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Abstract

The purpose of this article is to examine the hearsay rule, with a view to considering some much needed reform. It is submitted that it is within the power of the courts to reform the hearsay rule, which is a judicially created evidential concept, rather than await legislative reform. Recent cases of the High Court of Australia, *Walton v The Queen*, *R v Benz* and *Pollitt v The Queen* have involved consideration of difficult aspects of the hearsay rule, without however, providing any firm or certain basis for reform. It is submitted that sensible reform can be achieved by simply narrowing the operation of the scope of the hearsay rule without creating further ad hoc exceptions, as some of the Justices have suggested might be appropriate. The desirability of reform of hearsay has also been recently suggested by senior English Judges.

Keywords

hearsay rule, verbal acts, res gestae, *Walton v The Queen*, *R v Benz*, *Pollitt v The Queen*

VERBAL ACTS, RES GESTAE AND HEARSAY: A SUGGESTION FOR REFORM



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Introduction

The purpose of this article is to examine the hearsay rule, with a view to considering some much needed reform. It is submitted that it is within the power of the courts to reform the hearsay rule, which is a judicially created evidential concept, rather than await legislative reform.¹ Recent cases of the High Court of Australia, *Walton v The Queen*,² *R v Benz*³ and *Pollitt v The Queen*⁴ have involved consideration of difficult aspects of the hearsay rule, without however, providing any firm or certain basis for reform. It is submitted that sensible reform can be achieved by simply narrowing the operation of the scope of the hearsay rule without creating further ad hoc exceptions, as some of the Justices have suggested might be appropriate. The desirability of reform of hearsay has also been recently suggested by senior English Judges.⁵

An overly broad or liberal view of the scope of hearsay has led to some applications which arguably offend common sense and are very technical. To mention some:

- (i) exclusion of evidence relating to engine stampings in a case involving stolen motor vehicles on the basis that those who were responsible for the stampings were unavailable to give evidence;⁶
- (ii) exclusion of labelling on an imported product, 'Produce of Morocco', as evidence that the product had been imported from Morocco;⁷

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1 For a contrary approach requiring legislative intervention, see *Myers v DPP* [1965] AC 1001; *R v Kearley* [1992] 2 WLR 656; compare however *Jorgenson v News Media Ltd* [1965] NZLR 969; *Ares v Venner* (1970), 14 DLR (3d) 4 and *R v Khan* (1990) 59 CCC (3d) 92.

2 [1987-1988] 166 CLR 283.

3 [1989] 168 CLR 110.

4 (1992) 108 ALR 1.

5 See *B v Kearley* [1992] 2 WLR 656, 696, 705.

6 *Myers v DPP* [1965] AC 1001.

7 *Patel v Comptroller of Customs* [1966] AC 357.

- (iii) exclusion of business letters from persons addressed to the testator, at various stages during his life to rebut an assertion that the testator had been of unsound mind since birth, and children had been seen to ridicule or insult him;⁸
- (iv) exclusion of evidence that a number of unknown persons had made calls to a house requesting drugs from one of the inhabitants on a trial of possession for supply of drugs;⁹
- (v) evidence in which a telephone caller, in a very incriminating conversation, identified himself by name and occupation was inadmissible against a party of the same name and occupation.¹⁰

It is submitted that the hearsay rule should be limited in application to unsworn utterances containing narrative assertion, where it is sought to rely on the evidence testimonially. If an utterance of this kind is made then the evidence should generally be excluded unless it comes within an exception to the hearsay rule, since there is a more obvious possibility of error or concoction with reported assertion of this kind, particularly if they take place some time after the event or events, in question or the declarant has some motive to give a distorted account.

Associated with this proposal is the submission that unsworn declarations, be they verbal utterances or assertive conduct, which arise naturally, routinely, or spontaneously and give the colour to, or explain, an event or transaction or related series of events or transactions should be treated as items of circumstantial evidence. These kinds of declarations, referred to by Wigmore as 'verbal acts',¹¹ should not attract the hearsay rule. Such an approach appeared to receive some judicial support in the cases of *Walton*, *Benz*, and *Pollitt* and earlier Australian authority.¹² It has, however, been severely criticised by Professor Colin Tapper who, in a rather trenchant attack on the approach of Mason CJ in *Walton*, considered it as an unjustifiable incursion upon the hearsay rule.¹³ It is submitted in this article, however, that such an approach is defensible and, indeed, preferable to a broad application of the hearsay rule which may lead to the exclusion of very reliable and cogent evidence.

It is envisaged, however, that judicial discretion should be invoked to exclude evidence of unsworn assertions of this kind if the evidence is of a quality which would lead unfairly to speculation; has the taint of concoction or fabrication about it, its relevance is outweighed by prejudicial matter; or

8 *Wright v Tatham* (1837) 7 Ad & E 313.

9 [1992] 2 WLR 656.

10 (1984) 14 A Crim R 97.

11 *Wigmore on Evidence*, 3rd ed Vol 6 (1940) para 1772 at 190-1; see further *Ahern v The Queen* 80 ALR 161 at 164.

12 *Wilson v The Queen* (1970) 123 CLR 334; *R v Hendrie* (1985) 37 SASR 581.

13 (1990) 106 LQR 441.

for some other good reason such as improper conduct by one party in seeking to avoid calling the declarant. The mere fact, however, that the declarant is unavailable to give evidence should not per se lead to the exclusion of declarations that do not contain narrative material that is otherwise relevant.

It is also proposed that this approach should be extended to implied assertions whether of a verbal or non-verbal kind. In this regard some consideration will be given to the seminal case of *Wright v Tatham*,¹⁴ which extended the scope of the hearsay rule to implied assertions. It is submitted that a better approach to the issue of the admissibility of the letters in question would have been to have treated them simply as items of circumstantial evidence, rather than as inadmissible hearsay. Also considered will be the recent case of *Kearley v The Queen*¹⁵ where the House of Lords again ruled that the hearsay rule included implied assertions. It will be seen, however, that the dissenting Law Lords were most critical of the application of the hearsay rule in that case.¹⁶

This approach would also assist to eliminate the difficulties associated with the admission of evidence such as markings on products as evidence of their place of origin or business records generally. Evidence involving markings on products or business records, would be admissible as circumstantial evidence subject to the exercise of curial judicial discretion on the issue of reliability.

The article will finally consider the admissibility of unsworn declarations which contain narrative assertions under the *res gestae* exception to the hearsay rule. Two of the relevant criteria for admissibility under this exception will be its contemporaneity with the event to which it refers, and the degree of spontaneity of the utterance; criteria which Lord Wilberforce advanced in the important Privy Council decision of *Ratten*.¹⁷ It will be seen, however, that where the utterance occurs prior to, or during, an event or transaction in issue there may be room to admit the statement as constituting part of a relevant 'verbal act' or event or as circumstantial evidence notwithstanding the existence of narrative material.

Verbal Acts Or Hearsay?

Central to this discussion is the submission that the scope of the hearsay rule should be narrowed to include only those unsworn declarations that are truly narrative in content where it is desired to rely on the assertions testimonially.

14 (1837) 7 Ad & E 313.

15 [1992] 2 WLR 656.

16 See Lord Griffiths *ibid* at 659, Lord Brown-Wilkinson at 705-6; and further see Pattenden 'Conceptual Versus Pragmatic Approaches to Hearsay', (1993) 56 MLR 158.

17 [1972] AC 378.

Where the evidence, be it verbal utterances or conduct which is assertive in kind, does not have this quality, but arises naturally, routinely, or spontaneously as part of an event or transaction, or related series of events or transactions and is relevant, or can give colour to those events or transactions, then it should be admitted subject to the exercise of judicial discretion. The expression admitted as a 'verbal act' has been used to describe this kind of evidence.¹⁸ Another way of describing it, in more traditional terms, is simply as circumstantial evidence.¹⁹

Cases of importance in Australia in this area in recent times are the decisions of *Walton v The Queen*,²⁰ *R v Benz*²¹ and *Pollitt v the Queen*²² in the High Court. To fully understand the problems posed by these cases it is necessary to consider them individually and in some detail. Not only will the individual and diverse judicial approaches to the various problems be considered but resolution of the problems posed by those cases will be suggested in the light of the proposals for reform advanced in this article.

Walton v The Queen

In *Walton*²³ the Crown, on a charge that Walton murdered his wife, sought to admit various declarations of the deceased in order to establish that she had arranged to meet the accused at a certain location, the Town Centre, on the 5th December, 1985. There was evidence from an indemnified accomplice that the appellant, Walton, had told her that he had met his wife at the Town Centre on the same date and had driven her into the country where she had been killed. There was evidence which tended to support the fact that the deceased did go to the location in question. She had told one of the witnesses that she intended to travel by bus and, after her death, a bus ticket was found in her possession which would have placed her at the Town Centre at or about the material time when the appellant said that he had met her. The Crown also sought to admit evidence of a witness to a telephone conversation in which, after speaking for some time, the deceased called to her son and said, 'daddy's on the phone'. The boy then said 'hello daddy'; whereupon the deceased continued her conversation with the caller and agreed to meet him at the Town Centre.

There was a significant division of opinion amongst the Justices on the admissibility of these items of evidence. Mason CJ held that the evidence went to establish her intention or belief at the time of her departure and, from

18 See note 11 above.

19 See *R v Hendri* (1985) 37 SASR 581 at 585.

20 [1987-1988] 166 CLR 283.

21 [1989] 168 CLR 110.

22 (1992) 108 ALR 1.

23 [1987-1988] 166 CLR 283; For commentary on this case see Odgers, 'Walton v The Queen - hearsay revolution' (1989) 13 Crim LJ 201 and further Tapper, (1990) 106 LQR 441. Tapper is strongly critical of the hearsay rule being diminished by treating declarations of intention as circumstantial evidence.

this intention, the jury could properly infer that the deceased went to the location and met the applicant. In his opinion the evidence could be viewed as circumstantial and as such stood outside the hearsay rule. In so ruling Mason CJ looked closely at the other supporting evidence in the case which suggested that she had put her intention into effect.²⁴

On the issue relating to the identity of the accused as the caller Mason CJ considered that the evidence of the mother: 'daddy's on the phone' was an express assertion and inadmissible on the issue of identity. However, he was not persuaded that it constituted an error in view of the trial judge's direction that the jury could not consider this evidence as going to prove the caller's identity as opposed to her belief.²⁵ As to the child's statements, he considered that these constituted implied assertions. He appeared to consider that, ordinarily, implied assertions should be treated the same as express assertions: but that in the case of implied assertions there was greater latitude for flexibility, in the application of the hearsay rule. In his view the extreme unlikelihood of concoction on the part of the child would have been a factor favouring admission of those statements on the issue of the identity of the caller.²⁶

Wilson, Dawson and Toohey JJ also considered that the words spoken by the deceased 'constituted conduct on the part of the deceased from which her state of mind at the relevant time could be inferred'.²⁷ To the extent that there was any hearsay in the evidence, it was 'permissible for the trial judge to have disregarded it as he did'.²⁸ As to the telephone conversations, however, it was their opinion that, in so far as the evidence was intended to identify the accused, it was the hearsay. The jury had been correctly instructed not to consider this evidence on the question of identity.²⁹

Deane J was alone in ruling that the deceased's intentions were irrelevant. The evidence of the deceased's subjective intention was not, in his opinion, admissible to prove that she had in fact met the accused.³⁰ His Honour considered, obiter however, that the evidence relating to the telephone conversations, and in particular the mother's hearsay evidence could have been admitted under an exception to the hearsay rule which would allow for evidence of this kind to be led on the issue of identity where to exclude it would 'confound justice or commonsense'.³¹ Because there was evidence independently establishing that the other party to the telephone call was

24 Ibid at 289-92; in (1990) 106 LQR 441; see further *B v Hendrie* (1985) 37 SASR 581 at 585. Note see Tapper is critical of the reasoning of Mason CJ in *Walton* in what was a strong defence of the hearsay rule in cases of this kind. See, however, the response of Sir Daryl Dawson (1991) 15 Crim LJ 5 at 12.

25 Ibid.

26 Ibid at 292-4; see for a similar approach *R v Khan* (1990) 59 CCC (3d) 92 at 99-106.

27 Ibid at 302.

28 Ibid at 305.

29 Ibid at 306.

30 Ibid at 307-8.

31 Ibid at 308.

Walton, he considered that what was overheard by the witness of the deceased wife's conversation with her husband concerning their meeting was admissible to confirm the fact of that meeting.

It is submitted, however, that both the evidence of the deceased's intention to meet the accused at the given location and the evidence relating to her, and her son's, assertions, implicating the accused as the caller were admissible as 'verbal acts' occurring prior to her murder. With respect to the contrary opinion of Deane J, the evidence of the deceased's intentions on the day she met her death was of central relevance. Whilst it must be acknowledged that a person may have a change of heart the fact that, in this case, there was supporting evidence which would suggest that she did put into effect her intention was a matter which justified the admission of the evidence. Further, it is submitted that, once this evidence was admitted, it could legitimately, with the other circumstantial facts, be regarded by the jury as evidence from which they could infer that a meeting between the appellant and the deceased took place.³²

Similarly with the evidence of the deceased and her son on the identity of the caller: those declarations arose naturally, and formed part of an incident that was relevant, namely the ultimate decision of the deceased to leave to meet the accused at the Town Centre on the day of her death. As such, in so far as they expressly implicated the accused, they were no more than verbal acts of identification and should not have been excluded on the ground of hearsay. There was nothing in the nature of narrative which would justify excluding this evidence on the basis that it could be contrived. Nor was there any necessity to justify the admission of the evidence on the basis of any novel hearsay exception.

It is acknowledged, however, that in some circumstances it may be appropriate for a trial judge to reject evidence of belief or intention. Thus, where there is no supporting evidence to suggest that the intention was carried out it may be unsafe to admit the evidence. To admit it may be to invite speculation. Such a consideration, which finds some support in the majority view in *Walton*, possibly also assists in explaining the old cases of *R v Wainwright*³³ and *R v Buckley*.³⁴

32 Had there been no other supporting evidence of the woman putting her intention into effect, then it is very arguable that at least that part of the evidence which indicated her intention to meet the accused should have been excluded; compare the approach in *People v Alcade* 148 P 2d 627 (Cal, 1944) referred to by Mason CJ in *Walton* at 291.

33 (1875) 13 Cox CC 171.

34 (1873) 13 Cox CC 293; see also *Mutual Life Insurance Co v Hillmon* (1892) 145 US 285 considered by Mason CJ in *Walton v The Queen* [1987-1988] 166 CLR 283 at 290-1. This case was described by Cardozo J in *Shepard v US* 290 US 96 (1933) at 105 as marking 'the high water line beyond which courts have been unwilling to go'. It is submitted that, in the absence of some supporting evidence that Walton did commence a journey with Hillmon, the criticism of the admission of the letters of Walton saying that he would shortly be leaving for Colorado with Hillman as

In *Wainwright* the Crown sought to adduce a statement of intention made to a witness as she left her lodgings in Mile End, London. There was no other evidence to suggest that she put her intentions into effect, other than her act of leaving. She was not seen alive again, and the prosecution fixed the date of her leaving as the date of her death. Lord Chief Justice Cockburn ruled that the witness could not give evidence of the woman's departing statement. In his view:³⁵

It was no part of the act of leaving, but only an incidental remark. It was only a statement of intention which might or might not have been carried out.

In *Buckley*,³⁶ however, there was some evidence that the deceased, who had told a more senior police officer that he was leaving at about dusk to watch the movements of the prisoner, did in fact proceed to carry out his intention. There was evidence that he was seen a short time after dark that evening on the road, in what might be the direction of the prisoner's cottage. It may be argued that it was less dangerous to leave this unsworn declaration to the jury than that in *Wainwright* because there was some evidence that the deceased had put his intention into effect. In *Walton*³⁷ the totality of the supporting evidence made it safe to admit the deceased's declaration of intention as a 'verbal act' or item of circumstantial evidence from which, together with the other evidence, the jury could infer that she had met the accused at the Town centre.

Similarly, with verbal acts of identification embodied in a telephone conversation, it may be unsafe to admit the evidence if it is unsupported by other evidence, be it evidence arising intrinsically from the contents of the conversation or independently of it.³⁸ However, where there is nothing to suggest that the evidence is contrived, or in any other way unreliable, then the evidence should be admissible on an issue of identity.

This approach should apply, not only in cases like *Walton*, where the evidence concerned the reporting of a spontaneous act of recognition by a party to a telephone conversation, but also where a witness testifies that the other party to a telephone conversation introduced himself, or herself, by name. The evidence that a person gave a name should be treated as an item of circumstantial evidence from which, in the case of a party of the same name, it may be inferred that the party made that call.³⁹

As with reported acts of identification of the *Walton* kind, so in cases of

evidence that he did meet up with Hillmon, is valid. The approach taken in this article would suggest that this evidence should have been excluded because it did not provide a sufficiently sound circumstantial foundation for the inference that in all probability Walton did meet up with and travel to Colorado with Hillmon.

35 (1875) 13 Cox CC 171 at 172.

36 (1873) 13 Cox CC 293 at 294.

37 [1987-1988] 166 CLR 283.

38 See the judgment of Street CJ in *R v Ryan* (1984) 14 A Crim R 97 at 101.

39 In *Pollitt v The Queen* (1992) 108 ALR 1 at 31, Deane J indicated that he would

this kind, the evidence may be excluded if the court considers that it would be unsafe, in the absence of supporting evidence, for that inference to be drawn. A case which featured an issue of this kind is *R v Ryan*,⁴⁰ a decision of the New South Wales Court of Criminal Appeal.

There, the Court upheld the submission of the appellant, who was a solicitor, that a highly incriminating conversation between a witness and a person, who introduced himself by the same name as the appellant and as a solicitor, was not admissible as evidence that he was the caller. In the opinion of Street CJ, in the absence of other evidence identifying the appellant as the caller, there was insufficient in the terms of the conversation for the jury to conclude that the caller was the appellant.⁴¹ Roden J indicated that;⁴² '...neither the caller's use of the appellant's name, nor what he is alleged to have said, was capable of establishing that the appellant was the caller.' It may be argued that, in this case, the Court was overly protective. Not only was the name and the profession a remarkable coincidence, but there was evidence that the appellant had an interest in the very subject matter discussed between the witness and the caller.

*Benz*⁴³ is a further illustration of the uncertainty of judicial approach to evidence involving unsworn declarations. Again, it is submitted that a consideration of the evidence is best evaluated, not in terms of hearsay, but within the concept of a relevant 'verbal act' or as an item of circumstantial evidence arising as part of a material transaction.

In *Benz*, a mother and daughter were charged with the murder of a man with whom the mother had been living in a de facto relationship for some time. There was evidence that the deceased had been assaulted in a house on the Gold Coast. Bloodstains were located at the house and carpet had been uplifted and rearranged. Some days later the body of the deceased had been located in a stream downstream from a bridge. The bridge was some distance from the deceased's home. There was evidence of blood stains consistent with the accused's blood on the bridge and drag stains being present. Medical evidence indicated that the deceased had drowned having received serious head wounds and knife wounds to the chest and throat. At the trial, without objection, the Crown had been allowed to adduce evidence from a driver who passed over the bridge on the evening when the murder was alleged to have occurred who said that he spoke to two women who were facing over the edge of the bridge at about its centre; that he asked them if

entertain an exception to the hearsay rule to admit evidence of this kind when the other party identified 'herself or himself expressly or by implication in circumstances which do not, on their face, give rise to a significant possibility of concoction'.

40 (1984) 14 A Crim R 97.

41 Ibid at 101.

42 Ibid at 104.

43 [1989] 168 CLR 110; for discussion of this case see Tapper, (1990) 106 LQR 442 at 453-4; cf the remarks of Sir Daryl Dawson, (1991) 15 Crim LJ 5 at 12-3. Also Hon WAN Wells QC (1991-1992) Aust Bar Rev 255.

everything was all right and one of them replied that her mother was just feeling sick. He gave a description of the women and said there was a blue Laser or Pulsar, with its doors open, parked near the end of the bridge. Later that morning the mother's car was located burning with its number plates removed.

Both mother and daughter were found guilty and convicted of murder. The Court of Criminal Appeal, however, ruled that the evidence of the driver concerning the declarations heard on the bridge were inadmissible as hearsay in the absence of other evidence identifying the declarant as one of the accused. A new trial was ordered for the mother whilst her daughter's conviction was quashed.

A Crown appeal against the determination of the Court of Criminal Appeal failed by majority. On the issue of the admissibility of this evidence again there was a wide variance in approach amongst the Justices.

Mason CJ considered that it was an irresistible inference that the two women on the bridge were the perpetrators if the driver's evidence were accepted. He did not think that the evidence was hearsay but part of a relevant transaction, namely the disposal of the body.⁴⁴ It also revealed the relationship of the speaker to the other woman, a relationship that was relevant to the Crown's case.⁴⁵ He also considered that the statements if considered as implied assertions about relationship were sufficiently spontaneously made to come within the *res gestae* exception to the hearsay rule.⁴⁶ He observed, however, that the hearsay rule invited re-examination as did the *res gestae* exception.⁴⁷

Deane J appeared to consider that the evidence was hearsay and, although accepting that it might have qualified as *res gestae*, considered that, as the matter had not been addressed in the Court below, and in his view raised no question of general or public importance, special leave should not be granted.⁴⁸

In his view also appropriate warnings should have been given in relation to identification as the Court of Criminal Appeal had suggested.⁴⁹ However, he indicated that consideration might be given, in another case, to sanctioning a general exception to the hearsay rule where the evidence

44 Ibid at 115-6.

45 Ibid at 116-7, citing *Lloyd v Powell Duffryn Steam Coal Ltd* [1914] AC 733 and *The Aylesford Peerage* case (1885) 11 App Cas 1. Mason CJ considered that these authorities supported his approach that the young woman's declarations of relationship fell outside the hearsay rule. He emphasised again that the precise scope of the hearsay rule in all its aspects is by no means clear: *Walton* ibid at 116.

46 Ibid at 118-9. There is some uncertainty as to whether, accepting that the declaration of the young woman was part of the *res gestae*, this was original evidence or hearsay.

47 Ibid at 117-8.

48 Ibid at 121-2.

49 Ibid at 124-7.

appeared reliable.⁵⁰

In a separate joint judgment McHugh and Gaudron JJ considered that the evidence was relied upon testimonially and therefore was hearsay. They rejected the trial judge's approach that the evidence could simply be regarded as circumstantial evidence.⁵¹ They also considered that the res gestae exception could not apply unless the jury made an initial finding that the two women on the bridge were the murderers.⁵² Because the jury had not been directed that they could not use the statement of the witness prior to making this finding, they declined to grant special leave. Like Deane J they were prepared, in an appropriate case, to consider a general exception to the hearsay rule based upon⁵³ 'a high degree of reliability'.

Dawson J considered, however, that the actions and declarations of the young woman on the bridge were matters of fact, or conduct, from which, together with the other evidence, in the case it could be inferred that the two women on the bridge were the respondents. In his opinion:⁵⁴

The younger woman's statement did not form part of a narrative but constituted conduct from which, together with the other evidence, it might be inferred that the two women on the bridge were the respondents... The making of the statement constituted conduct which went to the identity of the two women on the bridge and was admissible, not as an exception to the hearsay rule, but as a relevant fact.

Further, in his opinion, the evidence qualified as res gestae. He said:⁵⁵

It was, of course, part of the res gestae constituted by the presence of the two women on the Mundoolun Bridge. Their presence at the time and place was one of a series of actions constituting the entire criminal transaction which the crown sought to prove.

It is clear that two of the Justices, Mason CJ and Dawson J, saw the evidence as original or as circumstantial evidence beyond the scope of the hearsay rule. It is submitted, with respect, that this approach was correct. The evidence of the conversation was not proffered testimonially. The utterance of the younger woman, as she was confronted by the motorist in the dead of the night on the remote Mundoolan bridge was simply a 'verbal act' or one further factual item of evidence from which the jury could infer that the persons on the bridge disposing of the body were Benz and her mother. On this analysis there was no necessity to consider the application of the res gestae exception or a more general exception based on a notion of reliability.

50 Ibid at 121.

51 Ibid at 145.

52 Ibid at 143-5.

53 Ibid at 147.

54 Ibid at 134. Tapper preferred the approach of Dawson J in *Benz* (1990) 106 LQR 441 at 454.

55 Ibid at 135.

Pollitt v The Queen

The last of the three cases which have caused the High Court difficulty in this area of unsworn declarations is *Pollitt*.⁵⁶ In this case the prosecution alleged that the accused had entered into a plan with one, Allen, to murder a man by the name of Williams. By mistake the accused shot another man, Simpson.

There was evidence from an accomplice and a police informer which heavily implicated Pollitt. The Crown, however, also relied on evidence given by two visitors to Allen's home to the effect that:

- (a) on the night of the shooting, Allen said to them 'watch the news, the late news',
- (b) the following day, Allen said to them 'Did you watch the news...the mistaken identity',
- (c) later that day, or the next morning, Allen had a telephone conversation in the course of which he said, 'You get the money when you do the job properly', and
- (d) after that telephone call Allen stated that he had been speaking to the applicant, that he had already paid the applicant \$5000, that the applicant wanted to be paid a further \$5000 for something he had not done and that the applicant had got the wrong person.
- (e) other subsequent statements in which he directly implicated the accused.

Allen died prior to trial. The Crown wished to use the evidence of his acts and declarations to show that he was party to a plan to murder, and that the killer had made a mistake. As Mason CJ recognised, 'Such evidence would establish a motive for the murder and assist in establishing the identity of the killer'.⁵⁷

The trial judge admitted the evidence as relevant to establishing Allen's state of mind, and hence assisting to show that he was a party to murder. He did not, however, allow the evidence to be led on the issue of identity. The Court of Appeal agreed with this approach.

On appeal to the High Court Pollitt appeared only to challenge what Allen had said after the telephone conversation in which he purported to identify, or expressly implicate, Pollitt on various occasions. Despite the limited nature of the objection, the Justices discussed more generally the

56 (1992) 108 ALR 1.

57 Ibid at 4.

admissibility of the evidence.

On this occasion Mason CJ considered that evidence of Allen's state of mind was not directly in issue or of direct and immediate relevance to an issue that arose at trial. The evidence, accordingly, was hearsay.⁵⁸ Notwithstanding this conclusion he indicated, obiter, a preference for admitting declarations contained in telephone conversations identifying the caller pursuant to a more relaxed application of the hearsay rule available in the case of implied assertions.⁵⁹ In coming to this view he referred to the approach adopted by McHugh and Gaudron JJ in *Benz*.⁶⁰ He considered that the remarks made after the telephone call identifying Pollitt as the caller were admissible as being made spontaneously, and in circumstances⁶¹ 'free from the possibility of concoction'. However, he indicated that he would have excluded the rest of the conversation as pure narrative.⁶²

Brennan J saw the evidence of the telephone call and subsequent statements as hearsay. He indicated reservation about creating any hearsay exception to cover telephone calls, noting however the comments of Deane J in *Walton*.⁶³ He did not appear to support a development which would justify the admission of this evidence on a basis purely of spontaneity.⁶⁴ Nor did he consider that any of the subsequent statements were admissible within the res gestae exception. Somewhat narrowly, it is submitted, he considered that the res was the killing of Simpson⁶⁵ 'not the making, non-performance and subsistence of an assassination contract.' In his view⁶⁶ 'the dealings between the contracting parties were not part of the res gestae.' However, because there was in other evidence a sufficient basis for inferring that the caller was Pollitt, he indicated that he would have admitted the contents of the calls in evidence.⁶⁷

Deane J considered that Allen's belief was irrelevant unless it was founded on things he had heard Pollitt say or do.⁶⁸ The evidence of what was said after the telephone conversation was inadmissible as hearsay and narrative.⁶⁹ However, as in *Walton*, he favoured creating a fresh exception to the hearsay rule which would allow the identity of the caller to have been established where there was no significant possibility of fabrication or impersonation.⁷⁰ He expressly, however, declined to permit the exception to

58 Ibid at 6.
 59 Ibid at 6-7.
 60 [1989] 168 CLR 110 at 143.
 61 (1992) 108 ALR 1 at 8.
 62 Ibid.
 63 [1987-1988] 166 CLR 283 at 308.
 64 (1992) 108 ALR at 20.
 65 Ibid at 21.
 66 Ibid.
 67 Ibid at 21-2.
 68 Ibid at 27-8.
 69 Ibid at 31-2.
 70 Ibid at 29-31.

extend to the narration of what was said after the telephone conversation.⁷¹

Dawson and Gaudron JJ in a joint judgment considered that Allen's statements were relevant to show his participation in a plan to murder, and the several statements were admissible as a sequence or pattern of conduct on the part of Allen at, or about, the time of the murder. It was not, however, evidence relevant to identity.⁷² Nor were their Honours confident about creating a fresh exception to the hearsay rule to govern telephones.⁷³

Toohy J considered that the statements were hearsay.⁷⁴ He considered that the remarks made during a telephone call could be considered reactive rather than assertive and could, in an appropriate case, establish the identity of the caller.⁷⁵ However, conversations at the conclusion of a call by a self confessed party to murder during which, not only was the other party identified, but what the other party said about his own activities was 'much more likely to be open to the possibility of concoction'.⁷⁶ He also took a narrow view of what constituted the *res*, it being simply the killing of Simpson. In his opinion the arrangement served only to explain why Simpson was killed. Like Brennan J he saw, not only spontaneity, but also contemporaneity, as underlying the *res gestae* exception to the hearsay rule. As such, 'what was said by Allen some days after the shooting lacked contemporaneity and [could not] be classified as part of the *res gestae*'.⁷⁷

McHugh J also considered that Allen's state of mind was not in issue. He considered that *Walton* was distinguishable because there the person's intention was prospective, a step in a plan. It was otherwise where the person's state of mind was sought to be used to prove the occurrence of a past fact or matter.⁷⁸ He considered that the statements could not be categorised as conduct but were purely hearsay statements.⁷⁹ His Honour acceded to the possibility of an exception governing telephone calls but would not extend the exception to criminal ventures.⁸⁰

It is submitted that the view that the *res* was the killing of Simpson without resort to the overall plan or involvement of Allen in the scheme was an overly narrow view, rather reminiscent of the approach taken in *Bedingfield*, which will be considered briefly below. The murder of Simpson could only be fully understood in the light of Allen's involvement or activities. As such, it is submitted, what Allen said, or did, at the time of the

71 Ibid.
 72 Ibid at 36-8.
 73 Ibid at 38.
 74 Ibid at 41.
 75 Ibid at 42.
 76 Ibid at 43.
 77 Ibid.
 78 Ibid at 50.
 79 Ibid at 52.
 80 Ibid at 51.
 81 *R v Bedingfield* (1879) 14 Cox CC 341; see further the text at n 110.

call were 'verbal acts' and were admissible as part of a continuing relationship between he and his confederate in a conspiracy to murder.

If Allen had been overheard mentioning Pollitt by name during the course of the call (which was not the case), consistently with the approach suggested in the discussion of *Walton*,⁸² that evidence, subject to the exercise of discretion, could have been admitted as a verbal act of identification, or as an item of circumstantial evidence from which the jury could have inferred that Pollitt was the caller.⁸³ If this approach is adopted it becomes unnecessary to create a new exception to the hearsay rule to govern telephone conversations so as to evidence the identity of the caller.

The evidence of Allen as to what was said after the call, and his subsequent account of Pollitt's involvement was pure narrative. As such it should not have been admitted unless it came within the *res gestae* exception to the hearsay rule. There was evidence that Allen was furious, ranting and raving, when he got off the telephone call which would suggest that any remarks made then were spontaneous and reliable. Further, if the view is correct that his discussion with his confederate was part of the *res*, then it was sufficiently contemporaneous to be admissible as *res gestae*, a topic that will be considered in greater detail below. It would be, otherwise, however, with the purely narrative accounts he gave some days after the death of Simpson.

Analysis of *Walton*, *Benz*, and *Pollitt* illustrates how diverse judicial attitudes are in the High Court in regard to the application of the hearsay rule and reform of it.⁸⁴ The thesis of this article is that the hearsay rule should be narrowed in scope so that only verbal utterances, which truly embody narrative assertions, and are intended to be relied upon testimonially, should fall within it. The reason is that it is this kind of evidence which is most suspect to fabrication or mistake. To narrow the rule further than this would, as Cardozo J said in *Shepard v US*,⁸⁵ effectively eliminate the hearsay rule altogether.

Where, however, utterances arise naturally in the course of a transaction or series of events that are related, then they should be treated, subject to the exercise of curial judicial discretion, as 'verbal acts' or as items of

82 Text at n 13 above and see the judgment of Deane J in *Pollitt v The Queen* (1992) 108 ALR 1 at 31.

83 Above notes 33 and 34.

84 A point noted by Kirby P in *B v Astill* (unreported CA (NSW) 060477/91 25th Aug 1992); see discussion in text at n 131 below.

85 290 US 96 (1933). In that case the Court of Appeals for the tenth circuit ruled that a deceased wife's assertion two days after she fell ill from bromide poisoning that her husband had poisoned her was wrongly admitted in evidence. The prosecution had relied on the evidence testimonially to establish that she had been murdered by her husband. The Court held however that the evidence may have been admissible as a contemporaneous declaration of feeling, in rebuttal of the appellant's assertion that she had been suicidal. The court considered that the jury would be unable to discriminate between the two uses and so the evidence was held to have been wrongly admitted.

circumstantial evidence. It is submitted that this approach better accommodates the kind of problems illustrated in the cases of *Walton*, *Benz*, and *Pollitt* than a slavish adherence to the hearsay doctrine. Professor Colin Tapper however was very critical of such a development advocating, it would seem, as the best solution the entire abolition of the rule.⁸⁶ Whilst there may be some merit in this proposal, particularly in relation to trials without jury,⁸⁷ there is, it is submitted greater merit as Cardozo J recognised in *Shepard*,⁸⁸ in drawing the line at narrative assertions relied upon testimonially. It is with this kind of evidence that there is a greater risk of mistake or fabrication.

Finally on this point, if the evidence is admitted as circumstantial evidence, may the evidence speak its contents? Wigmore was at pains to assert that evidence admitted as verbal acts could not be used testimonially.⁸⁹ This would appear to be the way, in which the evidence has been viewed in Australia when admitted as circumstantial evidence and would appear to be correct in principle.⁹⁰ The real issue for a trial judge in a jury trial, where evidence of this kind occurs, is whether it provides a sufficiently reliable foundation for the drawing of any inference that a jury may be asked to draw from the utterance. This may necessitate a critical examination of the circumstances in which the evidence came to exist and the purpose for which its admission is sought. If the evidence does not meet this standard, or if for some other reason its admission would cause unfair prejudice, then it should be excluded or edited to remove any unfairly prejudicial aspect of it. For even if evidence of this kind cannot be regarded as speaking its contents, a jury may well treat it in this way despite any warning to the contrary.⁹¹

86 (1990) 106 L QR 441 at 468; see further the Australian Law Reform Commission in its 1987 report on the law of evidence rejected a discretionary inclusionary approach to the hearsay rule, preferring a more formalised and elaborate solution based on a distinction between criminal and civil trials. Australian Law Reform Commission, Report No 38 *Evidence* (AGPS, 1987) considered by Odgers, (1989) 13 Crim LJ 201 at 216. Also see ss 47-8 New South Wales Evidence Bill 1991, and see comment Aronson (1991) 65 ALR 596.

87 See the New Zealand Law Commission which virtually abolishes the rule in civil cases and allows for a more inclusionary approach in criminal cases. NZ Law Commission, Preliminary Paper No 15, *Evidence Law; Hearsay* (1991).

88 Cardozo J said of the victim wife's assertion that she believed that her husband had poisoned her:

'Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored': 290 US (1933) 96, at 106

89 3rd ed vol 6 (1940) para 1772 at pp 190-1; see also the discussion by Phipson, (1903) LQR 435 at 448-450.

90 See *Walton v The Queen* [1987-1988] 166 CLR 283 at 292, 306; also *Pollitt* (1992) 108 ALR 1 at 37-8. Further, see *R v Astill*, unreported CA 060477/91 25th Aug 1992 and discussion below at n 133.

91 A point made by Cardozo J in *Shepard v US* 290 US 96 (1933) at 104: see note 77. It is suggested that in cases like *Shepard* it may be necessary to edit statements so that only those matters that can fairly provide a reliable foundation for the jury to consider are placed in evidence.

Implied Assertions

It is proposed that implied assertions should be eliminated from the scope of the hearsay rule and simply treated as items of circumstantial evidence.⁹² The availability of evidence of this kind as a basis for inference should depend upon factors such as the relevance, cogency, and reliability of the evidence.

Recently the House of Lords, in *R v Kearley*⁹³ reaffirmed the scope of the hearsay rule to apply to implied assertions.⁹⁴ In that case evidence of a number of calls received after the arrest of the appellant on a charge of possession of a drug with intent to supply were held to have been wrongly admitted by the trial judge.⁹⁵ A majority of the Law Lords referred with approval to the very old case of *Wright v Tatham*⁹⁶ in support of excluding the evidence on the grounds that it was no more than hearsay evidence of belief.⁹⁷

Lord Griffiths, however, considered that the evidence was admissible⁹⁸ 'to prove as a fact that the telephone callers and visitors were acting as customers or potential customers which was a circumstance from which the jury could if so minded draw the inference that the appellant was trading as a drug dealer'. In his opinion, a layman would consider the law⁹⁹ 'an ass' if this evidence were not admitted. Lord Browne Wilkinson, citing Wigmore, considered that the evidence constituted 'verbal acts', or evidence¹⁰⁰ 'of a market willing to purchase drugs' from the appellant. He said of the hearsay rule:¹⁰¹

In cases such as the present it hampers effective prosecution by excluding evidence which your Lordships all agree is highly probative, and since it comes from the unprompted actions of the callers is very creditworthy.

There has been a good deal of academic and judicial consideration on implied assertions and the merit of the hearsay rule covering this kind of

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| 92 | For a discussion of the hearsay rule as it applies to express or implied assertions, see <i>Cross On Evidence</i> , (4th Aust ed 1991) at 845-8. |
| 93 | [1992] 2 WLR 656; see further Pattenden (1993) 56 MLR 158. |
| 94 | [1992] 2 WLR 657, Lord Griffiths at 660; Lord Bridge at 669-73; Lord Ackner at 677; Lord Oliver at 688-9; Lord Brown-Wilkinson at 701. |
| 95 | See further <i>Davidson v Quirke</i> [1923] NZLR 552; <i>McGregor v Stokes</i> [1952] VLR 347; <i>Marshall v Watt</i> [1953] Tas SR 1; <i>Mathewson v Police</i> [1969] NZLR 218; <i>Police v Machirus</i> [1977] NZLR 218; <i>Ratten v The Queen</i> [1972] AC 379 at 388; <i>R v Harry</i> (1986) Cr App R 105; also see the discussion of <i>Kearley</i> by Brennan J in <i>Pollitt</i> (1992) 108 ALR 1 at 15. |
| 96 | (1837) 7 Ad & E 313. |
| 97 | [1992] 2 WLR 656 at 669-73 per Lord Bridge; at 677 per Lord Ackner; at 685-7 per Lord Oliver. |
| 98 | <i>Ibid</i> at 660. |
| 99 | <i>Ibid</i> at 659. |
| 100 | <i>Ibid</i> at 671-2. |
| 101 | <i>Ibid</i> at 705. |
| 102 | In support see Weinberg, 'Implied Assertions and the Scope of the Hearsay Rule' |

evidence.¹⁰³ It is submitted not only, on this analysis, do implied assertions fall outside the hearsay rule but that, in any event *Wright v Tatham*¹⁰⁴ was arguably wrongly decided and provided a very questionable basis for extending the hearsay rule to assertions of this kind.

The case for the opponents of the will in issue was that the testator had been of feeble mind from birth, and all manner of evidence was led including reports that boys used to taunt him with remarks: 'there goes silly Marsden'. In order to rebut the suggestion that he was insane, the proponents of the will sought to admit letters written to him by professional persons who had knowledge of his affairs at times remote from his death. Sir Frederick Pollock's argument that the letters constituted no more than acts was rejected by all but two of the Judges who would not admit the letters in the absence of evidence that he had acted upon them. Underlying the majority reasoning, generally attributed to Parke B, was that the evidence was no more than hearsay evidence of opinion.¹⁰⁵

Gurney B and Park J however in what was, it is submitted, a better and more equitable approach, admitted the letters on the basis that the inquiry ranged over the life of the testator. Gurney B considered that the real question was whether there were any suspicious circumstances surrounding the letters.¹⁰⁶ He considered there was not since the letters had been written at various times well before the death of the testator. Park J considered that, because the inquiry was so broad, the evidence should be received particularly since there was admitted in opposition to the will the unsworn evidence of the conduct of persons who had treated him as weak and an idiot. He considered the letters admissible as part of the *res gestae*.¹⁰⁷

It is submitted that, at the very least, *Wright v Tatham* constitutes an unsound basis for extending hearsay to implied assertions. The approach suggested here would treat evidence of this kind, whether verbal or non-verbal, simply as an item of circumstantial evidence as Sir Frederick Pollock submitted.

Of course, if there is any suggestion that it would be unsafe for the jury to rely on such evidence, or that the admission of the evidence would encourage speculation, then it should be excluded. Thus, for example, in the case of *Teper v The Queen*,¹⁰⁷ an unsworn declaration of a bystander purporting to identify Teper as fleeing from the scene of the arson of his business was rightly excluded, quite apart from an application of the hearsay

(1973) 9 MULR 268, and for a contrary view see Guest, 'The Scope of the Hearsay Rule', (1985) 101 LQR 385.

103 (1837) 7 Ad & E 313.

104 *Ibid* at 383-9.

105 *Ibid* at 368.

106 *Ibid* at 395-6.

107 [1952] AC 480.

rule, because, both in terms of the quality of the identification and as an implied assertion that Teper had decamped after the fire had started, it was patently unsafe. There was no evidence to suggest that the unidentified bystander had seen Teper at the scene of the fire which had occurred some time before.¹⁰⁸

Further, the approach advocated here would also avoid the problems faced by the House of Lords in *Myers v DPP*,¹⁰⁹ or the Privy Council in *Patel v Comptroller of Customs*.¹¹⁰ Records of numbers stamped on engines, or a marking on a product asserting a country of origin would be admissible as items of circumstantial evidence for the jury's consideration. Again it might be necessary, as a matter of discretion, to exclude evidence of this kind in circumstances where there was a real risk that any inference drawn from it would be tenuous or unsafe. Thus in *Myers* the systematic nature of the manufacturer's recording procedures suggested, as Widgery J said in the Court of Criminal Appeal,¹¹¹ 'the inherent probability that such records as a whole were correct rather than incorrect'. In *Patel*, however, the paucity of information as to how the stamping 'Product of Morocco' were affixed on the bags, together with the evidence that sometimes bags were used twice, would provide a much less certain foundation to infer that the contents of the bags came from Morocco. As Lord Donovan said in his dissent in *Myers*:¹¹²

There is plenty of circumstantial evidence which, looked at in isolation, proves nothing : but which, when the evidence is looked at as a whole, becomes relevant and cogent.

Res Gestae and Narrative Assertions

The proposal suggested in this article limits the application of the hearsay rule to narrative accounts sought to be relied upon testimonially, because there is obviously a greater risk of a fabricated, biased or inaccurate account where an unsworn declaration or explanation of this kind is in issue. English courts have, however, taken a more liberal approach in recent years to evidence of this kind.

In *Ratten*¹¹³ Lord Wilberforce in the Privy Council indicated that the

- 108 Further see *R v Blastland* [1986] AC 41. There, the House of Lords ruled that the trial judge had rightly excluded various unsworn statements of a bystander reporting the death of a child. The defence sought to have this evidence admitted to establish that it was he, and not the accused, who had committed the murder. Quite apart from any hearsay objection to the admissibility of this evidence it was, as Lord Bridge said, 'mere speculation': (ibid at 54); Compare *R v Astill* (unreported, CA (NSW) 060477/91 25th Aug 1992) and below at n 131.
- 109 [1965] AC 1001; compare *R v Rice* [1963] 1 QB 857.
- 110 [1966] AC 356.
- 111 [1965] AC 1001 at 1007.
- 112 Ibid at 1048.
- 113 [1972] AC 378.

narrow view taken in *Bedingfield*¹¹⁴ was¹¹⁵ 'more useful as a focus for discussion, than for the decision on the facts'. In *Bedingfield* the Court ruled that the dying utterance of the victim could not be admitted on an issue of identity because, although it occurred shortly after the knifing incident, it lacked contemporaneity with it. In the view of Lord Wilberforce:¹¹⁶

though, in an historical sense the emergence of the victim could be described as a different 'res' from the cutting of her throat, there could hardly be a case where the words uttered carried more clearly the mark of spontaneity and intense involvement.

Clearly today the remarks of the unfortunate woman, 'Bedingfield has done this to me' would be admissible on the issue of identity, notwithstanding the fact that the declaration was narrative.

Two later English cases are instructive. In *Turnbull*¹¹⁷ the Court of Criminal Appeal admitted the evidence of a mortally wounded man purporting to identify his assailant where the assault had taken place about half an hour before. Following *Ratten* the Court considered that there was nothing in the evidence to suggest that there was a risk that the utterances were false or misleading.

In *Andrews*¹¹⁸ the House of Lords, following *Ratten*, upheld the admission of information given by a man who had been grievously wounded to two police officers who arrived within minutes of the attack. The man died some months later. Lord Ackner considered that to qualify for admission the judge should satisfy himself that¹¹⁹ 'the event was so unusual, or startling, or dramatic, as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection.' Further, he considered that¹²⁰ 'the judge must be satisfied that the event which provided the trigger mechanism for the statement was still operative'. The judge should also consider whether there

114 (1879) 14 Cox CC 341.

115 [1972] AC 379 at 390.

116 Ibid. It is submitted that today the case of *Brown v The King* [1913] 17 CLR 570 would be decided differently. In that case, evidence of dying utterances of the victim who had walked about twenty five yards from the scene of the shooting was ruled inadmissible on the basis that it was insufficiently contemporaneous with the shooting.

117 (1984) 80 Cr App R 104.

118 [1987] AC 281.

119 Ibid at 301. It has been suggested that English courts have a more liberal or relaxed approach to the issue of contemporaneity in cases of *res gestae*, see Mason CJ in *Walton v The Queen* [1987-1988] 166 CLR 283 at 294, referring also to Dixon J in *Adelaide Chemical and Fertilizer Co Ltd v Carlyle* (1940) 64 CLR 514 at 531-532. Mason CJ expressed reservation about the more conservative approach suggested by Barwick CJ in *Voiscano v Voiscano* (1974) 130 CLR 267 at 273. Compare, however, Brennan J in *Pollitt v The Queen* (1992) 108 ALR 1 at 18-20, 41-3.

120 Ibid.

were any ¹²¹ 'special features which relate to the possibility of concoction or distortion'. The jury should be given careful, curial directions on their approach to the evidence.¹²² Finally Lord Ackner emphasised that he would¹²³ 'deprecate any attempt in criminal cases to use the doctrine as a device to avoid calling, when he is available, the maker of the statement'.

Sometimes, however, narrative accounts of matters of relevance arise before or during the commission of an offence rather than subsequent to the event, as is usually the case. One such case was *Edwards*.¹²⁴ There evidence was admitted, on a charge of murder, that the prisoner often beat his wife and had killed her with a poker. A neighbour was permitted to give evidence that a week before the murder the deceased came into her house with a carving knife and a large axe. Quain J admitted that the deceased's explanation for depositing these items: 'Please to put them up, and when I want them I'll fetch them for my husband always threatens me with these, and when they're out of the way, I feel safer'.

It is submitted that this explanation, although containing narrative material implicating her husband, was admissible as a 'verbal act'¹²⁵ or as circumstantial evidence of the victim's fear of her husband at a time reasonably proximate to her murder.

A more recent case in point is *R v Baker*,¹²⁶ a decision of the New Zealand Court of Appeal. There the Court admitted the deceased's actions and declarations evidencing her considerable fear of her husband in a period of four weeks prior to her death by shooting. The evidence was relevant, not only to show her fear, but to rebut any suggestion that the shooting was suicide. The Court rejected an argument, which had appealed to the trial judge, that the evidence was inadmissible as hearsay. Cooke P said in upholding the Crown appeal:¹²⁷

At least in a case such as the present it may be more helpful to go straight to basics and ask whether in the particular circumstances it is reasonably safe and of sufficient relevance to admit the evidence notwithstanding the dangers against which the hearsay rule guards. Essentially, the whole question is one of degree,... If the evidence is admitted the Judge may and where the facts so require should advise the jury to consider carefully both whether they are satisfied that the witness can be relied on as accurately reporting the statement, and whether the maker of the statement may have exaggerated or spoken loosely or in some cases even lied. The fact that they have not had the advantage of seeing that

121 Ibid.

122 Ibid.

123 Ibid at 302.

124 (1872) 12 Cox CC 230; see Stone (1939) 55 LQR and for further comment, Gooderson, (1957) Camb LJ 55 at 59.

125 Stone justified the admission on this ground, see (1939) 55 LQR 74, cf Gooderson, (1957) Camb LJ 55 at 59.

126 [1989] 1 NZLR 738; see further *Wilson v The Queen* (1970) 123 CLR 334; and further *R v Mathews* (1990) SASR 19.

127 Ibid at 741.

person in the witness box and that he or she has not been tested on oath and in cross-examination can likewise be underlined by the Judge as far as necessary.

In arriving at his decision Cooke P referred to the limitations of the hearsay rule. He considered that this approach was one which broadly would accord with the approach of the House of Lords in *R v Andrews*¹²⁸ to res gestae and also with the approach of the House of Lords in *R v Boardman*¹²⁹ in relation to similar fact issues. In his view there was little risk of fabrication, and the cogency and relevance of the evidence was high.¹³⁰

Again, it is submitted that admission of the evidence could have been justified on a 'verbal act' basis or as circumstantial evidence notwithstanding any narrative content. The various actions and declarations of the deceased were relevant facts or, to use the words of Dawson and Gaudron JJ in *Pollitt*, were¹³¹ 'interconnected events' constituting 'a sequence or pattern of conduct' from which the jury could infer that she was afraid of her husband and the killing was not suicide.¹³²

Baker is an authority in support of a less rigorous application of the scope of the hearsay rule. Just as in *Boardman*¹³³ their Lordships eschewed a rigid categorisation approach to the admissibility of evidence of propensity, so it is argued here, the courts should not strive in cases of this kind to apply the hearsay rule. Having said this, it should be emphasised again that there is an obligation on a trial judge in cases like *Edwards* or *Baker* to scrutinise the evidence to avoid any obvious unfairness.

Also instructive is the case of *R v Astill*¹³⁴ in the New South Wales Court of Criminal Appeal. There the Court allowed an appeal against conviction where the trial judge had declined to allow the defence to question various crown witnesses about telephone conversations that they had with the mother of a baby who had been beaten to death, allegedly by Astill. Astill contended that the conversations, which took place prior to the mother ascertaining that her child had been seriously assaulted and taken to hospital, were relevant to establish that he was not the person who was looking after the baby at the relevant time. The conversations involved various assertions made about the baby on the day of her death by two persons who were also in the house at the time and who, Astill claimed, had care of the child. Astill contended that he had spent most of the time asleep, and one, or both, of the other persons were involved in the actions causing death. Further, in a statement made to his mother at the hospital, one of those men said that he

128 [1987] AC 281.

129 [1975] AC 421.

130 [1989] 1 NZLR 738 at 742.

131 (1992) 108 ALR 1 at 37.

132 Tapper (1990) 106 LQR 441 at 451 is extremely critical, however, of this decision saying, 'Such abdication from judicial consideration of admissibility seems to presage the complete demise of the hearsay rule in New Zealand'.

133 [1975] AC 421.

134 Unreported, CA 060477/91, 25th August 1992.

had fed the baby, that she had become ill and he had then put her into bed with the appellant. The appellant also wanted to adduce this statement as further evidence that this witness had actual care of the child when trouble was encountered.

The Court of Criminal Appeal referred to *Walton*. Kirby P said:¹³⁵

I do not pretend that the subtle distinctions drawn in *Walton*, *Benz* and *Pollitt* and the other cases on this point are easy of application. Nor, as *Walton* and *Pollitt* demonstrate, do the highest courts speak with a single voice.

However, in his view, the conversations, in so far as they established that the appellant never answered the phone were not hearsay and were admissible as evidence supportive of the appellant's case that it was one of the others, and not Astill, who was in charge of the baby. He did not decide whether the statements were admissible testimonially.¹³⁶ Carruthers J and Smart J, however, would appear to accept that the statements could be relied upon testimonially. Carruthers J saw no 'basis in law upon which the appellant could have been denied the benefit of the evidence, bearing in mind that the parties to the telephone conversations were all Crown witnesses at the trial'.¹³⁷ Smart J admitted the evidence on a number of grounds: first, as evidence contradicting the witnesses' evidence at trial implicating the accused.¹³⁸ He also referred to the approach of Wilson, Dawson, and Toohey JJ in *Walton*¹³⁹ and ruled that the witnesses' assertions could have been treated as conduct from which inferences could be drawn favourable to the appellant.¹⁴⁰ In any event he considered that the statements made during the course of the afternoon were relevant, unlikely to be concocted, and were admissible testimonially as *res gestae*.¹⁴¹

In the view of all of the Justices what was said subsequently at the hospital concerning the child was admissible as *res gestae*. On this point Kirby P doubted whether the evidence would have satisfied the contemporaneity criterion, noting, however, the more liberal approach of Mason CJ in *Walton*.¹⁴² He considered however that the evidence was relevant and it was desirable that the appellant be allowed to cross-examine the witness and his mother about it. Smart J, however, was of the view that the statements made to the mother by the witness were said as part of the¹⁴³ '...climax of a series of dramatic events', namely the delivery of the baby in 'a dead or parlous condition' to the hospital. In his opinion there was little or

135 Ibid at 20.

136 Ibid at 17-9.

137 Ibid at 1-2 of his judgment.

138 Ibid at 3 of his judgment.

139 Above note 25.

140 Ibid at 5-6.

141 Ibid at 6-7.

142 Ibid at 20-21 of his judgment and above note 116.

143 Ibid at 9 of his judgment.

no opportunity for concoction. 'Nor', in his view, 'should the court take a technical approach in relation to material which is capable of having an exculpatory operation in favour of the accused'.¹⁴⁴

Conclusion

It has been submitted here that the hearsay rule should be concerned only with those kinds of unsworn declarations or utterances which contain narrative assertions where it is desired to rely on those assertions testimonially. If an assertion is of this kind then its admission will, commonly, depend on whether it satisfies the *res gestae* exception. In this regard, on the question of admissibility, considerations such as the degree of spontaneity, contemporaneity, and absence of reason to concoct or exaggerate will be factors that will have to be judicially evaluated.

Where, however, a court is concerned with unsworn declarations (be they verbal utterances or assertive conduct) that do not contain assertions of a narrative kind, then the hearsay rule should not apply if the evidence is relevant and appears to arise naturally, routinely, or spontaneously as part of an event or transaction in issue or a related series of them. Evidence of this kind should be admitted as circumstantial evidence. This approach may also apply where the evidence, although containing narrative material, is not relied upon testimonially but is tendered as subjective or circumstantial evidence of the declarant's state of mind as in *Edwards*¹⁴⁵ or *Baker*.¹⁴⁶

This approach also eliminates the hearsay difficulties associated with cases like *Myers*¹⁴⁷ or *Patel*¹⁴⁸ and the difficulties associated with implied assertions, whether of the verbal or non-verbal kind. It is not a radical solution, but one that can be utilised to ensure that relevant and cogent evidence is admitted into evidence. It is an approach which is well within the reforming powers of the judiciary to effect.

That is not to say that the evidence must be admitted, as our discussion of *Walton*¹⁴⁹ illustrates. If the evidence is unsupported by the existence of other material, then a declaration, for example of intention, or belief, an act of purported identification such as in *Teper*,¹⁵⁰ or an isolated note, record, or marking, purporting to evidence some business transaction, may be too tenuous to admit in a jury trial. Whilst it may be safe, for example, to rely on a number of telephone calls from persons seeking drugs as establishing the connection of premises or a person with a market in those drugs, it may

144 Ibid.
145 (1872) 12 Cox CC 230.
146 [1989] 1 NZLR 738.
147 [1965] AC 1001.
148 [1966] AC 356.
149 [1987-1988] 166 CLR 283.
150 [1952] AC 480.

not be so safe as Lord Griffiths recognised in *R v Kearley*¹⁵¹ where there were only one or two calls. Where there is a real risk that the admission of the evidence will lead to unfair prejudice or speculation rather than fair inference, then a judge should exclude it.

¹⁵¹ Above n 5 at 659.