# Admissibility of Implied Assertions: Towards a Reliability-based Exception to the Hearsay Rule

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## INTRODUCTION

Whether implied assertions fall within the hearsay rule has proved to be a vexed question for academics and judges alike. Indeed, the matter has prompted a wide range of intellectual responses from which, until recent times, it has been difficult to discern clear and consistent authority.

Generally speaking, the views of academic commentators[1] may be classified into one of two mutually exclusive categories: that implied assertions, whether implied from words or conduct, are hearsay and inadmissible unless falling within existing or newly-created exceptions;[2] or that no implied assertion is hearsay.[3]

Relevant cases reveal a variety of judicial approaches in rationalising the acceptance of some implied assertions as hearsay, and others not.[4] Moreover, it is difficult to distinguish between decisions in which implied assertions have been admitted as falling outside the definition of hearsay and those in which implied assertions have been admitted as an exception to the hearsay rule.[5]

This matter is not without legal significance. If admitted as an exception to the hearsay rule, the assertion becomes evidence of the truth of the information it conveys. If admitted as original evidence, the assertion cannot be used to prove the information it conveys, but simply to support the circumstantial inferences associated with the fact the assertion was made.[6] From a practical point of view, however, it would seem that the primary

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1 For a general summary of these views, see: D Byrne and J D Heydon, *Cross on Evidence*, loose-leaf reporting service (1995), 31,037–57; and M Weinberg, 'Implied Assertions and the Scope of the Hearsay Rule' (1973) 9 *MULR* 268, 285–92.

2 See for example: Y F Lim, 'A Logical View of the Hearsay Rule' (1994) 68 *ALJ* 724; S J Odgers, 'Walton v The Queen — Hearsay Revolution?' (1989) 13 *Crim LJ* 201; and R Pattenden, 'Conceptual Versus Pragmatic Approaches to Hearsay' (1993) 56 *Mod LR* 138.

3 See for example: P B Carter, 'Hearsay: Whether and Whither?' (1993) 109 *LQR* 573; C Cato, 'Verbal Acts, Res Gestae and Hearsay: A Suggestion for Reform' (1993) 5 *Bond LR* 72; and Report of the Law Reform Commission of New South Wales, *Hearsay Evidence* (1978) 71.

4 Compare for example *R* v *Kearley* [1992] 2 WLR 656 with *McGregor* v *Stokes* [1952] VLR 347.

5 Compare for example *Ratten* v *R* [1972] AC 378 with *Walton* v *R* (1989) 166 CLR 283.

6 See further V Waye and G McGinley, 'Farewell to Hearsay — Expanding Cracks in the Hearsay Rule' (1989) 17 *MULR* 72, 83.

consideration will be to ensure the evidence is admitted, there being a fine line in most cases between truth and inferences.[7]

## THE HEARSAY RULE

The rationale for the existence of the hearsay rule was explained succinctly by Lord Normand in *Teper* v *R*:[8]

> The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of a person whose words are spoken by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost.[9]

Although the rule itself has been expressed in several different ways,[10] there is wide support for the formulation expounded by the Privy Council in *Subramaniam* v *Public Prosecutor*.[11] On that approach, evidence of an assertion made to persons who are not themselves called as witnesses 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 assertion. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the assertion, but the fact that it was made.[12]

It follows, therefore, that where an assertion has been made but the truth of that assertion is not in issue, the hearsay rule does not apply. Thus the concept of hearsay may be understood as depending on two requirements: the existence of an assertion; and the objective of proving the truth of the assertion as opposed to the fact that it was made.

### Assertions

Assertions to which the hearsay rule applies may be express or implied. Express assertions are statements or documents which were intended to assert particular information. The term also includes gestures and other conduct intended to be assertive; for example, a nod of the head in answer to a question.[13]

Implied assertions (also known as non-assertive hearsay) are of two kinds:

[7] For example *Ratten* v *R* [1972] AC 378.
[8] [1952] AC 480.
[9] Id 486.
[10] For a summary of commonly referred to formulations of the hearsay rule, see P K Waight and C R Williams, *Evidence: Commentary and Materials* (4th ed, 1995), 629–30.
[11] [1956] 1 WLR 965. The general acceptance of the *Subramaniam* formulation has been noted in for example: C Arnold, 'The Hearsay Rule: The Controversy Continues' (1991) 21 *QLSJ* 407, 409; Y F Lim, 'A Logical View of the Hearsay Rule' (1994) 68 *ALJ* 724.
[12] Id 970 per Mr De Silva.
[13] For example *Chandrasekera* v *R* [1937] AC 220, in which the Privy Council held inadmissible the evidence of witnesses who had seen a victim, whose throat had been cut, nod her head when asked whether it was the accused who had inflicted the wound.

those implied from statements, or from conduct,[14] not intended to assert particular information.

On the basis of cases such as *Manchester Brewery Co Ltd* v *Coombs*,[15] where evidence that customers failed to drink a batch of beer was held to fall outside the hearsay prohibition and was admitted in support of the inference that the beer was bad, it is sometimes suggested that statements not intended to be assertive are hearsay but conduct not intended to be assertive is not.[16]

However, compare the decision in *Re Louck's Estate*,[17] where evidence of a doctor's conduct in examining a person's body and arranging for it to be placed in a mortuary van, which impliedly asserted that the person was dead, was inadmissible to show the person was dead at a particular time.

Attempts to distinguish conduct from statements are not entirely convincing. As Mason CJ observed in *Walton* v *R*;[18] 'the distinction between conduct and statement is both artificial and difficult'.[19] Accordingly, it is submitted that assertions implicit in both should be treated as hearsay.

Whether statements containing assertions are expressly or impliedly made is often a mere accident of language. Consider, for example, *Teper* v *R*.[20] There, the accused was charged with deliberately setting fire to a shop in which he carried on business. The only evidence to contradict his alibi was that of a policeman who swore that, in approaching the shop some 25 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'. On the basis that the woman might just as well have said 'There is Teper', evidence of her remark was held by the Privy Council to be inadmissible hearsay.[21]

Difficulty in drawing a line between express and implied assertions has given rise, in this writer's view, to somewhat spurious attempts to narrowly define the concept of an implied assertion so as to restrict the application of the hearsay rule. Ligertwood[22] and Pattenden,[23] for example, argue that only out-of-court statements/conduct which constitute a narration of observed events are within the scope of the hearsay rule, on the basis that assertions which do not convey information cannot be literally true.[24]

In a similar vein, Lim takes the view that all out-of-court statements/conduct can be divided into two categories. The first group consists of assertions

[14] To employ the classic example, the conduct of a deceased captain, who, after examining a vessel, embarks in it with family members, impliedly asserts that the vessel is seaworthy: *Wright* v *Doe d Tatham* (1837) 112 ER 488, 516 per Baron Parke.

[15] [1901] 2 Ch 608.

[16] For example A Ligertwood, *Australian Evidence* (2nd ed, 1993), 435.

[17] 160 Cal 551 (1911).

[18] (1989) 166 CLR 283.

[19] Id 290.

[20] [1952] AC 480.

[21] Alternatively, the evidence was inadmissible as not falling within the res gestae exception to the hearsay rule.

[22] Ligertwood, op cit (fn 16) 432.

[23] Pattenden, op cit (fn 2) 140.

[24] However, it has been contended that such a distinction is tenuous since all statements/conduct contain a narrative component to some extent: K J Arensen, 'Unravelling the Hearsay Riddle: A Novel Approach' (1994) 16 *Syd LR* 342, 355.

whose contents can be proved true or false, including assertions which expressly state, as well as imply, information. Relevant examples are said to be 'My mother's just feeling sick'[25] and 'You get the rest of the money when you do the job properly'.[26] The conclusion reached is that the hearsay rule can be applied to assertions within this category.[27]

The second group consists of assertions which do not contain anything that is capable of being proved true or false, including assertions which contain only implied, and no express, information. Examples here are said to be 'Hello daddy'[28] and 'Get me the police please'.[29] Lim argues that the hearsay rule cannot be applied to these assertions.[30]

Palmer takes a related but even narrower view, arguing that of the many inferences which may be drawn from statements/conduct, only the state of mind called belief is capable of being proved true or false. In his opinion, other states of mind, such as fear or intention, can be neither true nor false, they simply are. On this reasoning, Palmer asserts that only the state of mind called belief can legitimately be referred to as an implied assertion to which the hearsay rule may be applied.[31]

Employing a different approach, Arensen[32] and Cato[33] seek to justify the admissibility of implied assertions by conceptualising relevant statements as verbal acts and arguing that non-assertive conduct does not fall within the hearsay rule.

However, in this writer's view, there is little to be gained from endeavouring to restrict the hearsay rule to assertions which are in narrative form or which convey a certain state of mind, or from trying to circumvent the rule altogether by conceptualising statements as conduct (especially, with regard to the latter approach, since assertions implied from conduct clearly are covered by the hearsay rule). Behind these intellectual chimeras, the indisputable fact remains that statements/conduct may imply information, and the information which is implied is invariably capable of being proved true or false.

Returning to the examples referred to above, the implied information is as follows: that the relevant relationship is one of mother and daughter; that an arrangement has been entered into; that the person to whom the declarant is speaking is the declarant's father; and that something serious is happening which requires the presence of the police. Since the truth of such information is capable of being proved true or false, all these implied assertions prima facie should be classified as hearsay.

Whether the information conveyed is actually intended by the declarant, so as to make the assertion express rather than implied, will depend on the facts

[25] *R* v *Benz* (1989) 168 CLR 110.
[26] *Pollitt* v *R* (1992) 174 CLR 558.
[27] Lim, op cit (fn 2) 725–7.
[28] *Walton* v *R* (1989) 166 CLR 283.
[29] *Ratten* v *R* [1972] AC 378.
[30] Lim, op cit (fn 2) 725–6.
[31] A Palmer, 'Hearsay: A Definition that Works' (1995) 14 *UTLR* 29, 31–2.
[32] Arensen, op cit (fn 24) 348.
[33] Cato, op cit (fn 3) 74.

of the case. Of course, since express assertions fall within the hearsay rule, this lends further support to the view that implied assertions should be treated as hearsay as well.

Another example may reinforce the point. In *Ratten* v *R*,[34] the accused was charged with murdering his wife. The defence claimed that the deceased had been killed when the gun the accused was cleaning discharged accidentally. In rebuttal, the prosecution adduced testimony from a telephonist who, at a time established to be immediately before the shooting, received a call from the Ratten residence in which a woman asked hysterically 'Get me the police please'.

The evidence of the telephonist was held by the Privy Council not to be hearsay since the mere request to get the police contained no implied assertion that the woman was being attacked. Rather, it was the fact that the call was made hysterically at the crucial time which gave rise to the inference of anxiety or fear at an existing or impending attack.[35]

Although Ligertwood, Pattenden, Lim and Palmer would support the Privy Council's reasoning, surely the hysterical woman's words carried the implied assertion that a serious situation existed requiring the presence of the police.[36]

Should the result in *Ratten* turn on the fortuitous choice of words by the deceased; in particular, that she did not say 'My husband is trying to kill me'? With respect, the determination of whether evidence is hearsay cannot turn on such artificial distinctions.[37]

In Australia, *Ratten* has been followed in the so-called 'betting shop cases' to admit evidence of telephone calls seeking to place bets at locations reputed to be used for illegal gambling purposes. Thus, in *McGregor* v *Stokes*,[38] the fact that telephone calls were made was admissible as original evidence from which the inference could be drawn that the premises were being used as alleged.[39]

However, to the extent that the callers were impliedly asserting that the place to which the calls were made was a betting shop, it seems clear that evidence of the calls would more properly be treated as implied assertions falling within the hearsay rule.[40]

[34] [1972] AC 378.

[35] Id 387.

[36] Although, in Palmer's view, op cit (fn 31) 37, if 'used for this purpose the evidence would clearly have been hearsay'.

[37] As McHugh J warned in *Pollitt* v *R* (1992) 174 CLR 558, 620, 'The hearsay rule would be meaningless in practice if it prohibited a statement being used directly to prove a fact contained in the statement but allowed the statement to be used circumstantially to prove a state of mind from which could be inferred the existence of the very fact which could not be proved directly.'

[38] [1952] VLR 347.

[39] *R* v *Firman* (1989) 52 SASR 391 took the matter a step further by holding that the calls were admissible to establish the use of premises and also to identify the person on those premises carrying on the activity.

[40] This line of reasoning was adopted by a majority of the House of Lords in *R* v *Kearley* [1992] 2 WLR 656, discussed infra, a case involving an analogous fact situation.

## Proving the Truth of an Assertion as Opposed to the Fact that the Assertion was Made

In the words of Mason CJ, the hearsay rule applies only to out-of-court assertions 'tendered for the purpose of directly proving that the facts are as asserted'.[41] That is to say, express or implied assertions are inadmissible as evidence of the truth of the information which they convey.

Accordingly, it is how an assertion is used that determines whether or not it is hearsay. If an assertion is tendered for the purpose of proving the fact that the assertion was made, it is not hearsay. It only becomes hearsay evidence if it is tendered for the purpose of proving the truth of what is contained in that assertion.[42]

How does one determine whether an assertion is being offered for the legitimate (non-hearsay) purpose referred to above? If the assertion is relevant to proving a material issue in the case, the question is whether the assertion would have probative value in this regard irrespective of whether the information conveyed by the assertion is true. If so, the assertion is not being offered for the truth of the information it conveys, but merely as evidence that the assertion was made. In these circumstances, the assertion does not fall within the hearsay rule.[43]

When evidence is tendered to show that an assertion was made, it undoubtedly means that the tendering party wishes to utilise the effect of the inferences that can be drawn from the assertion. For example, the fact that an assertion was made may be indicative of the declarant's state of mind, or the declarant's intention to pursue a course of action, or the declarant's emotional state.[44]

However, as Wilson, Dawson and Toohey JJ observed in *Walton* v *R*,[45] in some cases 'a person's statements about his state of mind will only have probative value if they are truthful and accurate and to rely upon them is to rely to some extent upon the truth of any assertion or implied assertion contained in them.'[46]

Thus, in *Ratten* v *R*, the telephonist's evidence, although containing an implied assertion that the caller was in danger, arguably was being tendered not to prove the truth of that implication but simply to prove that the call was made. However, if the hysterical female caller is taken to have genuinely wanted the police, then this, along with other circumstantial evidence, could found an inference that she feared for her life. From this, a further inference could be drawn that the shooting was not accidental.

[41] *Walton* v *R* (1989) 166 CLR 283, 288 per Mason CJ. According to Palmer, op cit (fn 31) 54, this explanation appears to have been 'deliberately intended' to permit the circumstantial use of out-of-court assertions.

[42] As Brennan J explained in *Pollitt* v *R* (1992) 174 CLR 558, 578, 'where a statement is tendered to prove the maker's knowledge of a fact and that knowledge is used to found an inference of fact other than the truth of the fact known, the statement is not classified as hearsay but as original evidence.'

[43] See also Arensen, op cit (fn 24) 344.

[44] See also Pattenden, op cit (fn 2) 140–3.

[45] (1989) 166 CLR 283.

[46] Id 302.

In this context, it will be appreciated that the contemplation by Dawson and Gaudron JJ in *Pollitt* v *R*[47] of a discretion to exclude non-hearsay evidence when there is a significant risk that it will be used for a hearsay purpose, is deserving of further judicial consideration.[48]

## ADMISSIBILITY OF IMPLIED ASSERTIONS

The old case of *Wright* v *Doe d Tatham*[49] provides the foundation for including implied assertions within the hearsay prohibition. The case concerned the mental competence of a testator. Those seeking to uphold his will wished to tender in evidence a number of letters, written by persons who were no longer living, which impliedly asserted his competence.

According to Baron Parke, an explicit statement asserting the testator's competence would clearly be hearsay; therefore, conduct justifying the same inference should be excluded on that basis as well. As he concluded:

> those letters may be considered ... to be on the same footing as if they contained a direct and positive statement that he was competent.[50]

More recently, the High Court and the House of Lords have held that, at common law, the hearsay rule does extend to implied assertions.[51] At the same time, however, the High Court has acknowledged the need for the hearsay rule to be applied more flexibly.[52] Thus, in cases where implied assertions possess a high degree of reliability, the courts should be prepared to admit the evidence as an exception to the rule.[53]

In assessing the reliability of implied assertions, it is important for judges to consider the dangers of insincerity, ambiguity, faulty perception and erroneous memory (the four so-called 'hearsay dangers') inherent in hearsay evidence.[54] In *Walton* v *R*, Mason CJ said:

[47] (1992) 174 CLR 558.

[48] Id 603. See further Palmer, op cit (fn 31) 37–8.

[49] (1837) 112 ER 488.

[50] Id 515 per Baron Parke.

[51] *Walton* v *R* (1989) 166 CLR 283, 292 per Mason CJ; 304 per Wilson, Dawson and Toohey JJ. *R* v *Benz* (1989) 168 CLR 110, 118 per Mason CJ; 133 per Dawson J; 143 per Gaudron and McHugh JJ. *Pollitt* v *R* (1992) 174 CLR 558, 620 per McHugh J. *Bannon* v *R* (1995) 132 ALR 87, 108 per McHugh J. *R* v *Kearley* [1992] 2 WLR 656, 669 per Lord Bridge; 679 per Lord Ackner; 687 per Lord Oliver.

[52] *Walton* v *R* (1989) 166 CLR 283, 293–4 per Mason CJ; 308 per Deane J. *R* v *Benz* (1989) 168 CLR 110, 118 per Mason CJ; 121 per Deane J; 144 per Gaudron and McHugh JJ. *Pollitt* v *R* (1992) 174 CLR 558, 566 per Mason CJ; 610–11 per Toohey J. *Bannon v R* (1995) 132 ALR 87, 104–6 per Dawson, Toohey and Gummow JJ; 108–10 per McHugh J.

[53] Compare s 59(1) of the *Evidence Act* 1995 (Cth) which provides that a previous representation is not hearsay unless its maker 'intended to assert' the fact which its proponent wants to establish from it. Under the legislative regime, unintended inferences were obviously not to be included within the hearsay rule.

[54] See further C R Williams, 'Issues at the Penumbra of Hearsay' (1987) 11 *Adel LR* 113, 116. The problem, which is compounded by non-availability of the declarant for cross-examination, is that the declarant may have been lying, intending to imply something else or mistaken.

> It is necessary to apply the same rules regarding admissibility to both implied and express assertions. Any other approach would lend itself to artificial and confusing distinctions. However, where an assertion is not made directly by the words or actions of a person, but is derived by implication from those words or actions there will, depending on the relevant circumstances of the case, often be special considerations relevant to the determination of admissibility.[55]

In his Honour's view, where an assertion is made by implication only, 'it is necessary for the judge to balance the competing considerations in order to determine admissibility, since the dangers associated with hearsay evidence will not all necessarily be present.'[56]

In contrast to that approach, it is submitted here that the hearsay dangers appear to be present to much the same extent in cases of implied assertions as in cases of express assertions. In fact, the inferences to be drawn from implied assertions may be much more uncertain than those to be drawn from express assertions,[57] so that the danger of ambiguity may be far greater.[58]

It is sometimes suggested that implied assertions are much more likely, than express assertions, to be free from the risk of deliberate lying.[59] In Mason CJ's opinion, for example, an express assertion lends itself more readily to 'a suspicion of concoction'.[60] With respect, however, there would seem to be greater merit in the view that 'a liar is just as likely to give a misleading impression as to be brazenly direct'.[61]

### *R* v *Kearley* in the House of Lords

In *R* v *Kearley*,[62] the accused was charged with possession of drugs with intent to supply. The prosecution led evidence that, following the accused's arrest, a number of telephone calls had been made to his house in which the callers asked to speak to him and asked to be supplied with drugs, and a number of persons had called at the house asking to be supplied with drugs. None of the callers gave evidence themselves. By a three to two majority,[63] the House of Lords held that the trial judge had been wrong to allow evidence of the calls to be admitted.

The majority, Lords Bridge, Ackner and Oliver, reasoned that the mere act of calling was meaningless and irrelevant apart from the significance attached to the words used by the caller. While those words contained an implied assertion that the accused was a supplier of drugs, implied assertions[64]

[55] (1989) 166 CLR 283, 292–3.
[56] Id 293.
[57] The argument is that there are so many possible motives for speech/conduct that its mere occurrence does not warrant the implied assertion of just one of them: *R* v *Steel* [1981] 1 WLR 690.
[58] See further Williams, op cit (fn 54) 137–8.
[59] See for example Weinberg, op cit (fn 1) 273.
[60] *Walton* v *R* (1989) 166 CLR 283, 294.
[61] Waye and McGinley, op cit (fn 6) 86.
[62] [1992] 2 WLR 656.
[63] Lords Bridge, Ackner and Oliver; Lords Griffiths and Browne-Wilkinson dissenting.
[64] Their Lordships did not distinguish between implied assertions deriving from words and those deriving from conduct.

offended the rule against hearsay and were inadmissible.[65] According to their Lordships, the inadmissibility of evidence of a single call was unaffected by proof that there were multiple calls to the same effect.[66]

While Lords Bridge, Ackner and Oliver accepted that the words used by a caller might be admissible to show the caller's state of mind, the state of mind of the person making the request for drugs was not an issue in the trial. Accordingly, evidence of such requests was irrelevant and therefore inadmissible.[67] In the result, the majority refused to create an exception to the hearsay rule[68] and consequently excluded a body of weighty evidence.

The dissentients, Lords Griffiths and Browne-Wilkinson, agreed with the majority on the irrelevance of the caller's statements if offered as evidence of belief, but took the view that the calls proved something more.

Lord Griffiths regarded the large number of telephone calls and visitors as circumstantial evidence founding an inference that the accused 'had established a market as a drug dealer by supplying or offering to supply drugs and was thus attracting customers.'[69] The fact that there were other possible explanations meant that it was for the jury to decide which inference they chose to draw, although it was 'difficult to think of much more convincing evidence of his activity as a drug dealer than customers constantly ringing his flat to buy drugs and a stream of customers beating a path to his door for the same purpose.'[70] In his opinion, laymen would consider the law 'an ass' if the evidence was not admitted.[71]

Lord Browne-Wilkinson regarded evidence of the calls as tending to prove there was a market for drugs that the accused might satisfy and that this fact was relevant to the occupant's purpose in having possession of the drugs. His Lordship observed that in cases such as this, the hearsay rule 'hampers effective prosecution by excluding evidence which ... is highly probative and, since it comes from the unprompted actions of the callers, is very creditworthy.'[72]

[65] [1992] 2 WLR 656, 669 per Lord Bridge; 679 per Lord Ackner; 687 per Lord Oliver. In reaching this conclusion, their Lordships endorsed the views of Baron Parke in *Wright* v *Doe d Tatham* (1837) 112 ER 488 and stated that the reasoning of the Australian 'betting shop cases' was irreconcilable with authority.

[66] [1992] 2 WLR 656, 668 per Lord Bridge; 675 per Lord Ackner; 696 per Lord Oliver.

[67] Id 665 per Lord Bridge; 674 per Lord Ackner; 684 per Lord Oliver.

[68] To some extent their Lordships may have felt constrained by the House of Lords' declaration in *Myers* v *Director of Public Prosecutions* [1965] AC 1001 that the English common law was incapable of creating any new exceptions to the hearsay rule. However, as discussed infra, Australia's High Court is not demonstrating the same reluctance.

[69] [1992] 2 WLR 656, 660.

[70] Id 659.

[71] Ibid.

[72] Id 706.

## The High Court Cases: *Walton*, *Benz*, *Pollitt* and *Bannon*

### *Walton* v *R*

It has been suggested that the first case in the series of recent High Court decisions on implied assertions, *Walton* v *R*,[73] 'may be the start of a substantial weakening of the hearsay rule'.[74] In this case, the accused was charged with the murder of his estranged de facto wife. The prosecution sought to prove that the day before she was killed, the deceased had a telephone conversation with the accused during which they arranged to meet the next day. A witness had been present during the conversation and gave evidence that after speaking for some time, the deceased called to her son and said, 'Daddy's on the phone'. The boy then took the telephone and said 'Hello daddy'. Other evidence established that the boy only referred to the accused as 'daddy'.

According to Wilson, Dawson and Toohey JJ, the witness's evidence of what the deceased said on the telephone was admissible to establish her belief that she was arranging to meet the accused. Although containing an implied assertion of the deceased's intention, their Honours conceptualised the deceased's statements as conduct from which a relevant inference (her intention to meet the accused) could be drawn. However, any implied assertion as to the identity of the caller was held to be inadmissible hearsay.[75] In this way, Wilson, Dawson and Toohey JJ were prepared to admit the witness's evidence to show that the deceased believed she was talking to the accused, but not to show that it was the accused who was making the call![76]

Mason CJ took the additional step, holding that evidence of the deceased's telephone conversation was admissible to prove her state of mind and, pursuant to a new reliability exception, to prove that the person on the other end of the line was the accused.[77]

Deane J was prepared to admit evidence of the deceased's statements during the telephone call on the ground that it confirmed other evidence of the arrangement to meet.[78]

As to the witness's evidence of what the child had said, Wilson, Dawson and Toohey JJ held that this was inadmissible hearsay, but found that no miscarriage of justice could have arisen from its admission at trial, since it added little to what was said by the deceased.[79]

In considering the witness's evidence of the child's statements, Deane J advocated a flexible approach to the hearsay rule, stating:

[73] (1989) 166 CLR 283 (Mason CJ, Wilson, Deane, Dawson and Toohey JJ).
[74] Byrne and Heydon, op cit (fn 1) 31,056.
[75] (1989) 166 CLR 283, 303.
[76] Compare s 72 of the *Evidence Act* 1995 (Cth), which provides that the hearsay rule does not apply to evidence of a representation made by a person that was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind. The section would appear to significantly extend the principle from *Walton* v *R* (1989) 166 CLR 283 in that it is now possible to tender evidence not only to show that a belief was held but also to show that what was believed was true.
[77] (1989) 166 CLR 283, 292.
[78] Id 308.
[79] Id 306.

> The hearsay rule should not, however, be inflexibly applied but should be qualified where the circumstances are such that its inflexible application would confound justice or commonsense or produce the consequence that the law was unattuned to the circumstances of the society which it exists to serve.[80]

However, in a curious juxtaposition of views, his Honour went on to say that if the hearsay rule was to be 'inflexibly applied', the witness's evidence as to what was said by the deceased's son should have been rejected.[81] Despite his earlier comments, Deane J did not think it necessary to consider whether the hearsay rule should be applied more flexibly in the circumstances of this case. He simply stated that the admission of the evidence could not have given rise to a miscarriage of justice.[82]

Only Mason CJ regarded the implied assertion from the child's greeting as admissible, on the ground of a new reliability exception under the hearsay rule, to identify the person on the other end of the phone as the accused.[83] As his Honour explained:

> The hearsay rule should not be applied inflexibly. When the dangers which the rule seeks to prevent are not present or are negligible in the circumstances of a given case there is no basis for a strict application of the rule. Equally, where in the view of the trial judge those dangers are outweighed by other aspects of the case lending reliability and probative value to the impugned evidence, the judge should not then exclude the evidence by a rigid and technical application of the rule against hearsay. It must be borne in mind that the dangers against which the rule is directed are often very considerable, as evidenced by the need for the rule itself. But especially in the field of implied assertions there will be occasions upon which circumstances will combine to render evidence sufficiently reliable for it to be placed before the jury for consideration and evaluation of the weight which should be placed upon it, notwithstanding that in strict terms it would be regarded as inadmissible hearsay.[84]

Mason CJ found that the 'extreme unlikelihood of concoction' on the part of the child favoured admission of the statements by outweighing the lack of opportunity for cross-examination of the child as to his perception or understanding.[85]

### *R* v *Benz*

The second case, *R* v *Benz*,[86] concerned a mother and daughter who were charged with murdering the mother's de facto husband and dumping his body in a river. A witness gave evidence that he had seen two women on a bridge, upstream of the place where the body was found, at 3 am on the morning of the

[80] Id 308.
[81] Id 309.
[82] Ibid.
[83] Id 296. Mason CJ's views have not gone uncriticised. See for example C Tapper, 'Hillmon Rediscovered and Lord St Leonards Resurrected' (1990) 106 *LQR* 441, 443–6.
[84] (1989) 166 CLR 283, 293.
[85] Ibid.
[86] (1989) 168 CLR 110.

murder. He testified that on stopping to enquire as to their welfare, one of the women replied, 'It's all right, my mother's just feeling sick'.

The Court of Criminal Appeal in Queensland held that the witness's evidence ought to have been excluded. The Crown sought special leave to appeal to the High Court. In a three to two decision,[87] special leave to appeal was refused.

Four of the five judges classified that part of the younger woman's statement relating to her relationship with the older woman as constituting an implied assertion tendered for the purpose of proving the truth of its contents. As such it was hearsay and prima facie inadmissible.

Although Gaudron and McHugh JJ held that the implied assertion was hearsay, their Honours, in comments reminiscent of the approach of Mason CJ in *Walton*, nevertheless thought that the evidence had such a high degree of reliability that a case for its reception might be justified on that basis. However, since the Crown had not argued that the statement was admissible under the hearsay rule, they concluded it was pointless to pursue the matter further.[88]

Deane J referred with approval to the recognition in *Walton* of the need to apply the hearsay rule more flexibly[89] but held that the statement of the younger woman as to her relationship with the elder was inadmissible hearsay.[90]

In dissent, Mason CJ stated that the statement contained an implied assertion which was hearsay but which ought to be admitted because it was reliable.[91] His Honour explained:

> It was a spontaneous utterance, made in response to the sudden and unexpected arrival of a stranger upon the scene, an event which must have taken the younger woman by surprise. Her response in this situation should be treated as trustworthy and reliable . . .[92]

Dawson J, the other dissentient, conceptualised the younger woman's statement as 'conduct which went to the identity of the two women on the bridge and was admissible, not as an exception to the hearsay rule, but as a relevant fact.'[93]

[87] Deane, Gaudron, McHugh JJ; Mason CJ and Dawson J dissenting.
[88] (1989) 168 CLR 110, 144.
[89] Id 121.
[90] Id 127.
[91] Id 118. Alternatively, his Honour held, id 117, that the implied assertion was admissible as part of the res gestae.
[92] (1989) 168 CLR 110, 118. However, that part of the statement relating to the health of the older woman might have been a concoction to explain why they were on the bridge in the middle of the night. Hence, his Honour found that spontaneity supported certain aspects of the statement only.
[93] Id 134.

### *Pollitt* v *R*

In *Pollitt* v *R*,[94] the third case, the prosecution alleged that the accused had entered into an arrangement with Allen (the now deceased declarant) to murder Williams and, by mistake, had shot Simpson. Witnesses gave evidence that Allen had spoken on the telephone after Simpson had been killed, saying, 'You get the rest of the money when you do the job properly'.

While accepting that Allen's statements before, during or after the telephone conversation would be admissible to indicate his state of mind, a majority of the High Court[95] rejected the witnesses' evidence on the ground that Allen's state of mind was not relevant to a material fact in issue in the case.[96]

The dissenting judges were Brennan, Dawson and Gaudron JJ. Brennan J held that evidence of the telephone conversation was admissible as original evidence.[97] Dawson and Gaudron JJ relied on the conduct approach again. Their Honours took the view that although Allen's telephone call contained an implied assertion of an arrangement, it was admissible as conduct of Allen from which it could be inferred, along with other conduct by Allen at about this time, that he had arranged for Williams to be killed.[98]

In the course of their judgments, several members of the High Court appeared to entertain a possible new exception to the hearsay rule which would provide for the admissibility of statements made by a party to a telephone conversation identifying other parties to that conversation. This arose in response to the witnesses' further testimony that immediately after the telephone conversation, Allen had made a statement identifying the accused as the caller.

The origins of this so-called 'telephone exception' can be traced to the judgment of Deane J in *Walton*, where his Honour opined:

> There is plainly something to be said for the view that, at least in some circumstances, the hearsay rule should be qualified so as not to preclude the receipt of evidence of contemporaneous statements made by one party to a telephone conversation (either in the course of the conversation or immediately before or after it) which disclose that the other party to the conversation was the person against whom it is sought to lead otherwise relevant and admissible evidence of that part of the conversation which was overheard.[99]

In *Pollitt*, Mason CJ began his consideration of the issue by noting that it was 'in the field of implied assertions which naturally form an integral part of

[94] (1992) 174 CLR 558.
[95] Mason CJ, Deane, Toohey and McHugh JJ; Brennan, Dawson and Gaudron JJ dissenting.
[96] (1992) 174 CLR 558, 565 per Mason CJ; 593 per Deane J; 609 per Toohey J; 619 per McHugh J. However, as noted by McGinley and Waye, it does, with respect, seem to defy common sense that Allen's knowledge of a plan to kill Williams was irrelevant to the murder of Simpson. See G McGinley and V Waye, 'Implied Assertions and the Hearsay Prohibition' (1993) 67 *ALJ* 657, 661.
[97] (1992) 174 CLR 558, 584.
[98] Id 604.
[99] (1989) 166 CLR 283, 308.

a conversation that there is a very strong case for relaxing the hearsay rule.'[100] His Honour's analysis can be summarised in the following three propositions: statements during the course of a telephone conversation made by one party to it identifying the other party are admissible; statements immediately after the call to the same effect are admissible; statements about the contents of the conversation are narrative and inadmissible.[101]

Reiterating his commitment, in principle anyway, to the flexible application of the hearsay rule, Deane J appeared to accept that the above three propositions were correct, at least where the circumstances did not give rise to a significant possibility of fabrication or impersonation. His Honour therefore agreed with Mason CJ that Allen's remarks could be used to identify the accused as the other party to the telephone conversation.[102]

Toohey J, who endorsed Mason CJ's comments in *Walton* that the hearsay rule should not be applied inflexibly, appeared to agree with the first and third propositions, although it is not clear that he agreed with the second one. However, his Honour would not admit the evidence in the instant case because it was 'open to the possibility of concoction'.[103]

McHugh J expressed agreement with Deane J insofar as ordinary social and business conversations were concerned, but not where the identification was 'made for the purpose, if not in the course of, a criminal venture'.[104] Accordingly, his Honour would not admit the evidence in this case.

Dawson and Gaudron JJ expressed difficulty in extracting any principle upon which a telephone exception to the hearsay rule could be based,[105] while Brennan J did not find it necessary to pursue the possibility.[106]

In these circumstances, it can hardly be said that there is overwhelming judicial support for a 'telephone exception'.[107] Moreover, it is submitted that the contents of telephone conversations do not constitute a category of evidence which is so inherently reliable as to qualify automatically for admission on that basis.[108]

[100] (1992) 174 CLR 558, 566.
[101] Id 566–7.
[102] Id 594–7.
[103] Id 610–11.
[104] Id 622.
[105] Id 605.
[106] Id 582.
[107] Cf *Miladinovic* v *R* (1993) 124 ALR 698, in which the Full Federal Court (Gallop, Ryan and O'Loughlin JJ) unanimously upheld the 'telephone exception' recognised in the judgment of Miles CJ at first instance: *R* v *Miladinovic* (1992) 60 A Crim R 206 (ACTSC). However, in comments critical of the trial judge's decision, Palmer has suggested that Miles CJ fell victim to 'the "telephone fallacy": the idea that a statement is reliable merely because it is made over the phone.' See A Palmer, 'The Reliability-Based Approach to Hearsay' (1995) 17 *Syd LR* 522, 535. By extension, the same criticism may be levelled against the appellate judges.
[108] See also Carter, op cit (fn 3) 581.

### *Bannon* v *R*

In the most recent case, *Bannon* v *R*,[109] Anthony Bannon and Kerry Leanne Calder were convicted on two counts of murder. Although Bannon and Calder blamed each other for the killings, the prosecution alleged that they had acted in concert, one of them stabbing the deceased persons while the other aided and abetted the principal actor.

At trial, evidence was adduced that within two hours of the murders, Calder made various statements admitting her culpability in the killings. For instance, witnessess testified that when asked about a stab wound to her foot, Calder stated that she 'and the other bloke' were involved in a knife fight in the Dandenong area and that her injury was 'what you get when you kick knives out of people's hands'. Further testimony was given that when pressed to see a doctor, Calder replied, 'I just can't go to a doctor, I could have killed these couple of people tonight in this knife fight . . . I just can't go to a doctor, you don't understand, if I go there they'll know I've done it.'

Bannon's appeal to the High Court centred on the admissibility of the above statements. It was contended that Calder's remarks contained an implied assertion that she alone killed the deceased persons, thereby supporting Bannon's defence that he did not participate in the murders.[110] The statements were admissible, it was argued, primarily because the rule against hearsay should be applied flexibly to allow evidence of inherently reliable hearsay statements.[111]

The High Court[112] unanimously dismissed the appeal, holding that Calder's statements were unreliable if they implied that Calder was solely responsible for the killings.[113]

According to Dawson, Toohey and Gummow JJ, 'any support which Calder's statements provide for the lack of voluntary involvement of the appellant depends upon the drawing of a dubious inference from the use of the singular.'[114] Moreover, their Honours held that the reliability of any statement construed as an admission that Calder acted alone was 'at odds' with Calder's statement that Bannon was also involved in the knife fight.[115]

Deane J expressed general agreement with the reasoning of Dawson,

[109] (1995) 132 ALR 87.

[110] According to Bannon's version of events, he had been tied up by Calder at the time of the murders.

[111] In the alternative, it was argued that Calder's remarks should be admitted because out-of-court statements against penal interest constitute an exception to the hearsay rule.

[112] Brennan CJ, Deane, Dawson, Toohey, McHugh and Gummow JJ.

[113] (1995) 132 ALR 87, 93 per Brennan CJ; 96 per Deane J; 105–6 per Dawson, Toohey and Gummow JJ; 109–10 per McHugh J. Their Honours found it unnecessary to consider the alternative argument concerning out-of-court statements against penal interest. According to Brennan CJ, id 91, and Dawson, Toohey and Gummow JJ (with whom Deane J agreed), id 105, Calder did not apprehend that she was vulnerable to a penalty as a consequence of what she was saying, since she was speaking in a state of high emotion to trusted confidants. McHugh J, id 114, took the view that if Calder's statements implied that she had acted alone, that fact exposed her to no additional penalty.

[114] (1995) 132 ALR 87, 105.

[115] Id 106.

Toohey and Gummow JJ,[116] while McHugh J specifically reinforced their Honours' joint view.[117]

In contrast to the implicit support for a reliability-based exception to the hearsay rule underpinning the above-mentioned judgments in *Bannon*,[118] Brennan CJ was sharply critical of any approach promoting the admissibility of hearsay evidence when its admission was based simply on the trial judge's opinion of its reliability.[119] In his Honour's words:

> To admit hearsay evidence whenever the judge forms the opinion that the evidence is sufficiently reliable would be to transform the nature of a criminal trial. If the judge's opinion be based on no specific criteria but only on an appreciation of the circumstances generally, the judge would have to exercise a lively discretion to exclude evidence that the judge thought to be reliable in order to prevent undue prejudice to the accused who could not cross-examine the maker of the out-of-court statement. The judge would have to determine the scope of the evidence in the trial not by an application of legal criteria but by reference merely to reliability on the one hand and undue prejudice on the other. Admissibility would reflect no more than the judge's opinion of the fairness of exposing the accused to the risk of conviction on the hearsay evidence. That is not an appropriate power to vest in a trial judge who has not heard the declarant making the statement . . .[120]

Significantly, however, Brennan CJ, despite his concerns, was still prepared to apply the criterion of reliability in the instant case, concluding that if Calder's statements 'were understood to be exculpatory of the appellant in the sense that the appellant was not a party to Calder's offence, Calder's statements can hardly be taken to be reliable as to that fact.'[121]

In the result, therefore, all six members of the High Court in *Bannon* determined the admissibility of Calder's statements by reference to the concept of reliability.

## RELIABILITY AS THE DETERMINANT OF ADMISSIBILITY

The series of High Court cases previously discussed has laid the foundation in Australia for a flexible, reliability-based exception to the hearsay rule. In essence, implied assertions should be regarded as falling within the scope of

[116] Id 93.

[117] McHugh J held that the use of the singular was a 'weak basis' for claiming that Calder's statements exculpated Bannon from complicity in the killings; and that Calder's statement that both she and Bannon were involved in the knife fight was 'quite inconsistent' with his claim that he was tied up at the time of the murders: id 109–110.

[118] Although McHugh J did warn that it has not yet been conclusively determined by the High Court that the hearsay rule 'is always subject to an exception in the case of evidence that is "reliable" ': id 109.

[119] Id 89. As his Honour, id 92, pithily remarked, 'a judge's opinion of reliability does not make hearsay admissible'.

[120] Id 89. With respect, Brennan CJ may be somewhat mollified by a recent exposition on how the reliability of otherwise inadmissible hearsay should be determined in criminal proceedings. See Palmer, op cit (fn 107) 522.

[121] (1995) 132 ALR 87, 93.

the hearsay rule, but should be received when the court determines that, in all the circumstances of the case, the evidence is of sufficient reliability to justify its admission.[122]

This approach effectively involves a three step process: (1) Is the evidence hearsay? (2) If it is hearsay, is it within an 'established' exception? (3) If the evidence is hearsay and does not fall within any exception to the rule, the judge must determine whether, having regard to considerations of reliability, it should nevertheless be admitted.[123] The determination of these issues is to be made by the trial judge as a matter of law. Of course, the trial judge retains an overriding discretion to refuse to admit the evidence where, in the circumstances of the case, the prejudicial effect of the lack of opportunity for cross-examination of the declarant outweighs the probative value of the evidence.[124]

Admissibility, then, is to be determined on a case-by-case basis, relying on the sound common sense of the judiciary to determine whether a sufficiently high degree of reliability exists in any particular case.[125] If the evidence is admitted under the reliability-based exception to the hearsay rule, the weight to be attributed to the evidence is left to the assessment of the tribunal of fact.[126]

Mason CJ expressly stated in *Walton* that the reliability-based approach to the hearsay rule is not limited to implied assertions, although his Honour thought it would be applicable to express assertions only in 'very rare cases'.[127] However, it is difficult to see why the approach should be limited in this way, especially given his Honour's view that express and implied assertions should be treated the same way.[128]

In *R* v *Smith*,[129] Lamer CJC, of the Canadian Supreme Court, proposed that hearsay evidence which satisfies the criteria of reliability and necessity should be admitted as an exception to the hearsay rule.[130] On the criterion of reliability, his Honour said:

> If a statement sought to be adduced by way of hearsay evidence is made under circumstances which substantially negate the possibility that the

[122] Relying on the decisions of Mason CJ and Deane J in *Walton* v *R* (1989) 166 CLR 283; Gaudron and McHugh JJ in *R* v *Benz* (1989) 168 CLR 110; Deane J and Toohey J in *Pollitt* v *R* (1992) 174 CLR 558; and Dawson, Toohey and Gummow JJ and McHugh J in *Bannon* v *R* (1995) 132 ALR 87.

[123] Since *Walton* v *R* (1989) 166 CLR 283, this approach has been endorsed in several State Supreme Court decisions. See for example: *R* v *Daylight* (1989) 41 A Crim R 354 (QSC); *R* v *Miladinovic* (1992) 60 A Crim R 206 (ACTSC); *R* v *Astill* (1992) 63 A Crim R 148 (NSWCCA); and *R* v *Radford* (1993) 66 A Crim R 210 (VCCA).

[124] See further Pattenden, op cit (fn 2) 154. Compare the concerns expressed by Brennan CJ in *Bannon* v *R* (1995) 132 ALR 87, 89.

[125] See further: Lim, op cit (fn 27) 729; and Palmer, op cit (fn 107) 528–46.

[126] Reliability obviously will be relevant to this assessment also.

[127] (1989) 166 CLR 283, 293.

[128] Id 292–3. On this approach, it would have made little difference in *Ratten* v *R* [1972] AC 378, and rightly so, if instead of sobbing 'Get me the police please' the declarant had cried 'My husband is trying to kill me'.

[129] [1992] 2 SCR 915.

[130] Id 933.

declarant was untruthful or mistaken, the hearsay evidence may be said to be 'reliable' . . . [131]

It has been suggested that Lamer CJC's criterion of necessity would not be satisfied by the mere circumstance that the evidence enhances the presentation of a particular party's case.[132] The focus would be upon the non-availability of the evidence, either directly from the declarant or from any other source, with the burden of proof resting upon the party seeking the reception of the evidence.[133]

In contrast to the view propounded in Canada, Australia's High Court has emphasised the criterion of reliability,[134] with little mention of necessity.[135] It is submitted that the Australian position is to be preferred,[136] since the criterion of necessity 'adds very little'[137] to the reliability-based approach.

If the basis for the admissibility of hearsay evidence is reliability, then reliability must turn on the whole context in which the assertion is made. However, factors generally pertinent to the assessment are likely to include: spontaneity;[138] unlikelihood of concoction;[139] reasonable contemporaneity of assertions to relevant events;[140] motivation to speak truthfully;[141] and existence of independent corroboration.[142] Uncertainty about what is actually being implied provides a sound reason for rejecting the evidence;[143] and the particular tense or form of words used should have no bearing on the question.[144]

Conflicting cases on implied assertions can be reconciled on the principled basis that implied assertions which are reasonably reliable are admissible. In *Ratten* v *R*, for example, factors such as contemporaneity, unlikelihood of

[131] Ibid.
[132] Carter, op cit (fn 3) 579–80.
[133] Ibid.
[134] Supra (fn 122).
[135] In *Bannon* v *R* (1995) 132 ALR 87, the High Court adverted to the criterion of necessity for the first time. However, Brennan CJ, id 92, was dismissive of it; Dawson, Toohey and Gummow JJ (with whom Deane J generally agreed), id 103, discussed the concept but made no attempt to rely on it; and McHugh J, id 115, found it unnecessary to determine whether the 'principle of necessity' should be adopted.
[136] In contrast, Carter, op cit (fn 3) 590, has submitted that there is no reason for evidence which contravenes the hearsay rule to be admitted unnecessarily even if it has the appearance of reliability. Palmer, 'Hearsay: A Definition that Works' op cit (fn 31) 33, also appeared to support the dual criteria of necessity and reliability. However, more recently, Palmer, op cit (fn 107) 543–4, has been critical of the criterion of necessity.
[137] *Bannon* v *R* (1995) 132 ALR 87, 92 per Brennan CJ.
[138] However, in *Pollitt* v *R* (1992) 174 CLR 558, 582, Brennan J declined to recognise the admissibility of statements merely on the ground that concoction was extremely unlikely in view of their apparent spontaneity.
[139] However, in *Walton* v *R* (1989) 166 CLR 283, 304, Wilson, Dawson and Toohey JJ took the view that the unlikelihood of concoction or distortion was not sufficient of itself to render a hearsay statement admissible.
[140] There would appear to be some assimilation of the considerations which make spontaneous contemporaneous statements admissible as part of the res gestae.
[141] See further Palmer, op cit (fn 107) 528–32.
[142] Id 538–40.
[143] See further Pattenden, op cit (fn 2) 155.
[144] Compare the reasoning of the Privy Council in *Ratten* v *R* [1972] AC 378.

concoction and motivation to tell the truth, combine to support the admission of the declarant's hysterical request to get her the police.

On the other hand, the inadmissibility of the evidence in *Teper* v *R* can be justified on the basis that it was unreliable, both in terms of the quality of the identification it afforded and its lack of contemporaneity with the fire which had occurred some time before. Similarly, in *Wright* v *Doe d Tatham*, the fact that 'some time before the will had been made, a few laymen had written occasional letters addressed to the testator, which on one of several possible explanations were consistent with a belief in his sanity'[145] clearly was not sufficient to establish reliability.

Evidence of the declarant child's statements in *Walton* also was properly rejected. The greeting 'Hello daddy' followed on from the deceased's assertion that the caller was 'daddy' and was inherently unreliable because the child may have been unduly influenced by his mother. In *Pollitt*, the telephone conversation was, in the circumstances of that case, too tainted by criminality and the possibility of concoction to be regarded as reliable. Similarly, in *Bannon*, statements of culpability from one co-accused couched in the singular could not be reliably interpreted as exculpating the other, especially when further statements by the first-mentioned co-accused implicated both of them in the crimes.

However, considerations of spontaneity and corroboration under the reliability approach would have supported the admission of the calls requesting drugs in *Kearley*. Relatedly, spontaneity and unlikelihood of concoction should have demonstrated the reliability and hence admissibility of the declarant's statement in *Benz* that her mother was feeling sick.

The flexible approach to the hearsay rule stands in sharp contrast to the traditional rigid application of rule and exceptions.[146] Critics argue that flexibility leads to an unacceptable increase in uncertainty and unpredictability of result, and contend that a mechanical rule is more efficient and convenient.[147] With respect, such critics would be well-advised 'to reflect upon the confusion that has resulted and does result from present practices'.[148]

## CONCLUSION

According to the authors of *Cross*, it is 'not possible to be confident about what the future holds, save that the death of the debate about implied assertions is not in prospect.'[149] With respect, this view is unduly pessimistic.

[145] Byrne and Heydon, op cit (fn 1) 31,103.

[146] See further S J Odgers, '*Walton* v *The Queen* — Hearsay Revolution?' (1989) 13 *Crim LJ* 201, 216.

[147] For example: C Arnold, 'The Hearsay Rule: The Controversy Continues' (1991) 21 *QLSJ* 407, 422; and Byrne and Heydon, op cit (fn 1) 31,040. In *Bannon* v *R* (1995) 132 ALR 87, 115, McHugh J expressed concern that since reliability depends on the trial judge's discretionary judgment, this 'would result in some uncertainty and additional expense in preparing cases, since it could not be known until the ruling whether the evidence was admissible and whether evidence in rebuttal was required.'

[148] Carter, op cit (fn 3) 582. See also McGinley and Waye, op cit (fn 96) 660.

[149] Byrne and Heydon, op cit (fn 1) 31,057.

The High Court is well on its way to establishing a principled basis for the admission of implied assertions under the hearsay rule, namely, that courts should have the power to admit such evidence when its reception is warranted by reference to the criterion of reliability.[150]

It is generally accepted that a strict application of the hearsay rule can lead to absurd consequences by excluding reliable evidence from the courts.[151] Strangely, some authors have sought to justify this result by appealing to notions of sorcery:

> The trial itself is not simply a vehicle for establishing truth and justice. It is, in part, a ceremony involving mystery, rituals and incantations. The hearsay prohibition with all of its intricacies and *lack of logic* is a skein in this web.[152]

Such comments are viewed with dismay by this writer. Without denying the rich history and traditions of the adversarial process, there is no place in the modern trial for such mystical considerations. Logic is a vitally important aspect of the law and logic demands a reliability-based exception to the hearsay rule, both as a means of reconciling previous apparently inconsistent decisions and providing a rational basis for the admission of evidence in the future. In principle, there is no reason why this approach should not be applied in relation to both implied and express assertions.

The Australian approach to the relaxation of the hearsay rule is to be preferred to the conservative stance adopted by the majority of the House of Lords in *Kearley*. Pattenden has expressed the point neatly:

> Had the House of Lords in *Kearley* . . . weighed the probative value of the evidence tendered against its potential unreliability, the outcome of that case could have been very different . . . The implication of the telephone and personal calls was unambiguous. In these circumstances it would have been legitimate for a trial judge to have exercised a discretion such as that recommended by Mason CJ in *Walton* v *R* in favour of the prosecution to admit the evidence, and the law and common sense would have been in harmony.[153]

As *Kearley* and *Benz* demonstrate, there is much to be said for harmony between the law and common sense.

[150] In Palmer's view this is 'part of a broader movement towards a more flexible approach to the hearsay rule, an approach which places greater emphasis on the reliability of putative hearsay evidence than on its exact status as hearsay or non-hearsay'; Palmer, op cit (fn 31) 60–1.

[151] See for example: Cato, op cit (fn 3); McGinley and Waye, op cit (fn 96); Pattenden, op cit (fn 2); and Weinberg, op cit (fn 1). Consider also the result in *R* v *Kearley* [1992] 2 WLR 656.

[152] McGinley and Waye, op cit (fn 96) 670 (emphasis added).

[153] Pattenden, op cit (fn 1) 156.