



## ARTICLES

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### ISSUES AT THE PENUMBRA OF HEARSAY

#### 1. INTRODUCTION

The rule against hearsay is both the most important and the most controversial rule of exclusion in the law of evidence. It has been the subject of far reaching reform in a number of jurisdictions, and proposals for reform are under consideration in many others.<sup>1</sup> Given the ancient lineage of the hearsay rule, the vast amount of case law it has generated, and the attention it has recently received from law reformers, one would have expected that at least the existing operation of the rule would be reasonably clear. In fact this is not the case. At many points the distinction between hearsay and non-hearsay (commonly referred to as original evidence) remains uncertain.

The aim of the present article is to consider a number of difficult issues on the borderline between hearsay and original evidence.<sup>2</sup> The distinction between the two remains of crucial significance even in jurisdictions such as England where the Civil Evidence Act 1968 (UK) and the Police and Criminal Evidence Act 1984 (UK) have achieved fundamental reform of the rule. In England the common law remains applicable to oral assertions in all criminal cases, and in cases to which the statutes apply evidence classified as original will, of course, be

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#### Footnotes

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1 In England the rule has been the subject of statutory reform; see the Civil Evidence Act 1968 (UK) and the Police and Criminal Evidence Act 1984 (UK). In Australia and Canada there have been a number of proposals for reform; see in particular Australian Law Reform Commission, Report No 26, *Evidence*, Volumes 1 and 2 (1985); Law Reform Commission of New South Wales, Report No 29, *The Rule Against Hearsay* (1978); Law Reform Commission of Canada, Report, *Evidence* (1975); Law Reform Commission of Ontario, Report, *The Law of Evidence* (1976); Uniform Law Conference of Canada, *Uniform Evidence Act* (1982). For the United States see the American Law Institute's *Model Code of Evidence* (1942) and *Uniform Rules of Evidence* (1953). These were followed by the *Federal Rules of Evidence* (1972), which have now been adopted in a majority of states.

2 The scope of the hearsay rule has been the subject of surprisingly little academic writing in England. An excellent detailed analysis of the rule is contained in Cross and Tapper, *Cross on Evidence* (6th English edn 1985), Ch 15; Byrne and Heydon, *Cross on Evidence*

admissible without the necessity of satisfying the conditions spelt out in the statutes. For jurisdictions such as Canada and Australia, which have yet to achieve far reaching reform of the hearsay rule, a precise understanding of the present nature and operation of the rule constitutes a necessary pre-condition to satisfactory reform.

The argument to be presented in this article is that in difficult cases a consideration of the functions the rule against hearsay is designed to serve is the method most likely to lead the courts to satisfactory results. It will appear that as a matter of logic there is often no clear answer to the question whether evidence is hearsay or not. In such cases the classification of evidence as hearsay or original should, it will be argued, be determined by considerations of policy and principle rather than proceed upon a mistaken formalistic assumption that the rule can simply be applied to all situations.

## 2. RATIONALE OF THE HEARSAY RULE

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

'The rule against the admission of hearsay is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost.'<sup>3</sup>

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

1. That hearsay evidence is not the best evidence. As a matter of history, the hearsay rule and the best evidence rule have quite distinct origins. The best evidence rule developed as a general maxim,<sup>4</sup> and in application eventually came only to survive in the rule excluding secondary evidence

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### 2 *Continued*

(3rd Australian edn 1986) Ch 16. See also Baker, *The Hearsay Rule* (1950). The only major articles dealing with the rule are Cross, 'The Scope of the Rule Against Hearsay' (1956) 72 LQR 91; Cross, 'The Periphery of Hearsay' (1969) 7 MULR 1; Guest, 'The Scope of the Hearsay Rule' (1985) 101 LQR 385; Ashworth and Pattenden, 'Reliability, Hearsay Evidence and the English Criminal Trial' (1986) 102 LQR 292; Carter, 'Hearsay, Relevance and Admissibility: Declarations as to State of Mind and Declarations Against Penal Interest' (1987) 103 LQR 106. The same is true of Australia and Canada, where the only significant articles are Weinberg, 'Implied Assertions and the Scope of the Hearsay Rule' (1973) 9 MULR 268 and Schiff, 'Hearsay and the Hearsay Rule: A Functional View' (1978) 56 Can B Rev 674. The rule has, however, been the subject of a remarkable amount of academic writing in the United States. The more important articles include McCormick, 'The Borderland of Hearsay' 39 Yale LJ 489 (1930); Morgan, 'Hearsay and Non-Hearsay' 48 Harv LR 1138 (1935); Morgan, 'Hearsay Dangers and the Application of the Hearsay Concept' 62 Harv LR 177 (1948); Rucker, 'The Twilight Zone of Hearsay' 9 Vand LR 453 (1956); Maguire, 'The Hearsay System: Around and Through the Thicket' 1444 Vand LR 741 (1961); Weinstein, 'Probative Force of Hearsay' 46 Io LR 331 (1961); Finman, 'Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence' 14 Stan LR 682 (1962); Tribe, 'Triangulating Hearsay' 87 Harv LR 1786 (1980); Park, 'McCormick on Evidence and the Concept of Hearsay' 65 Minn LR 423 (1981); Bein, 'Substantive Influences on the Use of Exceptions to the Hearsay Rule' 23 BCL Rev 855 (1982); Graham, 'Stickperson Hearsay: A Simplified Approach to Understanding the Rule Against Hearsay' [1982] U Ill L Rev 887; Wellborn, 'The Definition of Hearsay in the Federal Rules of Evidence' 61 Tex LR 49 (1982).

3 [1952] AC 480, 486; approved in *R v Blastland* [1985] 3 WLR 345, 350.

4 The earliest statement of the maxim appears to be that of Holt in *Ford v Hopkins* (1700) 1 Salk 283; 91 ER 250.

of the contents of documents. The hearsay rule developed as a consequence of the marking off of the function of witnesses from those of jurors. Quite apart from historical origins, it is clear that hearsay evidence is inadmissible even when it is the best evidence. If the declarant is dead or otherwise unavailable then a hearsay report of the declarant's statement is the best evidence available. As will be seen, the rule often operates to prevent the reception of totally reliable evidence.

2. That hearsay evidence is not delivered on oath. This was one of the earliest reasons given for the rule.<sup>5</sup> The significance of the oath has, of course, diminished with the passing of time. In any event, a hearsay statement, even if made under oath, remains inadmissible.<sup>6</sup> Clearly the absence of the oath can be no more than a subsidiary justification for the rule.

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

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

‘The theory of the Hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of cross-examination...the Hearsay rule, as accepted in our law, signifies a rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of cross-examination.’<sup>7</sup>

The insistence that evidence be subject to the test of cross-examination in order to be admissible itself rests upon two rationales. First, that the assertions of observers or participants to events or incidents under consideration may only be safely acted upon by a jury if those assertions have been exposed to the test of cross-examination.<sup>8</sup> Secondly, a notion related less to the jury system than to the nature of the adversary process, that it is simply not fair for a party to have a statement used against her or him unless that party is given the opportunity of cross-examining the maker of the statement.<sup>9</sup>

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

Where a witness gives evidence-in-chief that evidence is subject to four

5 *R v Bradden and Speake* (1684) 9 How St Tr 1127, 1189 per Sir George Jeffries CJ; *Berkley Peerage Case* (1811) 4 Camp 400, 414; 171 ER 128, 134 per Mansfield CJ; *Wright v Doe d Tatham* (1838) 7 A & E 313, 389; 112 ER 488, 517 per Parke B.

6 *R v Eriswell (Inhabitants)* (1790) 3 TR 707; 100 ER 815; *Haines v Guthrie* (1884) 13 QBD 822; *Royal Bank of Canada v McArthur* (1984) 8 DLR (4th) 411.

7 *Wigmore on Evidence* Vol 5 (3rd edn 1940) para 1362.

8 This is the rationale relied upon by Wigmore.

9 The significance of this latter rationale is stressed by Morgan, ‘Hearsay Dangers and the Application of the Hearsay Concept’, supra n 2.

possible sources of error:<sup>10</sup> (1) insincerity, the witness may be lying, (2) ambiguity, the testimony may be unclear and may therefore be misunderstood by the tribunal of fact, (3) faulty perception, the witness may not have correctly perceived that which he or she purports to have perceived, and (4) erroneous memory, the witness may no longer correctly recall that which he or she perceived. Where a witness (W) repeats what he or she has been told about an event by a declarant (D), the possible sources of error are, of course, doubled. If D is not a witness, the test of cross-examination is only available to be used in respect of those possible defects in W's testimony; there is no method of testing the truthfulness, accuracy etc of the statement made by D to W. What of the case where W seeks to narrate to the Court a non-hearsay statement made to W by D, ie a statement the relevance of which depends not on the fact that it is true but only on the fact that it was made? Where this is the case, the possible sources of error are not doubled by the fact that W is repeating the statement of D. Since the truth of what D asserted to W is not in issue, questions as to D's sincerity, perception and memory do not arise. The only possible defect in the statement so far as D is concerned relates to its possible ambiguity.

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

'Yet, if a witness is willing to commit perjury and counsel is willing to co-operate, neither oath nor cross-examination will be of much avail to expose the wilful falsehood unless either witness or counsel is unusually stupid. The witness will tell a simple story, free of all complications; he will make no attempt to reconcile it with that of other witnesses; he will not try to explain suggested inconsistencies; he will purport to remember only the rather obvious and give no reason for failure to remember anything else. If his story is to be discredited, it must be by means of other evidence. Indeed, in most classes of litigation, perjury is not common; and where it is common, the witness is usually skillfully coached. Although the exposure of wilful falsehood is the most dramatic function of skillful cross-examination, it is very rarely demonstrated,'<sup>11</sup>

If the problem of distinguishing hearsay from original evidence raises difficulties in certain key areas, how may these difficulties be resolved? The best method, it is submitted, is by a consideration of the extent to which, in the particular context under consideration, the potential defects in testimony are likely to be present.

10 See generally Morgan, 'Hearsay Dangers and the Application of the Hearsay Concept', supra n 2 at 185-188; Maguire, supra n 2 at 743-749; Finman, supra n 2 at 684-691; Tribe, supra n 2 at 958-961; Graham, supra n 2 at 890-899.

11 Morgan, 'Hearsay Dangers and the Application of the Hearsay Concept', supra n 2 at 186.

### 3. THE PROBLEM OF DISTINGUISHING HEARSAY FROM ORIGINAL EVIDENCE

In its simplest form the hearsay rule may be defined as a rule which both prohibits a witness from repeating the out-of-court statement of another (the declarant) in order to establish the truth of that statement, and prevents the tendering of documents in order to establish the truth of assertions contained in them.<sup>12</sup> Part of the reason for the lack of clarity in relation to the scope of the rule is that there exists no generally accepted definition of hearsay. Various writers express the rule in slightly different fashion.<sup>13</sup> The most commonly quoted judicial formulation of the distinction between hearsay and original evidence is that of the Privy Council in *Subramaniam v Public Prosecutor*.<sup>14</sup> Their Lordships held that the rule was not infringed where an accused sought, in order to establish a defence of duress, to give evidence of what was said to him by terrorists. Their Lordships stated the distinction between hearsay and original evidence in the following passage:

‘Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.’<sup>15</sup>

In the present section the application of the distinction between hearsay and original evidence will be considered generally. In the following section a number of particular problems relating to hearsay will be dealt with. It will be convenient in the present section to treat documentary hearsay and oral hearsay separately.

#### (a) Documentary Hearsay

In the leading case of *Myers v Director of Public Prosecutions*<sup>16</sup> the accused was charged with offences relating to the theft of motor cars. The prosecution case was that the accused had purchased wrecked cars, had then stolen cars of similar make and model and, after disguising the stolen cars as far as possible to resemble the wrecked cars, had sold them claiming they were the wrecked cars which had been repaired. A great deal of evidence was adduced against the accused. Part of that evidence consisted of business records of the manufacturers of the cars. As the cars were built they were accompanied along the assembly line by cards upon which various items of information were recorded by workers. This information included the chassis number, the engine number and the block number of each car. The cards were then photographed

12 For particularly graphic methods of attempting to describe the distinction between hearsay and original evidence, see Tribe, *supra* n 2; Graham, *supra* n 2.

13 See, for example, Cross and Tapper, *supra* n 2 at 454; Byrne and Heyden, *supra* n 2 at 728; *Phipson on Evidence* (13th edn 1982) 329; *McCormick on Evidence* (2nd edn 1972) 584; Cowen and Carter, *Essays on the Law of Evidence* (1956) 1; Schiff, *Evidence in the Litigation Process* Vol 1 (2nd edn 1983) 222; *United States Federal Rules of Evidence* (1972) rule 801.

14 [1956] 1 WLR 965.

15 *Ibid* 970.

16 [1965] AC 1001. For commentary on the decision, note Andrews, ‘The Shackles of Rigidity and Formalism’ 27 MLR 606 (1964).

on microfilm and destroyed. Chassis numbers and engine numbers are readily capable of alteration, but a block number is virtually impossible of alteration. When the microfilms of the cards were examined they showed that the cars sold bore engine numbers and chassis numbers corresponding with the wrecked cars, but block numbers corresponding with the stolen cars. The evidence thus established that the cars sold by the accused were not the rejuvenated wrecked cars but were in fact the stolen cars disguised to resemble the wrecked cars. The accused was convicted and appealed to the Court of Criminal Appeal on the ground that the evidence ought to have been excluded. The Court dismissed his appeal, and the accused then appealed to the House of Lords. By a majority of three to two the House of Lords held the microfilms to be inadmissible.<sup>17</sup>

The argument for admissibility took the form of submitting both that the evidence ought not to be classified as hearsay or, if so classified, that an existing exception should be modified or a new exception created to permit admissibility.<sup>18</sup> The distinction between the two lines of argument is not so great as might at first appear. Where a court decides to admit evidence in spite of the hearsay rule, the decision whether to justify admissibility by classifying the evidence as original or by fitting the evidence within an exception is not infrequently one largely of convenience.

In the Court of Criminal Appeal the microfilms were held to be original evidence. Delivering the judgment of the Court, Widgery J stated that the probative value of the evidence depended not upon the credit of the unidentified workers, but 'rather on the circumstances in which the record is maintained and the inherent probability that it will be correct rather than incorrect'.<sup>19</sup> This view derived some support both from authority<sup>20</sup> and from practice.<sup>21</sup> All arguments of principle favoured reception of the evidence. The evidence was reliable, and no purpose would have been served by cross-examination of the workers. Their sincerity was not in doubt and there was no ambiguity in what they had recorded. The workers could not possibly have had any recollection of individual engines that proceeded along the assembly line, and hence cross-examination could expose no defects in perception or memory.

On appeal to the House of Lords the majority held that the assertions of the workers recorded on the microfilms were only relevant if they were true, and therefore that the rule against hearsay was infringed. Lord Pearce and Lord Donovan dissented, principally on the ground that a new exception to the hearsay rule should be recognized to cater for such evidence. Lord Pearce formulated the exception in the following terms:

'In my opinion, where the person who from his own knowledge made business records cannot be found, and where a business produces by some proper servant, who can speak

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17 Lord Reid, Lord Morris and Lord Hodson; Lord Pearce and Lord Donovan dissenting. The majority held, however, that the admissible evidence was so weighty as to warrant dismissing the appeal on the ground that no substantial miscarriage of justice had occurred.

18 The existing exceptions that could have been modified to justify admissibility were declarations made in the course of duty and statements contained in public documents.

19 [1965] AC 1001, 1008.

20 *R v Rice* [1963] 1 QB 857.

21 *Supra* n 16 at 1044 per Lord Pearce. Note also Eggleston, *Evidence, Proof and Probability* (2nd edn 1983) 62.

with knowledge to the method and system of record-keeping, its records reliably kept in the ordinary way of business, they should be admitted as prima facie evidence.<sup>22</sup>

The majority took the view that the hearsay rule should be regarded as settled in its ambit and operation. Further development of the rule and its exceptions should be left to legislation. Lord Reid stated:

‘If we are to extend the law it must be by the development and application of fundamental principles. We cannot introduce arbitrary conditions or limitations: that must be left to legislation. And if we do in effect change the law, we ought in my opinion only to do that in cases where our decision will produce some finality or certainty. If we disregard technicalities in this case and seek to apply principle and common sense, there are a number of other parts of the existing law of hearsay susceptible of similar treatment, and we shall probably have a series of appeals in cases where the existing technical limitations produce an unjust result. If we are to give a wide interpretation to our judicial functions questions of policy cannot be wholly excluded, and it seems to me to be against public policy to produce uncertainty. The only satisfactory solution is by legislation following on a wide survey of the whole field, and I think that such a survey is overdue. A policy of make do and mend is no longer adequate.’<sup>23</sup>

The argument of Lord Reid that, whatever the defects of the hearsay rule, a static and formalistic interpretation will at least produce certainty, is unconvincing.<sup>24</sup> No matter how the rule is formulated, when the need is felt to be particularly pressing the courts will on occasion find a way to admit the evidence either by defining it as original evidence or by fitting it into an existing exception.<sup>25</sup> The decision in *Myers*<sup>26</sup> case does not make the hearsay rule more logical or even predictable. It essentially means that when the courts are confronted with a hearsay issue they will resolve that issue without adequate analysis of the problem and with insufficient consideration being given to the question of whether, as a matter of principle, the rule should be applied to the instant case. Nor is it satisfactory to say the matter should be left to legislation. There is no reason why cautious and principled judicial development of the law should not proceed alongside major legislative reform.

*Myers*<sup>27</sup> case has been followed in Australia.<sup>28</sup> It has, however, been

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22 Supra n 16 at 1044.

23 Ibid 1021-1022. It may be noted that the legislature responded to the decision in *Myers*’ case by enacting the Criminal Evidence Act 1965 (UK) (repealed by the Police and Criminal Evidence Act 1984 (UK)), a narrowly drafted piece of legislation designed to overturn that decision. In Australia, where *Myers*’ case has been followed, similar legislation has been adopted in all jurisdictions, see Waight and Williams, *Cases and Materials on Evidence* (2nd edn 1985) 667-698.

24 This view has been adopted by a number of commentators, see Moore, Comment [1965] Camb LJ 14; Guest, supra n 2.

25 Note McCormick, supra n 2 at 503.

26 Supra n 16.

27 Ibid.

28 *R v Clune (No 1)* [1975] VR 723. The Australian courts have, however, adhered to the view that business records may be used to demonstrate the general financial position of the business: *Potts v Miller* (1940) 64 CLR 282; *Re Montecatini’s Patent* (1973) 47 ALJR 161, 169 per Gibbs J.

rejected in Canada. In *Ares v Venner*<sup>29</sup> the Supreme Court of Canada held that hospital records, including notes made by nurses, were admissible in order to prove the truth of the matters recorded. The Court relied on *Omand v Alberta Mining Co*,<sup>30</sup> where inspection reports prepared by an employee of the Wheat Board were held inadmissible, and *Ashdown Hardware Co v Singer*,<sup>31</sup> where ledger accounts of a business were received. Delivering the judgment of the Court, Hall J formulated the principle of admissibility as follows:

‘Hospital records, including nurses’ notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as *prima facie* proof of the facts stated therein.’<sup>32</sup>

The following cases provide some examples of documentary evidence held to constitute inadmissible hearsay. In *Stobart v Dryden*<sup>33</sup> the defendant claimed that a mortgage deed on which he was being sued had been fraudulently altered by one of the attesting witnesses. The Court of Exchequer held inadmissible statements made and letters written by the attesting witness, who had since died, tending to show that he had fraudulently altered the deed. In *Patel v Comptroller of Customs*<sup>34</sup> it was held by the Privy Council that the words ‘Produce of Morocco’ written upon bags containing seed were not evidence that the seed was in fact the produce of Morocco. Similarly in *Comptroller of Customs v Western Electric Co Ltd*<sup>35</sup> the Privy Council held that words indelibly stamped into various implements were not admissible to prove their country of origin. In *Kenny v Hornberg (No 2)*<sup>36</sup> the High Court of Australia held that a hotel register was not evidence that a person named in the register had stayed at the hotel during the period in question. In *R v Clune (No 1)*<sup>37</sup> the Supreme Court of Victoria held that an Interview Register kept by the police and recording details of interrogations was not admissible to prove a particular interrogation had taken place. In *Mobil Oil Corporation v Registrar of Trade Marks*<sup>38</sup> the Supreme Court

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29 (1970) 14 DLR (3d) 4.

30 (1922) 69 DLR 6.

31 [1952] 1 DLR (2d) 33. The Court also relied on the old case of *Canadian Atlantic R Co v Moxley* (1889) 15 SCR 145.

32 (1970) 14 DLR (3d) 4, 16. See also *Canadian Pacific Ry v City of Calgary* [1971] 4 WWR 241; *R v Penno* (1977) 76 DLR (3d) 529; *Tecoglas, Inc v Domglas Inc* (1985) 19 DLR (4th) 738. Note Lederman, ‘The Admissibility of Business Records - A Partial Metamorphosis’ 11 Osgoode Hall LJ 373 (1973); Ewart, ‘Documentary Evidence: The Admissibility at Common Law of Records Made Pursuant to a Business Duty’ 59 Can B Rev 52 (1981). A similar approach to the creation of exceptions to the hearsay rule was adopted by the United States Court of Appeals in *Dallas County v Commercial Union Assurance Co* 286 F 2d 388 (1961). Note also *Scholle v Cuban-Venezuelan Oil Voting Trust* 285 F 2d 318 (1960); *Butler v Southern Pacific Company* 431 F 2d 77 (1970).

33 (1836) 1 M & W 615; 150 ER 581.

34 [1966] AC 356.

35 [1966] AC 367. Note also *R v Cook* (1980) 71 Cr App R 205. Cf *Miller v Howe* [1969] 1 WLR 1510.

36 (1963) 37 ALJR 162.

37 [1975] VR 723.

38 [1984] VR 25.



of Victoria held the results of a market research survey recording the views of members of the public to constitute hearsay.<sup>39</sup> In *R v Romeo*<sup>40</sup> the Supreme Court of South Australia held that a sales docket was not admissible evidence that goods were purchased by the person named on the docket as purchaser.<sup>41</sup>

In *R v Kelly*<sup>42</sup> and *R v Le Roy*<sup>43</sup> the Supreme Court of South Australia and the New South Wales Court of Criminal Appeal respectively held a postmark on a parcel sent by post to be admissible evidence of the place from which the parcel was despatched. In *R v Kelly*<sup>44</sup> the Court distinguished *Patel's*<sup>45</sup> case and the *Western Llectric*<sup>46</sup> case on the ground that a postmark is 'an official cachet which is applied to a postal article, not as a statement of history, but as a contemporaneous record of a transaction'.<sup>47</sup> Such a distinction is inadequate; neither the fact that a marking or label is official, nor that it is affixed contemporaneously is sufficient to alter its character as hearsay. What these cases illustrate is that the courts, while accepting the decision in *Myers*<sup>48</sup> case, are not always prepared to take that decision to its logical conclusion.

In *R v Rice*<sup>49</sup> it was held by the Court of Criminal Appeal that a used airline ticket, produced from the place where such tickets were stored, was admissible to prove that someone of the name written on the ticket had travelled on the relevant flight. That decision may be regarded as impliedly overruled by *Myers'* case.<sup>50</sup> Just as the microfilm recorded the assertion of the unidentified workmen in *Myers'* case, so the ticket recorded the assertion made by the purchaser that the ticket was being purchased for use by the individual named. In a similar case the Australian Federal Court of Bankruptcy held the ticket inadmissible.<sup>51</sup> The decision in *Rice*

39 See also *Hoban's Glynde Pty Ltd Et al* (1973) 4 SASR 503; *McDonald's System of Australia Pty Ltd v McWilliams Wines Pty Ltd* (1979) 28 ALR 236. Contra *Customglass Boats Pty Ltd v Salthouse Brothers Ltd* [1976] RPC 589. Public opinion polls are regarded as original evidence in the United States. See *Zippo Manufacturing Company v Rogers Imports Inc* 216 F Supp 670 (1963); *Commonwealth v Trainor* 374 NE 2d 1216 (1978), and note McElroy, 'Public Surveys - The Latest Exception to the Hearsay Rule' (1976) 28 Baylor L Rev 59.

40 (1982) 30 SASR 243. See also *R v Gillespie* (1967) 51 Cr App R 172.

41 For other examples of evidence held inadmissible as documentary hearsay, see *Carmarthen Railway and Cardigan Railway Co v Manchester and Milford Railway Co* (1873) LR 8 CP 685 (receipts); *R v McNamara* [1917] VLR 407 (manufacturer's marks and shipping records); *R v Gordon and Spencer* (1958) 42 Cr App R 177 (bills of lading); *Hill v Baxter* [1958] 1 QB 277 (doctor's medical certificate); *R v Sealby* [1965] 1 All ER 701 (car's log book); *R v Gwilliam* [1968] 1 WLR 1839 (label accompanying a breathalyser machine); *R v Van Vreden* (1973) 57 Cr App R 818 (bankcard application form).

42 (1975) 12 SASR 389.

43 (1984) 55 ALR 338.

44 Supra n 42.

45 Supra n 34.

46 Supra n 35.

47 (1975) 12 SASR 389, 396. Note also *Perkin's Case* (1826) 1 Lew 99; 168 ER 974. In *R v Cook* (1980) 71 Cr App R 205, however, it was assumed by the Court of Criminal Appeal that a Customs and Excise date stamp was not at common law admissible as evidence of the date of importation. The evidence was held admissible under the Criminal Evidence Act 1965 (UK) (now repealed).

48 Supra n 16.

49 Supra n 20. Note also *R v Bastien* (1968) 20 CCC (2d) 562.

50 In *Myer's* case, supra n 16, the Court of Criminal Appeal relied in its earlier decision in *Rice*, supra n 20.

51 *Re Gardner* (1967) 13 FLR 345.

has been defended on the basis that the ticket may be regarded as a 'valid warrant for travelling on an aeroplane' and as such 'a piece of real evidence'.<sup>52</sup> While a ticket may properly be characterised as a warrant for travelling, the fact remains that in *Rice* the ticket was only relevant if the information recorded in the section marked 'Name of Passenger' was accepted as being likely to be accurate.

### (b) Oral Assertions

The basic distinctions between hearsay and original evidence laid down in *Subramaniam v Public Prosecutor* was affirmed by the Privy Council in *Ratten v R*.<sup>53</sup> The accused was charged with the murder by shooting of his wife. His defence was that the gun had discharged accidentally whilst he was cleaning it. To rebut that defence the prosecution called evidence from a telephone operator who stated that shortly before the time of the shooting she had received a call from the address where the deceased lived with her husband. The witness said that the call was from a female, who, in a voice sobbing and becoming hysterical, said 'Get me the police, please' and gave the address. The accused objected to that evidence on the ground that it was hearsay. The accused was convicted and appealed to the Privy Council.

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

'The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called, is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on 'testimoniallly', ie, as establishing some fact narrated by the words.'<sup>54</sup>

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

<sup>52</sup> Cross and Tapper, *supra* n 2 at 461. See also Guest, *supra* n 2 at 386-387.

<sup>53</sup> [1972] AC 378; *Subramaniam*, *supra* n 14.

<sup>54</sup> *Ibid* 387.

The following cases provide examples of oral assertions held to constitute inadmissible hearsay. In *R v Gibson*<sup>55</sup> the accused's conviction for unlawful wounding was quashed by the Court for Crown Cases Reserved because the prosecutor had been permitted to testify that immediately after a stone had been thrown at him a passer-by exclaimed, pointing to the accused's house, 'The man who threw the stone went in there'. In *Sparks v R*<sup>56</sup> the accused, a white man, was convicted of indecently assaulting a young girl. While allowing the accused's appeal on other grounds, the Privy Council held that the trial judge had rightly excluded evidence that shortly after the assault the child had said to its mother 'it was a coloured boy'. In *Hughes v National Trustees Executors and Agency Co of Australasia Ltd*<sup>57</sup> the High Court of Australia held on a petition for testator's family maintenance that statements by the testator as to her reasons for disinheriting her son could not be used to show the son had been guilty of disinheriting conduct.

Examples of oral assertions held to constitute original evidence include the following. In *R v Willis*<sup>58</sup> the Court of Criminal Appeal held that evidence by an accused as to what he had been told by an alleged accomplice, given in order to explain away the making of false statements to the police, did not infringe the rule. In *R v Chapman*<sup>59</sup> the accused was convicted of having driven a motor vehicle while having a blood alcohol concentration above the prescribed limit. A breath test had been administered to the accused whilst in hospital. He appealed on the ground that the evidence of police officers to the effect that the casualty officer did not object to the provision of specimens of breath and blood, which was a condition precedent to the obtaining of such specimens under the relevant legislation, was hearsay. The Court of Appeal held that the lack of objection which had to be established was an objective fact which could be proved by the police officers without infringing the rule.<sup>60</sup> In *Bridges v State*<sup>61</sup> the defendant was charged with indecently assaulting a young girl. The prosecution case was that the defendant had taken the girl to his apartment, molested her there and then allowed her to walk home. The Wisconsin Supreme Court held admissible statements made by the girl to the police describing the building and apartment in which she had been molested. The relevance of the evidence was not as establishing the features of the apartment, but as showing that she was aware of them in order to prove that she had in fact been there.

In a number of old English cases it was held that witnesses could not give evidence of their age nor of the place of their birth.<sup>62</sup> More recently, however, the courts have treated such evidence as admissible.<sup>63</sup> Logically such evidence is, of course, hearsay although it is clearly desirable

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55 (1887) 18 QBD 537.

56 [1964] AC 964.

57 (1979) 53 ALJR 249.

58 [1960] 1 All ER 331.

59 [1969] 2 QB 436.

60 Note also *Cavanagh v Nominal Defendant* (1959) 100 CLR 375.

61 19 NW 2d 529 (1945).

62 *R v Erith (Inhabitants)* (1907) 8 East 539; 103 ER 450; *R v Day* (1841) 9 Car & P 722; 173 ER 1026; *R v Rushworth (Inhabitants)* (1842) 2 QB 476; 114 ER 187; *R v Rogers* (1915) 111 LJ 115.

63 *Carlton and United Breweries Ltd v Cassin* [1956] VLR 186; *Smith v Police* [1969] NZLR 856; *Stock v Orcsik* [1977] VR 382 *R v Lachapelle* (1977) 38 CCC (2d) 369. Contra *R v Young* [1923] SASR 35.

that it should be received. In this context the courts choose not to carry the application of the rule to its logical conclusion.

It is submitted that in its most recent decision on hearsay the House of Lords wrongly rejected evidence that should have been classified as original. In *R v Blastland*<sup>64</sup> the accused's defence to a charge of murdering a young boy was that the crime had been committed by another person who had been in the vicinity at the time. He sought to call a number of witnesses to give evidence that that other person had said, before the boy's body had been discovered, that a young boy had been murdered. The trial Judge ruled the evidence hearsay and inadmissible. The accused was convicted, his appeal dismissed by the Court of Appeal, and that decision affirmed by the House of Lords. The judgment of their Lordships was delivered by Lord Bridge. His Lordship held that while a declarant's assertion might be tendered to prove his state of mind, that principle could apply only

'when the state of mind evidenced by the statement is either itself directly in issue at the trial or is of direct and immediate relevance to an issue which arises at the trial'.<sup>65</sup>

No such limitation flows from traditional formulations of the hearsay rule. The fact that inferences may be drawn from a statement which is not hearsay in form is not normally regarded as rendering that statement hearsay. This is precisely what occurred in *Ratten's*<sup>66</sup> case where the assertion made to the telephonist was used as the basis from which an inference could be drawn as to what had led the caller to utter the words used. In *Blastland*<sup>67</sup> the statement possessed a greater claim to admissibility than in *Ratten* since it demonstrated knowledge on the part of the declarant and as a consequence in no way depended upon the credibility of the declarant.

In *Blastland* Lord Bridge remarked in passing that if the evidence were admissible it would lead to the 'very odd result' that evidence that the third party had committed the murder might be proved indirectly 'though if he had directly acknowledged guilt this would have been excluded'.<sup>68</sup> While true, this demonstrates the absurdity of the rule excluding third party confessions; it certainly does not justify the exclusion of further evidence by analogy.

A year before the decision in *Blastland*, a different view had been adopted by the Supreme Court of Canada. In *Wildman v R*<sup>69</sup> the accused was charged with the murder of his step daughter. The child had been killed with a blow from a hatchet. Evidence led by the prosecution established that the accused was aware of the child's death and the method by which she had been killed prior to the discovery of the body. The trial Judge ruled inadmissible the testimony of two witnesses that shortly after the child disappeared they received a telephone call from the accused's wife, or someone purporting to be her, at a time when the accused was in their presence, in which the caller made an accusation that the accused

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64 [1985] 3 WLR 345. See Comments [1985] CLJ 345; [1985] Crim LR 728.

65 *Ibid* 351.

66 *Supra* n 53.

67 *Supra* n 64.

68 *Supra* n 64 at 350.

69 (1984) 12 DLR (4th) 641.

had killed the child with a hatchet. The Supreme Court held this evidence should have been received both as explaining the accused's knowledge of the fact and manner of the child's death, and as giving rise to an inference that the wife or someone purporting to be the wife was also aware of these facts and may have been involved in the killing.

#### 4. PARTICULAR PROBLEMS OF HEARSAY

##### (a) Where the declarant is a witness

It is not clear from the standard formulations of the rule against hearsay whether the rule applies to prevent a witness giving evidence of her or his own out of court statements for the purpose of proving their truth. Nor is it clear whether the rule applies to prevent one witness giving evidence of the out of court assertions of another witness.<sup>70</sup>

Whether regarded as hearsay or not, such statements will in any event normally be excluded by the rule against proof of prior consistent statements. Nonetheless, the hearsay rule is more correctly formulated as covering such cases. Where a witness's prior consistent statement is admissible under an exception to that rule, it is clear that it is admissible merely to show consistency and is not evidence of the truth of its contents.<sup>71</sup> Similarly, where a witness's prior inconsistent statement is admitted it is relevant only to the issue of credit and may not be used to prove the truth of its contents.<sup>72</sup> In other words, where the rule against proof of prior statements is inapplicable such prior statements will only be admissible for non-hearsay purposes. For this reason, the hearsay rule is more properly defined as applying to a witness's narration both of her or his own out-of-court statements and the out-of-court statements of other witnesses.

Such a view, however, has little to commend it as a matter of principle.<sup>73</sup> If the declarant is available for cross-examination, then there is no compelling reason why that declarant's prior statement should not be evidence of the truth of the matters contained in it. Indeed, the testimonial defect of erroneous memory will obviously be of less significance in relation to the witness's prior statement than to her or his evidence-in-chief.

The applicability of the hearsay rule to the prior statements of a witness was considered by the Ontario Court of Appeal in *R v Williams*.<sup>74</sup> In defence to a charge of arson the accused claimed the fire had been set by a defence witness. The Court held that confessional statements made by that witness were inadmissible as hearsay. Since the declarant was available to be questioned about such statements, the decision of the Court was clearly counter to the rationale of the rule. The Court's decision

70 The definition contained in early editions of *Cross on Evidence*, for example, covers the case of a witness giving evidence of another witness's out of court assertion, but not his own. The definition given in later editions covers both cases. Cf *Cross on Evidence* (3rd Eng edn 1967) 387; Cross and Tapper, supra n 2 at 454.

71 *Nominal Defendant v Clements* (1960) 104 CLR 476; *Kilby v R* (1973) 129 CLR 460; *R v Harman* (1984) Times, 21 Feb (CA).

72 *Deacon v R* [1947] 3 DLR 772; *R v Golder, Jones and Porritt* [1960] 1 WLR 1169; *R v Daren and Tange* [1971] 2 NSWLR 423; *Driscoll v R* (1977) 137 CLR 517.

73 See Morgan, 'Hearsay Dangers and the Application of the Hearsay Concept', supra n 2 at 196; Falknor, 'The Hearsay Rule and its Exceptions' 2 UCLA Law Rev (1954) 43, 49-55.

74 (1985) 18 CCC (3d) 356.

appears particularly unsatisfactory when it is realised that had the declarant not been available to be called as a witness the confessions would, in Canada, have been admissible as declarations against interest. Thus, paradoxically, it was the declarant's availability to be subjected to cross-examination which led to the rejection of his prior statements as hearsay.

### (b) Hearsay by conduct

Where a person seeks to convey information by gestures or other conduct rather than by words or in writing, the hearsay rule quite clearly applies to that conduct. The application of the hearsay rule to conduct which was not intended to convey information will be considered under the heading of implied hearsay, below.

Illustrative of hearsay by conduct is *Chandrasekera v R.*<sup>75</sup> The accused was convicted of the murder of a woman by cutting her throat. Before her death she had, in the presence of witnesses, and in response to the question of who had attacked her, made signs indicative of driving oxen, and had pointed at a policeman and made signs of slapping her face. The accused drove oxen, and had been in trouble for slapping a policeman's face. She was then asked the direct question whether it was the accused who had cut her throat, and in answer to that question she nodded her head. The Privy Council, on appeal from the Supreme Court of Ceylon, held that these gestures constituted hearsay but that they were admissible as a dying declaration.

Where a witness performs an out of court identification of the accused that act of identification is, of course, an example of hearsay by conduct. Evidence of that act of identification is admissible to support the witness's in court identification, but is not itself evidence that the person identified was the true culprit.<sup>76</sup> The same distinction applies where a witness participates in the preparation of an 'identikit' or 'photofit' likeness of the person that witness saw commit the crime. Similarities between the identikit likeness and the accused can be relied upon to support the witness's in court identification of the accused, but if the witness does not perform an in court identification evidence of the part played by the witness in preparing the likeness is inadmissible as hearsay.<sup>77</sup>

### (c) Combinations of witnesses

Where W (witness) testifies that D (declarant) stated he or she perceived X, that evidence remains hearsay notwithstanding that D is called as a witness. Normally, of course, D will simply give evidence of X. If, however, D is unable to so testify can W then give evidence of what D said relying on D to testify that what he or she said to W was accurate?<sup>78</sup> As a matter of logic such evidence is hearsay; W is giving evidence that D said he or she perceived X in order to prove X occurred. As a matter of policy, however, such evidence should be received. There is no other way in which the testimony can be obtained, and both W and D are available for cross-examination.

<sup>75</sup> [1937] AC 220.

<sup>76</sup> *Alexander v R* (1981) 55 ALJR 355.

<sup>77</sup> *R v O'Brien* [1982] Crim LR 746 and Comment. Note Cross and Tapper, supra n 2 at 472. Contra *R v Percy Smith* [1976] Crim LR 511; *R v Okorodu* [1982] Crim LR 747.

<sup>78</sup> See generally Cross, 'The Periphery of Hearsay' supra n 2; Schiff, supra n 2 at 687.

In England the courts have adopted the view that in such cases the hearsay rule is infringed. In *R v McLean*,<sup>79</sup> for example, the Court of Appeal held that a witness could not give evidence of the registration number of a car involved in the commission of a crime where that number had been narrated to him by the victim several minutes after the incident. The victim gave evidence at the trial to the effect that although he could no longer recall the number, he had accurately narrated the number he saw to the witness.

The Australian and Canadian courts, however, have generally allowed logic to yield to policy. In *Gaio v R*<sup>80</sup> the accused was convicted of murder in the Supreme Court of the Territory of Papua and New Guinea. The accused did not speak English, and a patrol officer gave evidence of a confession made by the accused during the course of an interrogation conducted through the medium of an interpreter. The interpreter gave evidence that he accurately translated the words used by both the patrol officer and the accused, but was unable to remember the details of the interrogation. On appeal the High Court held that the patrol officer's repetition of what the interpreter said to him did not amount to hearsay; the interpreter was no more than the means by which the conversation between the accused and the patrol officer occurred. Provided that the interpreter was available to testify that he translated accurately it was, the High Court held, open to the patrol officer to give evidence of the confession made through the medium of the interpreter.<sup>81</sup>

*Gaio v R*<sup>82</sup> was followed by the British Columbia Court of Appeal in *R v Kores*.<sup>83</sup> In *Guy and Finger v R*<sup>84</sup> the Supreme Court of Western Australia, on facts identical to those in *R v McLean*,<sup>85</sup> held the evidence admissible.

In *R v Penno*<sup>86</sup> the prosecution, in order to prove that coats were stolen from a particular store, tendered an inventory sheet containing numbers corresponding to tags on coats found in the accused's possession. The inventory sheet had been compiled by the manageress of the store as the assistant manageress looked at the ticket on each coat and called aloud the information there recorded. Both the manageress and the assistant manageress were called to give evidence. The British Columbia Court of Appeal, relying upon *Gaio v R*<sup>87</sup> and *R v Kores*,<sup>88</sup> held that both the inventory sheet and the testimony of the witnesses were admissible.

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79 (1967) 52 Cr App R 80. See also *Cattermole v Millar* [1977] Crim LR 553. Cf *Grew v Cubitt* [1951] 2 TLR 305; *Jones v Metcalfe* [1967] 3 All ER 205. Cross adopts the view that *R v McLean* was correctly decided, see 'The Periphery of Hearsay' supra n 2 at 5-7. The decision is apparently accepted as correct in the current English edition of *Cross on Evidence*, see Cross and Tapper, supra n 2 at 469-470.

80 (1960) 104 CLR 419. This case is strongly criticised by Cross, see 'The Periphery of Hearsay' supra n 2 at 3-5.

81 If in such cases the interpreter is not called evidence of the interrogation is clearly inadmissible, see *R v Wong Ah Wong* (1957) 57 SR (NSW) 582; *R v Attard* (1958) 43 Cr App R 90.

82 Supra n 80.

83 (1970) 75 WWR 93.

84 [1978] WAR 125.

85 Supra n 79.

86 (1977) 35 CCC (2d) 266.

87 Supra n 80.

88 Supra n 83.

In *Alexander v R*<sup>89</sup> a witness was able to testify that he selected the photograph of the person he saw commit the crime from a selection of photos shown to him by the police. The witness was, however, no longer able to remember which photo he had selected. A police detective then gave evidence that the photo selected by the witness was that of the accused. The High Court held the evidence of the police detective to have been properly admitted. Gibbs CJ considered the earlier authorities and held, rejecting the decision of the Court of Criminal Appeal in *R v Osbourne*,<sup>90</sup> that such evidence would constitute hearsay if the person who identified the accused was not called as a witness or was not prepared to testify as to the earlier act of identification. His Honour continued:

'The position is, however, different when the identifying witness says in the witness-box that he did, on a previous occasion, identify somebody as the person connected with the crime, but that he cannot now remember who it was that he identified. It is immaterial for this purpose whether the identification was made at an identification parade or by means of photographs. In such a case, in my opinion, evidence is admissible to prove who was the person thus identified. Such evidence would not be hearsay: it is not tendered to prove the truth of what the identifying witness asserted on the previous occasion...The evidence of the observer of the earlier act of identification is in such a case admitted as original evidence. It explains and gives meaning to the evidence of identification given by the identifying witness in the witness-box.'<sup>91</sup>

**(d) Statements the relevance of which derive from their falsity**

Where the relevance of a statement rests upon inferences that may be drawn from its falsity, then the statement does not infringe the hearsay rule. The statement is, by definition, not being tendered in order to prove the truth of any assertion contained in it.

In *Attorney-General v Good*,<sup>92</sup> for example, evidence of a wife's untrue statement that her husband was away from home was received on the issue of whether he intended to defraud his creditors. In *Mawaz Khan v R*<sup>93</sup> the two accused were convicted in the Supreme Court of Hong Kong of murder. The prosecution had tendered evidence of statements made by each accused in which they sought to set up a joint alibi which the evidence showed to be false. On appeal the Privy Council held the statements admissible. Lord Hodson stated they were tendered not for the purpose of proving the truth of the matters contained in them, but as tending to show that the makers were acting in concert and that such action indicated a common guilt.

In *R v Steel*<sup>94</sup> the accused on a charge of murder was prevented from

89 (1981) 55 ALJR 355. Note generally Libling, 'Evidence of Past Identification' [1977] Crim LR 268; Weinberg, 'The Admissibility of Out-of-Court Identification Evidence in Criminal Cases' 12 MULR 543 (1980).

90 [1973] QB 678.

91 (1981) 55 ALJR 355, 359-360. See also *R v Burke and Kelly* (1847) 2 Cox CC 295; *R v Ngahooro* [1982] 2 NZLR 203; *R v Swanston* (1982) 65 CCC (2d) 453.

92 (1825) M'Cle and Yo 286; 148 ER 421.

93 [1967] 1 AC 454.

94 (1981) 73 Cr App R 173.



tendering evidence of a false alibi given to the police by another man who had been questioned about the killing. The Court of Appeal held that in the circumstances of the case the evidence was of insufficient relevance to justify admissibility, but suggested in passing that it would in any event constitute hearsay. It is submitted that this suggestion is incorrect, and that in a case in which the evidence was more weighty the fact that lies were told by a third party might properly be used as evidence of a consciousness of guilt on the part of that third party.<sup>95</sup> This was the view adopted by the majority of the Supreme Court of South Australia in *R v Szach*.<sup>96</sup>

### (e) Declarations evidencing mental state

An assertion which is a direct statement of the declarant's state of mind, emotion or physical condition is hearsay when used to prove that mental state on the part of the declarant, but is admissible under a well established exception.<sup>97</sup> What of statements which are not intended by the declarant to indicate a state of mind but impliedly do so, for example, the statement 'I am Napoleon' as evidence of the declarant's mental incompetence? It may be argued that the statement is original evidence, since it is not tendered to prove the truth of the assertion contained in it.<sup>98</sup> Alternatively, it may be argued that such statements are hearsay because of the implied assertion as to belief which they contain, but that they fall within the exception relating to declarations as to states of mind.<sup>99</sup> It is of little significance which of these two arguments leading to admissibility is adopted.

In *Lloyd v Powell Duffryn Steam Coal Co Ltd*<sup>100</sup> the question was whether the posthumous child of a miner killed in an accident was entitled to compensation under the Workmen's Compensation Act 1906 (UK). The miner had not been married to the child's mother, and in order to establish the necessary condition of dependency the plaintiff sought to rely upon assertions by the deceased that he was the father of the child and intended to marry the mother. In the Court of Appeal the evidence was rejected on the ground that it was hearsay and did not fall within the scope of the exception relating to declarations by deceased persons against interest.<sup>101</sup> The House of Lords held the evidence did not amount to hearsay. It is submitted that the decision of the House of Lords was correct. The primary relevance of the statements made by the miner did not depend upon their truth, ie that he was in fact the child's father.

95 For consideration of the circumstances in which lies told by an accused are of sufficient relevance to justify admissibility, see *R v Lucas* [1981] QB 720.

96 (1980) 23 SASR 504 per King CJ with whom Mohr J agreed. Legoe J took the view that such evidence amounted to inadmissible hearsay.

97 *Willis v Bernard* (1832) 8 Bing 376; 131 ER 439; *Thomas v Connell* (1838) 4 M & W 267; 150 ER 1429; *R v Hagan* (1873) 12 Cox CC 357; *Ramsay v Watson* (1961) 108 CLR 642; *R v Perry (No 2)* (1981) 28 SASR 95.

98 *McCormick on Evidence*, supra n 13 at 590-593; Rucker, supra n 2 at 474-475; *Sollars v State of Nevada* 316 P (2d) 917 (1957).

99 Hinton, 'States of Mind and the Hearsay Rule' 1 U Chi L Rev 394 (1934); Morgan, 'Hearsay and Non-Hearsay' supra n 2 at 1143-1144; Morgan, 'Hearsay Dangers and the Application of the Hearsay Concept' supra n 2 at 202-204; Graham, 'Stickperson Hearsay' supra n 2 at 917-920.

100 [1914] AC 733. This case is discussed in detail in Morgan, 'Hearsay Dangers and the Application of the Hearsay Concept' supra n 2 at 209ff.

101 *Ward v Pitt* [1913] 2 KB 130.

The significance of the statements was that they showed he believed he was the father, and that he intended to assume responsibility for the mother and child.

Where the declarant's state of mind is used as the basis for an inference that a factual occurrence followed, problems of relevance arise. If the existence of the state of mind makes it likely that the occurrence followed, then the statement may be used for this purpose. Thus in *Sugden v Lord St Leonards*<sup>102</sup> the testator's pre-testamentary declarations of his intention to benefit his daughter by will were received as evidence that the last will he executed contained a legacy in her favour. In the famous case of *Mutual Life Insurance Co v Hillmon*<sup>103</sup> the United States Supreme Court was concerned with an action to recover on a life insurance policy. The insurance company sought to prove that a body found at a place called Crooked Creek was that of one Walters, not Hillmon, and tendered letters from Walters to his sister and his fiancée expressing his intention to travel to Crooked Creek with Hillmon. The Supreme Court held the letters admissible.

#### (f) Statements accompanying and explaining a relevant act

A statement accompanying an act may be admissible if it explains that act. In *Hayslep v Gymer*,<sup>104</sup> for example, a housekeeper's statement on delivering some of her deceased master's property to the master's son, to the effect that she had received it as a gift from the master, was held admissible.

The admissibility of this class of evidence arises for consideration most commonly in what are termed the illegal gambling cases.<sup>105</sup> The police raid premises that are suspected of being used for illegal betting. Numerous phones are found on the premises, and during the course of the raid these phones ring and are answered by police officers. The callers then attempt to place bets. Both in the United States<sup>106</sup> and the Commonwealth<sup>107</sup> such evidence is almost always admitted. Sometimes it

102 (1876) 1 PD 154. See also *R v Buckley* (1873) 13 Cox CC 293; *Marshall v Owners of SS Wild Rose* [1910] AC 486. Cf *R v Wainwright* (1875) 13 Cox CC 171; *R v Thompson* [1912] 3 KB 19. Note also *R v Moghal* (1977) 65 Cr App R 56, criticised on the ground of insufficient relevance in *R v Blastland* [1985] 3 WLR 345, and *R v Hendrie* (1985) 37 SASR 581.

103 145 US 285 (1892). For discussion of this case see Maguire, 'The Hillmon Case - Thirty-Three Years After' 38 Harv L Rev 709 (1925); Rucker, supra n 2 at 479-483; Tribe, supra n 2 at 969-971; Wiseman III, 'Federal Rule of Evidence 803(3) and the Criminal Defendant: the Limits of the Hillmon Doctrine' 35 Vand L Rev 659 (1982); McFarland, 'Dead Men Tell Tales: Thirty Times Three Years of the Judicial Process After Hillmon' 30 Vill L Rev 1 (1985). See also *People v Alcalde* 148 P 2d 627 (1944) *United States v Annunziato* 293 F 2d 373 (1961); *State v Vestal* 180 SE 2d 755 (1973); *United States v Pheaster* 544 F 2d 353 (1977). Cf *Shepard v United States* 290 US 96 (1933).

104 (1834) 1 Ad & El 162; 110 ER 1169.

105 See Weinberg, supra n 2 at 274-277; Graham, supra n 2 at 914-916.

106 *People v Barnhart* 153 P 2d 2d 214 (1944); *People v Radley* 157 P 2d 426 (1945); *State v Tolisano* 70 A 2d 118 (1949); *Reynolds v United States* 225 F 2d 123 (1955); *State v Di Vincenti* 93 So 2d 676 (1957); *Chacon v State* 102 So 2d 578 (1958); *State v Domino* 102 So 2d 227; *United States v Zenni* 492 F Supp 464 (1980).

107 *Davison v Quirke* [1923] NZLR 552; *Lenthall v Mitchell* [1933] SASR 231; *Marsson v O'Sullivan* [1951] SASR 244; *McGregor v Stokes* [1952] VLR 347; *Marshall v Watt* [1953] Tas SR 1; *Gorman v Newton* [1958] Qd R 169; *R v Fialkow* [1963] 2 CCC 42; *Mathewson v Police* [1969] NZLR 218; *Police v Machirus* [1977] 1 NZLR 288. Cf *Fingleton v Lowen* (1979) 20 SASR 312.

is said that the evidence is not hearsay,<sup>108</sup> but such a view is misconceived. Where the caller uses words such as 'I am calling to place a bet' then the statement is clearly hearsay. Where the caller uses words such as 'Place \$X on horse Y' then the statement, though not in form hearsay, certainly contains the implied assertion that the caller believes the number he or she has rung to be a betting shop. In any event the cases do not, nor should they, turn on the precise words used by the caller. The better view is that statements accompanying and explaining a relevant act constitute a true exception to the hearsay rule.

**(g) Negative hearsay<sup>109</sup>**

The failure of a declarant to speak or act may form the basis for an inference that conditions which might have been expected to prompt the declarant to speak or act did not exist. In some cases silence may constitute an admission.<sup>110</sup> Where this is not so, however, silence should be no more admissible than a direct statement of the inference it is sought to draw from that silence.

The point has not been the subject of detailed consideration other than in the United States, where the decisions of the courts are conflicting.<sup>111</sup> Thus in *George W Saunders Livestock Commission v Kincaid*<sup>112</sup> evidence that other purchasers of hogs had not complained to the seller was held inadmissible to prove the general soundness of hogs contained in a particular shipment. Similarly in *Menard v Cashman*,<sup>113</sup> where the plaintiff sought compensation for injuries allegedly inflicted when he fell down the defendant's stairs, evidence that other users of the stairs had not complained about their condition was rejected.<sup>114</sup> On the other hand, in *Schuler v Union News Co*<sup>115</sup> the fact that there had been no complaints from other purchasers of turkey sandwiches was held admissible on the issue as to the quality of those sandwiches, and in *Silver v New York Cent Ry Co*<sup>116</sup> the failure of other passengers on a train to complain

108 Eg *People v Radley* 157 P 2d 426 (1945); *State v Tolisano* 70 A 2d 118 (1949); *McGregor v Stokes* [1952] VLR 347; *Marshall v Watt* [1953] Tas SR 1; *R v Failkow* [1963] 2 CCC 42.

109 See Falknor, 'Silence as Hearsay' 89 U of Pen L Rev 192 (1940); Morgan, 'Hearsay Dangers and the Application of the Hearsay Concept' 213-214; Rucker, supra n 2 at 460-464; Weinberg, supra n 2 at 282-284; Saltzberg, 'A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence' 66 Calif L Rev 1011 (1978); Schaitkin, 'Negative Hearsay - The Sounds of Silence' 84 Dick LR 605 (1980); Graham, supra n 2 at 902; Ashworth and Pattenden, supra n 2 at 308-311.

110 *Bessela v Stern* (1877) 2 CPD 265; *Parkes v R* [1976] 1 WLR 1251. Silence may, on occasion, be admissible under other exceptions to the hearsay rule, eg as giving rise to a negative inference as to the declarant's physical or mental state, see *Fogg v Oregon Short Line RR* 1 P 2d 954 (1931).

111 In *Manchester Brewery Co Ltd v Coombs* (1900) 82 LT 347 lack of complaint by customers was received as evidence that beer supplied to them was satisfactory. The point was not, however, carefully considered.

112 168 SW 977 (1914).

113 55 A 2d 156 (1947).

114 See also *Lake Drainage Comr's v Spencer* 93 SE 435 (1917); *James K Thompson Co v International Compositions Co* 191 App Div 553 (1920); *Segars v City of Cornelia* 4 SE 2d 60 (1939); *Farm Bureau Mutual Insurance Co v Horne* 510 SW 2d 70 (1974); *Smith v Korn Industries Inc* 262 SE 2d 27 (1980).

115 4 NE 2d 465 (1936).

116 105 NE 2d 923 (1952).

was received as evidence that the temperature on the train was not too low.<sup>117</sup>

As with silence, the absence of particular information in a set of documentary records may give rise to certain inferences. If the statement 'X occurred' would amount to hearsay if contained in a document, then the absence of any reference to X in the document must equally be hearsay if it is sought to use that absence in order to establish X did not occur. In *R v Patel*<sup>118</sup> it was held to amount to hearsay when, in order to establish that someone was an illegal entrant, the prosecution called an immigration officer who gave evidence that he had examined Home Office records on legal entrants and was unable to find that person's name. Had the records themselves been produced they would equally have constituted hearsay.

It has, however, been held that where those responsible for compiling and maintaining records are called to give evidence of the method of compiling the information recorded and of the significance of the absence of particular information from those records, then negative inferences may be drawn from the absence of particular items. Thus in *R v Shone*<sup>119</sup> the prosecution was permitted to prove that certain missing car parts had been stolen from a supplier by calling the relevant record keepers to establish that the records relating to those parts had not been inscribed as they would have been if the parts had been supplied in the normal course of business.<sup>120</sup> While such a result may be desirable on principle, it involves a clear departure from the principle of *Myers*<sup>121</sup> case. If a probability of accuracy arising from the method of record keeping can not render the statement 'X occurred' admissible, then such a probability cannot render the absence of any reference to X admissible evidence that X did not occur.

#### (h) Confessions and flight by third parties

Evidence that a third person confessed to the crime the accused has been charged with is hearsay and, in England and Australia, does not fall within the common law exception relating to declarations against interest.<sup>122</sup> Likewise evidence of the flight of third parties has been held inadmissible when adduced to raise an inference of the accused's innocence.<sup>123</sup> These results are a consequence of the decision of the House of Lords in the *Sussex Peerage Case*<sup>124</sup> that the declaration against interest

117 See also *St Louis Southwestern Ry Co v Arkansas & T Grain Co* 95 SW 656 (1906); *Katz v Delohery Hat Co* 118 Atl 88 (1922); *Sullivan v Minneapolis St Ry* 200 NW 922 (1924); *Landfield v Albiani Lunch Co* 168 NE 160 (1929); *Latham v Houston Land & Trust Co* 62 SW 2d 519 (1933); *Bowman v Kaufman* 387 F 2d 582 (1967); *Cain v George* 411 F 2d 572 (1969); *Murray v American Builders Supply Inc* 472 P 2d 738 (1970).

118 [1981] 3 All ER 94. See also *Commissioner for Motor Transport v Collier-Moat Ltd* (1959) 60 SR (NSW) 238.

119 (1983) 76 Cr App R 72.

120 It is not clear from the report whether in *Shone's* case, supra n 119, the documents themselves were produced. If the documents are not produced then the testimony of those responsible for compiling and maintaining them is obviously hearsay. It is submitted that *R v Muir* [1984] Crim LR 101 clearly was incorrectly decided.

121 Supra n 16.

122 *In the Matter of a Petition by Frits Van Beelen* (1974) 9 SASR 163; *R v Turner* (1975) 61 Cr App R 67.

123 *State v Menilla* 158 NW 645 (1916); *People v Mendez* 223 P 65 (1924).

124 (1844) 11 Cl & Fin 85; 8 ER 1034.

exception is confined to statements made against pecuniary or proprietary interest and does not permit evidence of a statement made by a deceased person against penal interest. Wigmore castigated this rule as a

‘barbarous doctrine, which would refuse to let an innocent accused vindicate himself even by producing to the tribunal a perfectly authenticated written confession, made on the very gallows, by the true culprit now beyond the reach of justice’.<sup>125</sup>

Nonetheless, in *R v Blastland*<sup>126</sup> the House of Lords affirmed the view that such evidence is inadmissible by refusing leave to appeal on the point.

The English and Australian view has been rejected in both the United States<sup>127</sup> and Canada. In *R v O’Brien*<sup>128</sup> the Supreme Court of Canada, while rejecting the statement on the ground that the declarant had been at pains not to expose himself to penal liability, held that in a proper case a statement exposing the declarant to penal liability could be received as evidence of the innocence of an accused.

It is submitted that the limitation on the declarations against interest exception adopted in the *Sussex Peerage Case*<sup>129</sup> should be rejected in favour of the view adopted by the Supreme Court of Canada in *R v O’Brien*.<sup>128</sup> There is no basis for an argument that a person is more likely to be telling the truth in making statements against financial interest than in making statements which may lead to criminal conviction. If anything the converse is more likely to be the case. It is further suggested that such statements should be admissible not just where the declarant is deceased, but also where the declarant is unavailable for some other reason.<sup>131</sup>

### (i) Implied assertions

It has long been uncertain whether the hearsay rule extends to ‘implied assertions’, that is, statements which were not intended by their maker to be assertive of the fact they are tendered to prove, and non-verbal conduct not intended to be assertive of the fact it is tendered to prove.<sup>132</sup> An example of an implied assertive statement would be a case in which efforts were made to establish X’s presence at a particular place by calling a witness to swear that he heard someone say ‘Hello X’ at that place. An example of an implied assertion by conduct would be seeking to prove that beer delivered to a hotel was of poor quality by calling a witness to testify as to the conduct of patrons of the hotel in leaving glasses

125 *Wigmore on Evidence* supra n 7 at Vol 5, para 1477. See also the dissenting judgment of Holmes J in *Donnelly v United States* 228 US 243 (1913).

126 *Supra* n 64.

127 *Chambers v Mississippi* 410 US 284 (1973).

128 (1977) 76 DLR (3d) 513. See also *Demester v R* (1977) 75 DLR (3d) 251. Cf *Lucier v R* (1982) 132 DLR (3d) 244.

129 *Supra* n 124.

130 *Supra* n 128.

131 This was the view adopted by the United States Supreme Court in *Chambers v Mississippi*, supra n 127, and unsuccessfully argued for in *Re Van Beelen*, supra n 122.

132 Implied assertions is the aspect of hearsay most comprehensively dealt with by academic writers. See in particular McCormick, supra n 2; Morgan, ‘Hearsay and Non-Hearsay’ supra n 2; Rucker, supra n 2, Falknor, ‘The ‘Hear-Say’ Rule as a ‘See-Do’ Rule: Evidence of Conduct’ 33 Rocky Mt LR 133 (1960); Finman, supra n 2; Weinberg, supra n 2; Guest, supra n 2; Ashworth and Pattenden, supra n 2 at 311-315.

of the beer undrunk after tasting it. Such evidence was held admissible in *Manchester Brewery v Coombs*.<sup>133</sup>

There is little English or Commonwealth authority on the question of whether the hearsay rule extends to implied assertions. The reason for this lack of authority would seem to be that the courts, when confronted with an implied hearsay problem, rarely appreciate the distinctive character of this sort of evidence. Usually they simply attempt to apply the hearsay rule in the normal way, sometimes holding the evidence admissible and sometimes rejecting it. Three examples may suffice to illustrate this tendency. In *Teper v R*<sup>134</sup> the accused was convicted of arson of a shop in which he carried on business. His defence was an alibi. The only evidence to contradict his alibi was that of a policeman who swore that, in approaching the shop some twenty-five minutes after the fire began, he heard a woman in the crowd of spectators exclaim to a passing motorist who bore some resemblance to the accused 'Your place burning and you going away from the fire'. The Privy Council simply stated that this evidence infringed the hearsay rule, and went on to consider whether it fell within the *res gestae* exception to the rule. They held that it did not. Their Lordships did not, however, appear to give consideration to the fact that the statement by the woman was not intended to convey information, but was rather in the nature of an exclamation. In *Ratten v R*<sup>135</sup> on the other hand, the Privy Council held the evidence not to be hearsay, notwithstanding that it contained an implied assertion. The words 'Get me the police, please', although not assertive in form, clearly carried with them the implied assertion that 'Something serious is happening which requires the presence of the police'. A similar view was adopted in *Woodhouse v Hall*<sup>136</sup> where the accused was charged with managing a brothel. The Divisional Court held that evidence by police officers of conversations in which sexual services were offered to them by women employed at the premises as masseuses was admissible. The words of the masseuses, however, carried the implied assertion that 'These are premises at which sexual acts are performed'.

The problem of implied hearsay was considered by the Court of Exchequer Chamber in *Wright v Doe d Tatham*.<sup>137</sup> Tatham, the heir in law, brought an action to recover certain manors from Wright, a steward, who claimed them as devisee of one Marsden. The issue was whether Marsden had testamentary capacity. Evidence adduced to prove incompetency included testimony that Marsden was treated as a child by his own menial servants; that in his youth he had been called 'Silly Jack'; that a witness had seen boys shouting after him 'There goes crazy Marsden', and throwing dirt at him, and had persuaded a person passing by to see him home. This evidence was received without objection. With regard to evidence adduced to prove competency, however, the question arose whether three old letters addressed to Marsden and written in such a manner as to permit the inference that the writers believed they were dealing with a person of reasonable understanding were admissible. The writers of the letters had died before the proceedings.

133 (1900) 82 LT 347. Note also *Holcombe v Hewson* (1810) 2 Camp 391; 170 ER 1194.

134 [1952] AC 480.

135 *Supra* n 53.

136 (1980) 72 Cr App R 39.

137 (1837) 7 Ad & El 313; 112 ER 488. This case is discussed in detail in Maguire, *supra* n 2 at 749ff.

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

'the supposed conduct of the family or relations of a testator, taking the same precautions in his absence as if he were a lunatic; his election, in his absence, to some high and responsible office; the conduct of a physician who permitted a will to be executed by a sick testator; the conduct of a deceased captain on a question of seaworthiness, who, after examining every part of the vessel, embarked in it with his family; all these, when deliberately considered, are, with reference to the matter in issue in each case, mere instances of hearsay evidence, mere statements, not on oath, but implied in or vouched by the actual conduct of persons by whose acts the litigant parties are not to be bound.'<sup>138</sup>

The authority of *Wright v Doe d Tatham*<sup>139</sup> is, however, weakened by a number of considerations. The case was in its day a cause celebre, and this may have had some influence on the views expressed by the Court. This seems particularly likely when it is remembered that evidence which was admitted as tending to show that Marsden lacked testamentary capacity (his treatment by his servants and the taunts thrown at him etc) was just as much implied hearsay as the three letters which were rejected. The letters were, in any event, of very limited probative value in relation to the issue before the Court, and this may constitute the true explanation for their rejection.

In *Holloway v McFeeters*<sup>140</sup> Dixon CJ apparently adopted the view that the hearsay rule did not extend to implied assertions arising from conduct. The plaintiff's husband had been struck and killed by a motor vehicle. To establish a claim for damages against the nominal defendant the plaintiff had to prove negligence on the part of the driver of the vehicle. The flight of the driver was not admissible as an admission by conduct since the driver was not the defendant. In the High Court the majority took the view that the legislation establishing the nominal defendant had the effect of rendering the evidence admissible. Dixon CJ disagreed with this view, but nonetheless held that the fact of flight could be taken into account as part of the material tending to suggest negligence. His Honour stated that it could be considered as one of the circumstances of the deceased's death to be taken into account in reaching a conclusion as to the manner of its occurrence.

Implied oral hearsay was held to have been properly received in *R v Hissey*.<sup>141</sup> The accused was convicted of the murder of a woman with whom he had been living in a flat. The woman, whose body was found

138 Ibid 388; 516.

139 Supra n 137.

140 (1956) 94 CLR 470.

141 (1973) 6 SASR 280.

in the flat, had died from the effects of a blow. The accused denied he had been present in the flat at a time when the blow might have been inflicted. The Supreme Court of South Australia held that the trial judge had properly admitted evidence of neighbours that they had heard voices and the sound of a quarrel including a voice identified by one witness as that of the accused, shouting 'Get out! Get out!'. The relevance of these words was as establishing the presence of the accused at the relevant time, and they did so by being treated as the equivalent of words to the effect that 'I am a person with the right to order others out'.

The application of the hearsay rule to implied assertions was considered by Mahoney JA in *Jones v Sutherland Shire Council*.<sup>142</sup> The question before the New South Wales Court of Appeal was whether the plaintiff's predecessor in title had obtained permission to use land in a certain way from the defendant council prior to a particular date. The trial Judge held that a statement in a letter written by the predecessor after the relevant date requesting permission to use the land in the desired way could be used as evidence that permission had not been given prior to that date. The Court of Appeal affirmed the trial Judge's ruling. The majority rested their decision on other grounds. Mahoney JA, however, held that the statement contained in the letter did not infringe the hearsay rule. His Honour stated that the hearsay rule applies to exclude implied assertions only where they are 'seen to be a functional equivalent of the kind of expressed statement to which ordinarily the hearsay rule applies'.<sup>143</sup> The precise meaning of this sentence is unclear, but it would seem to have the effect of excluding implied hearsay only in cases such as *Teper v R*<sup>144</sup> where the references to 'your place' and 'you' were a precise equivalent of 'Mr Teper'.

Implied hearsay has been held admissible in Canada. In *R v Wysochan*<sup>145</sup> the accused was convicted of murder. The victim had been shot, and the issue at the trial was whether the offence had been committed by the accused or by the victim's husband. The Court of Appeal for Saskatchewan held testimony of a bystander that as the wife lay wounded she held out her hand to her husband and spoke to him affectionately was admissible as tending to show that the accused, not the husband, had shot her.<sup>146</sup>

It would seem then that the balance of English and Commonwealth authority favours the view that the hearsay rule is limited in its application to assertions and conduct which were intended by the declarant to convey information. This is the view adopted in the current edition of *Cross on Evidence*<sup>147</sup> and is supported by the majority of the more recent cases, including *Ratten v R*,<sup>148</sup> *Woodhouse v Hall*,<sup>149</sup> *R v Hissey*<sup>150</sup> and *Jones*

142 [1979] 2 NSWLR 206.

143 Ibid 230.

144 Supra n 134.

145 (1930) 54 CCC 172.

146 See also *Gilbert v R (No 2)* (1907) 12 CCC 127; *R v Wied* [1950] 1 DLR 143.

147 See Byrne and Heydon, supra n 2 at 461 and 473. The solution adopted in *Cross* to the problem of implied assertions has varied from edition to edition, see Weinberg, supra n 2 at 288-290, and note *Cross on Evidence* (5th Eng edn 1979) 472-473.

148 Supra n 53.

149 Supra n 136.

150 Supra n 141.



v *Sutherland Shire Council*.<sup>151</sup> As a decision of the Privy Council holding admissible evidence which was clearly implied hearsay, *Ratten's* case stands as particularly strong sub-silentio authority in favour of admissibility.

In America, however, the courts have generally held implied assertions to constitute hearsay. In *Thompson v Manhattan Railway Co*,<sup>152</sup> for example, the issue was whether the plaintiff had actually suffered an injury to the spine as she claimed. The Court rejected evidence that her physician treated her for spinal injuries, stating that this was the equivalent of a declaration by the physician that she had suffered such injuries. Similarly in *People v Bush*<sup>153</sup> it was held to be inadmissible hearsay to attempt to prove that a prosecution witness did not have venereal disease by reference to the fact that she was placed in a VD free ward after she had had a Wasserman's test for the detection of syphilis.<sup>154</sup> The cases are not uniform, however, and on one occasion the American courts admit what clearly amounts to implied hearsay. In *State v Galvan*,<sup>155</sup> for example, the accused was convicted of murder, the victim having been bound before being beaten and stabbed to death. The accused's young daughter was with him on the night of the killing. The Supreme Court of Iowa held that the trial Judge had properly received evidence of the conduct of the child two days after the killing in binding her hands and beating her chest in such a way as to mimic the killing of a bound victim.<sup>156</sup>

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

In summation then, two of the four testimonial dangers, ie erroneous memory and faulty perception on the part of the declarant, are present in cases of implied hearsay to precisely the same extent as in cases of express hearsay. One of the dangers, insincerity, is hardly present at all,

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151 Supra n 142.

152 42 NY (Supp) 896 (1896).

153 133 NE 201 (1921).

154 See also *In re Hine* 37 Atl 384 (1897); *In re Loucks Estate* 117 P 673 (1911); *Norris v Detroit United Railway* 151 NW 747 (1915); *Powell v State* 227 SW 188 (1921); *McCurdy v Flibotte* 139 Atl 367 (1927); *Daly v Publix Cars* 259 NW 163 (1935); *Phoenix Refining Co v Walker* 108 SW 2d 323 (1937); *Griffith v Thrall* 29 NE 2d 345 (1940).

155 297 NW 2d 344 (1980). See also *Meserve v Folsom* 20 Atl 926 (1890).

156 The Court in fact rested its decision on the *res gestae* doctrine which was clearly wrong.

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

In the case of assertions implicit in conduct, it is sometimes argued that the fact of the conduct demonstrates reliance upon the matter to be inferred, and that this reliance gives the assertion increased validity.<sup>157</sup> The willingness of the captain to put to sea with his family gives the assertion to be inferred from his conduct greater reliability than a mere statement that he believed the vessel to be sea worthy. This line of reasoning is only valid, however, in cases where the conduct was of significance to the declarant. The acts of patrons of a hotel in leaving their beer undrunk, for example, would seem to confer no particular reliability upon the assertion to be inferred from their conduct.

If arguments of principle demonstrate that the hearsay rule should apply to implied assertions, why then does the balance of authority in England, Australia and Canada favour the conclusion that the hearsay rule does not extend to implied assertions? The most likely answer is that this is one response to the formalism and rigidity of the rule itself. If evidence is once classified as hearsay and does not fall within a recognised exception, then in England and Australia it will be rejected. To classify implied assertions as hearsay would be to keep out much valuable evidence, and therefore the courts take the view that the exclusion rule does not extend to them.<sup>158</sup> Such an approach is unsatisfactory. Just as the rigidity of the hearsay rule keeps out much reliable evidence in the form of express assertions, a blanket rule that implied assertions are not hearsay may let in much evidence that is unreliable and ought not to be received.

Since the status of implied assertions is uncertain, it is submitted that in this context there is scope for flexibility. It is submitted that implied assertions should be regarded as falling within the scope of the hearsay rule, but should be received when the court determines that, in all the circumstances of the case, the statement is of sufficient reliability to justify its admission.

## 5. CONCLUSION

The distinction between hearsay and original evidence is not one which should be regarded as turning on logic alone. At many points on the frequently difficult borderline between hearsay and original evidence logic may not provide an answer, and considerations relating to the function and purposes of the rule should play a part. A failure adequately to appreciate this point has in particular characterised the decisions of the English courts, and is exemplified most clearly in *Myers v Director of Public Prosecutions*.<sup>159</sup> A purely formalistic approach leads frequently to unsatisfactory and incorrect results. Thus it is submitted that in *Myers'* case the evidence should have been admitted under an exception to the hearsay rule, in *Ratten v R*<sup>160</sup> it should have been classified as hearsay

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157 Note Finman, *supra* n 2 at 691-693.

158 Perhaps more surprising is the fact that proposals for reform frequently deal with implied hearsay by simply classifying all implied insertions as original evidence. See, for example, the United States' *Federal Rules of Evidence*, rule 801; Law Reform Commission of New South Wales, *supra* n 1 at 71; Australian Law Reform Commission, *supra* n 1, Draft Statute s 55.

159 *Supra* n 16.

160 *Supra* n 53.

but received under the *res gestae* exception and in *R v Blastland*<sup>161</sup> it should have been admitted as original evidence.

It is also submitted that the House of Lords in *Myers'* case was incorrect in adopting the view that there should be no further judicial modification of the hearsay rule or its exceptions. Clearly major reform of the rule in all jurisdictions is for the legislature and not the courts. There is, however, no reason why legislative reform and cautious judicial modification and development should not proceed alongside one another. It is submitted that the approach taken by the Supreme Court of Canada and by some American and Australian courts is to be preferred to that adopted by the English courts.

Where the status of evidence as hearsay or original or as fitting within an exception or not is unclear, considerations of the probative value of evidence of the type under consideration and the functions which cross-examination may be able to serve should play a significant role. Thus in cases where the declarant or declarants are witnesses and may therefore be cross-examined, it is submitted that the evidence should be classified as original. Likewise statements the relevance of which derives from falsity, declarations evidencing mental state and third party confessions and flight should all be admissible. In cases involving hearsay by conduct and negative hearsay, where the defects and deficiencies of the evidence exist in the same way and to the same extent as with other hearsay, the evidence should, unless falling within an established exception, be inadmissible. The expression implied assertion covers many diverse types of evidence in respect of which no simple solution is appropriate. Implied assertions should, it is submitted, be regarded as falling within the scope of the hearsay rule but should be received when the court determines that the evidence is of sufficient reliability to justify admission.

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161 *Supra* n 126.