IMPLIED ASSERTIONS IN CRIMINAL CASES

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The application of the hearsay rule to implied assertions has long been problematical. Prior to the decision in Walton v The Queen *(1989) 166 CLR 283, the balance of authority supported the view that the hearsay rule, while strict in its application, did not extend to implied assertions. In* Walton v The Queen, *the High Court moved to the position that the hearsay rule did extend to implied assertions, with a body of judicial opinion favouring a flexible, reliability based approach to the admissibility of implied hearsay. In* Bannon v The Queen *(1995) 185 CLR 1, the High Court affirmed the applicability of the hearsay rule to implied assertions but returned to a strict approach to admissibility. In contrast, the* Evidence Act 1995 *(Cth),* Evidence Act 1995 *(NSW) and* Evidence Act 2001 *(Tas) restrict the application of the hearsay rule to express assertions, with admissibility being further extended by significant statutory exceptions to the rule. This approach is affirmed in the recent review of this uniform legislation carried out by the Australian, New South Wales and Victorian Law Reform Commissions.*

It is submitted that when regard is had to the purposes which the hearsay rule is designed to serve, the rule should be treated as extending to implied oral and written assertions, but not to assertions to be implied from conduct. It is suggested that the hearsay rule is properly regarded as formalistic in nature, and that the rejection in Bannon v The Queen *of a flexible approach to admissibility is correct in principle. Leeway should however exist, allowing for admissibility in appropriate cases. This is best achieved not by judicial flexibility, but rather by statutory provisions, such as those contained the* Evidence Act 1995 *(Cth),* Evidence Act 1995 *(NSW) and* Evidence Act 2001 *(Tas), which should be carefully construed having regard to the primary principle of exclusion.*

I INTRODUCTION

The review of the *Evidence Act 1995* (Cth), *Evidence Act 1995* (NSW) and *Evidence Act 2001* (Tas) ('the uniform Evidence Acts') completed in 2005 by the Australian, New South Wales and Victorian Law Reform Commissions, and foreshadowed adoption of possible amended uniform legislation in Victoria, gives renewed significance to issues as to the scope of the hearsay rule.[1]

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1 See generally Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2005); New South Wales Law Reform Commission, *Uniform Evidence Law*, Report No 112; Victorian Law Reform Commission, *Uniform Evidence Law*, Final Report (2005). These three reports were published jointly, and contain the same text. See also Victorian Law Reform Commission, *Implementing the Uniform Evidence Act* (2005), <http://www.lawreform.vic.gov.au/CA256902000FE154/Lookup/Evidence_Information_Paper/$file/Final_Report.pdf> at 22 July 2006.

Particularly problematical is the status of 'implied assertions', that is, statements which were not intended by their maker to be assertive of the fact they are tendered to prove, and non-verbal conduct not intended to be assertive of the fact it is tendered to prove.[2] An example of an implied assertive statement would be a case in which efforts were made to establish X's presence at a particular place by calling a witness to swear the witness heard someone say 'Hello X' at that place.[3] An example of an implied assertion by conduct would be seeking to prove an individual suffered from a particular illness by calling a witness to testify to seeing a doctor treat the individual for that illness.[4] While questions of implied assertions arise in both criminal and civil cases, it is in the criminal context that the issues are most crucial and that will be the focus of the present article.

Prior to the decision in *Walton v The Queen*[5] ('*Walton*'), the balance of authority favoured the view that the hearsay rule, while strict in its application, did not extend to implied assertions. In *Walton* and subsequent cases, the High Court moved to the position that the hearsay rule did extend to implied assertions, with Mason CJ and several other members of the Court favouring a flexible, reliability

2 The scope of the hearsay rule has been the subject of much academic writing. In Australia, see Mark Weinberg, 'Implied Assertions and the Scope of the Hearsay Rule' (1973) 9 *Monash University Law Review* 268; Charles R Williams, 'Issues at the Penumbra of Hearsay' (1987) 11 *Adelaide Law Review* 113; Gerald McGinley and Vicki Waye, 'Implied Assertions and the Hearsay Prohibition' (1993) 67 *Australian Law Journal* 657; Ken Arenson, 'Unravelling the Hearsay Riddle: A Novel Approach' (1994) 16 *Sydney Law Review* 342; Yee Fen Lim, 'A Logical View of the Hearsay Rule' (1994) 68 *Australian Law Journal* 724; Andrew Palmer, 'Hearsay: A Definition that Works' (1995) 14 *University of Tasmania Law Review* 29; Andrew Palmer, 'The Reliability-Based Approach to Hearsay' (1995) 17 *Sydney Law Review* 522; Brenda Marshall, 'Admissibility of Implied Assertions' (1997) 23 *Monash University Law Review* 200; Tom Molomby and F Clark, 'Let's Not Hear it for Hearsay' (2001) 75 *Australian Law Journal* 133. In England, see Anthony Guest, 'The Scope of the Hearsay Rule' (1985) 101 *Law Quarterly Review* 385; Andrew Ashworth and Rosemary Pattenden, 'Reliability, Hearsay Evidence and the English Criminal Trial' (1986) 102 *Law Review Quarterly* 292; Peter Carter, 'Hearsay, Relevance and Admissibility: Declarations as to State of Mind and Declarations Against Penal Interest' (1987) 103 *Law Quarterly Review* 106; Peter Carter, 'Hearsay: Whether and Whither?' (1993) 109 *Law Review Quarterly* 573. For Canada, see Stan Schiff, 'Hearsay and the Hearsay Rule: A Functional View' (1978) 56 *Canadian Bar Review* 674. The rule has been the subject of voluminous writing in the United States. The more important articles include Charles McCormick, 'The Borderland of Hearsay' (1930) 39 *Yale Law Journal* 489; Edmund Morgan, 'Hearsay and Non-Hearsay' (1935) 48 *Harvard Law Review* 1138; Edmund Morgan, 'Hearsay Dangers and the Application of the Hearsay Concept' (1949) 62 *Harvard Law Review* 177; Richmond Rucker, 'The Twilight Zone of Hearsay' (1956) 9 *Vanderbilt Law Review* 453; John Maguire, 'The Hearsay System: Around and Through the Thicket' (1961) 14 *Vanderbilt Law Review* 741; Jack Weinstein, 'Probative Force of Hearsay' (1961) 46 *Iowa Law Review* 331; Ted Finman, 'Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence' (1962) 14 *Stanford Law Review* 682; Laurence H Tribe, 'Triangulating Hearsay' (1974) 87 *Harvard Law Review* 957; Roger Park, 'McCormick on Evidence and the Concept of Hearsay' (1981) 65 *Minnesota Law Review* 423; Freda Bein, 'Substantive Influences on the Use of Exceptions to the Hearsay Rule' (1982) 23 *Boston College Law Review* 855; Michael Graham, '"Stickperson Hearsay": A Simplified Approach to Understanding the Rule Against Hearsay' [1982] *University of Illinois Law Review* 887; Olin Guy Wellborn III, 'The Definition of Hearsay in the Federal Rules of Evidence' (1982) 61 Texas Law Review 49; Glen Weissenberger, 'Unintended Implications of Speech and the Definition of Hearsay' (1992) 65 *Temple Law Review* 857.

3 This example is given in James Gobbo, David Byrne and John Dyson Heydon, *Cross on Evidence* (2nd Australian ed, 1979) 452. The example is based on *Teper v The Queen* [1952] AC 480.

4 *Thompson v Manhattan Railway Co*, 42 NYS 896 (NY App Div, 1896). See also *Re Estate of Loucks*, 160 Cal 551 (Cal, 1911); *People v Bush*, 133 NE 201 (Ill, 1921).

5 (1989) 166 CLR 283.

based approach to admissibility. Then, in *Bannon v The Queen*[6] ('*Bannon*') the Court affirmed the applicability of the hearsay rule to implied assertions but returned to a strict approach to admissibility. In contrast, the uniform Evidence Acts restrict the application of the hearsay rule to express assertions, with admissibility being further extended by significant statutory exceptions to the rule.

In the present article it will be argued that when regard is had to the purposes which the hearsay rule is designed to serve, the rule should be treated as extending to implied oral and written assertions, but not to assertions to be implied from conduct. It will be submitted that the hearsay rule is properly regarded as formalistic in nature, and that the rejection in *Bannon* of a flexible approach to admissibility is correct in principle. Leeway should however exist, allowing for admissibility in appropriate cases. This is best achieved not by judicial flexibility, but rather by statutory provisions, such as those contained in the uniform Evidence Acts, which should be carefully construed having regard to the primary principle of exclusion of hearsay in normal cases.

II RATIONALE OF THE HEARSAY RULE

A number of justifications have been put forward for the rule. In *Teper v The Queen*, Lord Normand stated that:

> the rule against the admission of hearsay is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost.[7]

In this passage Lord Normand listed four justifications for the rule:

1. That hearsay evidence is not the best evidence. As a matter of history, the hearsay rule and the best evidence rule have quite distinct origins. The best evidence rule developed as a general maxim,[8] and in application came only to survive in the rule excluding secondary evidence of the contents of documents. The hearsay rule developed as a consequence of the marking out of the function of witnesses from those of jurors. Quite apart from historical origins, it is clear that hearsay evidence is inadmissible even when it is the best evidence. If the declarant is dead or otherwise unavailable then a hearsay report of the statement of the declarant is the best evidence available. If the statement does not, however, fall within an exception to the rule it remains inadmissible.

6 (1995) 185 CLR 1.
7 *Teper v The Queen* [1952] AC 480, 486 (Lord Normand).
8 The earliest statement of the maxim appears to be that of Holt J in *Ford v Hopkins* (1700) 1 Salk 283.

2. That hearsay evidence is not delivered on oath. This was one of the earliest reasons given for the rule.[9] The significance of the oath has, of course, diminished with the passing of time. In any event, a hearsay statement, even if made under oath, remains inadmissible.[10]

3. That the demeanour of the declarant cannot be observed. This, like the absence of the oath, can be no more than a subsidiary justification for the rule.

4. Absence of cross-examination. Clearly the lack of opportunity for the adversary to cross-examine the person whose out of court statement is reported by the witness is the fundamental justification for the rule against hearsay. Wigmore writes:

> The theory of the Hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of cross-examination ... the Hearsay rule, as accepted in our law, signifies *a rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of cross-examination.*[11]

The insistence that evidence be subject to the test of cross-examination in order to be admissible itself rests upon two rationales. First, that the assertions of observers or participants to events or incidents under consideration may only be safely acted upon by a jury if those assertions have been exposed to the test of cross-examination.[12] Second, given that the notion is related less to the jury system than to the nature of the adversary process, that it is simply not fair for a party to have a statement used against her or him unless that party is given the opportunity of cross-examining the maker of the statement.[13]

What then are the potential defects in testimony which cross-examination is designed to expose? To what extent are such defects absent when a witness repeats a statement which is non-hearsay in form?

Where a witness gives evidence-in-chief, that evidence is subject to four possible sources of error: (1) insincerity, the witness may be lying; (2) ambiguity, the testimony may be unclear and may therefore be misunderstood by the tribunal of fact; (3) faulty perception, the witness may not have correctly perceived that which he or she purports to have perceived; and (4) erroneous memory, the witness may no longer correctly recall that which he or she perceived.[14] Where a

9 *R v Bradden and Speake* (1684) 9 How St Tr 1127, 1189 (Sir George Jeffries CJ); *Berkley Peerage Case* (1811) 4 Camp 400, 414 (Mansfield CJ); *Wright v Doed Tatham* (1838) 7 A & E 313, 389 (Baron Parke LJ).

10 *R v Eriswell (Inhabitants)* (1790) 3 TR 7007; *Haines v Guthrie* (1884) 13 QBD 822; *Royal Bank of Canada v McArthur* (1984) 8 DLR (4th) 411.

11 John Wigmore, *Wigmore on Evidence*, (3rd ed, 1940) vol 5, [1362].

12 Ibid. This is the rationale relied upon by Wigmore.

13 The significance of this latter rationale is stressed by Morgan. See Morgan, 'Hearsay Dangers and the Application of the Hearsay Concept', above n 2.

14 See, eg, ibid 185-8; Maguire, above n 2, 743-9; Finman, above n 2, 684-91; Tribe, above n 2, 958-61; Graham, above n 2, 890-9.

witness (W) repeats what he or she has been told about an event by a declarant (D), the possible sources of error are doubled. If D is not a witness, the test of cross-examination is only available to be used in respect of those possible defects in W's testimony; there is no method of testing the truthfulness, accuracy, etc of the statement made by D to W. What of the case where W seeks to narrate to the court a non-hearsay statement made to W by D, ie a statement the relevance of which depends not on the fact that it is true but only on the fact that it was made? Where this is the case, the possible sources of error are not doubled by the fact that W is repeating the statement of D. Since the truth of what D asserted to W is not in issue, questions as to D's sincerity, perception and memory do not arise. The only possible defect in the statement so far as D is concerned relates to its possible ambiguity.

The four testimonial defects are not all of equal significance; problems of ambiguity, for example, arise less often than problems of erroneous memory or faulty perception. Nor is cross-examination an equally effective tool for testing evidence against each of the possible defects. While cross-examination is effective in exposing ambiguity of language and faults in perception and memory, it is in most cases unlikely to expose deliberate falsehood. Thus, Professor Morgan writes:

> Yet, if a witness is willing to commit perjury and counsel is willing to co-operate, neither oath nor cross-examination will be of much avail to expose the wilful false hood unless either witness or counsel is unusually stupid. The witness will tell a simple story, free of all complications; he will make no attempt to reconcile it with that of other witnesses; he will not try to explain suggested inconsistencies; he will purport to remember only the rather obvious and give no reason for failure to remember anything else. If his story is to be discredited, it must be by means of other evidence. Indeed, in most classes of litigation, perjury is not common; and where it is common, the witness is usually skilfully coached. Although the exposure of wilful false hood is the most dramatic function of skilful cross-examination, it is very rarely demonstrated.[15]

In areas of uncertainty, determining the proper scope for the rule against hearsay is best done by considering the extent to which, in the particular context under consideration, the potential defects in testimony are likely to be present.

III THE CASE LAW PRIOR TO *WALTON V THE QUEEN*

Prior to the decision of the High Court in *Walton*, there was little English or Commonwealth authority on the question of whether the hearsay rule extends to implied assertions. The reason for this lack of authority would seem to be that the courts, when confronted with an implied hearsay problem, rarely appreciated

15 Morgan, 'Hearsay Dangers and the Application of the Hearsay Concept', above n 2, 186.

the distinctive character of this sort of evidence. Usually they simply attempted to apply the hearsay rule in the normal way, sometimes holding the evidence admissible and sometimes rejecting it.[16]

The problem of implied hearsay was considered in the civil context by the Court of Exchequer Chamber in *Wright v Doe d Tatham*.[17] Tatham, the heir in law, brought an action to recover certain manors from Wright, a steward, who claimed them as devisee of one Marsden. The issue was whether Marsden had testamentary capacity. Evidence adduced to prove incompetency included testimony that Marsden was treated as a child by his own menial servants; that in his youth he had been called 'Silly Jack'; that a witness had seen boys shouting after him '[t]here goes crazy Marsden', and throwing dirt at him, and that the witness had persuaded a person passing by to see him home. This evidence was received without objection. With regard to evidence adduced to prove competency, however, the question arose whether three old letters addressed to Marsden and written in such a manner as to permit the inference that the writers believed they were dealing with a person of reasonable understanding were admissible. The writers of the letters had died before the proceedings.

The Court of Exchequer Chamber held the letters should be considered to be on the same footing as if they contained direct statements that the addressee was mentally competent, and that as such they amounted to hearsay. The leading judgment of the Court was delivered by Baron Parke LJ, who expressed in the clearest fashion the view that the hearsay rule extends to all implied assertions whether oral, written or derived from conduct. His Lordship gave the following examples of hearsay by conduct:

> The supposed conduct of the family or relations of a testator, taking the same precautions in his absence as if he were a lunatic; his election, in his absence, to some high and responsible office; the conduct of a physician who permitted a will to be executed by a sick testator; the conduct of a deceased captain on a question of seaworthiness, who, after examining every part of the vessel, embarked on it with his family; all these, when deliberately considered, are, with reference to the matter in issue in each case, mere instances of hearsay evidence, mere statements not on oath, but implied in or vouched by the actual conduct of persons by whose acts the litigant parties are not to be bound.[18]

The authority of *Wright v Doe d Tatham* is, however, weakened by a number of considerations. The case was in its day a cause celebre, and this may have had some influence on the views expressed by the Court. This seems particularly likely when it is remembered that evidence which was admitted as tending to show that Marsden lacked testamentary capacity (his treatment by his servants and the taunts thrown at him, etc) was just as much implied hearsay as the three

16 See, eg, *Teper v The Queen* [1952] AC 480 (where the evidence was held inadmissible); *Woodhouse v Hall* (1980) 72 Cr App R 39 (where the evidence was admitted).
17 (1837) 7 Ad & El 313. This case is discussed in detail in Maguire, above n 2, 749ff.
18 Ibid 388, 516.

letters which were rejected. The letters were, in any event, of very limited probative value in relation to the issue before the Court, and this may constitute the true explanation for their rejection.[19]

In *Ratten v The Queen*[20] ('*Ratten*'), the accused was charged with the murder by shooting of his wife. His defence was that the gun had discharged accidentally while he was cleaning it. To rebut that defence, the prosecution called evidence from a telephone operator who stated that shortly before the time of the shooting she had received a call from the address where the deceased lived with her husband. The witness said that the call was from a female, who, in a voice sobbing and becoming hysterical, said '[g]et me the police, please', and gave the address. The accused objected to that evidence on the ground that it was hearsay. The accused was convicted and appealed to the Privy Council.

The Privy Council held that the fact that the call was made was admissible to rebut evidence given by the accused that no call had been made from the house prior to the shooting. Their Lordships held that the telephonist's repetition of the words used by the caller did not infringe the hearsay rule, and that in any event the evidence would be admissible by virtue of the doctrine of *res gestae*. Delivering the advice of their Lordships, Wilberforce LJ stated:

> The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called, is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on 'testimonially', ie, as establishing some fact narrated by the words.[21]

The reasoning of the Privy Council, however, is weakened by the fact that their Lordships apparently failed to appreciate the element of implied hearsay in the telephonist's repetition of the words of the caller. Although the words used were not hearsay in form, they were being used as the equivalent of a statement which, had it been expressly made, would have amounted to hearsay, ie a statement to the effect that something serious was happening which required the presence of the police. The testimonial dangers of ambiguity and erroneous perception on the part of the declarant were clearly present. The danger of lack of sincerity was not present to any significant extent, and that of faulty memory, not at all. While this justifies the admission of the evidence under the doctrine of *res gestae*, it does not justify the Privy Council's view that testimony such as that given by the telephonist should always be regarded as original evidence.

19 In *Lloyd v Powell Duffryn Steam Coal Co Ltd* [1914] AC 733, implied hearsay was held admissible by the House of Lords. See Morgan, 'Hearsay Dangers and the Application of the Hearsay Concept', above n 2, 209-10. In *Holloway v McFeeters* (1956) 94 CLR 470, Dixon CJ apparently adopted the view that the hearsay rule did not extend to implied assertions. See Williams, above n 2, 135.

20 [1972] AC 378.

21 Ibid 387.

Implied oral hearsay was held to have been properly received in *R v Hissey*.[22] The accused was convicted of the murder of a woman with whom he had been living in an apartment. The woman, whose body was found in the apartment, had died from the effects of a blow. The accused denied he had been present in the apartment at a time when the blow might have been inflicted. The Supreme Court of South Australia held that the trial judge had properly admitted evidence from neighbours that they had heard voices and the sound of a quarrel including a voice, identified by one witness as that of the accused, shouting '[g]et out! Get out!' The relevance of these words was as establishing the presence of the accused at the relevant time, and they did so by being treated as the equivalent of words to the effect 'I am a person with the right to order others out'.

The application of the hearsay rule to implied assertions was considered in the civil context by Mahoney JA in *Jones v Sutherland Shire Council*.[23] The question before the New South Wales Court of Appeal was whether the plaintiff's predecessor in title had obtained permission to use land in a certain way from the defendant council prior to a particular date. The trial judge held that a statement in a letter written by the predecessor after the relevant date requesting permission to use the land in the desired way could be used as evidence that permission had not been given prior to that date. The Court of Appeal affirmed the trial judge's ruling. The majority rested their decision on other grounds. Mahoney JA, however, held that the statement contained in the letter did not infringe the hearsay rule. His Honour stated that the hearsay rule applies to exclude implied assertions only where they are 'seen to be a functional equivalent of the kind of expressed statement to which ordinarily the hearsay rule applies'.[24]

Implied hearsay had been held admissible in Canada. In *R v Wysochan*[25] the accused was convicted of murder. The victim had been shot, and the issue at the trial was whether the offence had been committed by the accused or by the victim's husband. The Court of Appeal for Saskatchewan held that testimony of a bystander that, as the wife lay wounded, she held out her hand to her husband and spoke to him affectionately, was admissible as tending to show that the accused, and not the husband, had shot her.[26] In *R v Edwards*[27] on a charge of dealing in drugs, police searched the car of the accused and seized a mobile phone and pager. They then answered calls from persons who sought to order quantities of cocaine. The Ontario Court of Appeal held that the police could give evidence of what the callers said, notwithstanding that orders for drugs carried the implied assertion that the callers knew the accused to be someone who was engaged in dealing in drugs. In *R v McKinnon*[28] on a charge of murder, the Ontario Court of Appeal held evidence of the presence of the wife of the accused with police when

22 (1973) 6 SASR 280.
23 [1979] 2 NSWLR 206.
24 Ibid 230.
25 (1930) 54 CCC 172.
26 See also *Gilbert v The King (No 2)* (1907) 12 CCC 127; *R v Wied* [1950] 1 DLR 143.
27 (1994) 91 CCC (3d) 123. See also *R v Ly* [1997] 3 SCR 698; 119 CCC (3d) 479. Cf *R v Wilson* (1996) 107 CCC (3d) 86 (Ontario Court of Appeal).
28 (1989) 70 CR (3d) 10.

they discovered the body of the victim was admissible. Findlayson JA stated that 'if the jury was prepared to draw an inference adverse to the appellant from the fact that his wife was in the company of the police officers when they found the body in a very remote area, then in my opinion it was perfectly entitled to draw such an inference'.[29] Such an inference could, however, only be based on reasoning that the wife was present because she was able to assist the police, and was able to assist them because of information given to her by the accused.

It would seem then that prior to *Walton*, the balance of English and Commonwealth authority supported the view that the hearsay rule is limited in its application to assertions which were intended by the declarant to convey information. This was the view adopted in the then current Australian edition of *Cross on Evidence*[30] and was consistent with the majority of the more recent cases. As a decision of the Privy Council holding admissible evidence, which was clearly implied hearsay, *Ratten* stood as particularly strong sub-silentio authority in favour of admissibility.

As a matter of principle, should the hearsay rule extend to implied assertions? This question turns on the extent to which the four testimonial dangers inherent in express hearsay exist in relation to implied assertions. In cases of implied assertions the dangers of erroneous memory and faulty perception on the part of the declarant are present to exactly the same extent as in the case of express assertions. In most cases, the danger of lack of sincerity is not normally present to any significant extent. Cross-examination is, however, thought to be less effective in demonstrating deliberate lying than in exposing the other testimonial defects. Further, in cases of implied assertions, the danger of ambiguity on the part of the declarant is far greater than in cases of express assertions. First, it must be determined that the statement is in fact an implied assertion, ie that the declarant was not intending to make an assertion about the matter in issue. This may be unclear from the statement itself. Second, an inference must be drawn from the statement that the declarant believed some fact to be true. Since by definition the declarant is not making an express statement about the matter in issue, the statement is inevitably to some extent, and often to a very considerable extent, ambiguous in respect of the matter it is being tendered to prove.

In summation then, two of the four testimonial dangers, ie erroneous memory and faulty perception on the part of the declarant, are present in cases of implied hearsay to precisely the same extent as in cases of express hearsay. One of the dangers, insincerity, is less likely to be present. The remaining danger, ambiguity,

29 Ibid 16.

30 David Byrne and John Dyson Heydon, *Cross on Evidence* (3rd Aust ed, 1986) 461, 473. The solution adopted in *Cross on Evidence* to the problem of implied assertions has varied from edition to edition: see, eg, Weinberg, above n 2, 288-90. In the current edition the various possible views as to the status of implied assertions are considered under six heads, but no definite preference is expressed: John Dyson Heydon, *Cross on Evidence* (7th Aust ed, 2004) 980-93. Similarly, McNicol and Mortimer do not adopt a final view, stating that the judicial debate over implied assertions 'has not resulted in any meaningful principle from which trial judges can work in deciding whether to exclude such assertions': Suzanne McNicol and Debra Mortimer, *Evidence* (3rd ed, 2005) 169.

is present to a far greater extent. The conclusion that must follow is that on principle the hearsay rule should extend to implied assertions.

In the case of assertions implicit in conduct, it is sometimes argued that the fact of the conduct demonstrates reliance upon the matter to be inferred, and that this reliance gives the assertion increased validity.[31] The willingness of the captain to put to sea with his or her family gives the assertion to be inferred from the captain's conduct greater reliability than a mere statement that the captain believed the vessel to be sea worthy. This line of argument is only valid, however, in cases where the conduct was of significance to the declarant.

If arguments of principle demonstrate that the hearsay rule should apply to implied assertions, why then did the balance of authority in England, Australia and Canada tend to the conclusion that the hearsay rule did not extend to implied assertions? The most likely answer is that this was one response to the rigidity of the rule itself. If evidence was once classified as hearsay and did not fall within a recognised exception, then in England and Australia it would be rejected.[32] The common law exceptions to the rule were, as they remain today, narrow in scope and illogical in operation. Prior to the enactment of the uniform Evidence Acts the statutory exceptions to the hearsay rule in all Australian jurisdictions were restrictively drafted and limited to documentary hearsay.[33] Thus to classify implied assertions as hearsay would necessarily be to keep out evidence which might be of great value, and therefore the courts took the view that the exclusion rule did not extend to such assertions. Such an approach is problematical. Just as the rigidity of the hearsay rule and the absence of principled exceptions keep out much reliable evidence in the form of express assertions, a blanket rule that implied assertions are not hearsay may let in evidence that is unreliable and ought not to be received.

IV THE CURRENT COMMON LAW: *WALTON V THE QUEEN* TO *BANNON V THE QUEEN*

In *Walton*,[34] two classic issues of hearsay arose for consideration by the High Court. First, whether a declaration of intent can be received as evidence that the

31 See, eg, Finman, above n 2, 691-3.

32 See below n 86 and accompanying paragraph.

33 *Evidence Ordinance 1971* (ACT) ss 28-31 (now repealed); *Evidence Act 1898* (NSW) ss 14B-14C (now repealed); *Evidence Act 1977* (Qld) ss 92-94; *Evidence Act 1929* (SA) ss 34C-34D; *Evidence Act 1910* (Tas) ss 81A-81D (now repealed); *Evidence Act 1958* (Vic) ss 54-55; *Evidence Act 1906* (WA) ss 79B-79E.

34 *Walton* (1989) 166 CLR 283. For discussion of *Walton*, see Stephen Odgers, '*Walton v The Queen* – Hearsay Revolution?' (1989) 13 *Criminal Law Journal* 201, 214; Rosemary Pattenden, 'Conceptual Versus Pragmatic Approaches to Hearsay' (1993) 56 *Modern Law Review* 138, 154-6; Jill Hunter, 'Unreliable Memoirs and the Accused: Bending and Stretching Hearsay' (1994) 18 *Criminal Law Journal* 8, 76; Palmer, 'The Reliability-Based Approach to Hearsay', above n 2, 524-5.

declarant subsequently acted in accordance with her or his expressed intent.[35] Second, whether the hearsay rule extends to implied assertions. The accused had been convicted of the murder of his estranged wife. It was part of the Crown case that the deceased went to the town centre to meet the accused on the evening in question. On appeal the admissibility of two items of evidence was in issue. First, the testimony of a witness that on the evening prior to the killing she overheard a telephone conversation between the deceased and a caller. In the course of the conversation the deceased arranged to meet the caller at the town centre, and said to the three-year-old child of the marriage, 'daddy's on the phone'. The child then spoke on the phone, saying 'hello daddy'. It was established that the child called the accused, and no-one else, 'daddy'. Second, the testimony of three witnesses that on the day before and the day of the killing the deceased had told each of them that she was going to catch the bus to the town centre to meet the accused.

By a majority the Court held the testimony of the latter three witnesses admissible as original evidence of the state of mind of the declarant, from which an inference might be drawn that she acted on the basis of her expressed intent.[36] In a joint judgment Wilson, Dawson and Toohey JJ stated:

> In the present case, the statements made by the deceased to [the three witnesses] were admitted upon the basis that they constituted conduct on the part of the deceased from which her state of mind at the relevant time could be inferred. They were not admitted as hearsay evidence and it was made plain to the jury that their probative value lay in the fact of their having been made rather than in the truth of any assertion or implied assertion contained in them. To the extent that there was an element of hearsay in the evidence of those statements, it was, we think, for the reasons which we have given, permissible for the trial judge to have disregarded it as he did.[37]

The testimony of the first witness contained elements of hearsay. If used to prove the identity of the caller, the words 'daddy's on the phone' were express hearsay,

35 In the famous case of *Mutual Life Insurance Co v Hillmon*, 145 US 285 (1892), the United States Supreme Court was concerned with an action to recover on a life insurance policy. The insurance company sought to prove that a body found at a place called Crooked Creek was that of one Walters, not Hillmon, and tendered letters from Walters to his sister and his fiancée expressing his intention to travel to Crooked Creek with Hillmon. The Supreme Court held the letters admissible. For discussion of this case see John Maguire, 'The Hillmon Case – Thirty-Three Years After' (1925) 38 *Harvard Law Review* 709; Rucker, above n 2, 479-83; Tribe, above n 2, 969-71; Colin Tapper, 'Hillmon Rediscovered and Lord St Leonards Resurrected' (1999) 106 *Law Quarterly Review* 441.

36 Mason CJ, Wilson, Dawson and Toohey JJ; Deane J dissenting.

37 *Walton* (1989) 166 CLR 283, 305. See also 288-92 (Mason CJ). This aspect of the decision in *Walton* appears likely to be subject to further consideration by the High Court. In *Kamleh v The Queen* (2005) 79 ALJR 541, on the trial of the accused for murder, evidence was received of statements by the accused that he proposed to 'catch up with' the victim in order to support a conclusion that the accused visited the victim on the morning of the killing (at 546). The status of *Walton* was not argued in the High Court, and the appeal of the accused was dismissed. Gleeson CJ and McHugh J delivered a joint judgment in which they declined to reconsider *Walton* on the basis that the issue had not been argued. Hayne J delivered a brief judgment agreeing with Gleeson CJ and McHugh J. Heydon J, while agreeing that the appeal be dismissed, cast doubt on *Walton*. At 548, his Honour stated:

while the child's reference to the caller as 'daddy' was implied hearsay. Justices Wilson, Dawson and Toohey held the former had been received only to prove the arrangement to meet, and the judge had correctly directed the jury 'that it constituted no evidence of the identity of the caller as opposed to evidence of the deceased's belief as to his identity'.[38] The child's response to the caller was, however, strictly inadmissible. Their Honours stated:

> the words uttered by the boy on the telephone were no more than hearsay and were therefore, strictly speaking, inadmissible. ... In this case, particularly as the child's greeting and subsequent conversation followed immediately upon the assertion by his mother that the person to whom he was about to speak was 'daddy', the value, if any, of what the child said lay in the truth of the implied assertion that the person to whom he was speaking was in fact 'daddy'. However, it added little if anything to what was said by the deceased and the jury were adequately warned against using it to identify the caller. No substantial miscarriage of justice can have arisen from its admission.[39]

Chief Justice Mason delivered a separate judgment. His Honour analysed the evidence along the same lines as the majority, but took a different approach to the admissibility of implied hearsay. His Honour argued that a flexible approach to hearsay should be adopted, with the evidence being admitted where its apparent reliability justified receipt. His Honour stated:

> 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.
>
> ...
>
> To this extent it can be said that the hearsay rule is less rigorous in its application to implied assertions than it is in the case of express assertions. It is for the trial judge to decide whether or not a particular implied assertion is of a kind to which the rationale underlying the hearsay rule would be relevant. If the judge determines that an assertion is express or is otherwise one which it would be dangerous to admit as hearsay, then the ordinary rules of hearsay and the various exceptions to the general exclusionary rule will be applied.

Footnote 37 cont'd

> The proposition ... that past statements by a person who is not a party about that person's intentions, which are reported to the court by that person or another person or another witness, are admissible is certainly true in some circumstances. However, it is highly controversial whether those statements are generally admissible to prove that the intention was carried out or that an intention to do an act with a second person is evidence that that act was performed.
>
> Kirby J expressed his agreement with Heydon J.

38 *Walton* (1989) 166 CLR 283, 305.

39 Ibid.

> But where the assertion is one made by implication only, it is necessary for the judge to balance the competing considerations in order to determine admissibility since the dangers associated with hearsay evidence will not all necessarily be present.[40]

While not going as far as Mason CJ, Deane J (dissenting) expressed himself as favouring some flexibility in the application of the hearsay rule.[41] Justices Wilson, Dawson and Toohey, however, stated that '[t]he unlikelihood of concoction or distortion is not sufficient of itself to render a hearsay statement admissible'.[42] Although Mason CJ limited his support for a flexible approach to implied hearsay, there is little reason not to regard a flexible approach as equally valid in the case of express hearsay.[43] Chief Justice Mason's view is based upon the premise that implied hearsay is inherently more likely to be reliable than express hearsay, yet there is little basis for believing this to be a correct proposition. His Honour's approach was supported by several other members of the court in subsequent cases.[44] Although never commanding a majority of the court, this flexible approach was approved and followed by courts below.[45] Flexibility in the present context, however, involves two fundamental difficulties. First, while it is difficult to see any reason why a child would falsely call someone to whom the child was speaking 'daddy', in most cases seeking to determine the reliability of implied hearsay carries the danger of becoming an essentially

40 Ibid 293.

41 Ibid 308. His Honour stated:

> The hearsay rule should not, however, be inflexibly applied but should be qualified where the circumstances are such that its inflexible application would confound justice or common sense or produce the consequence that the law was unattuned to the circumstances of the society which it exists to serve.

42 Ibid 304.

43 Palmer, 'The Reliability-Based Approach to Hearsay', above n 2, 547, is thus correct in suggesting that, if followed, this approach 'spells the end of the [hearsay] rule as we know it'.

44 In *R v Benz* (1989) 168 CLR 110, 144, Gaudron and McHugh JJ stated:

> a strong case can be made for developing and applying the common law rules of evidence by reference to the principle that hearsay evidence will be admitted when it appears to have a high degree of reliability.

> In *Pollitt v The Queen* (1992) 174 CLR 558, 594-5, Deane J stated:

> In my view, it is permissible and desirable that this Court, as the final appellate court of the nation, recognizes a new exception to or qualification of the hearsay rule when changing circumstances throw up an identified category of case in which it is plain that the inflexible application of the rule would confound justice or common sense or produce the consequence that the law was unattuned to the circumstances of the society which it exists to serve.

> At 610, Toohey J stated:

> In *Walton,* Mason CJ said that the hearsay rule 'should not be applied inflexibly' and with that statement there can be no quarrel. If applied rigidly, the rule can assume an unreality which gives little credit to the common sense of juries.

> At 621, McHugh J affirmed the statement by Gaudron J and himself in *R v Benz* (1989) 168 CLR 110.

45 *R v Daylight* (1989) 109 ACTR 11; *R v Miladinovic* (1992) 60 A Crim R 206; *R v Astill* (1992) 63 A Crim R 148; *R v Radford* (1993) 66 A Crim R 210.

speculative, if not intuitive, process.[46] Second, notwithstanding difficulties of analysis, a formalistic approach to hearsay has advantages of expedition and predictability. Issues of hearsay, actual or potential, are before trial courts in most cases. An obligation to determine the admissibility of hearsay, or even a class of hearsay, in the exercise of discretion according to the criterion of perceived reliability could be potentially both onerous for the judge and unpredictable in outcome.

Three years after *Walton*, the House of Lords held the hearsay rule applicable to implied assertions. In *R v Kearley*,[47] on a charge of trafficking in drugs the prosecution led evidence that, following the arrest of the accused, a number of telephone calls had been made to his house in which the callers requested to speak to him and asked to be supplied with drugs. The House of Lords by a majority allowed the accused's appeal, holding that insofar as the callers' requests could be treated as having impliedly asserted the fact that the accused was a supplier of drugs, evidence of the requests was excluded by the rule against hearsay.[48]

In *R v Benz*[49] ('*Benz*') a mother and daughter were convicted of the murder of the de facto husband of the mother. The victim's body was found downstream from a wooden bridge where he had been stabbed and rolled into the river while still alive. To place the accused at the scene, the Crown called a witness to testify that he saw two women on the bridge at the relevant time, and that in response to his question whether everything was alright, one of them replied 'its all right, my mother's just feeling sick'. By a majority the High Court held the evidence inadmissible.[50] In a joint judgment Gaudron and McHugh JJ held the words used 'impliedly asserted that the other woman on the bridge was her mother, and was tendered to prove that fact'.[51] It was, accordingly, relied on testimonially and was hearsay. Their Honours stated, 'a strong case can be made for developing and applying the common law rules of evidence by reference to the principle that hearsay evidence will be admitted when it appears to have a high degree of reliability'.[52] Such an argument had not, however, been put at trial, and accordingly was not available to justify admissibility on appeal.

46 Palmer argues that the following factors should be taken into consideration in applying a flexible approach to admissibility: whether the declarant had a motive to lie; likelihood of the declarant being mistaken; the declarant's creditworthiness; the existence of evidence corroborating the hearsay statement; 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 for to the defence of an accused person: Palmer, 'The Reliability-Based Approach to Hearsay', above n 2, 536-47.

47 [1992] 2 AC 228.

48 Lord Bridge, Lord Ackner and Lord Oliver; Lord Griffiths and Lord Browne-Wilkinson dissenting. In Australia the evidence would have likely been admissible as falling within an exception relating to statements proving the nature of a business: see *McGregor v Stokes* [1952] VLR 347; *Police v Machirus* [1977] 1 NZLR 288; *R v Firman* (1989) 52 SASR 391; *Abrahamson v The Queen* (1994) 63 SASR 139; Peter Waight and Charles R Williams, *Evidence Commentary and Materials* (7th ed, 2006) 636-7.

49 (1989) 168 CLR 110.

50 Gaudron, McHugh and Deane JJ; Mason CJ and Dawson J dissenting.

51 *Benz* (1989) 168 CLR 110, 143.

52 Ibid 144.

53 (1992) 174 CLR 558.

In *Pollitt v The Queen*[53] ('*Pollitt*') the accused was convicted of murder. The Crown case was that the accused had been engaged by a person since deceased (A) to kill one individual, and had by mistake shot and killed another. Two witnesses were called and gave evidence of conversations one or other of them had with A shortly after the shooting. The most crucial of these followed a telephone conversation in the course of which A had said, '[y]ou get the rest of the money when you do the job properly'. A then said to the witness that he had given the accused 'a job to do and he had stuffed it up'. A also said, 'I have already given him $5,000, he expects me to give him another five for something he hasn't done'. Two further such statements were made some days later by A. The accused appealed unsuccessfully to the Full Court of the Supreme Court of Victoria, and then to the High Court where the case was heard by the Full Bench.

By a majority of four to three, the High Court dismissed the appeal.[54] Four of the seven judges, however, held the evidence to infringe the hearsay rule. Chief Justice Mason sought to develop further his flexible approach to hearsay. His Honour stated:

> The case for relaxing the hearsay rule should in my view prevail so as to permit, at least, the reception in evidence of statements made during the course of a telephone conversation made by a party to that conversation when they form part of that conversation and identify the other party to the conversation.[55]

Justice Brennan, dissenting, held the words used by A amounted to hearsay. His Honour stated:

> The words spoken by A in the telephone call on the morning after the murder might be seen, in the circumstances, as a statement by A *implying* that the other party to the conversation had made a contract with him, that the other party had failed to perform the contract properly and that final payment had been deferred until the contract was fully performed. If that were the only way in which evidence of the conversation could be used, it would have been inadmissible as hearsay.[56]

His Honour stated that insofar as A's statements were used merely to prove the existence of a contract, they were original evidence. The words could not, however, be used to infer the truth of the statements made. Commenting on the approach of Mason CJ, Brennan J stated '[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'.[57] Justices Deane and Toohey delivered separate dissenting judgments, each adopting an analysis similar to that of Brennan J.

54 Mason CJ, Dawson, Gaudron and McHugh JJ; Brennan, Deane and Toohey JJ dissenting.
55 *Pollitt* (1992) 174 CLR 558, 566.
56 Ibid 584 (emphasis in original).
57 Ibid 573-4.

Justices Dawson and Gaudron delivered a separate dissenting judgment holding the evidence admissible. Their Honours stated:

> Although it is possible to treat the evidence of [the witnesses] as evidence of four separate out-of-court statements, the statements are more accurately described as interconnected events which, taken together, constitute a sequence or pattern of conduct on the part of ['A'] at or about the time that [the deceased] was murdered.[58]

To speak of 'interconnected events' or 'pattern of conduct' misses the essential point. The relevance of the various statements made by A was that they involved the implied assertion that A paid the accused to kill one person and the accused killed another person. As such, the evidence was hearsay.

The Court was thus divided 3-3 on the issue of hearsay. The remaining judge, McHugh J, adopted a similar analysis of the evidence to that of Brennan J. His Honour held, however, that in the light of the direction given by the trial judge as to the use that could be made of the evidence no substantial miscarriage of justice had occurred. Accordingly, the appeal was dismissed.

The decision in *Pollitt* left the operation of the hearsay rule in relation to implied assertions in a state of considerable confusion. The Court was divided in its analysis of hearsay, and the suggested adoption of a flexible approach remained a possibility. In these circumstances a return to a more certain and formalistic approach was a distinct likelihood.

In *Bannon*[59] the accused and a co-accused were convicted on two counts of murder. The victims had been stabbed to death. The Crown case was that either both accused acted in concert in committing the murders, or the accused aided and abetted the co-accused in committing the murders. The defence of each accused was that the other had been solely responsible for the killings. Evidence was admitted of statements made by the co-accused to two witnesses in which she admitted she killed the deceased. She made no mention of the accused in these statements. The co-accused did not give evidence at trial. The judge directed the jury that the case against each accused must be considered separately, and that evidence of out-of-court admissions by the co-accused were not admissible against the accused. On appeal to the Supreme Court of Victoria (Court of Criminal Appeal), it was argued that the judge should have directed the jury that the statements of the co-accused could be used to exculpate the accused, notwithstanding that they were hearsay and not admissible to inculpate the accused. The argument was rejected and the appeal dismissed.

The argument of the defence involved using the statement of the co-accused as implied hearsay. From the admission 'I killed the deceased' without reference to the accused, it was sought to infer that the co-accused was in substance saying 'I

58 Ibid 604.
59 (1995) 185 CLR 1.

alone killed the deceased', which if the statement had been made, would have been direct hearsay. If a general rule against the admission of hearsay evidence is accepted, then the statement of the co-accused was correctly regarded as not admissible for the purpose of drawing such an inference. No issues of faulty perception or erroneous memory on the part of the co-accused arose. Possible issues of insincerity and ambiguity were however both present and significant. There are any number of reasons why a person who has committed a killing may choose not to implicate another participant in the offence. When considered for the purpose for which it was sought to be used, the statement was highly ambiguous; a statement 'I committed a killing' by no means necessarily means 'I alone committed a killing'. On appeal to the High Court, three arguments were deployed by the defence. First, the rule against hearsay should be applied flexibly. Second, there is an exception to the hearsay rule where the out-of-court statement is against the penal interest of the person making it and that person is unavailable to testify. Third, there is an alternative exception to the hearsay rule where the out-of-court statement is judged to be 'reliable' and its admission is 'necessary'. The Court rejected the first and third arguments, and while leaving open for future consideration the second argument held that it could not assist the accused in the instant case.

The Court's rejection of the argument that the rule against hearsay should be applied flexibly, either generally or in relation to implied assertions, was clear. Chief Justice Brennan stated:

> To admit hearsay evidence whenever the judge forms the opinion that the evidence is sufficiently reliable would be to transform the nature of the criminal trial. If the judge's opinion be based on no specific criteria but only on an appreciation of the circumstances generally, the judge would have to exercise a lively discretion to exclude evidence that the judge thought to be reliable in order to prevent undue prejudice to the accused who could not cross-examine the maker of the out-of-court statement. The judge would have to determine the scope of the evidence in the trial not by an application of legal criteria but by reference merely to reliability on the one hand and undue prejudice on the other. Admissibility would reflect no more than the judge's opinion of the fairness of exposing the accused to the risk of conviction on the hearsay evidence. That is not an appropriate power to vest in a trial judge who has not heard the declarant making the statement and ordinarily would not have seen the declarant.[60]

The third argument involved an invitation to the court to create a new overarching exception to the hearsay rule. The terminology used was taken from Wigmore, who argued a combination of the two principles of circumstantial probability of trustworthiness and necessity could be seen as an underlying theme explaining the development of the common law exceptions to the rule.[61] Of course, there is a huge difference between on the one hand asserting that these two principles may

60 Ibid 7.
61 Wigmore, above n 11, [1420].

assist in explaining the exceptions to the rule, and on the other arguing that whenever these factors may be seen as present then the evidence is to be admitted. Acceptance of the argument would, in effect, have created a single exception to the rule of such width as to come close to swallowing the rule itself.

The second argument may be viewed as in principle sound, but the Court was correct in holding it could not assist the accused in the instant case. The rule that declarations against penal interest, or third party confessions as they are commonly called, are not admissible to assist an accused, although well established,[62] is absurd. The rule was described by Wigmore as a 'barbarous doctrine, which would refuse to let an innocent accused vindicate himself even by producing to the tribunal a perfectly authenticated written confession, made on the very gallows, by the true culprit now beyond the reach of justice'.[63] The Court considered decisions of the Supreme Court of Canada which had rejected the third party confession rule, and noted that the admissibility of such confessions was subject to limitations, in particular that the declarant should have apprehended a vulnerability to penal consequences, the vulnerability to penal consequences would have to be not remote, and the declarant would have to be unavailable by reasons of death, insanity or grave illness which prevents the giving of testimony.[64] Chief Justice Brennan commented that unless 'principles of this kind are adopted to limit that admissibility of evidence of out-of-court declarations against penal interest, false confessions untested by cross-examination would bedevil criminal trials'.[65] Since the application of such principles would mean that the statements of the co-accused would not be admissible in favour of the accused, the Court held that it was unnecessary to decide whether and subject to what conditions the third party confession rule should be discarded.[66]

V THE UNIFORM EVIDENCE ACTS

Under the uniform Evidence Acts the hearsay rule is stated not to extend to implied assertions.[67] The Australian Law Reform Commission had originally proposed that the hearsay rule should apply to both express and implied assertions, but concluded that such an approach would give too broad an operation to the rule. In its interim report the Commission stated:

> The result of including unintended implied assertions in the definition may,

62 *Sussex Peerage Case* (1844) 11 Cl & Fin 85; 8 ER 1034; *Re Petition by Van Beelen* (1974) 9 SASR 163; *R v Blastland* [1985] 3 WLR 345; *Question of Law Reserved (No 3 of 1977)* (1998) 70 SASR 555. For discussion of the rule see Williams, above n 2, 132-3.

63 Wigmore, above n 11, [1477].

64 *Demeter v The Queen* (1977) 75 DLR (3d) 251; *R v O'Brien* (1977) 76 DLR (3d) 513; *Lucier v The Queen* (1982) 132 DLR (3d) 244.

65 *Bannon* (1995) 185 CLR 1, 9.

66 Ibid 12 (Brennan CJ), 28 (Dawson, Toohey and Gummow JJ).

67 This follows the approach taken in the United States *Federal Rules of Evidence 2004* r 801, <http://judiciary.house.gov/media/pdfs/printers/108th/evid2004.pdf> at 22 June 2006.

> therefore, be that the hearsay proposal would embrace evidence of relevant acts, however detailed and complicated they may be, because it is sought to tender such evidence to prove, inter alia, the intent or state of mind of a relevant person ... [T]rials could be seriously disrupted and much evidence excluded.[68]

Section 59 of the uniform Evidence Acts provides:

> (1) 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.
>
> (2) Such a fact is in this Part referred to as an asserted fact.

The term 'previous representation' is defined in the dictionary of the uniform Evidence Acts as meaning 'a representation made otherwise than in the course of giving evidence in the proceedings in which evidence of the representation is sought to be adduced'.[69]

The Acts then spell out wide ranging exceptions to the operation of the hearsay rule. In criminal cases, s 65 provides for the admission of first hand oral or documentary hearsay,[70] where the maker of the representation is unavailable,[71] as follows:

> (1) This section applies in criminal proceedings if a person who made a previous representation is not available to give evidence about an asserted fact.
>
> (2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation was:
>
> (a) made under a duty to make that representation or to make representations of that kind; or
>
> (b) made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or

68 Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985) 375.

69 The word 'representation' is also defined in the Dictionary of the uniform Evidence Acts to include:
(a) an express or implied representation (whether oral or in writing); or
(b) a representation to be inferred from conduct; or
(c) a representation not intended by its maker to be communicated to or seen by another person; or
(d) a representation that for any reason is not communicated.

70 First hand hearsay is defined by s 62 of the uniform Evidence Acts:
(1) A reference in this Division (other than in subsection (2)) to a previous representation is a reference to a previous representation that was made by a person who had personal knowledge of an asserted fact.
(2) 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.

(c) made in circumstances that make it highly probable that the representation is reliable; or
(d) against the interests of the person who made it at the time it was made.

...

(7) Without limiting paragraph (2)(d), a representation is taken for the purposes of that paragraph to be against the interests of the person who made it if it tends:
(a) to damage the person's reputation; or
(b) to show that the person has committed an offence for which the person has not been convicted; or
(c) to show that the person is liable in an action for damages.

(8) The hearsay rule does not apply to:
(a) 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 in 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.

Section 66 provides for the admission of first hand oral or documentary hearsay in criminal cases where the maker of the representation is available as follows:

(1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.
(2) If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:
(a) that person; or
(b) a person who saw, heard or otherwise perceived the representation being made; if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

[71] Clause 4 of Part 2 of the Dictionary of the uniform Evidence Acts deals with the unavailability of persons:
(1) For the purposes of this Act, a person is taken not to be available to give evidence about a fact if:
(a) the person is dead; or
(b) the person is, for any reason other than the application of s 16 (Competence and compellability: judges and jurors), not competent to give evidence about the fact; or
(c) it would be unlawful for the person to give evidence about the fact; or
(d) a provision of this Act prohibits the evidence being given; or
(e) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or to secure his or her attendance, but without success; or
(f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success.
(2) In all other cases the person is taken to be available to give evidence about the fact.

In the case of more remote hearsay, s 69 provides for the admission of business records.[72]

The narrowing of the operation of the hearsay rule achieved by s 59 is not as great as might at first be thought. The child's conversation including calling the person spoken to 'daddy' in *Walton* would not infringe the rule. In other cases, however, the application of s 59 may be unclear. While a distinction between express and implied assertions may be analytically helpful in elucidating the operation of the hearsay rule, encapsulating this distinction in statutory form gives rise to problems of uncertainty. In *Pollitt*, A was complaining of the inadequate performance by the accused of the contract to kill. A was intending to convey this information, and so the evidence would still be hearsay. *Benz* is perhaps more borderline, but the evidence would also appear to remain hearsay. The primary information the declarant was intending to convey was as to the well being of her companion. She was, however, also seeking to convey the information that the companion was her mother.

What of the situation in *Bannon*? The co-accused made statements to the effect that she had committed the killings, and thus on a narrow interpretation did not intend to assert that the accused had not been involved. On the other hand, the accused was seeking to have the jury draw an inference that the co-accused had been intending to say that she alone had committed the killings, and on this interpretation the statement would remain hearsay.

To regard the test posed by s 59 as purely subjective in nature gives rise to difficulty, for the declarant will frequently have had no such distinction present to her or his mind.[73] Was the declarant in *Ratten* intending simply to summon the police or to assert that a crime was in progress requiring the presence of the police? In *R v Hannes*,[74] regarding charges of insider trading, the New South Wales Court of Criminal Appeal was concerned with the admissibility of a document appearing to contain the personal ruminations of the accused. The Court held that the trial judge had been correct in refusing to admit the document. The difficulty of seeking to resolve questions of characterisation by reference to the mind of the declarant was considered by Spigelman CJ, who stated that if the word 'intended' in s 59(1) 'requires some form of specific conscious advertence on the part of the asserter', very few implied assertions would be covered by the rule.[75] Without expressing 'a final view', his Honour concluded:

> It is arguable that the scope of the word 'intended' in s 59(1) goes beyond the specific fact subjectively adverted to by the author as being asserted by the

72 Other specific exceptions to the hearsay rule are tags and labels (s 70); telecommunications (s 71); contemporaneous statements about a person's health (s 72); marriage, family history or family relationships (s 73); public or general rights (s 74); admissions (s 81) and representations about employment or authority (s 87(2)).

73 Odgers, however, favours a purely subjective interpretation of the provision: Stephen Odgers, *Uniform Evidence Law* (6th ed, 2004) 190-2. Cf Jeremy Gans and Andrew Palmer, *Australian Principles of Evidence* (2nd ed, 2004) 177.

74 (2000) 36 ACSR 72.

75 Ibid 131.

> words used. It may encompass any fact which is a necessary assumption underlying the fact that the assertor does subjectively advert to.[76]

In their Report, the Australian, New South Wales and Victorian Law Reform Commissions seek to resolve problems of interpretation by providing an objective test. Proposal 7-1 states:

> The uniform Evidence Acts should be amended to provide expressly that, for the purposes of s 59, in determining whether a person intended to assert the existence of facts contained in a previous representation, the test to be applied should be based on what a person in the position of the maker of the representation can reasonably be supposed to have intended; and the court may take into account the circumstances in which the representation was made.[77]

Far from clarifying issues of interpretation, such a recommendation would leave the distinction between express and implied assertions even more unclear. If the judge is satisfied the declarant did not intend to convey information, is the fact that a reasonable person in the position of the declarant would have been intending to convey information to render the declaration hearsay? In truth, if an entirely objective test is employed, then, whatever the distinction that is being drawn, it is no longer one between express and implied assertions.

Quite apart from issues of interpretation, it is suggested that given the wide ranging exceptions to the hearsay rule under the uniform Evidence Acts, the decision to exclude implied hearsay from the scope of the rule is unwarranted. In cases where the maker is not available, sections 65(2)(a) and (b) re-instate the common law exceptions of declarations in the course of duty[78] and *res gestae*.[79] Para (c) was not recommended by the Australian Law Reform Commission, and derives from the approach developed by Mason CJ, as discussed above.[80] A statutory, reliability based general exception carries the same dangers of unpredictability as a similar judicially created exception. There is, however, a real if subtle difference in that judges are more likely to read down a widely expressed statutory provision than they are to interpret narrowly a discretionary power of their own creation. In *Conway v The Queen*,[81] the Full Federal Court adopted a strict interpretation of this provision. The Court held that statements

76 Ibid 132 (Spigelman CJ), 154 (Dowd J, agreeing with Spigelman CJ), 153 (Studdert J, who also held the document to constitute hearsay).

77 Australian Law Reform Commission; New South Wales Law Reform Commission; Victorian Law Reform Commission, above n 1, 203.

78 The exception is wider under the Acts in that the common law exception applied only where the declarant was dead and not where he or she was otherwise unavailable, and the concept of a duty was narrowly interpreted: Waight and Williams, above n 48, 634.

79 *Ratten v The Queen* [1972] AC 378; *Vocisano v Vocisano* (1974) 130 CLR 267; *R v Andrews* [1987] AC 281. The requirement of contemporaneity under s 65(2)(b) is, however, less strict than at common law: *R v Mankotia* [1998] NSWSC 295; *R v Polkinghorne* (1999) 108 A Crim R 189; *Conway v The Queen* (2000) 98 FCR 204.

80 Such a provision was expressly rejected by the majority of the Australian Law Reform Commission: Australian Law Reform Commission, above n 68, 402-4. For Mason's approach, see above n 40 and accompanying text.

81 (2000) 98 FCR 204.

made by the victim in a murder case to the effect that she had been drugged by the accused were not admissible under s 65(2)(c).[82] Their Honours stated:

> The requirement in s 65(2)(c) of the Act that it be 'highly probable' that a representation be 'reliable' in order to be admissible is an onerous one. It is easy to see why that should be so. Section 65(2)(c) has the potential to operate unfairly against an accused person. This particular exception to the hearsay rule was not recommended by either the Australian Law Reform Commission or the New South Wales Law Reform Commission. Treating 'reliability' alone as the basis for admissibility, represents a radical departure from the principle that hearsay evidence, no matter how reliable it may appear to be, is inadmissible unless it falls within a recognized exception to the hearsay rule.
>
> It is true that in *Pollitt v The Queen* (1992) 174 CLR 558 Mason CJ favoured the development of an exception to the hearsay rule based solely upon 'reliability'. However, the High Court eschewed that approach in *Bannon v The Queen* (1995) 185 CLR 1, and there are plainly dangers associated with it.[83]

Section 65(2)(d) re-instates the declarations against interest exception, extending its operation beyond declarations against pecuniary or proprietary exceptions, to declarations against penal and other interests.[84] In its extension of this exception however, the uniform Evidence Acts do not incorporate the limitations which the High Court indicated in *Bannon* would be likely to accompany a common law extension of the exception to cover third party confessions.[85] Section 65(8) creates an exception for statements adduced by the accused. In cases where the maker of the representation is available, s 66 introduces a new exception of declarations fresh in the memory of the declarant.

The impact of the uniform Evidence Acts' exceptions on the leading common law decisions considered above would be limited. In *Walton*, even if the child's conversation was classified as hearsay, it would be admissible under s 65(2)(c). *Benz*, however, is problematical. People usually tell the truth about their family relationships, and there was no reason to believe the statement of the younger woman on the bridge to be untrue. Equally, however, there was nothing in the circumstances which would make it highly probable that the representation was reliable, and a person who has recently committed a crime may have reason to mislead someone who comes upon the scene as to the identity of an accomplice.

82 Ibid 206. The Court held, however, that the statements were properly admitted under s 65(2)(b). The Court stated, at 243, that the test in s 65(2)(b) 'imposes a different, and we think significantly lower, threshold of admissibility than does the requirement in s 62(2)(c) that it be shown that it is "highly probable that the representation is reliable"'.

83 *Conway v The Queen* (2000) 98 FCR 204, 244. See also *Williams v The Queen* (2000) 119 A Crim R 490, 504. Cf *R v Gover* (2000) 118 A Crim R 8.

84 The exception under the Acts is wider also in that the common law exception operated only where the declarant was dead and not where he or she was otherwise unavailable: Waight and Williams, above n 48, 633-4.

85 See above n 61-6 and accompanying paragraphs.

Thus s 65(2)(c) might not apply. In *Pollitt*, if the evidence was classified as hearsay, it would be likely to remain inadmissible. There was nothing in the circumstances that would appear to render it highly probable that A's declarations were reliable. Nor was it against A's interests to have made the declaration since A did not appear under any apprehension that his statements might lead to prosecution. In *Bannon*, the co-accused did not give evidence. Since she could not be compelled to do so, she was unavailable for purposes of s 65.[86] Thus, s 65(8) would render her statement admissible. Had the co-accused given evidence, then s 65 would not have been applicable, and s 66 would have been unlikely to render the evidence admissible since the statement was made some time after the killing. Thus, if classified as hearsay, the evidence would have remained inadmissible.

The above suggested outcomes demonstrate that the statutory exceptions under the uniform Evidence Acts by no means provide an easy path to admissibility. This may be accepted as correct in principle. The purpose of the statutory exceptions is to provide for admission of evidence where hearsay possesses a significant likelihood of reliability. The purpose of the exceptions is not to undermine the primacy of the exclusion rule itself.

VI FUTURE DIRECTIONS

With the decision in *Bannon*, the High Court moved the common law to a position more restrictive of admissibility than that which had applied pre-*Walton*. The hearsay rule now applies to implied assertions, and it is a rule to be applied strictly. Such a view has a good deal to commend it. In *Myers v Director of Public Prosecutions*,[87] the House of Lords declined to admit business records that were both reliable and probative but nonetheless hearsay. Lord Reid stated:

> I have never taken a narrow view of the functions of this House as an appellate tribunal. The common law must be developed to meet changing economic conditions and habits of thought, and I would not be deterred by expressions of opinion in this House in old cases. But there are limits to what we can or should do. If we are to extend the law it must be by the development and application of fundamental principles. We cannot introduce arbitrary conditions or limitations; that must be left to legislation. ... And if we do in effect change the law, we ought in my opinion only to do that in cases where our decision will produce some finality or certainty. ... [I]t seems to me to be against public policy to produce uncertainty. The only satisfactory solution is by legislation following on a wide survey of the whole field, and I think that such a survey is overdue. A policy of make do and mend is no longer adequate.[88]

86 Clause 4(1)(f) of Part 2 of the Dictionary of the uniform Evidence Acts.
87 [1965] AC 1001.
88 Ibid 1021-2.

The formalistic approach of *Myers* was adopted by Australian courts up until the decision in *Walton*.[89] The basic premise of the hearsay rule should be recognized as fundamentally sound. In criminal cases the rule has been retained in those jurisdictions which have undertaken fundamental reform of its operation.[90] Evidence which is not subject to the test of cross-examination frequently carries significant dangers of unreliability, and the sources of that unreliability may not be readily detectable. Nor is the hearsay rule entirely negative in its operation. It carries echoes of the old best evidence principle, in that it insists that matters be proved by what is normally the most reliable form of evidence.

The potential defects in testimony which may be exposed by cross-examination are not to a significant extent less likely to be present in the case of implied written or oral assertions than in the case of express assertions. It follows that the preferable starting point should be that the hearsay rule applies equally to implied oral or written assertions as to express assertions. What of assertions implied from conduct? Here it is submitted the position should be different. It is true that the testimonial defects that cross-examination is designed to uncover may frequently be present in the case of hearsay by conduct, although to a lesser extent than in the case of oral or written assertions. Nonetheless, the results that may flow from treating the hearsay rule as extending to implied assertions by conduct are unsatisfactory.[91] Not to receive evidence of a doctor's treatment of a patient as evidence of the illness of the patient borders on the bizarre. Further, if the proposition that the hearsay rule extends to implied assertions by conduct is accepted, a little forensic ingenuity will soon discover further examples of implied hearsay in evidence previously accepted as admissible. For example, evidence of treatment bearing on the relationship of a victim and the accused is accepted as admissible circumstantial evidence.[92] Such evidence, however, carries a strong element of implied hearsay. It is suggested then, that the hearsay rule is best regarded as limited to oral and written statements and to conduct intended to convey information (a gesture or a nod of the head).[93] Conduct from which it is desired to draw an inference not intended by the actor is best regarded as circumstantial evidence, the admissibility of which is determined by the principle of relevance.[94]

The view that the hearsay rule does not extend to implied oral or written

89 See, eg, *R v Clune* [1982] VR 1.

90 This was the view taken by the Australian Law Reform Commission in proposing the uniform Evidence legislation: Australian Law Reform Commission, above n 69, 370. In England, the *Criminal Justice Act 2003* (UK) c 44 retains a basic rule excluding hearsay: see Colin Tapper, *Cross and Tapper on Evidence* (10th ed, 2004) ch XIV.

91 See, eg, *Thompson v Manhattan Railway Co*, 42 NYS 896 (NY App Div, 1896); and the example of the captain departing to sea after examining the vessel for seaworthiness in *Wright v Doe d Tatham* (1837) 112 ER 488, 516.

92 *Wilson v The Queen* (1970) 123 CLR 334.

93 *Chandrasekera v The King* [1937] AC 220.

94 *Plomp v The Queen* (1963) 110 CLR 234; *Wilson v The Queen* (1970) 123 CLR 334; *R v Heath* [1991] 2 Qd R 182; *R v Jeffrey* (1991) 60 A Crim R 384; *Conway v The Queen* (2000) 172 ALR 185. The view that statements not intended to be assertive are hearsay but that conduct not intended to be assertive is not was the view advanced in the second Australian edition of *Cross on Evidence*: Gobbo, Byrne and Heydon, above n 3, 455-6; see comment on this view in the current edition, Heydon, above n 30, 986.

assertions appears to have had its origin in the failure to develop a principled and satisfactory set of exceptions to the hearsay rule. The common law exceptions are complex, haphazard and restrictive.[95] The Australian jurisdictions which have not adopted the uniform Evidence Acts have enacted only limited and piecemeal exceptions to the rule.[96] This lack of mechanism to admit hearsay the receipt of which is warranted was likewise the basis for the attempts to move to a flexible application of the doctrine.

Significant arguments in support of the flexible approach to hearsay were put prior to the decision in *Bannon*.[97] It could be argued that having the judge determine the value and reliability of potentially hearsay evidence would result in better outcomes in individual cases. Over time, the courts would develop guidelines as to the factors to be taken into account in determining whether to receive such evidence. The existence of only very limited legislative reforms in those Australian jurisdictions which had not adopted the uniform Evidence Acts gave strength to the argument for a measure of judicial creativity in the area. On balance, however, these arguments do not appear persuasive. It is desirable that as a basic forensic tool, the hearsay rule be both capable of ready application, and as predictable as possible in its application. Such predictability is more satisfactorily achieved by clear legislation than through judicial development. Nor is it easy to see how problems of hearsay can readily be solved by reference to judicial discretion. The criterion for the exercise of the discretion is probative value, but that criterion is likely to prove difficult to apply to evidence which is not subject to the primary method by which the probative value of evidence is tested, that of cross-examination. Now that the uniform Evidence Acts have been adopted federally and in two states, and adoption recommended in Victoria, the argument that it is necessary for the judges to take an active role in refining the operation of the hearsay rule has less force than formerly.

It is more satisfactory to seek to determine the scope of the hearsay rule through carefully drafted legislative exceptions to the rule. Legislative provisions will of course have areas of open texture and uncertainty, and in an area as complex as hearsay, scope for significant judicial interpretation can and should remain.[98] Sections 65 and 66 of the uniform Evidence Acts involve significant modification of the operation of the rule. Although essentially modelled on the common law, the declarations against duty[99] and *res gestae*[100] exceptions are wider than at common law, and the declarations against interest exception extends to penal and other interests.[101] Section 65(8) renders admissible first hand hearsay where it is adduced by the accused, which involves a significant departure from the position

95 See the comments of Lord Reid in *Myers v Director of Public Prosecutions* [1965] AC 1001, 1020.

96 *Evidence Act 1977* (Qld) ss 92-94; *Evidence Act 1929* (SA) ss 34C-34D; *Evidence Act 1958* (Vic) ss 54-55; *Evidence Act 1906* (WA) ss 79B-79E.

97 Among academic commentators, see Weinberg, above n 2; Palmer, 'The Reliability-Based Approach to Hearsay', above n 2; Marshall, above n 2; Molomby and Clark, above n 2.

98 See geneSee above n 79.

99 See above n 78.

100 See above n 79.

101 See above n 84.

at common law.[102] Where the maker of the representation is available, s 66 provides for the admissibility of statements made while the facts were fresh in the memory of the maker. While the scope of ss 65 and 66 is significant, those provisions fall far short of abrogating the operation of the rule. In analysing how these provisions would operate if applied to leading decisions of the High Court at common law,[103] it appeared that in not all cases would the provisions of the uniform Evidence Act lead to admissibility, and that there remained significant areas of uncertainty which would need to be resolved by judicial interpretation and application. If the argument that the hearsay rule is fundamentally sound is accepted, then a reasonably cautious approach both to the drafting and the interpretation of exceptions may be accepted as a proper method of approach.

Section 65(2)(c) of the uniform Evidence Acts, of course, contains a legislative embodiment of the flexible approach of Mason CJ. If that provision is given full rein then, somewhat ironically, a flexible judicial approach to hearsay would be applicable under the Acts while not at common law. How the courts will approach s 65(2)(c) must remain to be seen. The decision in *Conway v The Queen*,[104] however, indicates a limited application is likely to be given to the provision.

While the approach taken in the uniform Evidence Acts is broadly supported, it is suggested that the Acts should commence from the starting position that the hearsay rule extends to implied oral and written assertions. The normal rule should, it is submitted, be one of inadmissibility, with a set of statutory exceptions that is on the one hand strict but on the other sufficiently open to admit such evidence when the circumstances are compelling.

VII CONCLUSION

The rule against hearsay is intended to guard against the four testimonial dangers of insincerity, ambiguity, faulty perception and erroneous memory which may lie undetected in the assertion of a declarant. By and large these dangers are not significantly less likely to be present in the case of implied assertions than in the case of express assertions. The hearsay rule should then apply in the same manner to implied oral and written assertions as to express assertions. Assertions which may be implied from conduct are best characterised as involving issues of circumstantial evidence and as such not within the province of the hearsay rule.

Prior to the decision in *Walton*, the hearsay rule was accepted as being strict in its operation, but the balance of authority tended to the conclusion that the rule did not extend to implied assertions. In *Walton*, the High Court regarded the rule as extending to implied oral or written assertions, but Mason CJ put forward the argument that, at least in the case of implied assertions, the rule should be flexible

102 As illustrated by Sparks v The Queen [1964] AC 964.
103 See above pt V The Uniform Evidence Acts.
104 (2000) 98 FCR 204.

in its operation, and that where the evidence possessed sufficient reliability, it should be received. The desirability of expedition and certainty in the application of the rule, however, are significant drawbacks in such an approach. A general and largely undefined judicial power to receive hearsay carries the additional danger of judicial activism being carried to the point of circumscribing the legitimate role of the rule in limiting the receipt of assertions not subject to the test of cross-examination. In *Bannon* the High Court, correctly, it is submitted, affirmed the application of the hearsay rule to implied oral and written assertions and rejected the existence of a judicially created, reliability driven flexible approach to the rule.

By contrast, the uniform Evidence Acts seek to limit the operation of the hearsay rule to express assertions, and at the same time provide principled and reasonably wide ranging exceptions in cases where the declarant is unavailable, including a reliability based exception contained in s 65(2)(c). The approach of the courts to these exceptions has been cautious, yet they provide for receipt in situations where the case for admissibility is particularly strong. The best approach, it is suggested, is to treat the hearsay rule as extending to implied oral and written assertions, while providing such statutory exceptions to prevent unwarranted rigidity and unsatisfactory outcomes in the application of the rule.