Greg Taylor

"Let them say more that like of hearsay well": implied assertions under the hearsay rule as expressed in the uniform evidence legislation

Australian Bar Review, 2012; 35(3):270-280

‘Let them say more that like of hearsay well’:* Implied assertions under the hearsay rule as expressed in the uniform evidence legislation

Greg Taylor†

The attempt to exclude implied assertions from the reach of the hearsay rule in the uniform evidence legislation has produced a provision that is both self-contradictory and at odds with modern analysis of the way in which language works — even with the commands of logic itself. Furthermore, the whole project of excluding implied assertions from the hearsay rule is based on the mistaken view that they must necessarily be more reliable than express ones. This article identifies the sub-categories of implied assertion, which depend on the process necessary to make the implication, and shows how that process, the use of language as a tool of communication and the hearsay rule all interact with one another.

1 Introduction

The definition of hearsay in the uniform evidence legislation runs as follows:

> 59 The hearsay rule — exclusion of hearsay evidence
>
> (1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.
> [. . .]
>
> (2A) For the purposes of determining under sub-section (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the Court may have regard to the circumstances in which the representation was made.
>
> *Note*
> Subsection (2A) was inserted as a response to the decision of the Supreme Court of New South Wales in *R v Hannes*.[1]

Thus the intention is manifested to exclude what are commonly called implied assertions. But how are they defined? What can subs (2A) possibly mean? Without it, would courts try to decide what people intended to assert without looking at the circumstances in which the representation was made?

There is no assistance on any of these points from case law. Consideration of the legislation appears to have been avoided by the courts, no doubt

* Shakespeare, Sonnet 21. The author wishes to thank Professor Jeffrey Goldsworthy for his comments on a draft of this article; the usual disclaimers apply.

† Associate Professor, Faculty of Law, Monash University.

1 (2000) 158 FLR 359; 36 ACSR 72; [2000] NSWCCA 503; BC200007407.

because it is so hard to determine what it means and how subss (1) and (2A) relate to each other.[2]

The commentaries are divided. One states:

> The current test will result in more evidence being classified as hearsay and subject to the exclusionary rule. Although the hearsay rule established by this provision does not apply to all 'implied assertions', if the person who made the representation 'can reasonably be supposed' to have intended to assert a fact implied in the representation, it will be caught by the rule.[3]

Another commentator points out, however, that the intention of the law reform commissions in adding subs (2A) was to exclude certain statements from the hearsay rule that would otherwise fall within subs (1), and thus to narrow rather than broaden the reach of the hearsay rule.[4]

In fact, the root of this confusion is that the concept of what 'may reasonably be supposed' to have been intended makes no sense in the law of evidence. '[W]hatever the distinction that is being drawn, it is no longer one between express and implied assertions.'[5] In fact, the type of analysis proposed by the section is not applicable to assertions at all.

One of the first things that many students learn in law school is the objective approach to determining intention in the law of contract. In its place, it is sensible — perhaps inevitable. It enhances the ability of contracting parties to rely on ordinary language used in the marketplace in circumstances where that language is not used in a narrative way, as evidence in court is, but rather as a means of creating, changing and ending binding legal obligations. Such language constitutes what is known in the philosophy of language and linguistics as 'performatives' or 'speech acts': speech is here not merely hot air, but is made by the law a means of changing rights and obligations in the external world. 'I accept your offer' is not a narrative statement at all (unlike 'then he picked up the gun and shot the policeman'), but is invested with significance by the law as an act by which contracts are created. Just as rights and obligations may be changed by non-verbal acts, such as by running someone over negligently, they may also be changed by verbal acts constituting, for example, the conclusion of a contract. Another example would be the groom who says 'I do' at the marriage ceremony: because this statement changes legal rights and obligations and we are reasonably entitled to rely on the outward expression of apparent intention, it matters not if the groom later claims that he did not intend to consent to become married by those words.[6]

In such cases, it makes sense to use the term 'objective intention', despite the obvious contradiction it contains. This is because we are not interested in

---

2 *Tran v Nominal Defendant* (2011) 58 MVR 462; [2011] NSWCA 220; BC201105677 at [179] — [182] is the only exception I have been able to find, and it contains a very brief and uncertain reference to the sub-section.

3 S C Odgers, *Uniform Evidence Law in Victoria*, Law Book, Sydney 2010, p 229.

4 J Anderson, S C Williams and L Clegg, *New Law of Evidence*, 2nd ed, Butterworths, Chatswood, 2009, p 194.

5 C R Williams, 'Implied Assertions in Criminal Cases' (2006) 32 *MonULR* 47 at 68.

6 Cf J D Goldsworthy, 'Moderate *versus* Strong Intentionalism: Knapp and Michaels Revisited' (2005) 42 *San Diego LR* 669 at 676. The famous case of *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 may be analysed in exactly the same terms.

the actual state of mind of the speaker, but rather what their words, as in truth conduct, made happen in the external world. That being so, we are entitled to look not to what they actually intended, but to what we were entitled to take their verbal act to mean.

Language used as a speech act like that is precisely the opposite of the situation in which the rule of hearsay applies. When the hearsay rule applies, we are dealing not with speech as the equivalent of an act, but as a narrative of past events — 'pure' speech if you like, rather than an act masquerading under the guise of speech. In that capacity, it makes no sense to talk of an objective intention which the speech can be deemed to embody, because the effect of the speech on external reality is not relevant. Either the speech corresponds with the facts or it does not.

In this area of the law, we are not in the business of changing external reality to make it accord with the apparent intention of the speaker as manifested in words, as we are in contract and other areas in which speech acts may be performed, but rather in the business of finding the speech which matches the external reality as it is or was.[7] The question is not what the speaker might reasonably be supposed to have asserted, but what he actually did assert. It is what he actually did assert, not what he might reasonably have been supposed to assert that may constitute relevant evidence.

We cannot attribute to the speaker an intention to assert something just because it would be reasonable to do so, for that would simply be to falsify the narrative: in determining what the narrative was meant to mean, what facts in the real world it is supposed to correspond with, we need to know not what a hypothetical reasonable person would have meant by the words used, but what the speaker did actually mean and what knowledge about the world he (subjectively) intended to communicate.[8] We are dealing with the opposite situation from that for which the concept of objective intention was designed, and therefore the intention of the utterer as perceived and then acted upon by an objective external world is irrelevant — only the utterance's subjectively intended meaning and degree of correspondence with the truth matter. Thus

---

7 Cf the illuminating example offered by J Searle, *Expression and Meaning: Studies in the Theory of Speech Acts*, CUP, 1979, pp 3ff:

> Suppose a man goes to the supermarket with a shopping list given him by his wife on which are written the words 'beans, butter, bacon and bread'. Suppose as he goes around with his shopping cart selecting these items, he is followed by a detective who writes down everything he takes. As they emerge from the store both shopper and detective will have identical lists. But the function of the two lists will be quite different. In the case of the shopper's list, the purpose of the list is, so to speak, to get the world to match the words; the man is supposed to make his actions fit the list. [The list is supposed to make something happen in the world, like a contract.] In the case of the detective, the purpose of the list is to make the words match the world; the man is supposed to make the list fit the actions of the shopper [in other words, to give accurate evidence of what has happened in a narrative form]. This can be further demonstrated by observing the role of 'mistake' in the two cases. If the detective gets home and suddenly realizes that the man bought pork chops instead of bacon, he can simply erase the word 'bacon' and write 'pork chops'. But if the shopper gets home and his wife points out he had bought pork chops when he should have bought bacon he cannot correct the mistake by erasing 'bacon' from the list and writing 'pork chops'.

8 The relationship between intention and meaning is a subject of much debate (see, eg, Goldsworthy, above n 6) which it is not necessary to enter into here in full.

the approach taken by the Act is entirely out of place in the law of hearsay and applies a standard which is designed for statements inevitably falling outside its purview.

Because language is, as a rule, a communicative enterprise and depends upon interpersonal cooperation, people, when making narrative statements, will generally use it reasonably in order to be understood, and thus there will often be little to no difference between actually intended and reasonably apprehended meanings. But it is nevertheless a category mistake that lies at the heart of the distinction made in s 59. This is made quite apparent by the Australian Law Reform Commission's report which led to the legislation under discussion here, which states as one reason for the adoption of the present law that '[i]ntent or state of mind is inferred from the *conduct* engaged in by a person'.[9] But here we are not dealing with conduct (including speech acts which count as conduct) at all, but rather with language used as a communicative tool — not as a tool to operate the law of contract or to get married, but in order to make an assertion of fact, narrate a past event, etc. We are not dealing with acts at all, but with statements. In s 59, then, we have an import from the law of contract which has muscled its way into the law of evidence.

It is the thesis of this essay that, for that and several further reasons, the import is out of place and indefensible, both practically and theoretically.

2 Practically indefensible

The law reform commissions complain that 'a subjective approach requires the party opposing a finding that a fact was subjectively intended to be asserted to do battle with the intangible shadows of subjective intentions'.[10] However, those very subjective intentions themselves render the evidence relevant in the first place and thus admissible at all! Accordingly, there is no escaping those 'intangible shadows'.

It is true that, in order to determine whether a statement is hearsay, it must first be determined what purpose or purposes it is being admitted for. This can be difficult in the case of implied assertions. But it is also true that a statement must tend to establish some relevant fact in order to be admissible at all. Thus, we must tease out what relevant fact is expressed or implied in the statement even before we reach the hearsay rule. It is not the case that we can entirely dispense with the 'intangible shadows' by removing them from the application of the hearsay rule, because they only get in in the first place because the statement containing the so-called shadows is relevant owing to some content or other of the assertion, which needs to be identified as part of determining the relevance of the statement.[11]

An example is *Ratten v R*,[12] in which the House of Lords famously failed to see that the statement 'Get me the police please' was relevant — and thus also hearsay — as an implied assertion that an emergency was taking place on

9 ALRC Report 102, p 202 (emphasis added).

10 Ibid, p 202.

11 Cf A Ligertwood and G Edmond, *Australian Evidence: A Principled Approach to the Common Law and the Uniform Acts*, 5th ed, LexisNexis, Sydney 2010, p 737.

12 [1972] AC 378; [1971] 3 All ER 801; [1971] 3 WLR 930.

the premises in question that required the attendance of the police. This was relevant because the defence was that the shooting was accidental, and the statement contradicted that because it supported the supposition, suggested also by other evidence, that in fact the shooting was planned in advance of its occurrence. Had their Lordships made the relevance of the statement clear to themselves, their failure of perception would not have occurred: it is not a way out of grappling with implied assertions to exclude them from the hearsay rule, for relevance must be ascertained as a preliminary step for admissibility before the rule against hearsay is even reached.[13] In jury trials, the need to do this will often be clearer and the process more conscious than in judge-alone trials, but the principle is the same.

Furthermore, the principal justification for removing implied assertions from the hearsay rule quickly breaks down under examination. It is often said[14] that implied assertions are more reliable than express ones because they are not overt; being therefore more reliable, they can be safely excluded from the operation of the hearsay rule. The assumption is that liars will be straightforward in their lies, and will say what they want us to believe straightforwardly.

The case that got us into this mess in the first place, *R v Hannes*,[15] shows how flawed this reasoning is. The facts of *Hannes* are reasonably well known. Clearly conscious of his guilt of insider trading — of which he was ultimately convicted[16] — Hannes arranged for a document to be discovered on which he had written various assertions relating to his supposed client, one Mark Booth. The statements were along the lines of 'must take Mark with me to ASC'. The jury's verdict of guilty implies that this document was a fabrication concocted in order to support an untruthful defence based on the claim that Mark existed, had placed orders for shares in ignorance of the information known to Hannes but through him, and by the time of the trial could no longer be located. Yet the theory that implied assertions are more reliable than express ones asks us to believe that what Hannes wrote was more reliable than if he had written expressly, 'Mark Booth exists'.

Most people are sensible enough, if they are going to lie, to do so in the most convincing way possible. This will often involve hinting at what they want us to conclude rather than saying it outright. *Hannes* is perhaps an extreme case in this regard, but it indicates that implied assertions are no less likely to contain lies than express ones. There is no justification for any special treatment for implied assertions on the supposition that they are more likely to be true.[17] It is certainly not the case that with non-express assertions, the

13 Cf J D Heydon, *Cross on Evidence: Eighth Australian Edition*, LexisNexis, Sydney 2010, pp 1101ff.

14 Although not, it should be noted, by the ALRC itself in Report 26 (para [684]), which draws a similar distinction to that of Spiegelman CJ rejected by Report No 102.

15 (2000) 158 FLR 359; 36 ACSR 72; [2000] NSWCCA 503; BC200007407.

16 After one successful appeal, another series of convictions occurred, and special leave to appeal against them was refused by the High Court of Australia: *Hannes v R* [2008] HCATrans 224.

17 Cf T Finman, 'Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence' (1962) 14 *Stan LR* 682 at 687; A Rein, 'The Scope of Hearsay' (1994) 110 *LQR* 431 at 437. However, this point applies not merely to what is logically entailed by the statement (as in *Hannes*), but also to that which is implied as a matter of conversational

danger of insincerity is 'hardly present at all'.[18]

3 Implied or inferred?

In order to clarify our thoughts on this topic, it is well worth noticing that there is a difference in the strength of the so-called implication in cases that are usually compendiously grouped under the banner of 'implied assertions'.

Take, first, the case of a statement such as that in *Hannes*: 'must take Mark with me to ASC'. When the context is a to-do list ostensibly directed at oneself,[19] this statement logically presupposes or entails[20] that there is a person called Mark to which the statement refers. It would be an absurd statement otherwise. It would be like saying that there was a need to take the Loch Ness monster there, or a unicorn.

The existence of Mark is logically implied in the statement made by the accused in *Hannes*. The entire project of making utterances about getting Mark to do things necessarily implies that he exists. This is an absolute logical necessity to be deduced from the statement made — if only it is true.

It is otherwise with the statement in issue in *Ratten*, 'Get me the police please'. This logically implies, or perhaps more precisely presupposes, that there is an institution called the police; otherwise, it would be like ringing up and asking for the zombie patrol. But the statement is not proposed for admission as evidence that the police exist. Rather, it is admitted as evidence that an emergency situation is taking place. However, this is not so much implicit in the statement but rather an inference we draw, having regard to the other facts we (but not the telephonist) know, including facts about events that at the time of the statement were still to occur: most notably, the death of the speaker by gunshot wound shortly afterwards. No doubt much might possibly be implied in 'get me the police please', depending on the circumstances in which it is uttered; but to assume any set of circumstances would, of course, beg the very question that must be answered; furthermore, we have to receive the statement through the medium of the telephonist, whose knowledge of the circumstances in which the statement is uttered is also very limited because she cannot see what is going on.[21] In technical terms, we have little beyond the sentence-meaning in this case; the full import of the utterance, such as might be deduced from the complete context in which it was uttered, is denied to us. I do not however say that its full intended meaning is denied to us, for the

---

pragmatics (as in *Benz*). Thus, I do not agree with Rein's proposal (at 442) that only the former should be included within the scope of the hearsay rule.

18 C R Williams, 'Issues at the Penumbra of Hearsay' (1987) 11 *Adel LR* 113 at 137. It is surprising how many commentators believe that implied assertions are ipso facto not subject to the danger of deceit: M Weinberg, 'Implied Assertions and the Scope of the Hearsay Rule' (1973) 9 *MULR* 269 at 291 is another example. In the final analysis, this view attributes to speakers an ignorance of language conventions which they must be able to operate in order to communicate. Again this may be worked out with *Benz* as an example.

19 Thus this case is different from the discredited ontological argument for the existence of God.

20 It being unimportant for my purposes, I do not need to deal with the question whether these are the same or different things: S Levinson, *Pragmatics*, CUP, 1983, p 197.

21 Cf J D Goldsworthy, 'Implications in Language, Law and the Constitution' in G Lindell (Ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines*, Federation Press, Sydney, 1994, pp 159ff.

speaker did not intend to communicate much beyond the literal meaning of the sentence having regard to the simplicity of the act demanded and the urgency of the situation.

In the form in which we receive the utterance, therefore, we are asked to infer certain facts from the utterance of it, having regard to a combination of other facts beyond the statement itself which have since become known. Much more depends in this case on an active process of inference on our part which is external to rather than implicit in language. The utterance quoted would still be a meaningful and non-absurd one (although the subsequent facts would have been different) if, for example, it was the Auditor-General calling in order to test the responsiveness of the police force, or even if (as the accused argued was in fact the case) he had just accidentally shot his wife and was ringing in order to report that fact to the police. (Significantly, what sank this claim — an attempt to dispute not the meaning of the sentence but our process of inference from it — was not anything about the utterance itself, but rather the accused's inability to explain plausibly why the telephonist thought the voice was that of a woman.)

The telephone call is thus another piece of circumstantial evidence pointing to the manner in which the victim died (the true manner — not the imaginary one which the accused wants to pass off on to us). It replaces the missing direct evidence of the victim (dead) and the accused (lying). It is not that something relevant is implied in the victim's last known words; rather, we infer something relevant from them and the other things we later come to know.

I have argued elsewhere that, as well as a possible implication that the accused is or was a drug dealer, a request directed to the accused for drugs can be circumstantial evidence of the intention of that person in possessing them and thus admissible without infringing the hearsay rule through anyone who personally heard the request.[22] The statement in *Ratten* could be analysed in a similar way as circumstantial evidence of the intention with which an act was done; but it would still be hearsay seen from that angle, because the telephonist was giving evidence of what she heard the woman say rather than having any direct access to the manifestations of the accused's intention, which in this case were acts rather than words. She did not see the events in question: all she had was a report of the accused's intention deduced from his conduct, and non-hearsay evidence could have been given only by someone who saw the conduct in question.[23] It would have been otherwise had the telephonist heard the accused's voice in the background, or any voice which was capable of being linked by extraneous evidence to the accused. That would then have constituted original evidence of the intention with which the accused was doing the act he did in the same way as telephone calls to a drug dealer establish non-testimonially that he possesses drugs not for personal use, but for sale.

A middle position between *Ratten* and *Hannes* is also possible. In *R v Benz*,[24] the statement made to a Mr Neil Saunders was, 'My mother's just

22 'Two English Hearsay Heresies' (2005) 9 *Int Jo Evidence & Proof* 110.
23 Cf S Guest, 'The Scope of the Hearsay Rule' (1985) 101 *LQR* 385 at 396.
24 (1989) 168 CLR 110; 89 ALR 339; [1989] HCA 64; BC8902683.

feeling sick', and the Crown wished to rely on that as showing that the two people concerned, the young woman who spoke those words and a middle-aged one next to her, were indeed mother and daughter (but not that either of them was sick, which was neither relevant nor, on the Crown's case, particularly likely to be true). The allegation was that Mr Saunders had chanced upon the two women while they were disposing of the body of a man whom one of them, at least, had just murdered, but as Mr Saunders could no longer identify the two accused as the women he saw the statement in question was relied upon as showing that they were, at least, mother and daughter like the two accused. This was relevant because there was more than sufficient external evidence from which it could be concluded that someone had brought the deceased's body to the place in question at about this time.

There are many easily imaginable circumstances in which 'my mother's just feeling sick' could not possibly carry a logical implication that one was standing next to one's own mother — and that is so even in many circumstances in which one is accompanied by an older woman. The utterance standing by itself does not necessarily, as a matter of logic, imply anything about the relationship between two women. Nor was there any express statement: the speaker did not add: 'and the person standing beside me is my mother'.

However, in this situation the words in question were uttered in response to a query from Mr Saunders, who addressed the two women asking whether everything was alright. In such a situation, the question is one of pragmatics — a fairly new field at the intersection of philosophy and linguistics which deals with the functioning of human language. One of its co-founders, H P Grice, developed a series of maxims which attempt to describe the basic preconditions of human communication.[25] One of them, the maxim 'be relevant', was mobilised in the *Benz* situation: it is an unspoken assumption of all conversation that statements relevant to the topic will be given rather than irrelevant ones. A simple example: 'what time is it?' may elicit the response 'the guests have all gone home', thus implying the answer 'quite late' from our knowledge of the behaviour of guests and our assumption that a response to a question is likely to be relevant to it. Literally, the answer is irrelevant to the question; it does not tell anyone the time; but our knowledge and assumptions enable us to connect it to the question and to make out of it a relevant answer.

Thus, in the circumstances in *Benz* the response did presuppose, although as a matter of conversational pragmatics rather than logical necessity as in *Hannes*, that the woman next to the speaker was her mother and that that was part of the explanation of her slightly odd behaviour. If the person next to the speaker had not been her mother, the speaker would have been guilty, among other things, of providing an irrelevant response to the question and thus ignoring the laws which govern communication. Conversational pragmatics rather than strict logic supplies this gap and makes us realise that the reference to 'my mother' is a reference to the other woman and thus an answer to the question asked.

Unlike in *Ratten*, it was not a matter of our actively needing to infer the

25 An introduction to Grice's thought that is suitable for a legal audience may be found in Goldsworthy, above n 21, pp 154ff.

desired conclusion from what was said and the circumstances, so far as we knew them; the speaker personally asserted that the woman next to her was her mother, although not in so many words, and this was the only conclusion about the meaning of the utterance to which the hearer, with his knowledge of the circumstances, could have come; the assertion in question was accordingly part of what the speaker intended to convey. Thus, the High Court of Australia correctly held (under the common law) that it was hearsay if tendered to prove, as was proposed, that asserted fact.[26]

4 Intention and implication

This brief survey has thus revealed that the talk of 'implied assertions' in fact masks a number of very different situations in which the hearsay rule may be applied to statements. First, there are those, such as *Hannes*, in relation to which the relevant proposition to be deduced from the statement in question is logically presupposed by it. Second, there are circumstances, such as *Benz*, in which the statement is implied as a matter of conversational pragmatics rather than strict logic, but still appears to be one which is intended by the speaker. Finally, there are statements such as that in issue in *Ratten*, in which the circumstances of a statement's utterance render it difficult to say that anything significant is contained in it beyond what it expressly asserts; we are, rather, invited to infer from the statement and other items of knowledge something about the circumstances in which it was made.

The difficulty in determining how all this fits under s 59 is largely due to the fact that its meaning is horrifyingly opaque. As suggested in the introduction, this is because it is the product of a category mistake: a proposition that makes perfect sense for speech acts cannot be applied to utterances properly so called. Subsection (1) is therefore barking up the wrong tree when it talks about objective intention. Subsection (2A) appears to show some minimal awareness of the idea that language use is informed by context and convention by stating that the circumstances in which an utterance is made may be considered in determining what it means. But that in turn is immediately negated by the note appended to the subsection by the legislature, which suggests that the strongest case for an implication — one that is logically required — is not to count as an implication for the purposes of the hearsay rule under the Act and the implication must therefore be exempted from the hearsay rule. This in turn can be gathered not so much from the note itself — what sort of 'response', positive or negative, is intended? — but rather from the law reform commissions' report.[27] No wonder the commentators are at odds!

The section is also self-contradictory. In cases such as *Hannes* and *Benz*, it is, whatever the intention behind the legislation may be, hard to deny that the speaker intended to assert that Mark existed and that the other woman was her mother. If however the note to subs (2A) is meant to signify that the purpose of that subsection, whatever it may mean, is to ensure that the decision in

26 And unlike in *Ratten*, the assertion was not circumstantial evidence of the intention with which any criminal act was committed, and thus not capable of being saved through the alternative path of reasoning.

27 ALRC Report 102, pp 202ff.

Hannes would now go the other way and the statements in question there held not to be hearsay,[28] it contradicts subs (2A)'s apparent meaning. Worse: it can only rest on a singularly impoverished view of language and human communication — one that no serious linguist or philosopher of language would entertain for a moment.

In both linguistics and philosophy, it is now well recognised that language does not function by express statements alone. Often an implication is the heart and soul of what is conveyed. A famous example[29] may be adapted here in order to make the point clear. If I walk into a restaurant and order a hamburger — 'bring me a hamburger please' — no-one would imagine for a moment that the meaning of my statement had been adequately understood if a hamburger were in fact brought to me, but it was encased in a box which required a jackhammer to open it, or it were poisoned. The ideas that the hamburger should be accessible, fit to eat, etc, are just as much part of my meaning as if I had stated them expressly — even though I did not. Indeed, someone who did state those requests expressly, and all others needed for the acquisition of a hamburger in the desired state, would be considered both highly eccentric and a time-waster — even if he or she did succeed in specifying all the conditions needed for the order to be effective. The law has long had a rough-and-ready appreciation of this, even in the area of speech acts, for it is well known that 'an implication is as much part of a contract as any term couched in express words'.[30] In a case like *Hannes*, the whole project of speaking about Mark is absurd if in fact he is known not to exist; in a case like *Benz*, the answer is incomprehensible and absurd without an appropriate pragmatic implication.

But when the rule against hearsay is applied, the law is (on some readings of s 59) now meant to forget this truth and proceed as if a statement means only what is expressly stated! This is all the more remarkable given that the hamburger example is an example in which the implied matter is implied solely as a matter of conversational pragmatics: there is nothing logically inconsistent in asking for an inaccessible or poisoned hamburger, it's just that we know that that is not what the speaker intends in virtually all imaginable contexts. But even a case like *Hannes*, in which the implication is a matter of absolute logical necessity, one reading of s 59 is that the statement is to be exempted from the hearsay rule!

It is therefore a highly unsatisfactory situation if, as one commentator asserts and as seems to be correct, s 59 now signifies that form is the strongest indicator of what the speaker, for the purposes of s 59, must be taken to have intended to assert.[31] This is because, as should by now be sufficiently obvious, language does not work in that way. Rather, it works *via* an intricate web of unexpressed logical presuppositions and unexpressed but still important implications (such as in the hamburger example). That is also why, if form is our guide to the operation of the hearsay rule under s 59, ridiculously formalist

28 As J Gans and A Palmer, *Uniform Evidence*, OUP, 2010, p 94 state, it is 'not immediately obvious' how this is so, but this was the purpose, apparently, of the amendment.

29 Searle, above n 7, p 127.

30 *Hart v MacDonald* (1910) 10 CLR 417 at 430; (1910) 16 ALR 585; [1910] HCA 13; BC1000031.

31 Gans and Palmer, above n 28, p 95.

distinctions which are no credit to the law must be drawn: as the commentator just mentioned points out, 'Pablo, are you there?' would not be hearsay (not being assertive in form), whereas 'this is Pablo' would be. This difference would exist even if each statement is tendered for exactly the same purpose and with exactly the same relevance, namely, to show that the person addressed in each case is in fact Pablo. Bank robbers, take note what words you use when you address each other during the robbery!

If, however, subs (2A) is meant to indicate that:

> literal meaning is dependent on context in the same way that other non-conventional forms of intentionality are dependent on context, and there is no way to eliminate the dependence in the case of literal meaning which would not break the connections with other forms of intentionality and hence would eliminate the intentionality of literal meaning altogether,[32]

then how does s 59 differ from the position under the pre-existing common law, under which implied assertions (it was eventually and correctly settled) are subject to the rule against hearsay? Language is permeated by implications of one sort or another, and the rule against considering implied assertions as assertions (although they clearly are, for otherwise they would not be relevant at all) will collapse in on itself, applying to a null set, if s 59 (2A) is taken literally.

This, indeed, is what *Hannes* presaged, for that case is the ultimate illustration of implied meaning. Subsection (2A) appears to confirm what was decided in that case, while the note appears to deny it.

5 Conclusion

Should this article come by chance into the hands of those learned in philosophy or linguistics, I point out that its brevity and simplicity are due not merely to my own limited learning in those fields, but also to the need to ensure that the analysis is not over-technical, elaborate beyond necessity or confusing.

I have sought to show that even an analysis of language of only moderate sophistication, within the reach of every reflective lawyer and indeed every intelligent speaker of the language, shows that the thinking behind the present law of hearsay contained in the uniform evidence legislation is gravely deficient. It ignores what in any other discipline would be considered obvious facts about language, and as a practical matter proceeds from an unsustainable view that lying will be direct rather than indirect, express rather than implied.

Section 59 is inevitably expressed opaquely because of the category mistake it embodies; to the extent that any meaning can be extracted from it at all, it contradicts itself. The present law is simply an embarrassment to the claims of the law to be a learned profession.

The section needs fundamental re-thinking. Of the curate's egg that is the uniform evidence legislation, it is by far the rottenest part.

---

32 Searle, above n 7, p 135.