IMPLIED ASSERTIONS AND THE SCOPE OF THE HEARSAY RULE

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[*The purpose of this article is, in the author's own words, 'to focus on one particular aspect of the scope of the hearsay rule': the problem of 'implied assertions' and whether they fall foul of the rule. To this end, the author examines all the relevant authorities under six headings. He then treats of the various academic attempts at a solution to the problem. Finally, the author looks to reform of the law in particular in the light of certain of the provisions of the Civil Evidence Act 1968 (U.K.).*]

I INTRODUCTION

To anyone familiar with the Anglo-American law of evidence, and in particular the hearsay rule, it will come as no surprise to see yet another attempt to re-define and outline the scope of that rule. Of course, there is little doubt that ultimately Australian jurisdictions will substantially modify, if not abolish the rule in its present form. The recent developments in England, and in particular the Civil Evidence Act 1968,[1] plus the Eleventh Report of the Criminal Law Revision Committee[2] have been noted, and are being studied by various Law Reform Bodies in Australia.[3] However it would seem desirable that before substantial modification of the hearsay rule is contemplated, some further analysis of the scope and rationale of the rule be attempted.[4]

Surprising as it may seem, comparatively little theoretical study has been undertaken in Australia of a rule which has played such a dominant role in the development of our adjectival law.[5] Most of the in-depth

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[1] Based on the Thirteenth Report of the Law Reform Committee: Cmnd 2969.

[2] Cmnd 4991. At the date of completion of this paper a draft bill implementing most of the recommendations of the Report had been prepared but not yet enacted.

[3] See Harding, 'Modification of the Hearsay Rule' (1971) 45 *Australian Law Journal* 531. It is understood that the New South Wales Law Reform Commission is to issue a working paper on the Hearsay Rule in September 1973.

[4] The Report of the Sub-committee of the Chief Justice's Law Reform Committee dated 2 June 1969 recognized the need for such analysis before wide ranging reforms of the hearsay rule are implemented in Victoria.

[5] Apart from the article cited above, the only recent theoretical treatment of the hearsay rule to have been published in an Australian Law Review is Cross, 'The Periphery of Hearsay' (1969) 7 *M.U.L.R.* 1.

research in this area appears to have been done in the United States,[6] where the problem is complicated somewhat by Constitutional questions,[7] which of course have no direct relevance to the Anglo-Australian position.

It is the purpose of this article to focus on one particular aspect of the scope of the hearsay rule, the problem of so called 'implied assertions'. Traditional statements of the rule against hearsay all have common elements, but some are drafted in a wider form than others. For example, Phipson[8] in his seventh and subsequent editions stated the rule in this manner:

> Oral or written statements made by persons who are not parties and who are not called as witnesses are inadmissible to prove the truth of the matters stated.

Cross[9] however states the rule as follows:

> Express or implied assertions of persons, other than the witness who is testifying, and assertions in documents produced to the court when no witness is testifying, are inadmissible as evidence of the truth of that which was asserted.

All formulations of the hearsay rule would accept that the purpose for which the 'statement' or 'assertion' is tendered in evidence must be 'as evidence of the truth of that which was asserted' if the hearsay rule is to come into play. The main substantive controversy about the scope of the hearsay rule revolves around the earlier part of the formulation, namely whether statements or conduct, not primarily intended to be assertive, infringe the hearsay rule if related to the court by someone who overheard the statement, or witnessed the conduct in question.

We can initially reject any formulation of the hearsay rule as narrowly phrased as that of Phipson. His use of the word 'statement' apparently precludes the possibility of any type of non-verbal conduct coming within the scope of the hearsay rule. However it is manifestly clear, both on principle and on the authorities[10] that conduct intended by the actor to be assertive, such as sign language or gestures, falls within the hearsay

[6] Some of the leading United States articles in this area include Morgan, 'The Hearsay Rule' (1937) 12 *Washington Law Review* 1; Morgan, 'Hearsay and Non-Hearsay' (1935) 48 *Harvard Law Review* 1138; Morgan, 'Hearsay Dangers and the Application of the Hearsay Concept' (1948) 62 *Harvard Law Review* 177; McCormick, 'The Borderland of Hearsay' (1930) 39 *Yale Law Journal* 489; Falknor, 'Silence as Hearsay' (1940) 89 *University of Pennsylvania Law Review* 192; Falknor, 'The "Hearsay" Rule as a "See-Do" Rule: Evidence of Conduct' (1961) 33 *Rocky Mountain Law Review* 133; Maguire, 'The Hearsay System: Around and Through the Thicket' (1961) 14 *Vanderbilt Law Review* 741; Finman, 'Implied Assertions as Hearsay: Some Criticism of the Uniform Rules of Evidence' (1962) 14 *Stanford Law Review* 682.

[7] Reed, 'Evidentiary Problems and the Trial Judge' in Ball (ed.) *Evidence*, 56.

[8] *Phipson on Evidence* (11th ed. 1970) 269.

[9] Cross and Wilkins, *An Outline of the Law of Evidence* (3rd ed. 1971) 96.

[10] See *Chandra Sekera v. R.* [1937] A.C. 220 and *U.S. v. Ross* (1963) 321 F. (2d) 61.

doctrine. Whichever rationale or combination of justifications we use to explain the existence of the hearsay rule, it is clear that if a statement intended by its maker to be assertive may be hearsay, there is no logical basis to distinguish an assertion intentionally transmitted by means of conduct.[11]

Clearly then we should speak of 'assertions' rather than 'statements' when we discuss the scope of the hearsay rule, as this allows for the inclusion of assertive conduct, that is, conduct intended by the actor to communicate ideas or information. The question then arises whether *only* assertive statements and conduct can come within the ambit of the hearsay rule. This question has not received anything like the attention due to it in this country. Perhaps the explanation for this lack of attention lies in the fact that the matter is deemed to be of 'academic' interest only, and of no practical significance. A clear illustration of this attitude can be found in New Zealand *Report of the Torts and General Law Reform Committee* (1967).[12] Referring to the controversary concerning implied assertions, the Committee stated:

> We prefer to avoid making a recommendation to resolve this dispute, which is of little practical importance, and to avoid defining what constitutes hearsay evidence.[13]

Even academic writers who have considered this question at some length sometimes espouse similar sentiments.[14] It is suggested, however, that the question of implied assertions is of considerable practical importance when the issue of whether to modify the hearsay rule arises, as it has at the present moment in Australian jurisdictions. Furthermore, even if the question were 'only of academic interest', surely the soundest method any Law Reform Body considering the hearsay rule could adopt would be to attempt to study and define the scope of that rule prior to altering it. From the conceptual point of view it is surely important to analyse whether, for example, evidence of non-assertive conduct has been admitted in a given case because it does not fall within the scope of the hearsay rule, or as an exception to that rule. Too often the expression 'of academic interest only' has been a substitute for reasoned logical analysis.

II BACKGROUND

Certainly the first, and probably the only decision in England or Australia to consider at length the principles involved in classifying implied assertions as hearsay or non-hearsay was the celebrated case of *Wright v.*

[11] *Cross on Evidence* (3rd ed. 1967) 380.
[12] New Zealand *Report of the Torts and General Law Reform Committee*, presented to the Minister of Justice in July 1967, and reprinted February 1970.
[13] *Ibid.* 3.
[14] Cross, *op. cit.* 386.
[15] (1837) 7 Ad. & E. 313; 112 E.R. 488. The House of Lords judgments are reported in (1838) 5 Cl. & Fin. 673; 7 E.R. 559.

Doe d. Tatham.[15] The facts of this classic case are too well known to warrant more than a cursory restatement. The case involved an action by Admiral Tatham, as heir-at-law, to recover certain manors from Wright, a steward, who claimed them as devisee of John Marsden. The issue was whether Marsden had testamentary capacity. Items adduced to prove incompetency included testimony

> that Marsden was treated as a child by his own menial servants; that, in his youth, he was called, in the village where he lived, 'Silly Jack' and 'Silly Marsden' . . .; 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 . . .[16]

This evidence was received without objection. However, with regard to evidence adduced to prove competency, the question arose as to whether three letters addressed to Marsden, and written long before the period with which the court was concerned in determining Marsden's testamentary capacity, were admissible, or constituted hearsay. None of the letters expressly stated that the writer believed that Marsden had testamentary capacity, or even that they believed him to be 'normal', but all of them were written in such a manner as to permit the inference that the writers believed they were dealing with a person of reasonable understanding. The writers of the respective letters had died long before the trial.

It is the judgment of Parke B. in the Exchequer Chamber which bears most clearly on the matter at hand. At one point in his judgment he stated:

> But the question is, whether the contents of those letters are evidence of the fact to be proved upon this issue—that is, the actual existence of the qualities which the testator is, in those letters, by implication, stated to possess: and those letters may be considered in this respect to be on the same footing as if they had contained a direct and positive statement that he was competent. For this purpose they are mere hearsay evidence, statements of the writers, not on oath, of the truth of the matter in question, with this addition, that they have acted upon the statements on the faith of their being true, by their sending the letters to the testator.[17]

Parke B. went on to say that the fact that they had acted by actually sending letters did not render the implied assertions of the writers of the respective letters admissible—they were hearsay and thus excluded.[18] Careful analysis of most of the statements of law delivered by other Judges in the Exchequer Chamber and in the House of Lords clearly illustrates that *Wright v. Doe d. Tatham*[19] is at least authority for the view that statements not intended to be assertive, but from which inferences as to the belief of the maker of the statement can be drawn, come

[16] (1837) 7 Ad. & E. 313, 316; 112 E.R. 488, 490.
[17] (1837) 7 Ad. & E. 313, 385-6; 112 E.R. 488, 515.
[18] *Ibid.*
[19] (1837) 7 Ad. & E. 313; 112 E.R. 488.

within the scope of the hearsay rule, at least in so far as the reason for putting the statement into evidence is to support the truth of that which is impliedly asserted in the statement.

Phipson formerly maintained that the evidence in this case was rejected not because it was hearsay, but because it infringed the rule relating to opinion evidence.[20] Clearly Baron Parke did not take this view. Consider the famous *dicta* in which he elaborated his views on the question of implied assertions and the scope of the hearsay rule. He cited as some examples of inadmissible hearsay evidence the following situations:

> (1) The fact that payment had been made of a sum exactly equivalent to the amount wagered between two parties, as evidence that the event on which the wager was made had taken place.
>
> (2) The payment by other underwriters on the same policy to the plaintiff as evidence to prove that the subject insured had been lost.
>
> (3) The conduct of the family or relations of a testator in taking the same precautions as if he were a lunatic.
>
> (4) The conduct of a physician in permitting a will to be executed by a sick testator.
>
> (5) 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.

Baron Parke said of these situations:

> 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.[21]

In other words Parke B. expressed the view that not only could non-assertive statements constitute hearsay, but so also could non-assertive conduct! Only Parke B. among the Judges in this case dealt specifically with the question of non-assertive conduct as distinct from non-assertive statements.

Parke B. did not expressly set out his reasons for extending the ambit of the hearsay rule to implied assertions. Clearly his understanding of the rationale of the hearsay rule was somewhat deficient in that he saw it mainly as a rule to remedy the defect of testimony not subjected to judicial oath.[22] Modern rationalizations of the development of the hearsay doctrine tend to focus on the lack of opportunity to cross-examine, or a combination of several factors.[23] The main reason for requiring evidence to be given on oath can only be described as tending to encourage veracity

[20] See Baker, *The Hearsay Rule* (1950) 4-6 for a detailed discussion of this aspect of the case.
[21] (1837) 7 Ad. & E. 313, 388; 112 E.R. 488, 516.
[22] (1837) 7 Ad. & E. 313, 384; 112 E.R. 488, 515.
[23] *Wigmore on Evidence* (3rd ed. 1940) Paras. 1362-4; Cross, *op. cit.* 393-4; Taylor, *A Treatise on the Law of Evidence* (11th ed. 1920) 392.

on the part of witnesses. Yet the danger of non-veracity in the case of implied assertions is by definition extremely limited. One is scarcely likely to tell untruths if one does not intend specifically to communicate with another person. Given Parke B.'s acceptance of the main rationale of the hearsay rule as being the lack of judicial oath, it appears to have been illogical of him to extend the scope of the hearsay rule to implied assertions.

This does not mean that his decision to extend the hearsay rule in this manner was incorrect. It may well be that given more carefully reasoned rationalizations for the development and continued existence of the hearsay rule, it is logically necessary that this rule be extended to cover implied assertions. Parke B. may have been correct to extend the rule in this manner, though not for the reasons that he articulated. It seems that his analysis, somewhat superficially, equated two quite distinct situations. It is not accurate to say, as he did, that implied assertions contained in the letters written to the testator 'may be considered in this respect to be on the same footing as if they had contained a direct and positive statement that he was competent'.[24]

Implied assertions may present quite different dangers from express assertions in respect of reception of evidence. The question which really has to be decided is whether the differences in the dangers inherent in implied assertions, still warrant them coming within the ambit of the hearsay rule. To deny the very existence of these different kinds of dangers is a somewhat unreal exercise.

III IMPLIED ASSERTIONS AND THE AUTHORITIES

This branch of the law is certainly one in which decided cases are singularly unhelpful. The question whether implied assertions fall within the scope of the hearsay rule has rarely been discussed at any length even in those cases where the possibility that this might be so has been recognized. The authorities themselves conflict though a recent trend is perhaps discernible in the United States. As for England and Australia, there are so few cases where this question has even been recognized as a possible issue, that one cannot state with any degree of confidence what a court would decide in a fully argued case.

The decided cases which do to some extent consider the question of implied assertions, can for the sake of convenience be considered under six reasonably distinct headings. Each represents a group of cases collected together in which the problem of whether implied assertions (whether non-assertive statements or non-assertive conduct) constitute hearsay has been considered. In almost all cases, a simple decision one way or the other was made, and no analysis of principle was attempted. They are

[24] (1837) 7 Ad. & E. 313, 385-6; 112 E.R. 488, 515.

illuminating however, in so far as their inconsistent results point out the need for some more closely reasoned examination of this entire problem.

(a) THE ILLEGAL GAMBLING CASES

The classic situation which has arisen in many cases in the United States and Australia, involves a police raid upon premises suspected of being used for the purpose of illegal gambling on racing results. During the raid the phone rings and is answered by a policeman who overhears something to the effect of This is Al, Charlie, the Doc. wants a $10.00 number hitch on the eighth race at Saratoga'.

The defendant invariably objects to the admission of this damning testimony on the grounds that what was said over the phone constitutes hearsay. The question whether evidence of what was said on the phone is admissible is often crucial to the possibility of obtaining a conviction.

This question has arisen in a number of cases in the United States. Unfortunately the manner in which it has been dealt with does not reveal a consistent approach. Usually the hearsay objection has failed and the evidence has been admitted, but the cases reveal two broad and inconsistent reasons for taking this course.

In *People v. Radley*[25] it was held that evidence as to such conversations could be received,

> not for the purpose of establishing the truth of what was said over the telephone, but for the purpose of establishing that the room was being occupied for placing bets on horse races.[26]

This rather neat statement over-simplifies many complex issues. Clearly the court admitted the statements made over the phone as original evidence, that is, not within the scope of the hearsay rule. The statements were admitted as circumstantial evidence, not as evidence of the truth of that which was asserted.

The case of *State v. Tolisano*[27] reveals a similar conceptual approach to this question. The calls were said to have been admitted as 'verbal acts to show that the defendant was engaged in the activities described in the information', and 'not to establish the truth of the facts related in the telephone calls'.[28]

The problem with this approach is that the court fails to develop its inquiry into the reason for the attempt by the prosecution to introduce this evidence beyond very superficial analysis. It is said that the phone conversation is not admitted as evidence of the truth of that which was asserted. On its face this is true, but only because the court has failed to perceive that the relevant assertion in those cases is an 'implied assertion'.

[25] (1945) 157 P. (2d) 426.
[26] *Ibid.* 427.
[27] (1949) 70 A. (2d) 118.
[28] *Ibid.* 119.

The only probative value such a telephone conversation has, is to show the court that the party making the call believed he was speaking to a betting house. When we multiply this belief by twenty or thirty calls we have a very strong case against the defendant. We infer from the statement 'Hello Al, I'd like to put $10 on X horse', the assertion that the maker of that statement believes he is talking to a person who will take bets on horse racing. Clearly if the telephone caller had rung the police directly at police headquarters and said, 'I believe this address is an illegal gaming house', evidence of that express assertion by a telephone caller who is not called as a witness would be hearsay, being an express assertion. In essence when evidence of the phone calls intercepted at the suspected premises is tendered, it is tendered to prove exactly the same thing as an express assertion of this type, that is, the belief by the maker of the call that the suspected premises are being used for illegal gambling.

In the case of *State v. Di Vincenti,*[29] the fact that the probative value of such telephone conversations lay in an implied assertion was recognized. Of course this did not mean that the phone conversation had to be classified as hearsay, let alone excluded. Those are two distinct questions. It may be that there are strong reasons for not extending the hearsay rule to implied assertions. It may be that even if the hearsay rule is extended to implied assertions, the evidence of those phone conversations ought to be admitted as an exception to the hearsay rule. But surely it should be recognized that the evidence of what is said by the telephone callers in cases of this type only has probative value in so far as we accept the implied assertion by the maker of the statement that he believes he is dealing with a betting establishment, as likely to be true.

In *Di Vincenti's* case[29] the court in fact dealt with this problem on the basis that the evidence of the telephone conversations constituted hearsay. Implicit in the judgment is a recognition of the purpose for which the evidence was tendered, though no clear analysis of the nature of non-assertive statements emerged. However the evidence was admitted under an exception to the hearsay rule as part of the *res gestae.*

The Australasian cases fall into the same pattern. Invariably evidence of the telephone conversations has been admitted, but sometimes without any real indication as to why this should be so. In *Davidson v. Quirke,*[30] Salmond J. stated:

> notwithstanding the general rule which excludes evidence of statements, the contents of those telephone messages as received and testified to by the police officers are legally admissible in evidence. This is an illustration of the principle that, notwithstanding the rule against hearsay, where the purpose or meaning of an act done is relevant, evidence of contemporaneous

[29] (1957) 93 So. (2d) 670.
[30] [1923] N.Z.L.R. 552.

> declarations accompanying and explaining the act is admissible in proof of such purpose or meaning.[31]

It is not clear whether Salmond J. was saying that this evidence was admissible because it was outside the scope of the hearsay rule, or as an exception to that rule. The use of the word 'notwithstanding' seems to suggest the latter, though the case is certainly inconclusive on this point. The direct question of whether or not implied assertions fall within the hearsay rule is not dealt with, though if the latter view is adopted, by implication the case is authority for the view that non-assertive statements fall within the hearsay rule.

In *McGregor v. Stokes,*[32] Herring C.J. referred to Wigmore's distinction between the testimonial and non-testimonial use of human utterances. He considered the judgment of Salmond J. in *Davidson v. Quirke,*[33] and summed up the principle of that case as showing that utterances accompanying and explaining acts are 'verbal' acts, admitted entirely outside the scope of the hearsay rule as original evidence. This seems to be a misreading of Salmond J's judgment.

The judgment of Herring C.J. is also deficient in failing to recognize that where a person accompanies his act of telephoning with the statement 'I want $10 both ways on X Horse', the evidence is tendered not because it explains the act of calling, though it does that incidentally, but because of an implied assertion on the part of the caller that he believes he is talking to a person who takes bets on horses. Without that implied assertion the fact that the statement was made has no probative value.

In *Marshall v. Watt,*[34] an appeal from a judgment of Gibson J., extracts from the judgment of Gibson J. are set out. This judgment represents the only clear recognition of the complex issues relating to implied assertions involved in cases of this type from an Australian judge. Gibson J. felt constrained to reject the reasoning of Herring C.J. in *McGregor v. Stokes.*[35] He held that evidence of what was said by the telephone callers constituted hearsay. 'The truth of their statements that they wished to bet was a vital matter to the prosecution'.[36]

Even if they did not expressly assert their belief that they were dealing with a gambling establishment, this was an inference which could be drawn from their statements. There were questions one would have liked to hear answered under cross-examination by the makers of these 'implied assertions', for example, how did they come to believe that the establishment they were telephoning conducted betting on horse races? Did they have any motive to deliberately try to convey the impression that this was

[31] *Ibid.* 556.
[32] [1952] V.L.R. 347.
[33] [1923] N.Z.L.R. 552.
[34] [1953] Tas. S.R. 1.
[35] [1952] V.L.R. 347.
[36] [1953] Tas. S.R. 1, 5.

so, knowing that the police were there? Was the whole raid and series of calls merely a police trap? Gibson J. went even further—he expressed the view that not only were non-assertive statements of this type within the scope of the hearsay rule, but so was non-assertive conduct![37]

On appeal, Green A-C.J. and Crisp J. reversed Gibson J. after remarking on the desirability of retaining as much uniformity of law in common law jurisdictions as possible. It was held that the conversations were admissible as original evidence for similar reasons to those expressed by Herring C.J.

It seems, therefore, that while the cases are not at all consistent on matters of principle in this area, evidence of telephone conversations of this type has always been admitted in the United States and Australia. This does not mean that the reason such conversations were admitted is of 'academic interest only'. It is submitted that if the courts had directed their attention to the fact that in essence they were dealing with implied assertions, or rather non-assertive statements, they could then have rationally considered whether to extend the hearsay rule to such statements or not, and whether or not to admit such statements as exceptions to the hearsay rule. In failing to recognize the 'implied assertions' element of these conversations the courts have adopted a distorted analysis which involves labelling such statements as original evidence without considering whether the hearsay rule should be extended to them.

(b) THE FLIGHT CASES

The problem here raises the fundamental question of whether non-assertive conduct can fall within the scope of the hearsay rule. Specifically can the fact that X has been observed to run away after the occurrence of a crime be admitted as evidence to justify the inference that X committed the crime, when this fact is offered on behalf of another person accused of guilt? Clearly evidence of such flight when offered against the fleeing person himself may be used as an implied admission by conduct.

If the person who runs away does so with the express intention of casting suspicion on himself, and away from the accused, surely there can be no doubt that the fact of his flight comes within the hearsay rule (though it may be admissible under an exception to that rule). This is clearly conduct of an assertive nature, indistinguishable from signs, gestures, etc. However, the problem we are concerned with arises when the person who flees from the scene of a crime appears to have done so purely for the purpose of getting away. Clearly his conduct is not equivalent to an express assertion of his guilt, but equally clearly an inference of his guilt from his conduct would not be unreasonable. Usually the hearsay objection is not raised in cases of this type. Where the fact that flight may constitute an implied assertion of guilt has been recognized, once again the cases have failed to adequately discuss the principles involved.

[37] *Ibid.* 7.

The United States approach is seen in *Owensby v. State*.[38] Evidence of the flight of a third party was held to be hearsay when adduced to show that the accused was unlikely to be guilty of the offence charged. Clopton J. stated:

> It is also said that hearsay is not confined, in the legal sense, to what is *said*; that acts or conduct, as well as words, may be hearsay.[39]

The reason for describing this non-assertive conduct as hearsay appears to have been the fact that such conduct was equivocal and unreliable. It was desirable to cross-examine the person who fled as to why he did so, and in the absence of such cross-examination, the unprobed implied assertion of his guilt ought not be admitted.

The cases of *People v. Mendez*[40] and *State v. Menilla*[41] are illustrations of the same approach, once again evidence of flight being excluded as hearsay. No discussion of why the hearsay rule ought to be extended to cover such cases appears in the judgments.

The point has not directly arisen in Australia apart from the interesting case of *Holloway v. McFeeters*.[42] In that case the plaintiff sued the Nominal Defendant for damages resulting from the death of her husband. It was necessary for the plaintiff to prove that the death of her husband was caused wholly or in part by negligence on the part of the driver of an unidentified motor vehicle. The majority of the Court held that it was reasonably open to the jury to find for the plaintiff. Dixon C.J. and Kitto J. dissented. They held that the flight of the driver of an unidentified vehicle from the scene of the collision, if an admission by conduct, was not admissible in evidence as such against a nominal defendant. The driver was not a party to the proceedings, and the Nominal Defendant was not being sued on his behalf.

As Kitto J. phrased it:

> Even if in all the circumstances, the disappearance of the motorist were fairly open to be interpreted as an admission by conduct that some carelessness of his had been wholly or partly the cause of the collision, it would not be permissible to treat it as such in this action. In an action against the motorist, an admission of negligence made by him *in any form* would be receivable as evidence against him; but in the present action no admission by the motorist can be receivable as such, for the motorist is not the defendant and an admission forms no part of the facts which constitute the plaintiff's title to recover against the motorist.[43]

Clearly, then, where the hearsay objection has been raised in 'flight' cases, it has generally been sustained, though the authorities are again

[38] (1887) 2 So. 764.
[39] *Ibid.* 765.
[40] (1924) 193 Cal. 39; 223 P. 65.
[41] (1916) 158 N.W. 645.
[42] (1956) 94 C.L.R. 470.
[43] *Ibid.* 487. My emphasis.

not generally well-reasoned. Non-assertive conduct has, at least in this sphere, been held to fall within the hearsay rule.

(c) THE MEDICAL TREATMENT CASES

The question here is whether the fact that a medical practitioner is observed to treat a patient in a particular manner is admissible evidence that the patient had a specific physical ailment at the time he was so treated. Clearly when a doctor treats a patient for a particular illness, his conduct in doing so is most unlikely to be assertive in nature. He does not, as a rule, treat the patient in this manner in order to communicate the fact that he believes the patient to have a specific malady, but rather to alleviate or cure that malady. But it may be that in a given case, the nature of the doctor's conduct is such that it might be inferred from that conduct that the patient suffered from a specific conditon. Does such conduct fall within the scope of the hearsay rule?

In three United States cases this question has been answered in the affirmative. The case of *Thompson v. Manhattan Railway Co.*[44] concerned an action for personal injuries whereby the plaintiff alleged that she had suffered spinal injuries as a result of a collision. The issue was whether the fact that the plaintiff had been treated for a spinal injury by a physician who was not called as a witness was admissible as evidence that she had such an injury. In holding this evidence inadmissible, it was stated:

> We think such proof was in the nature of hearsay. The treatment of the plaintiff for a particular disease was no more than a declaration of the physician that she was suffering from such a disease. As the declaration would not be competent, we think proof of the treatment was not competent.[45]

The case of *In re Louck's Estate*[46] is generally cited as authority for the proposition that the conduct of a doctor in placing a patient in a mortuary van after examining him constitutes hearsay evidence if tendered to prove that the patient was deceased at that time. The facts of this case do not support such a wide principle, and indeed the court appears not to have considered the question of non-assertive conduct and hearsay at all. The evidence excluded in this case was clearly excluded as opinion evidence.

The case of *People v. Bush*[47] is, however, a very clear decision in favour of extending the hearsay rule to non-assertive conduct. 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 V.D. free ward after she had had a Wasserman's test for the detection of

[44] (1896) 42 N.Y. (Sup.) 896.
[45] *Ibid.* 897.
[46] (1911) 160 Cal. 551; 117 P. 673.
[47] (1921) 133 N.E. 201.

syphilis. The fact that she was put in a non-V.D. ward was not intended by the person who ordered her put there to communicate anything about her condition to anyone. She was put there because that was the appropriate place for her condition. An argument that this was really a form of assertive conduct is specious because it confuses the prime motive for acting in a particular way with incidental inferences which may be drawn from such conduct.

(d) THE TREATMENT AS EVIDENCE OF RELATIONSHIP CASES

Does the hearsay rule extend to situations where assertions of love or hate can be inferred from affectionate or vindictive conduct? If X is heard telling Y that he hates her, evidence that he said this falls within the scope of the hearsay rule if tendered to prove that he did in fact hate Y.[48] What if X is seen to be physically mistreating Y, in a cruel and malicious manner? Of course such evidence is always admitted without objection on the issue of whether X hated Y. Technically speaking, does it come within the scope of the hearsay rule?

In fact the hearsay objection has been made several times in this type of situation. Usually it has arisen in the more specific context of whether a testator had testamentary capacity. For instance, in *Wright v. Doe d. Tatham*,[49] letters written to the testator which implied that the writers believed that they were dealing with a person of reasonable understanding were held to be hearsay.

The case of *In re Hine*[50] held that where the mental capacity of the testatrix was in issue, evidence that the boys on the street used to make fun of her was inadmissible as hearsay.

Also the case of *De Laveaga's Estate*[51] held that evidence of the manner in which a testatrix was treated by members of her family was not admissible as tending to show she lacked testamentary capacity.

As for the more general question of whether treatment as evidence of relationship falls within the hearsay rule, no case has ever held this to be so.[52] In *Lloyd v. Powell Duffryn Steam Coal Co.*[53] the House of Lords felt constrained to hold that a man's treatment of a woman, as though she would become his wife, was admissible original evidence outside the scope of the hearsay rule, when tendered to prove that a child born to the woman was fathered by him.

[48] Though evidence of such a statement might be admissible under an exception to the hearsay rule relating to statements concerning the maker's contemporaneous state of mind or emotion.

[49] (1837) 7 Ad. & E. 313; 112 E.R. 488.

[50] (1897) 37 A. 384.

[51] (1913) 133 P. 307.

[52] The recent case of *Ratten v. R.* [1971] 3 W.L.R. 930 is a continuation of this approach. The words overheard by the telephone operator were admitted as original evidence, although it is arguable that the only probative value of this evidence was an implied assertion made by the hysterical wife that she was in danger.

[53] [1914] A.C. 733.

Professor Cross is adamant that cases involving treatment as evidence of relationship do not fall within the scope of the hearsay rule. The matter is not dealt with at length. We are simply told that 'it may be said that deeds speak louder than words'.[54] Cross argues that if this sort of non-assertive conduct were hearsay, we would have to recognize numerous exceptions to the hearsay rule, an approach he does not favour, particularly since modern trends favour a narrowing of the scope of the hearsay rule.[55]

But elsewhere Cross has conceded that certain forms of non-assertive conduct might come within the scope of the hearsay rule.[56] Why distinguish treatment as evidence of relationship from other types of non-assertive conduct? If it is being argued that the 'treatment as evidence of relationship' line of cases is more reliable than other forms of non-assertive conduct, this certainly does not seem to be axiomatic in all cases. If, on the other hand, Cross is in effect saying that all non-assertive conduct is outside the scope of the hearsay rule (that is if he has changed his earlier views) then we would want to know why non-assertive conduct is more reliable than non-assertive statements. The explanation of 'deeds speak louder than words' is simply too shallow.

Once again it may be useful to state the obvious. To classify the 'treatment as evidence of relationship' cases as hearsay does not mean such evidence ought not to be admitted. It simply means that this evidence shares many features in common with more traditional forms of hearsay, and is analytically indistinguishable from them.

Unfortunately the hearsay rule has developed in such a way as to create the inflexible idea that labelling an item of evidence is the crucial factor. But labels are conceptual tools, no more than that. There is a great advantage in retaining and using the concept of hearsay to ensure that judges and therefore juries have their minds directed to the unreliable aspects of many forms of testimony which share the features of hearsay evidence. The fact than an item of proof is conceptually hearsay, visibly and forcibly raises to the surface any inherent dangers involved in that testimony. The term 'hearsay' could operate as a warning buzzer rather than a rigid safety fence.

If this more flexible idea of hearsay were to be adopted, the criticism of extending the hearsay rule to many areas of evidence to which it has not traditionally been applied would be rendered groundless. The current arbitrary and unsatisfactory distinctions drawn between express and implied assertions could be buried, once and for all.

[54] Cross and Wilkins, *op. cit.* 99.
[55] *Ibid.*
[56] Cross, 'The Scope of the Rule against Hearsay' (1956) 72 *Law Quarterly Review* 91, 95-6.

(e) THE 'SILENCE AS HEARSAY' CASES

The fifth category of cases which generally raises the issue of whether implied assertions fall within the scope of the hearsay rule, consists of a series of cases where the fact that no speech or conduct has occurred is tendered as evidence of the truth of an implied assertion. Failure to speak or act may be offered as the basis for an inference that, since one would have expected a positive response from the party who was silent had certain conditions existed, his silence is an implied assertion that those conditions did not exist.

For example, take a case where on an issue as to the quality of goods sold, the particular goods being part of a larger lot the remainder of which had been sold to other customers, the seller wishes to show that no complaints as to quality were received from the other customers. Clearly the probative value of such evidence depends on the court drawing an inference from the silence of the other customers that they believed their goods were of satisfactory quality.

Their silence is treated as an implied assertion that the quality of their goods was satisfactory. Had one such customer expressly stated that he believed his goods to be satisfactory, such an assertion would be hearsay if the maker of the statement was not called as a witness.

Yet the probative value of this customer's silence lies in making an inference about his belief from the fact that he remained silent, an inference whose content is identical to that of an express assertion to the same effect. In a sense the silence of the customer is more reliable than an express assertion, provided the silence was non-assertive. No real question as to the veracity of the customer arises. But there are many other dangers involved in taking the silence of the customer as an implied assertion. Defence counsel would wish to cross-examine the silent customer and ask him questions designed to discover whether in fact his silence represented satisfaction with the goods, how carefully he had examined the goods, when he had examined them and many other questions designed to test his perception and memory.

In many 'silence' cases the hearsay objection is not taken at all. In fact the hearsay aspect of this problem is recognized far less frequently even than in positive implied assertions. Where the question has arisen for discussion, once again the cases show no consistency either in principle or result. Courts in the United States have often held such evidence of silence to constitute hearsay. In *George W. Saunders Live Stock Commission v. Kincaid*[57] an action was brought by a buyer of hogs to recover for the seller's misrepresentation of soundness. Proposed testimony that there had been no complaint by the packing companies who purchased hogs from

[57] (1914) 168 S.W. 977.

the same shipment was rejected. However in *Schuler v. Union News Co.*[58] 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. Each approach has the support of a number of authorities in the United States.

The English case of *Manchester Brewery Co. Ltd v. Coombs*[59] dealt with the question whether evidence of lack of complaint by customers could be tendered to prove that beer supplied was satisfactory. Farwell J stated:

> Mr Carson objected to the question put to the defendant—'Have you received complaints from customers?' According to my recollection this question has always been allowed in actions of this nature . . .[60]

This case is authority for the proposition that silence does not fall within the scope of the hearsay rule, at least in so far as it relates to lack of complaints. On the other hand, in the case of *Fogg v. Oregon Short Line R.R.*[61] the plaintiff sought to prove that his knee had not been injured in an accident prior to that in question in the present case. In support of this proposition, the plaintiff's wife testified that he had made no complaint of any injury to his knee in the earlier accident. The plaintiff's silence was held to constitute hearsay, but was admitted under the *res gestae* as an exception to the hearsay rule (that is, that exception relating to declarations of present pain and suffering). Compare the case of *Cain v. George*[62] in which it was held that evidence of silence did not and could not come within the scope of the hearsay rule at all.

Overall in the silence cases it seems that evidence of negative implied assertions has been admitted more often than in cases of positive non-assertive conduct. This is probably due to the fact that the hearsay problem has passed unnoticed more frequently in the silence cases.[63] The consequence is of course ironic. There are so many extra variables involved in matters of *inaction* that the probative value of non-assertive *nonconduct* must be less than the probative value of non-assertive positive conduct. In neither, do questions of veracity arise since the conduct was not intended to be communicative. But in the inaction cases a broad spectrum of reasons may explain the lack of conduct, while at least positive conduct

[58] (1936) 4 N.E. (2d) 465.
[59] (1900) 82 L.T. 347.
[60] *Ibid.* 349.
[61] (1931) 1 P. (2d) 954.
[62] (1969) 411 F. (2d) 572. On the issue of whether a gas heater in a motel room was defective, absence of complaints from others who had occupied the room was admissible.
[63] See for example the case of *Bessela v. Stern* (1877) 2 C.P.D. 265, where the defendant's silence was held to constitute an admission by conduct and was admissible. No mention of whether this silence could constitute hearsay is to be found in the case, but as admissions are exceptions to the hearsay rule, such a view is implicit in the judgment.

permits the inference of an implied assertion more easily. In other words, evidence which is inherently less reliable is more likely to be admitted as the hearsay problem is easier to identify in positive conduct cases.

(f) THE IDENTITY CASES

There is a series of cases which do not fall easily into any of the categories thus far mentioned, yet bear heavily upon the question of implied assertions and the scope of the hearsay rule. Perhaps an accurate way of referring to them generally would be to call them 'identity' cases. The issue which arises here is whether the contemporaneous conduct or statement of a witness, which identified the defendant as the perpetrator of a particular act, though not intended at the time to communicate such information to anyone else, can be tendered in evidence as an implied assertion of the defendant's guilt.

Consider the facts of *Teper v. R.*[64] The appellant was charged with arson of his shop. His defence was an alibi. A policeman swore that some few minutes after the conflagration in the shop began he overheard an unknown woman in the crowd exclaim: 'Your place burning and you going away from the fire!'

The issue was whether this evidence constituted hearsay. The probative value of the woman's statement lay in the fact that it was equivalent to an assertion by her that she believed the accused to be present at the fire. Clearly she did not intend to communicate this fact to anyone, but equally clearly evidence of this type possessed many of the same hearsay dangers inherent in express assertions. The fact that she did not intend to communicate her belief that the appellant was present to anyone certainly meant that dangers relating to lack of veracity were slim. But the accuracy and perception of the woman's powers of observation should surely be a matter for cross-examination. The evidence was held to be hearsay and could not be saved as part of the *res gestae* because the requirement of contemporaneity was not sufficiently met.

In this connection, the hypothetical case of a person being heard to say 'Hello X' is often raised for discussion. Is this evidence that X was present in a particular place at a particular time if the maker of the statement is unavailable? Clearly there was no intent on the part of the maker of the statement to communicate the fact that X was present. People do not say 'Hello X' to deceive others as to X's whereabouts under normal circumstances. But equally clearly one would want to ask the maker of this statement many questions designed to test his powers of observation and perception.

In the light of two cases, *Teper's* case[65] and *Wright v. Doe d. Tatham*,[66] Professor Cross argues that the scope of the hearsay rule extends at least

[64] [1952] A.C. 480.
[65] *Ibid.*
[66] (1837) 7 Ad. & E. 313; 112 E.R. 488.

to non-assertive statements, though, he claims, not to non-assertive conduct. This is a tenuous distinction. What possible rationale can there be for treating 'Hello X' as hearsay, but not the non-assertive conduct of a soldier seen saluting another person as evidence that the person concerned was an officer? Soldiers do not normally salute to deceive other passers by, and saluting is not an act intended to communicate to others the fact that an officer is present. The same hearsay dangers relating to observation and perception which apply in the 'Hello X' situation apply in the salute example.

About the only consistent feature which this analysis of the authorities relating to implied assertions reveals is the complete absence on the part of the judges of any real attempt to rationalize and explain why they label some implied assertions as hearsay, and others not. The next question which arises is whether academic writers can claim any greater degree of success, if not in reconciling the authorities, at least in spelling out relevant and suitable criteria with which to shape future developments in this area.

IV ACADEMIC ATTEMPTS TO SOLVE THE PROBLEM — A HISTORY OF FAILURE

Virtually all academic attempts to solve the problem of 'implied assertions' can be classified as falling into one of four categories. The following is simply an attempt to sum up some of the approaches which have been taken to this problem together with a critical evaluation of their worth.

POSITED SOLUTION (1):

All implied assertions, be they non-assertive statements or non-assertive conduct are analytically speaking hearsay. Unless they fall within a recognized existing exception to the hearsay rule they ought *prima facie* to be excluded.[67]

This view represents an extreme solution. It is based on a particular evaluation of the reason for the existence of the hearsay rule, namely that the rule is designed to prevent the admission of evidence which cannot be tested on cross-examination, and which may be unreliable for one of several reasons that is, there may be a doubt as to the veracity of the evidence, as to the perception of the maker of the statement or doer of the conduct, as to his memory, or clarity of expression (the 'narration problem'). It accepts the fact that when one deals with implied assertions the veracity problem is not present in general for obvious reasons, but the other unreliability factors may be just as great if not greater in the case of implied assertions, as in the case of express assertions. Because these unreliability factors still exist the evidence can usefully be termed hearsay, in exactly the same manner as express assertions. The perception factor is

[67] See Baker, *op. cit.* 6 for a strong proponent of this view.

rated far more important than the veracity factor in assessing the admissibility of evidence, and therefore it is felt appropriate that the very same exceptions to the hearsay rule apply in the case of implied assertions if they are to become admissible.

Such an all-or-nothing approach is simplistic. While it recognizes that implied assertions contain many similar unreliability factors to express assertions, too little weight is given to the very real differences between them. Though the fact that implied assertions do not normally present a veracity problem does not mean that they are therefore inherently more reliable than express assertions (the dangers relating to perception *etc.* may be correspondingly greater in the case of implied assertions), it does mean that the existing exceptions to the hearsay rule may not be appropriate to ensure that reliable implied assertions in fact are rendered admissible. Besides, there has been a great deal of justifiable criticism of the existing exceptions to the hearsay rule, which often render inadmissible reliable express assertions. Why extend unsatisfactory criteria even further to attempt to solve a quite different problem?

POSITED SOLUTION (2):

All implied assertions, be they non-assertive statements or non-assertive conduct are analytically speaking hearsay. This does not however answer the question of whether they ought to be admitted in evidence or not. Existing exceptions to the hearsay rule, being geared to express assertions are not entirely appropriate, therefore new 'reliability factors' must be sought to render this type of hearsay admissible.

This view represents the traditional United States academic solution to the implied assertion problem. It accepts solution (1) in so far as there is a recognition that implied assertions, both conduct and statements, present many similar unreliability dangers (perception, narration and memory) to express assertions, though not veracity. On the other hand, it accepts that the dangers of unreliability involved in implied assertions are, if not fewer than express assertions at least different in some respects, and thereby warrant different treatment in searching for 'reliability factors' to override the inherent 'unreliability factors' built into any form of hearsay.

What sorts of 'reliability' factors have been suggested as criteria for determining whether implied assertions should be excluded or not? Professor Edmund Morgan, certainly one of the most eminent writers and scholars in the subject of Evidence considered this question at length.[68] He had no great difficulty in coming to the conclusion that implied assertions could profitably be analysed as a form of hearsay. He noted the differences between the dangers raised by express and implied assertions, and attempted to set out criteria relevant to the question of whether implied assertions ought to be admitted in any given case.

The criteria adopted by Morgan bear examination. He felt that implied assertions, though hearsay, ought to be admitted if the conduct of the actor in question was tendered as evidence of the actor's own belief, and that belief was in some way relevant. Morgan stressed that an actor was not likely to make innocent mistakes in the perception of his own behaviour or in his memory of it, thus rendering such non-assertive conduct reliable, and overcoming the non-reliability factor of perception. Veracity, of course, by definition did not arise.

An alternative method of rendering implied assertions admissible was also suggested by Morgan. If the matters to which the actor's conduct related were (a) within his knowledge and (b) the conduct was detrimental to the actor this would also render the non-assertive conduct sufficiently reliable to warrant its admission, though hearsay.[69]

Two years after suggesting these criteria of admissibility, Morgan came out with completely different reliability factors. The first thing that a court must do in determining whether this type of hearsay ought to be admitted, Morgan argued, was to see whether any of the existing exceptions to the hearsay rule relating to express assertions could render the implied assertion admissible. If not, the Court would generally ascertain

> whether the dangers of error in perception or memory which might be eliminated by cross examination are so substantial as to call for its exclusion. If not the evidence should be received, for by hypothesis, neither veracity nor narration is involved.[70]

Other writers have also attempted to provide criteria which might be useful in determining whether to admit implied assertions, which they accept as logically falling within the ambit of the hearsay rule. One such early attempt was that of McCormick.[71] His view was that the trial judge ought to exercise a discretion in cases of implied assertions, and admit them when there was a reasonable assurance of their trustworthiness. For McCormick such a guarantee of trustworthiness lay in the answer to the question of whether the conduct in question 'necessarily must be of significance' to the actor, that is, 'if the actor was sufficiently satisfied with his observation and recollection of the relevant event or condition to predicate action important to himself' upon his belief in the event, then there would be enough in the way of reliability factors to allow the evidence of his conduct in, though no cross-examination took place.[72]

[68] See Morgan, 'The Hearsay Rule' (1937) 12 *Washington Law Review* 1; Morgan, 'Hearsay and Non-Hearsay' (1935) 48 *Harvard Law Review* 1138; Morgan, 'Hearsay Dangers and the Application of the Hearsay Concept' (1948) 62 *Harvard Law Review* 177.

[69] Morgan, 'Hearsay and Non-Hearsay' (1935) 48 *Harvard Law Review* 1138, 1158-60.

[70] Morgan, 'The Hearsay Rule' (1937) 12 *Washington Law Review* 1, 10.

[71] McCormick, 'The Borderland of Hearsay' (1930) 39 *Yale Law Journal* 489.

[72] *Ibid.* 504. As McCormick put it, implied assertions ought to be admitted 'whenever the trial judge in his discretion finds that the action so vouched the belief as to give reasonable assurance of trustworthiness'.

This approach commended itself to Falknor in an article he wrote in 1940,[73] though by 1954 he had decided that implied assertions ought not to be classified as hearsay at all.[74]

Finman[75] also accepted that implied assertions logically fell within the scope of the hearsay rule. He recognized that some implied assertions are reliable and therefore ought to be admitted notwithstanding the fact that they are hearsay. He rightly criticized the approach adopted in the Uniform Rules of Evidence, whereby implied assertions are not hearsay, but section 45 allows a judge to exclude any evidence in his discretion if the hearsay aspects of it are too dangerous. But Finman was less successful when it came to expressing criteria for determining when implied assertions are sufficiently reliable to be admissible. He argued they ought to be admitted when the actor had *perceived* the matter he was acting in relation to.[76] But this begs the question — the reason for cross-examining the actor is to ascertain whether his perception is reliable, and if he is not present in court how can we simply assume that it is reliable in order to admit the implied assertion? Maguire in 1961 also concluded that analytically speaking non-assertive conduct could fall within the hearsay rule, but ought to be admitted if reliable.[77] And his test of whether it was reliable was exactly the same as that of Finman that is, did the conduct occur when the actor was 'currently perceiving' the matter, and while his recollection of it was clear? Again this question-begging solution must be rejected out of hand, for exactly the same reasons as Finman's solution is untenable (Maguire wrote his article one year before Finman).

We must find reliability factors distinct from the question of whether the actor *perceived* the matter, that being the very question at issue!

POSITED SOLUTION (3):

A distinction can and should be drawn between non-assertive statements, which are analytically speaking hearsay, and non-assertive conduct, which is analytically speaking not within the scope of the hearsay rule.

This compromise solution represents one of three distinct views which Professor Cross has propounded in this area. In 1956 Cross[78] made it clear that he believed that non-assertive statements such as the 'Hello Smith' example were hearsay if tendered as equivalent to a third person's assertion of the presence of Smith. He also expressed the view that no

[73] Falknor, 'Silence as Hearsay' (1940) 89 *University of Pennsylvania Law Review* 192.
[74] Falknor, 'The Hearsay Rule and its Exceptions' (1954) 2 *University of California and Los Angeles Law Review* 43, 47.
[75] Finman, 'Implied Assertions as Hearsay: Some Criticism of the Uniform Rules of Evidence' (1962) 14 *Stanford Law Review* 682.
[76] *Ibid.* 708.
[77] Maguire, 'The Hearsay System: Around and Through the Thicket' (1961) 14 *Vanderbilt Law Review* 741, 769.
[78] Cross, 'The Scope of the Rule against Hearsay' (1956) 72 *Law Quarterly Review* 91.

logical distinction could be drawn between non-assertive statements and non-assertive conduct. The danger of inaccuracy was present in both non-assertive statements and non-assertive conduct to a similar degree.

As Cross put it:

> It follows from the above discussion that as a matter of principle, conduct which is relied on as equivalent to an assertion of the actor's perception of or belief in a particular fact should be rejected as evidence of the existence of that fact, unless it can be treated as admissible under an exception to the rule against hearsay . . .[79]

By the time the third edition of Cross's justly acclaimed book on Evidence appeared in 1967, a shift in approach was apparent. Cross still maintained that non-assertive statements were best classified as hearsay, in the light of the actual decisions in *Wright v. Doe d. Tatham*[80] and *Teper v. R.*[81] But he was ambiguous about non-assertive conduct of the deceased sea captain type. He pointed out that,

> although certain types of conduct such as those mentioned by Parke, B. in *Wright v. Doe d. Tatham*[82] may be excluded under the rule against hearsay, many other types are received in evidence without reference to that rule because they have been admitted on countless previous occasions. The question whether they are received because the rule against hearsay does not apply, or because the situation is governed by an exception to the rule is thus devoid of practical significance.[83]

But by 1971 Cross has become much more fixed in his ideas. He notes that it has *'even'* been suggested that the hearsay rule applies to non-assertive conduct,[84] as though this were some outlandish proposition instead of one he himself advocated fifteen years earlier! Thus a distinction is drawn between non-assertive statements (hearsay) and non-assertive conduct (not hearsay). The rationale for this distinction, according to Cross is that 'Deeds speak louder than words'. A second reason, according to Cross, was that,

> if such conduct is to be treated as hearsay whenever it is proved as equivalent to an assertion by someone other than the witness who is testifying there will be no end to the situations to which the hearsay rule will apply.[85]

Cross recognizes that many of the dangers against which the hearsay rule provides are present if, for instance, in Parke B.'s hypothetical example, evidence of the behaviour of the deceased sea captain is received. For example the sea captain cannot be cross-examined as to his competence to judge seaworthiness, or whether he may have had reasons for

[79] *Ibid.* 96.
[80] (1837) 7 Ad. & E. 313; 112 E.R. 488.
[81] [1952] A.C. 480.
[82] (1837) 7 Ad. & E. 313; 112 E.R. 488.
[83] *Cross on Evidence* (3rd ed. 1967) 386.
[84] Cross and Wilkins, *op. cit.* 99.
[85] Cross, 'The Periphery of Hearsay' (1969) 7 *M.U.L.R.* 1, 13.

going aboard the ship which outweighed the danger of its unseaworthy condition. Nevertheless Cross doubts the propriety of treating conduct which was not intended to be assertive as hearsay. In fact he believes that the United States courts have over-applied the hearsay rule through having taken what Baron Parke said in *Wright v. Doe d. Tatham*[86] too seriously, and concluded an article in 1969 by writing that we could count ourselves fortunate that the English and Australian courts have not, on the whole, fallen into the same error.[87]

With respect, it seems that many of these arguments are specious. Cross assumes that if we label a piece of evidence hearsay there is a strong case for excluding it. Simply because many items of evidence have always been accepted by the courts without considering the question whether they fall within the hearsay rule does not mean very much. Analytically speaking, they may still be hearsay. The praise given to the Australian and English courts for not adopting the United States approach is misplaced. The cases reveal, as has been seen, that Australian and English courts have not rejected the idea that non-assertive conduct can be hearsay. They have scarcely ever recognized that the question exists. At least the United States courts have identified the problem and have noted that implied assertions contain many of the main dangers the hearsay rule was created to overcome.

What does the bland statement that 'deeds speak louder than words' really mean? Is this inevitably the case? Finally, should the mere fact that labelling non-assertive conduct as hearsay will cause us to create and recognize many more exceptions to the hearsay rule than we have previously thought desirable, cause us to distort the scope of the hearsay rule? Had we recognized all along that implied assertions logically must be classified as hearsay, it is probable that the current unsatisfactory rigid hearsay rule with its inflexible exceptions would never have emerged in its present form, and we would not now be faced with the urgent need to modify it. Professor Cross has moved one step forward and two steps back since he first wrote on this subject in 1956.

POSITED SOLUTION (4):

Implied assertions, whether non-assertive statements or non-assertive conduct are not within the scope of the hearsay rule at all.

This view confined the hearsay rule to assertions of an express nature that is, statements or conduct intended to be assertive. It appears to be based on a conception of the rationale of the hearsay rule which places great weight on the danger of non-veracity, rather than problems of accuracy. No problems of veracity arise in relation to implied assertions. Therefore it is argued that the hearsay rule does not apply to implied assertions, though other hearsay type dangers do exist.

[86] (1837) 7 Ad. & E. 313; 112 E.R. 488.
[87] Cross, 'The Periphery of Hearsay' (1969) 7 *M.U.L.R.* 1, 13.

Phipson was an early proponent of this view. Recently a trend has been discernible in the United States away from the views of Morgan, and towards this approach. Virtually all draft reforms of the law of Evidence have confined the hearsay rule to assertive conduct and statements and not extended it to implied assertions.[88] A typical justification for this approach would usually read as follows:

> [a]dmittedly evidence of this character (i.e. implied assertions) is untested with respect to the perception, memory, and narration (or their equivalents) of the actor, but the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert, and do not justify the loss of the evidence on hearsay grounds.[89]

It is difficult to see why dangers relating to inaccurate perception, memory, and narration are less in the case of implied assertions than express assertions. Of course the veracity danger does not arise, but surely these other dangers continue to exist in as virulent a form as before. Also the passage just quoted again illustrates the failure to appreciate that classifying a particular item of evidence as hearsay does not mean automatically rendering it inadmissible.

A logical distinction can perhaps be drawn between express and implied assertions. But a policy of attributing to the former class of assertions the label hearsay, and not the latter class, must surely be justified on grounds other than logic. Few would argue that the hearsay rule as it has developed has led to absurd consequences by excluding reliable evidence from the courts. But this is a criticism of the inflexibility of the hearsay rule and its narrowly defined exceptions. It is a criticism of the lack of a general discretion on the part of the judges to admit evidence which logically is hearsay, but is nevertheless 'reliable'. Implied assertions are not necessarily 'reliable', or even more trustworthy than express assertions. Many hearsay-like dangers arise in relation to implied assertions. Simply because the way the hearsay rule currently operates is unsatisfactory is no reason to classify as non-hearsay that which possesses almost all the characteristics of hearsay. Rather it is a strong reason to look closely at the way the hearsay rule works, and substantially to modify that

[88] See *Model Code of Evidence—American Law Institute* (1942). Rule 501 (1) —A Statement includes both conduct found by the Judge to have been intended by the person making the statement to operate as an assertion by him and conduct of which evidence is offered for a purpose requiring an assumption that it was so intended. *Cf. Uniform Rules of Evidence* (1953) Rule 62(1)—'Statement' means not only an oral or written expression, but also non-verbal conduct of a person intended by him as a substitute for words in expressing the matter stated; *State of California Evidence Code* (1965) s. 225—'Statement' means (a) oral or written verbal expression or (b) non-verbal conduct of a person intended by him as a substitute for oral or written verbal expression; *Proposed Rules of Evidence for U.S. District Courts and Magistrates* (1971) Revised Draft, Rule 801(a)—'Statement'— A statement is (1) an oral or written assertion or (2) non-verbal conduct of a person if it is intended by him as an assertion: (adopted by *Proposed Wisconsin Rules of Evidence*—see (1973) 56 *Marquette Law Review* 332).

[89] (1973) 56 *Marquette Law Review* 332, 333-4.

rule. Classifying implied assertions as non-hearsay does not solve the problem. It avoids it, and indirectly helps perpetuate an anachronistic rule better suited to nineteenth rather than twentieth-century needs.

The real solution to the problem does not lie in attaching blanket verbal symbols to any single type of evidence and saying all such types of evidence must be excluded. It lies in individualization of the problem. Judges ought to be able to look at a tendered item of evidence and admit it if they consider it sufficiently reliable to go to a jury (assuming jury trial). They already exercise a similar discretion in relation to other types of evidence. For instance the burden of adducing evidence, or evidentiary burden, is one which involves satisfying the judge that a matter is fit to be left to the jury. Of course there is a need for lawyers to know in advance whether some item of evidence is likely to be admitted or not. It would be for the judiciary to articulate criteria which would assist lawyers to determine in advance whether an item of evidence, though logically hearsay, has about it sufficient 'reliability factors' to overcome that stigma.

The recent United States approach is not a solution to the problem of implied assertions. It is a distortion of the concept of hearsay evidence, and an evasion of the problem. Everything we know about the rationale of the hearsay rule tells us that implied assertions ought to fall within its scope. Edmund Morgan was surely correct in so far as he recognized the importance of the dangers of perception in relation to implied assertions. Only by fully appreciating the scope and rationale of the hearsay rule can we then proceed to evaluate and reform or even abolish it. Posited Solution (4) simplifies matters, but only at the great cost of distortion.

V. MODIFICATION OF THE HEARSAY RULE IN AUSTRALIA

In a recent article, Professor D. Harding made out a strong case for substantial reform of the hearsay rule in Australian jurisdictions.[90] The deficiencies of the existing rule were clearly indicated, and an analysis of the Civil Evidence Act 1968 (U.K.) which so profoundly altered the hearsay rule in England was undertaken. The case for extensive reform of the rule is currently being investigated in several Australian States.[91]

This paper does not purport to consider how reform of the hearsay rule ought to be implemented in Australia. There are clearly a number of possibilities.

(a) Admit all relevant evidence. Abolish the concept of hearsay. Such matters as the traditional hearsay dangers could go to weight and not admissibility.

[90] Harding, *op. cit.*

[91] The N.S.W. Law Reform Commission is scheduled to issue a Working Paper in September 1973, which will advocate the adoption of a code on Evidence. The Hearsay Rule would be drastically modified along similar lines to the Civil Evidence Act 1968 (U.K.) but without the cumbersome notice procedures required therein. Hearsay will be defined as not including implied assertions of any sort.

(b) Continue to classify evidence as either hearsay or non-hearsay. If it is hearsay, only admit it if it is the best available evidence.

(c) Continue to classify evidence as hearsay or non-hearsay. If it is hearsay, only admit it if it is the best evidence available, and if there are extrinsic factors which render it 'reliable'.

(d) Continue to classify evidence as hearsay or non-hearsay. If it is hearsay, admit the evidence only if it satisfies some fixed statutory and procedural requirements, whether it is the best available evidence or not.

(e) Continue to classify evidence as hearsay or non-hearsay. Widen the range of exceptions to the hearsay rule and introduce more flexibility into them.

No doubt arguments can be found to support any or all of these possible methods of reform. The likelihood is, however, that only (d) and (e) will receive any real attention in Australia. These correspond directly with reform of the hearsay rule in England and the United States respectively.

As far as implied assertions are concerned, the approach adopted by the various Evidence Codes in the United States has been one of ignoring the problem. The Codes expressly state that implied assertions are not within the hearsay rule. But surely this is not a satisfactory approach. Courts have grappled with the problems raised by implied assertions for over a hundred years without resolving them successfully. Academic writers have had only fractionally greater success in outlining why implied assertions should or should not be classified as hearsay. On this issue no-one has been more persuasive than Edmund Morgan who argued forcefully that implied assertions must logically and analytically come within the hearsay rule. If we, in Australia, are to codify our hearsay rule and our law of evidence, it is essential that we investigate this question of implied assertions thoroughly.[92] It is the submission of the author of this paper that the soundest approach is a recognition of the fact that implied assertions are hearsay. That is not to say that all such evidence ought to be excluded. However, it seems desirable that we be made aware of the hearsay-like dangers inherent in implied assertions so that a rational and flexible decision on whether or not to admit the evidence can be made.

What of the English approach as manifested in the Civil Evidence Act 1968, and more recently in the latest report of the Criminal Law Revision Committee?[93] Again the question of implied assertions raises practical

[92] The Report of the N.S.W. Law Reform Commission, expected in September 1973, will reject the idea that implied assertions are hearsay, apparently without dealing with this question at great length.

[93] The Eleventh Report of the Criminal Law Revision Committee (Cmnd 4991). The Report itself encompasses many other matters besides those relating to hearsay in the criminal context. Note that s. 41 (3) of the Draft Bill appended to the Report significantly differs from s. 10 of the Civil Evidence Act 1968 (U.K.) by

difficulties. The Civil Evidence Act 1968 defines the term 'statement' in section 10 as including a representation of fact, whether made in words or otherwise.[94] Section 1 has the effect of abolishing all common law exceptions to the hearsay rule so far as civil proceedings are concerned.[95] Hearsay evidence can only be admitted in civil proceedings by virtue of the Act itself. The aim of the Act was clearly to widen the basis of admissibility and narrow the effect of the hearsay rule in excluding reliable evidence. Yet a strong argument can be made that the Act has in fact achieved the very opposite of what was intended, at least as far as implied assertions are concerned.

The argument would run this way. If Section 10 does not include implied assertions (that is, if these are not 'representations of fact') then implied assertions cannot be admitted by virtue of the Act itself. This will not matter if implied assertions are outside the scope of the hearsay rule anyway, as they will then be admissible irrespective of anything in the Act. But if implied assertions are within the scope of the hearsay rule as many writers have argued, and if section 10 does not extend to implied assertions, then many forms of evidence which previously were admitted as common law exceptions to the hearsay rule before 1968 are no longer admissible after the Act! This appears to be an outrageous suggestion but it flows logically from a lack of attention having been paid to the problem of implied assertions by those who drafted the Act.

Professor Cross has argued, not convincingly it has been suggested, that some implied assertions are hearsay (non-assertive statements), and some are not (non-assertive conduct). If he wishes to avoid the absurd conclusion postulated above, he is forced to adopt a tenuous construction of section 10. Cross argues that the words 'representation of fact' include non-assertive statements, but not non-assertive conduct, as a matter of construction.[96] Why this should be so we are not told, beyond the fact that

including non-assertive statements (though not conduct) within the scope of the Hearsay Rule. S. 41(3) reads as follows—'For the purposes of this Part of this Act a protest, greeting or other verbal utterance may be treated as stating any fact which the utterance implies.'

[94] S. 10(1)—'In this Part—"statement" includes any representation of fact, whether made in words or otherwise.' S. 41(1) of the Draft Bill of the Eleventh Report of Criminal Law Revision Committee includes the same definition of 'statement', but s. 41(3) was clearly implemented to allow non-assertive statements to come within the scope of the hearsay rule.

[95] S. 1(1). In any civil proceedings a statement other than one made by a person while giving oral evidence in those proceedings shall be admissible as evidence of any fact stated therein to the extent that it is so admissible by virtue of any provision of this Part of the Act, or any other statutory provision, or by agreement of the parties, but not otherwise.

[96] See *Cross on Evidence,* (Supp. to 3rd ed., 1969) 19. Cross has apparently convinced those who drafted the Bill appended to the Eleventh Report (he himself is a member of the Committee). S. 41(3) is an attempt to rectify the error incorporated in s. 10 of the Civil Evidence Act 1968 (U.K.) and to avoid the absurd consequences of that section. However the distinction it draws between non-assertive statements and non-assertive conduct makes no real sense.

the words 'representation of fact' *impliedly* include non-assertive statements which are after all 'implied representations of fact'. Surely this is no basis at all on which to distinguish non-assertive conduct. It is simply that Professor Cross has a theory which is logically flawed. To support that theory he is forced to adopt a completely untenable construction of section 10, or confess that absurd consequences flow from his theory.[97]

A more sensible approach would have been to define 'statement' in section 10 widely enough to cover both express and implied assertions. Of course this would have meant conceding that implied assertions were hearsay, and when admitted in the past were admitted by virtue of ill-formulated exceptions to the hearsay rule. However that seems preferable to continuing to draw highly artificial distinctions between non-assertive statements and non-assertive conduct.

It is to be hoped that if we do adopt a reform of the hearsay rule in Australia along similar lines to that presented in the Civil Evidence Act 1968, the question of implied assertions will first have been thoroughly considered. This is not a matter of 'academic interest' only, but of serious practical consequences.

In 1969 Professor Cross expressed relief that Australian and English courts did not take all that Baron Parke said in *Wright v. Doe d. Tatham*[98] seriously.[99] Many Law teachers who specialize in the Law of Evidence would disagree with him, for as one commentator put it, to adopt this view

> would sadden the heart of the Evidence teacher who finds, for classroom purposes, the existing doctrine tagging evidence of non-assertive conduct as hearsay in certain situations, not only an extremely fascinating area of law but one which challenges the analytical and reasoning faculties of his students.[1]

It seems as though we have not taken what Baron Parke said seriously enough!

[97] Or to adopt a clause such as s. 41(3) or the Eleventh Report which arbitrarily includes non-assertive statements but not non-assertive conduct.

[98] (1837) 7 Ad. & E. 313; 112 E.R. 488.

[99] Cross, 'The Periphery of Hearsay' (1969) 7 *M.U.L.R.* 1, 14.

[1] Falknor, 'The "Hear-Say" Rule as a "See-Do" Rule' (1961) 33 *Rocky Mountain Law Review* 133, 138.