 D.Byrne and J.D.Heydon, *Cross on Evidence* (3rd Aust. ed., 1987), 735 (hereafter "Cross").

9 (1988) 80 ALR 161.

10 *Id.*, 164.

11 For example, in *Subramaniam v. The Queen* [1956] 1 WLR 965, evidence of threats made by terrorists was admissible to prove that S was acting under duress (and not to prove that the threats would have been carried out).

12 For example, the making of an arrest may consist in part of certain statements made by a police officer. If the fact of arrest is a fact in issue or relevant to a fact in issue then evidence of such statements would be admissible to prove the fact of arrest. Thus, evidence of the words "I arrest you, A, for crime X" would be admissible because they constitute, in part, the making of an arrest. They would not thereby be admissible to prove that A had in fact committed crime X.

13 See *R. v. Blastland* [1986] 1 AC 51 and P.B.Carter, "Hearsay, Relevance and Admissibility: Declarations as to State of Mind and Declarations Against Penal Interest" (1987) 103 LQR 106, 112. The reasoning is not dissimilar to that involved in the area of similar fact evidence when evidence of conduct similar to that charged against an accused is admitted not to show a criminal propensity but because the circumstances are such that it is probable that the same person was responsible. See *Perry v. The Queen* (1982) 150 CLR 580.

purpose are not caught by the hearsay rule, it is apparent that use of the term *res gestae* in relation to such verbal acts is unnecessary and potentially misleading. If the statements are relevant and non-hearsay then they are admissible, subject to the other exclusionary rules.[14] It is only if an out-of-court statement is really tendered for a hearsay purpose that the question arises whether any of the suggested categories of *res gestae* constitutes exceptions to the hearsay rule.

The second point to note is that it is often the case that evidence of a statement allegedly part of the *res gestae* is not hearsay in form – it does not contain any express assertion of fact. This raises the vexed question of implied assertions. An implied assertion is an assertion of a particular fact implied or inferred from a statement or conduct which was not intended to thereby assert the fact. For present purposes it is only necessary to focus on assertions implied from statements. An often repeated example is a statement made by D in the form "Hello X". If W overheard that statement by D and testifies to it, such evidence could in theory be caught by the hearsay rule if tendered for the purpose of proving the truth of the implied assertion that the person who D was addressing was in fact X.

If the hearsay rule does not apply to implied assertions then, again, it would not be necessary to consider in this context the application of the *res gestae* doctrine as an exception to the hearsay rule. However, at least until recently, it was impossible to provide a clear answer to this question. There are decisions where the hearsay rule has been applied to implied assertions.[15] On the other hand, in a number of cases both in England and Australia evidence which seems to have been implied hearsay has been classified as original evidence, suggesting that these courts did not consider that implied assertions are caught by the rule.[16] But the recent decision of the High Court in *Walton v. The Queen*[17] supports the former approach. The majority of the Court composed by Wilson, Dawson and Toohey JJ. accepted that evidence of statements or conduct which has no probative value other than as an assertion or implied assertion should be treated as hearsay.[18] On the other hand, they considered that in some circumstances it may be permissible to "disregard" the element of hearsay

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14 Wigmore, note 1 *supra*, laid down a number of additional conditions on the admissibility of such "verbal acts". He stated (para. 1772) that a statement would only be admissible on this basis when it accompanied conduct to which it is desired to attach some legal effect. Thus the statement would not be admissible if there were no other conduct or the conduct were unequivocal. While in practice this will usually be the case, it is misleading. The principle is simply that the statement will be admissible if it has a relevant legal effect. Whether there is other conduct which also, in part, has a relevant legal effect is beside the point.

15 *Wright v. Doe d. Tatham* (1834) 1 Ad & El 3; 110 ER 1108; *Teper v. R.* [1952] AC 480.

16 *Lloyd Powell v. Duffryn Steam Co. Ltd* [1914] AC 733; *Ratten v. The Queen* [1972] AC 378; *R. v. Towers* (1985) 75 FLR 76 (NSWCCA).

17 (1989) 63 ALJR 226. This decision is discussed in detail in S.J.Odgers, "*Walton v. The Queen* – Hearsay Revolution?" (1989) 13 *Crim LJ* 201.

18 *Id.*, 234. See also Mason C.J., 229.

(that is, the reliance upon the truth of the implied assertion).[19]

Thus, evidence of an out of court statement may be tendered to prove the state of mind of the person who made the statement. Wilson, Dawson and Toohey JJ. held that the element of hearsay in such evidence, the implied assertion as to state of mind, may sometimes be disregarded:

> Such statements will rarely be purely assertive. Ordinarily they are reactive and are uttered in a context which makes their reliability the more probable.[20]

The evidence need not be admitted as part of the *res gestae*. Rather, in such circumstances the statement may be treated as conduct from which an inference to a fact in issue may be drawn. Another example might be a prosecution for illegal gambling where a police officer gives evidence of a telephone call received at the alleged gambling premises in which the voice at the other end says: "This is Fred Bloggs. Give me 100 on Sure Thing in the 5th at Flemington". The statement contains no express assertion of fact but seems relevant only because of the implied assertion that the premises telephoned are in fact engaged in the business of gambling. However, such statements "are uttered in a context which makes their reliability the more probable". Thus the hearsay element might be disregarded. Alternatively, it might be argued that "probability reasoning" is available. If a large number of such calls are received it would be probable that the premises were in fact engaged in the business of gambling, without any need to rely upon the truth of any particular implied assertion.[21]

It is clear, therefore, that the applicability of the *res gestae* doctrine need not be considered if evidence of an out of court statement is tendered for a non-hearsay purpose or any hearsay element may be "disregarded". Otherwise, there is authority only for two *res gestae* exceptions to the hearsay rule:

A. STATEMENT ROUGHLY CONTEMPORANEOUS WITH RELEVANT EVENT AND UNLIKELY TO BE FABRICATED

In *Ratten v. The Queen*[22] the accused had been charged with the murder

19 *Id.*, 234, 235. See also Mason C.J., 229-230: "The hearsay rule should not be applied inflexibly. When the dangers which the rule seeks to prevent are not present or are negligible in the circumstances of a given case there is no basis for a strict application of the rule. Equally, where in the view of the trial judge those dangers are outweighed by other aspects of the case lending reliability and probative value to the impugned evidence, the judge should not then exclude the evidence by a rigid and technical application of the rule against hearsay."

20 *Id.*, 235. Mason C.J. considered that evidence as to state of mind is not hearsay at all, 228.

21 See an example of this reasoning process in the case of *Concrete Constructions Pty Ltd v. Plumbers and Gasfitters Employees' Union of Australia* (No.2) (1987) 72 ALR 415. Wilcox J. of the Federal Court held that it was permissible to use evidence that 59 union members believed that they were constrained from working by the defendant union in order to prove that the union was in fact constraining them from working. He argued that it is "highly unlikely that, without some message from the union officials, there would have been such a widespread perception of constraint", 435.

22 Note 16 *supra*.

of his wife. The evidence in question was testimony from a telephonist who received a phone call from the Ratten residence, opened the speak key and after saying "number please" heard the high pitched reply "Get me the police please," then the words "59 Mitchell Street". This was crucially important evidence in the case since the telephonist was convinced the speaker was a woman, apparently in a state of fear. Ratten claimed that he accidently shot his wife and that it was he who telephoned, asking for an ambulance.[23] The Judicial Committee of the Privy Council held that the evidence was admissible.[24] Lord Wilberforce, speaking for the Privy Council, stated that "the test should not be the uncertain one of whether the making of the statement was in some sense part of the event or transaction".[25] Rather

> the principle [is] that hearsay evidence may be admitted if the statement providing it is made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused.[26]

This proposition was restated and affirmed by the House of Lords in *R v. Andrews.*[27] While one may question whether the possibility of concoction or distortion can ever be wholly excluded,[28] the principle is relatively clear - admissibility is dependent on an assessment by the trial judge of the probable reliability of D's assertion, taking into account such factors as relative contemporaneity, the presence of stressful circumstances and any "special features that may give rise to the possibility of error".[29] However the position in Australia is less clear.[30]

In *Adelaide Chemical and Fertilizer Co. Ltd v. Carlyle*[31] the husband of the plaintiff was seriously injured when a jar of sulphuric acid spilt over him. Very soon after the accident, as he was washing the acid from his legs, he told the plaintiff what had happened. Two members of the High Court addressed the admissibility of these statements in detail. Starke J., accepting that this aspect of the *res gestae* rule constituted an exception to the hearsay rule,[32] emphasised that reduced risk of fabrication was the

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23 There was no doubt that the accused had an unusually high-pitched voice.

24 One basis for this decision was that the evidence was not hearsay at all, note 16 *supra,* 387. Given the preceding discussion, this seems wrong. The statement was relevant either for the implied assertion that D was in justified fear of attack or to prove that "she" believed an attack was imminent.

25 Note 16 *supra,* 389.

26 *Id.,* 391. The Privy Council thereby rejected the well-known decision of Cockburn C.J. in *R. v. Bedingfield* (1879) 14 Cox CC 341.

27 [1987] 1 AC 281.

28 See T.R.S.Allan, "Res Gestae in the House of Lords: Concoction or Distortion?" [1987] *Camb LJ* 229, 230-231.

29 Note 27 *supra,* 301.

30 Except in Tasmania where this exception has received statutory embodiment - Evidence Act 1910 s.81F.

31 (1940) 64 CLR 514.

32 *Id.,* 526.

central principle on which the exception was based. He quoted Phipson for the proposition that such statements must, in order to be admissible, be "made either during, or immediately before or after, its occurrence – but not at such an interval from it as to allow of fabrication, or to reduce them to a mere narrative of a past event".[33]

This latter statement in fact adopts two different criteria – risk of fabrication and "mere narrative of a past event". It was the latter test which formed the basis of the judgment of Dixon J. (as he then was). He noted the American view that statements made substantially contemporaneously with a relevant event may be

> admitted in evidence as an exception to the rule excluding hearsay, on the ground that a guarantee of their truth is to be found in their spontaneity, in the lack of 'time to devise or contrive' and in the instinctive character of utterances made under the influence of excitement.[34]

However, he considered that the general view among "English lawyers" is that such statements are admissible only as "relevant facts", "one of the parts or details of a transaction not complete when the statement was uttered and as supplying no proof of antecedent facts." Therefore, the plaintiff's husband's statement was not admissible unless it formed "a portion of or an incident in the transaction which in all its parts and details constitutes one of the matters in issue". Since it was a "mere narrative explaining an event that had occurred ... and was over" the statement was not admissible.[35] The thrust of the analysis of Dixon J. is that there is no hearsay exception for statements made roughly contemporaneously with a relevant event. The only statements which are admissible are those which constitute non-hearsay "verbal acts" – statements relevant on a basis other than to prove the truth of any facts asserted.

Before the recent decision of the High Court in *Walton*, the difference in approach between Starke and Dixon JJ. had not been clearly resolved in Australia. While a number of State Supreme Courts accepted the authority of *Ratten*,[36] thereby favouring the Starke analysis, the High Court itself had not expressed any firm view. In *Vocisano v. Vocisano*[37] Barwick C.J. considered that it was "not an appropriate occasion" to discuss whether the decision of the Privy Council in *Ratten* had changed the law in relation

33 *Id.*, 524-525 citing Phipson, *Law of Evidence* (5th ed., 1911), 47. Starke J. held that it was reasonably open to the trial judge to find that the statement by the plaintiff's husband was so near in point of time to the accident that it was substantially contemporaneous with it and might in a fair sense be said to be part of the transaction, *id.*, 526.

34 Note 31 *supra*, 531. For the classic American view, see Wigmore, note 1 *supra*, para. 1747. Rule 803 of the United States Federal Rules of Evidence establishes a hearsay exception for a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

35 Note 31 *supra*, 530.

36 *R. v. Hissey* (1973) 6 SASR 280, 293; *R. v. Lawless* [1974] VR 398, 418-419; *Van den Hoek v. The Queen* (1985) 17 A Crim R 191, 193, 200 (WACCA). *Cf. R. v. Manh* (1983) 33 SASR 563.

37 (1974) 130 CLR 267.

to the doctrine of *res gestae*.[38] However, he added:

> A reason for the doctrine that statements made as part of the res are admissible as evidence is that, because of their contemporaneity and the circumstances of their making, they were unlikely to be concocted and therefore might well be reliable: but that does not mean that statements made on an occasion when they are unlikely to be concocted are for that reason admissible. It is the contemporaneous involvement of the speaker at the time the statement is made with the occurrence which is identified as the res which founds admissibility.[39]

In *Vocisano,* the statements in question were made more than five minutes after the motor vehicle accident which constituted the fact in issue. Barwick C.J. consequently held that there was no sufficient contemporaneity to warrant the conclusion that the statements were part of the *res.* They were in the nature of a historical account rather than in the nature of a statement made as part and parcel of the occurrence.[40]

This latter requirement that statements be "made as part and parcel of the occurrence" before they may be admitted in evidence suggests that such statements are not admitted as an exception to the hearsay rule but as "verbal acts". But the assertion that a reason for the *res gestae* doctrine is that statements falling within its scope "might well be reliable" strongly suggested that the doctrine is an exception to the hearsay rule. The stress on contemporaneity may be seen as both derived from precedent and a factor which enhances reliability.

The law in Australia has been clarified to some extent by *Walton.* The majority of Wilson, Dawson and Toohey JJ. stated in obiter dicta:

> An assertion may be admitted to prove the facts asserted if it is part of the *res gestae,* but it is then an exception to the rule against hearsay: see *Adelaide Chemical and Fertilizer Co Ltd v. Carlyle* (1940) 64 CLR 514. The justification for that exception is now said to lie in the spontaneity or contemporaneity of assertions forming part of the *res gestae* which tends to exclude the possibility of concoction or distortion: *Ratten,* at 389-390; *R. v. Andrews* AC 281 at 300-1. See also *Adelaide Chemical and Fertilizer Co. Ltd v. Carlyle,* at 531. Of course, the discussion in *Ratten and Andrews* was in the context of the *res gestae* rule. The unlikelihood of concoction or distortion is not sufficient of itself to render a hearsay statement admissible: see *Vocisano v. Vocisano* (1974) 130 CLR 267 at 273.[41]

The majority of the High Court clearly accepted that the *res gestae* doctrine is, in this context an exception to the hearsay rule. Mason C.J. in his separate judgment, also took that view.[42] But the scope of the doctrine remains unclear. The majority expressed no view on the test for determining whether a statement is part of the *res gestae.* Nevertheless, their view seems to be that contemporaneity with "the occurrence which is identified as the *res*" is essential, notwithstanding the fact that admission is justified because of the unlikelihood of concoction or distortion.

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38 *Id.,* 273.
39 *Ibid.*
40 *Ibid.* Stephen And Jacobs JJ. were in agreement with Barwick C.J.
41 Note 17 *supra,* 234-235.
42 *Id.,* 230.

In contrast, the Chief Justice preferred the (modern) English approach

> which places emphasis upon the spontaneity of an assertion (as evidence that it was not concocted) rather than upon the contemporaneity of that assertion to the occurrence to which it relates.[43]

As he noted[44] this principle accords with the American approach as Dixon J. described it in *Adelaide Chemical* (although *not* with Justice Dixon's approach). Mason C.J. thus disagreed with the obiter views of Barwick C.J. in *Vocisano* and concluded that they "[do] not prevent this Court from considering the issues suggested by *Ratten* on an appropriate occasion".[45]

Certainly, any requirement of strict contemporaneity with the *res* should be avoided. Classifying evidence as "part of the transaction" does not in any way justify the creation of a hearsay exception. As Wigmore argued, "to admit hearsay testimony simply because it was uttered at the time something else was going on is to introduce an arbitrary and unreasoned test, and to remove all limits of principle".[46] Adoption of *res gestae* terminology is unhelpful and potentially misleading.

Nonetheless, it is difficult to express a firm view on the appropriate scope of this hearsay exception. It is, for example, arguable that conditions of involvement or pressure may reduce the possibility that D is insincere.[47] On the facts of the famous case of *Bedingfield*,[48] it is unlikely that a woman who comes out of a house with her throat cut is lying (or mistaken) when she blames the accused.[49] On the other hand, psychological research has not verified the proposition that stress in fact protects against fabrication.[50] More important, circumstances of stress or excitement may well substantially aggravate weakness in D's perception of events.

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43 *Ibid.* Recent State Court decisions also seem to be following the modern English approach. In the South Australian decision of *Pangallo* (1989) 51 SASR 254, Prior J. held that statements made three days after the relevant event were admissible as part of the *res gestae* since they were "spontaneous". In the Queensland decision of *Daylight* (1989) A Crim R 354, the *Ratten* analysis was applied to admit statements made to police soon after the victim was stabbed, although it was stated not to be *res gestae* evidence!

44 *Ibid.*

45 *Id.*, 231.

46 Note 1 *supra*, para. 1757.

47 Wigmore noted the "experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock... the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts", *id*, para. 1747.

48 (1879) 14 Cox CC 341.

49 Of course, it was *possible* that she had determined, as the defence contended, to commit suicide and at the same time blame the accused. But such a possibility should not render the statement inadmissible.

50 See Australian Law Reform Commission, Interim Report No.26, *Evidence* (1985), para. 692. Nor, it should be added, has it disproved it.

Psychological research suggests that stress adversely affects the perception and performance of the person under stress.[51] Some studies suggest that substantial stress can produce decreased efficiency in intellectual and visual search tasks as well as hindering memory function.[52] Such stress can also impact on the transfer of information between D and W. D may well narrate events in an unusual and imprecise manner while W, perhaps also under the influence of stress, may have difficulty in accurately perceiving such communication.[53] Indeed, it is arguable that a requirement of substantial contemporaneity will enhance reliability, in the sense that D will presumably have little time to fabricate evidence in relation to the events perceived and given the fact that there could hardly be any memory or recall problems in such circumstances. It might be argued on this basis that there should be no requirement of stress or excitement, that substantial contemporaneity should be a sufficient basis for admission.[54]

Of course, the significance of this debate is considerably reduced by the High Court's willingness in *Walton* to "disregard" an element of hearsay in evidence, to apply the hearsay rule "flexibly", where the evidence is unusually probative or the normal hearsay dangers are not present.[55] Argument as to whether this hearsay exception should emphasise stress or relative contemporaneity becomes rather unimportant. Nevertheless, what there cannot be any argument about is that the use of *res gestae* terminology in the context of this exception to the hearsay rule should be avoided.

B. STATEMENT CONCERNING "BODILY SENSATIONS"

In *Ramsay v. Watson*[56] the High Court[57] quoted from *Wills on Evidence:*

> Whenever there is an issue as to some person's state of health at a particular time, the statements of such a person at that time or soon afterwards with regard to his bodily feelings and symptoms are admissible in evidence.[58]

The Court regarded such statements as "evidence of the facts they

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51 *Id.*, paras 420, 666, 692.

52 A.D.Yarmey, *The Psychology of Eyewitness Testimony* (1979), 51, 52.

53 It is arguable that this was a real danger in *Ratten*, discussed above at text corresponding to notes 22-26 *supra*. Evidence from the telephonist of the phone call from a distressed woman asking for the police clearly contradicted Ratten's claim that he accidently shot his wife and that it was he who telephoned, asking for an ambulance. Subsequent investigation of the case suggests that Ratten was telling the truth, that he did ask for an ambulance and that the telephonist heard only the last part of the call, mistaking the word "please" for "police". See T.Molomby, *Ratten - The Web of Circumstance* (1978), 211.

54 See C.McCormick, *McCormick on Evidence* (2nd ed., 1972) 579; U.S. Federal Evidence Rule 803.

55 See discussion accompanying notes 19-21 *supra*.

56 (1961) 108 CLR 642.

57 Dixon C.J., McTiernan, Kitto, Taylor and Windeyer JJ.

58 Note 56 *supra*, 647 citing *Wills on Evidence*, note 4 *supra*, 209.

recount, and thus as exceptions to the general rule excluding hearsay".[59] The statements must be roughly contemporaneous with the bodily sensation described[60] but it is not necessary that the declarant be unavailable to testify.[61] This exception to the hearsay rule extends to contemporaneous statements of mental as well as physical condition.[62] However, it seems that it does not extend to statements of intention, memory and belief. In *Walton v. The Queen* the majority of the High Court considered that such statements could only be admitted as original evidence or in situations where the hearsay element in the evidence might be disregarded.[63] There was no suggestion that the *res gestae* doctrine might apply.

The reasons for, and the limits of, this exception derive from a consideration of the primary justifications for the hearsay rule. While the probative value of these statements is conditional on the reliability of D, there can be little question of mistaken perception with regard to a person's own roughly contemporaneous mental and physical sensations. Further, the fact that the statement was made roughly contemporaneously with the existence of the sensations asserted minimises problems of memory and recall. Assuming sincerity, there can be little question of unreliability with respect to D's statement.[64] Furthermore, if D is unavailable to testify, evidence of W as to D's statement regarding his or her bodily sensations is the best available evidence of that fact – no other source could provide better evidence as to those sensations. Indeed, it is arguable that even if D is available to testify, his or her statements as to bodily sensations made roughly contemporaneously with the existence of the sensations are likely to be better evidence than D's testimony thereto.

It follows there are good arguments for the existence of a hearsay exception in relation to statements concerning roughly contemporaneous bodily sensations. Conversely, this exception should not extend to a statement by D as to the factual causes of such bodily sensations since this

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59 *Id.*, 648. The Court preferred this analysis to the view in some textbooks – "that the statements admitted were spontaneous and natural expressions of suffering forming part of a res gestae". It may be inferred from this that the High Court considered that the *res gestae* never constitutes an exception to the hearsay rule. This position is very much the view of Dixon C.J., see discussion accompanying notes 34 ff. *supra*.

60 *Evans v. Hartigan* (1941) 41 SR (NSW) 179, 183; *R. v. Perry (No.2)* (1981) 28 SASR 95, 99; *Batista v. Citra Constructions Pty Ltd* (1986) 5 NSWLR 351, 357.

61 *R. v. Perry (No.2)*, note 60 *supra*, 96-98; *Wogandt* (1983) 33 A Crim R 31; *Batista v. Citra Constructions Pty Ltd*, note 60 *supra*, 355, 361.

62 In *Batista v. Citra Constructions*, note 60 *supra*, the New South Wales Court of Appeal admitted evidence of B's out of court statement that "he suffered chronic despondency and felt hopeless at all times".

63 Note 17 *supra*, 233-235.

64 In those cases where the sensations are painful or disturbing it might be argued that this factor is likely to maximise sincerity – see Wigmore, note 1 *supra*, para. 1722. However this is not always the case since the only evidence of the pain or disturbance may well be the declarant's statement.

is less likely to be reliable and would not be the best available evidence of such facts, regardless of the availability of D to testify.[65] But whatever the scope of this hearsay exception, it should again be clear that adoption of *res gestae* terminology is unnecessary and misleading. As Wigmore explained:

> It would be well if the invocation of the "res gestae" doctrine in this connection would be wholly abandoned. The simple and sufficient reason for admission is the Hearsay exception receiving statements of an existing mental condition. Whether these accompany some conduct relevant in the litigation, or any movement or "act", is wholly immaterial. The labour shown in certain judicial opinions to discover some "act" of which the declarations "are a part" is wasted; such speculations serve only to confuse an otherwise simple situation.[66]

III. PRIOR CONSISTENT STATEMENTS

Evidence of an out-of-court statement will not be caught by the hearsay rule if it is not tendered for the purpose of proving an assertion contained in it. However, it may be caught by another exclusionary rule. The rule against prior consistent statements provides that evidence of an earlier out-of-court statement made by a witness in a trial and consistent with that witness' testimony may not be admitted to support his or her credibility.[67] The primary reason for this rule is that such consistency is of minimal probative value as to credibility – repeating the same story several times does little if anything to enhance the credit of the teller.[68] There is some nineteenth century authority for the existence of a *res gestae* exception[69] but it is difficult to justify. The well-recognised exceptions to the rule[70] are permitted essentially to rebut an allegation that the witness's testimony is a recent invention.[71] In the absence of such an allegation, the fact that a consistent statement was made roughly contemporaneously with relevant events adds nothing to the credibility of the witness's testimony. Of course, that fact may well support the reliability of the out-of-court statement but that is relevant only to the application of the hearsay rule.

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65 See *Mobil Oil Corporation v. Registrar of Trade Marks* [1984] VR 25.

66 Note 1 *supra*, para. 1726.

67 *R. v. Parker* (1783) 3 Doug KB 242; 99 ER 634. See also Cross, note 8 *supra*, para. 9.32.

68 Cross, *ibid.*

69 *Milne v. Leisler* (1862) 7 H & N 786; 158 ER 686. See Cross, note 8 *supra*, para. 9.40.

70 Complaints in sexual cases, rebutting allegations of recent invention, statutory exceptions – see Cross, *id.*, para. 9.33 - 9.42.

71 With respect to the exception for complaints in sexual cases, this principle was extended for historical reasons to allow proof even without prosecution assertion of lack of complaint – see Cross, *id.*, para. 9.33. The statutory exceptions are premised on the view that evidence admitted under a hearsay exception may also be received as evidence of consistency.

IV. OPINION EVIDENCE

Evidence of an opinion (an inference from data) is normally not admissible but a number of substantial exceptions are recognised. The most important permits expert witnesses to give opinion evidence but it is also clearly established that a non-expert witness may give evidence in the form of an opinion if it is based on personal perception and needs to be presented in this form to give a complete account of those perceptions.[72] The question is whether the *res gestae* doctrine constitutes another exception. There is virtually no authority on this question but the third Australian edition of *Cross on Evidence* states that

> [i]t seems that in certain cases evidence which would infringe both the rule against hearsay and the opinion rule may be received as part of the res gestae although it would be excluded if it consisted of statements made at a time which was at all remote from the events to which they relate. The typical example is provided by the reception of a bystander's statements alleging negligence on the part of one of the drivers involved in a motor accident.[73]

But while such a bystander's statement may well be admissible under the hearsay exception for roughly contemporaneous statements unlikely to be fabricated, it is difficult to see why the *res gestae* doctrine is needed to provide an exception for the opinion evidence rule in this case. The bystander's statement is almost certainly based on personal perceptions and needs to be presented in this form to give a complete account of those perceptions. Indeed, if this were not the case it would be very difficult to justify admission of the evidence. Drawing inferences from facts is normally a matter for the tribunal of fact. While a bystander should be able to provide a complete picture of the facts he or she observed, presence at the scene and substantial contemporaneity do not justify that bystander in drawing inferences from those facts. Again it may be concluded that the *res gestae* doctrine is unnecessary and potentially misleading.

V. SIMILAR FACTS

Similar fact evidence is evidence which tends to show that on a particular occasion a person has acted in a way more or less similar to the way the person is alleged to have acted on some other relevant occasion. Such evidence may in certain circumstances be tendered by the prosecution against an accused, alleging similar conduct to that in issue in the trial. The law relating to similar fact evidence in this context is not entirely clear but the following propositions may be suggested:

(i) Evidence of similar facts is not admissible if it shows only that the

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72 In a sense, this is not a true exception since the witness is giving substantive evidence of his or her perceptions, which perceptions are communicated in the form of an opinion (see *R. v. Kelly* [1958] VR 412). Another exception admits opinion evidence where the existence of the opinion is relevant other than to establish the truth of the opinion.

73 Note 8 *supra*, para. 19.31.

accused had a propensity or disposition to commit crime, or crime of a particular kind, or that he was the sort of person likely to commit the crime charged.[74] Whether this is an absolute prohibition on all propensity-type reasoning, no matter how specific or unique the alleged propensity, remains a matter of debate.[75]

(ii) Evidence of similar facts which is not excluded by proposition one is not admissible if its probative value is not sufficiently strong to clearly outweigh the prejudicial dangers associated with such evidence.[76] These prejudicial dangers include the risk that a jury will convict the accused as a means of punishing him for conduct for which he is not on trial and the risk that it will significantly overestimate the probative value of the similar fact evidence in relation to the offence charged.

(iii) Evidence of similar facts will not be admissible under proposition two "if there is a rational view of the evidence that is inconsistent with the guilt of the accused."[77]

(iv) Evidence of similar facts which is not excluded under any of the preceding tests may still be excluded under the general fairness discretion where the probative value of the evidence is outweighed by its prejudicial dangers.[78]

One difficulty with similar fact evidence in the context of *res gestae is* that it may be difficult to draw a clear dividing line between similar facts and the facts actually in issue in the prosecution. More precisely, it may not be clear an event is relevant to a fact in issue (with the various exclusionary rules of evidence applying to evidence of that event) or is itself part of the facts in issue (so that the exclusionary rules would be inapplicable). Furthermore, the prevailing position in Australia seems to be that if events are classified as part of the *res gestae* of a fact in issue then similar fact rules do not apply.

In *O'Leary v. The King*[79] the accused was charged with the murder of a fellow worker at a timber camp. The latter was found dying from his recently inflicted injuries on a Sunday morning. Evidence had been tendered that the accused had violently assaulted a number of other fellow workers during a "drunken orgy" at the camp which lasted from the Saturday morning until late on the Saturday night. The High Court considered that the evidence was not inadmissible under the similar fact

74 Per Gibbs C.J. in *Markby v. The Queen* (1978) 140 CLR 517, 532.

75 See T.H.Smith and S.J.Odgers, "Propensity Evidence - The Continuing Debate" (1987) 3 *Aust Bar Rev* 77, 80-82.

76 This proposition is a composite of the various tests adopted by members of the High Court in several similar fact cases over the last decade - *Markby v. The Queen* (1978) 140 CLR 517; *Perry v. The Queen* (1982) 150 CLR 580; *Sutton v. The Queen* (1984) 152 CLR 528; *Hoch v. The Queen* (1988) 62 ALJR 582.

77 Per Mason C.J., Wilson and Gaudron JJ., in *Hoch v. The Queen, ibid.*

78 Of course, the possible theoretical application of this discretion is unlikely in practice given the terms of proposition two.

79 (1946) 73 CLR 566.

rules, but a majority[80] accepted the prosecution contention that

> evidence may be given, not only of the act charged itself, but of the other acts so closely connected therewith as to form part of one chain of facts which could not be excluded without rendering the evidence unintelligible – part in fact of the res gestae.[81]

Of the majority, Justice Dixon's judgment is the most often cited. He held that the evidence was admissible because it showed "a connected series of events ... which should be considered as one transaction." Without the evidence "the transaction of which the alleged murder formed an integral part could not be truly understood and, isolated from it, could only be presented as an unreal and not very intelligible event." While the evidence should not be used to show a particular "disposition" in the accused as a form of "identifying mark", it was "relevant to the question whether the prisoner was the assailant and, if so, whether he was at the time capable of forming, and did form, the intention which would make his crime murder."[82]

This concept of "transaction" is ambiguous. It is not limited to the facts in issue. In *O'Leary* the facts in issue were the identity of the person who killed the victim and the mental state of the killer at that time. The preceding events at the timber camp were clearly relevant to these issues, but equally clearly not a part of them. The word "transaction" suggests a discrete series of events which has a beginning and an end. It seems almost impossible to formulate criteria for determining these.[83] More important, it is not clear why the similar fact rules should not apply. Dixon J. stressed that the alleged murder could not be "truly understood" without evidence of the preceding events. It is not clear whether this means anything more than the events were relevant to the murder.[84] Presumably all relevant evidence is needed to "truly understand" a fact in issue. But the similar fact rules are premised on the view that the dangers with such relevant evidence may outweigh the benefits to understanding. The fact that the events were roughly contemporaneous with the alleged murder enhanced the probative value of the evidence, without negating its prejudicial dangers.

It is difficult to see how the evidence was relevant to whether the accused was the assailant and his mental state at the time other than via a form of propensity reasoning. In relation to the first issue the reasoning

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80 *Id.*, Latham C.J., Rich, Dixon and Williams JJ. Starke and McTiernan JJ. dissented.

81 *Id.*, per Starke J., 577.

82 *Id.*, Dixon J., 577-578. The other members of the majority used similar language.

83 A comment by the editors of Cross, note 8 *supra*, para. 19.12 in relation to another area of the *res gestae* is apposite here – "much attention was devoted to the question whether the words could be said to form part of the transaction or event with all the attendant insoluble problems of when the transaction or event began or ended."

84 Julius Stone, note 2 *supra*, 80-81 suggested that such events are admitted to provide "a complete picture . . . without producing any passport of relevance." While he acknowledged that they should be excluded if shown to be irrelevant, the requirement of relevance should not be qualified in this way. All evidence must be relevant to be admissible.

involved is that, of the timber workers at the camp, he was one of the few to manifest a violent propensity in the hours before the murder. This increased the probability that he was the murderer. In relation to mental state, the reasoning involved is that someone who has shown a propensity to intentionally attack persons is more likely to have intentionally attacked a person he assaulted some hours later.

There are clear prejudicial dangers with such evidence. The jury may seek to punish the accused for his violent conduct in the hours preceding the murder. Thus, they may more readily convict because of the sort of person he is. The jury may give too much weight to such evidence, overestimating the extent to which it increases the probability that he committed the murder or too readily assuming that his mental state in relation to one assault was the same in relation to another. In fact one may query whether the evidence was sufficiently probative to outweigh these prejudicial dangers. Perhaps that is why the majority of the High Court preferred to avoid application of the similar fact rules.

Of course, if it were *impossible* to prove those events which constituted the facts in issue without proving surrounding events, then one could readily accept that evidence of the latter must be admissible regardless of the similar fact rules. But such a situation would be rare.[85] It is quite a different thing to say that evidence of the surrounding events is necessary to "truly understand" the events in issue.[86]

This application of the *res gestae* doctrine has arisen in a number of recent drug cases. Take this example. A is charged with having heroin in his possession on 3 July for the purpose of supplying it to another person or persons. Evidence is tendered that on 2 July he had sold heroin. Certainly the events on 2 July are not part of the facts in issue in the prosecution of A. A is not charged with possessing heroin on 2 July for the purposes of supply. Evidence is also tendered to show that the heroin on 2 July and the heroin possessed on 3 July came from the same batch of heroin purchased by A on 2 July. It is hard to see how this additional fact makes the events on 2 July part of the facts in issue in the case. It does enhance the relevance, or probative force, of the evidence of the events on 2 July to the events on 3 July but it is not clear that it does more than that. It assists an "understanding" of the events on 3 July but it certainly is not the case that

85 Wigmore provided one example. Suppose A is charged with stealing the tools of X. The evidence shows that a box of tools was taken, and that in it were the tools of Y and Z as well as X. Here there would be incidental proof of the commission of two additional crimes because they are necessarily interwoven with the theft in issue. Further, the other two crimes are not prejudicial because all were done or none at all – if the tribunal believes or disbelieves his commission of one theft it believes or disbelieves his commission of all. See Wigmore, note 1 *supra*, para. 218.

86 Some state courts have narrowly interpreted "truly understand" in order to prevent wholesale admission of receding events involving the accused – see *R. v. Ciesielski* [1972] 1 NSWLR 504; *R. v. Heidt* (1976) 14 SASR 574; *R. v. Couper* (1985) 18 A Crim R 1; *R. v. Hocking* [1988] 1 Qd R 582. But they do not clearly explain what the concept means.

it is impossible to lead evidence of the events on 3 July without also leading evidence of the events on 2 July.

The example is derived from the case of *Bell v. The Queen*[87] decided by the Federal Court in 1985. The Court agreed that the evidence (an admission) of A's sale of heroin on 2 July was admissible although the three Justices divided on their analysis. Wilcox and Miles JJ. applied the *O'Leary* approach. They rejected the submission that evidence of A's sale of heroin on 2 July was similar fact evidence but considered that it was logically probative of the purpose for which A was in possession of the remainder of the batch on 3 July and that, following *O'Leary*, the

> law relating to similar fact evidence does not apply where the evidence in question relates to facts which are so closely connected with the essential facts constituting the charge that they are seen to form one transaction.[88] Again, it is not explained why the similar fact rules do not apply in these circumstances or, more specifically, why the dangers of unfair prejudice to the accused may be ignored.

In this respect, the judgment of Davies J. seems more attractive. He was "content to accept" the submission that evidence of A's sale of heroin on 2 July was similar fact evidence and ought to have been admitted only if it complied with the principles established for the admission of such evidence.[89] Applying these rules, he concluded that the evidence "did not show a mere propensity on the part of the appellant to commit offences" of the type involved in the similar fact. Rather, it went

> to the res gestae of the offence with which the appellant was charged, namely the possession of heroin and the intent thereof. It was evidence of the purpose with which the appellant had purchased [the heroin on 2 July] and was evidence from which an inference could be drawn that he retained the heroin in his possession on [3 July] for the purpose for which he had acquired the greater quantity on the preceding day, namely, to use some and to sell some.[90]

He concluded that evidence of similar facts "is of particular relevance when purpose or intention must be proved, as in the subject offence, and also when the similar facts form part of the *res gestae* of the offence itself".[91]

But while the evidence was clearly relevant to the purpose of possession on 3 July, it seems to involve propensity reasoning (only) – A possessed heroin which he sold on 2 July, therefore he had a propensity to possess heroin (or that particular batch of heroin) for the purposes of supply,

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87 (1985) 7 FCR 555.

88 *Id.*, 561. An almost identical analysis to that of Wilcox and Miles JJ. was followed by a differently constituted Federal Court in *Suen* (1987) 25 A Crim R 393. Suen was charged with possessing heroin for the purposes of supply on 9 July 1985. Spender J., with whom Keller and Neaves JJ. were in agreement, held that evidence that Suen had supplied heroin to M a short time earlier would be probative of Suen's intention in relation to the heroin in issue. He stated that such evidence "was led not to establish propensity or identity, but purpose", *id,* 430, and also rejected the submission that it was similar fact evidence, *id,* 402.

89 Note 87 *supra.*

90 *Ibid.*

91 *Id.*, 558.

therefore it is more likely that the heroin possessed on 3 July was for the purposes of supply. The evidence is particularly probative, albeit via propensity reasoning. Thus, while there were good grounds to admit the evidence notwithstanding the general rule excluding propensity evidence, adoption of the *res gestae* terminology seems only to confuse the issue. More important, even Davies J. treated the *res gestae* doctrine in this context as an automatic guarantor of admissibility rather than a factor enhancing probative value in its balancing contest with the danger of prejudice to the accused.

In conclusion, the weight of authority in Australia holds that evidence of conduct by an accused will not need to comply with the similar fact rules if it was substantially contemporaneous to the events in issue (i.e. part of the *res gestae*) or necessary to "truly understand" those events in issue.[92] However, the recent High Court decision in *Van Den Hoek,*[93] while not directly on point, opens up the possibility that a balancing or probative value and prejudice will in future be required in these circumstances. The Court found it unnecessary to decide whether certain statements were admissible as part of the *res gestae* but stressed that the probative value/prejudice judicial discretion was available to exclude any evidence led by the prosecution, including evidence forming part of the *res gestae.*[94] Applied to conduct, such a discretion would in practice perform precisely the same task as the similar fact rules.[95]

VI. THE VOLUNTARINESS RULE

At least in a criminal trial, a defendant's out-of-court admission is not admissible unless it is shown to have been made voluntarily.[96] The most commonly cited formulation of this voluntariness requirement is that any admission must have been "made in the exercise of a free choice to speak or remain silent".[97] The Australian editors of *Cross on Evidence* assert that

> it is possible that an otherwise inadmissible confession would be rendered admissible by the res gestae doctrine. Suppose, for example, that a policeman were to chase a suspect from the scene of a murder and that, when he caught up with the suspect, the policeman were to say: "If you don't tell me who killed the deceased I will kill you". If the suspect were to reply, "I did" this spontaneous admission might be received, although it would plainly be inadmissible if made long after the event at a police station in response to such a threat as that which has been suggested.[98]

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92 For a recent example see *R. v. T.J.W.; ex parte the Attorney-General* [1988] 2 Qd R 456.
93 (1986) 161 CLR 158.
94 *Id.*, 163. Of course, this contradicts any suggestion that the *res gestae* doctrine is a true inclusionary rule.
95 With the qualification that discretionary exclusion is not treated by the courts in the same way as the application of rules of admissibility – both in terms of burden of proof and appellate review.
96 *R. v. Lee* (1950) 82 CLR 133.
97 *Id.*, 149 per Latham C.J., McTiernan, Webb, Fullagar and Kitto JJ.
98 Cross, note 8 *supra*, para. 19.33.

However, it is not clear why the voluntariness rule should not apply in these circumstances or, alternatively, why it's requirements should be deemed satisfied. Perhaps it might be argued that the primary rationale of the voluntariness rule is to ensure that any admission is reliable. If an admission were in fact made in *res gestae*-type circumstances then there would certainly be grounds for asserting that its reliability is enhanced, thereby obviating the need to apply the voluntariness rule or treating it as satisfied. But the primary rationale of the voluntariness rule is not to ensure reliability. Indeed, the High Court has emphasised that the likely reliability of an admission is irrelevant to the question of voluntariness.[99] While one cannot be dogmatic about the true rationale of the rule, it is clearly more concerned with protecting an accused person's right to silence[100] and discouraging improper methods of police interrogation[101] than maximising reliability. It follows that the *res gestae* should have little, or no bearing on the question of voluntariness.

VII. CONCLUSION

The term *res gestae* should be abandoned in the law of evidence. To the extent that it encompasses statements tendered for a non-hearsay purpose, it is unnecessary and confusing. To the extent that it creates an exception (or exceptions) to the hearsay rule, it would be far better if the scope of those exceptions were precisely delimited in accordance with the justifications for each. If there is authority for the proposition that the doctrine constitutes an exception to the rule against prior consistent statements and the opinion evidence rule, then that authority should be rejected. To the extent that it avoids the application of the similar fact rules, it improperly ignores the danger of prejudice to a criminal defendant. Finally, there is no justification for using it to develop an exception to the voluntariness requirement for admissions in criminal cases.

POSTSCRIPT

The High Court has recently handed down two decisions which impact on the law relating to *res gestae*. The first is *Benz*[102] in which the High Court considered the admissibility of evidence given by a witness named Saunders that on 11 September 1987 he saw two people standing on a bridge at about 3.40 a.m. He asked if everything was all right and one of the two, a female, said "that it was OK, her mother was just feeling sick".

The respondents, Benz and Murray, were, respectively, the de facto step

99 Note 96 *supra*, 149-150, 153.
100 See *McDermott v. The King* (1948) 76 CLR 501, 513 per Dixon J.
101 See note 96 *supra*.
102 (1989) 64 ALJR 94.

daughter and wife of the deceased, Taber. Taber's body was found on 17 September 1987 in the river downstream from the bridge where the conversation testified to by Saunders had occurred. There was considerable circumstantial evidence that he had been taken to the bridge, stabbed and thrown into the river. The Queensland Court of Criminal Appeal had held that evidence of the statement by the woman was inadmissible hearsay. Except for Dawson J., the High Court agreed that the evidence was hearsay (an implied assertion that the other woman was the speaker's mother tendered for the purpose of proving that fact). However, they all (with the possible exception of Deane J.) considered that it was admissible, although for different reasons.

Mason C.J. followed the modern English approach in concluding, as one basis for admission, that the statement formed part of the *res gestae* as "a spontaneous utterance, made in response to the sudden and unexpected arrival of a stranger upon the scene, ... [which] should be treated as trustworthy and reliable".[103] Interestingly, he also adopted the more traditional analysis in stating that it was a statement made by a person engaged in disposing of the body, at or immediately after its completion. Dawson J., while not considering the statement to be hearsay, also held that it formed part of the *res gestae* applying the traditional analysis – "the statement in question accompanied the act of being present on the bridge" which was in turn part of "the entire criminal transaction". He did not find it necessary to decide whether the *res gestae* doctrine requires strict contemporaneity.

Unfortunately, the other members of the Court did not clearly resolve this difference in approach. Deane J. was prepared, without deciding, to assume that the evidence was part of the *res gestae*. Gaudron and McHugh JJ. raised an entirely separate issue. In a joint judgement, they held that the statement "was admissible and could have been used against the respondents subject to an initial finding by the jury that the two women on the bridge were the murderers and were disposing of the deceased's body when seen by Mr Saunders. Upon making that finding on the basis of other evidence the jury could use the statement as part of the *res gestae*".[104] The jury should have been so directed in order to prevent it using the statement to establish that the killing had in fact taken place at about that time (the necessary precondition to its use as part of the *res gestae*).

The conclusion of Gaudron and McHugh JJ. that the statement would form part of the *res gestae* if made by the murderers when disposing of the body seems to apply the traditional analysis rather that the modern English view. In other respects their approach appears, with respect, to be in error. They concluded that a precondition to admissibility of the statement (not simply its relevance) was that it formed part of the *res*

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103 *Id.*, 96.
104 *Id.*, 109.

gestae. This must be a question for the trial judge, presumably to be determined to the civil standard of proof. Preconditions to admissibility are not then to be reconsidered by the jury, although such matters may well go, as here, to the appropriate weight to be accorded the evidence. It might well be different if the precondition to admissibility were also an ultimate issue in the case (for example, if admissibility required proof that the women on the bridge were the respondents) but this was not the case in *Benz*. Both the Chief Justice and Dawson J. assumed that admissibility depended on a judicial determination that the statement was in fact part of the criminal transaction and both considered that the evidence could be used by the jury without it first finding that the two women had just killed the deceased and were disposing of his body.[105]

The other recent High Court decision is *Harriman v. The Queen*[106] which considers the law relating to similar fact and propensity evidence. Although each member of the Court handed down a separate judgement, the decision appears to be in accord with the summary of the law in this area advanced above. However, for present purposes, the most interesting judgment was that of McHugh J. His Honour noted that "the cases draw a distinction between evidence, disclosing other criminal conduct, which is part of the transaction or *res gestae* and circumstantial evidence, disclosing other criminal conduct, which tends to prove a fact in issue".[109]

While the latter evidence, which includes but is not limited to similar fact evidence, is required to satisfy stringent requirements for admissibility (i.e. the probative force of the evidence must transcend its prejudicial effect), his Honour noted that these requirements have not been applied to *res gestae*. He added that evidence "which is in truth purely circumstantial has improperly avoided this test of admissibility by classifying it as *res gestae* – "by applying labels such as 'one transaction', connected series of events', 'system', 'history', 'completeness' and 'part of one chain of relevant circumstances'."[110] He concluded that "[f]actual situations such as those in [cases such as *O'Malley* and *O'Leary*] should now be categorised as circumstantial evidence cases and not *res gestae* cases".

While the analysis of McHugh J. is a welcome step in the right direction, it is suggested that it does not go far enough. He considered that *res gestae* should be limited to evidence which "directly relates to the facts in issue".[111] This is a somewhat ambiguous concept, as explained above. If

105 *Id.*, 97.
106 (1989) 63 ALJR 694.
107 Brennan, Dawson, Toohey, Gaudron and McHugh JJ.
108 See text accompanying notes 74-78 *supra*.
109 (1989) 63 ALJR 694, 711.
110 Id., 714.
111 Id., 713.

the evidence is of a fact which *is* a fact in issue then it clearly must be admissible, without the need to balance probative value and prejudice. Similarly, if it is *impossible* to prove facts in issue without proving other facts then evidence of the latter must be admissible, without the need to balance probative value and prejudice. But there is no need to use *res gestae* terminology to deal with such evidence. In respect of all other evidence disclosing criminal conduct other than that charged such a balancing should, it is suggested, be undertaken.[112] Adoption of *res gestae* terminology is, therefore, unnecessary or misleading, or both. It should be abandoned.

112 Brennan J. seemed to accept this conclusion, *id.*, 696.