foreseeability concept to a more realistic level and prevent its continued misuse.[28]

The Supreme Court was presented with an ideal opportunity for acknowledging the actual motivating elements which determine the existence of a duty of care. Several factors tended toward a decision favouring the plaintiff. The harm suffered was physical, the act causing injury was positive and the defendant driver was no doubt insured. Authority in other countries favoured recovery,[29] while decisions in criminal and property law also protected the unborn. Probably the strongest argument for compensation was the influence of the concept of 'natural justice', which Lamont J. explained in *Montreal Tramways v. Leveille.*[30] He there said, 'If a child after birth has no right of action for pre-natal injuries we have a wrong inflicted for which there is no remedy . . . If a right of action be denied to the child, it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor.'

Regrettably, the majority in *Watt v. Rama*[31] refrained from all comment on such policy factors and relied solely on the foreseeability test. Although Gillard J. raised the natural justice consideration, and fleetingly discussed the function of policy in duty questions, his comments were tentative and played no prominent part in his judgment. Thus, while the actual decision in this case is highly praiseworthy, the staid approach adopted by the court may be regarded as a disappointing reminder that Australia is not yet prepared to follow promising overseas developments[32] in dealing with the duty concept in negligence.

JOSEPHINE M. D'ARCY

RATTEN v. R.[1]

Criminal Law—Admissibility of Evidence—Relevant Facts—Hearsay—Res Gestae.

That tide, which generated such fundamental reforms of the Law of Evidence in England[2] that it was likened to a 'hurricane of a velocity and turbulence

[28] The dangers of overestimating the foreseeability test and the function of the duty element in negligence are fully discussed in an article by Fleming 'Remoteness and Duty; The Control Devices in Liability for Negligence' (1953) 31 *Canadian Bar Review* 471. For other discussions of the duty concept see Buckland, 'The Duty to Take Care' (1935) 51 *Law Quarterly Review* 637; W. L. Morison, 'A Re-examination of the Duty of Care' (1948) 11 *Modern Law Review* 9; Atiyah, *Accidents, Compensation and the Law* (1971).

[29] *Pinchin v. Santam Insurance Co. Ltd* [1963] (2) S.A. 254; *Montreal Tramways v. Leveille* [1933] 4 D.L.R. 339; *Duval v. Seguin* [1972] 26 D.L.R. (3d) 418; *Bonbrest v. Kotz* (1946) 65 Fed. Supp. 138.

[30] [1933] 4 D.L.R. 339, 345.

[31] [1972] V.R. 353.

[32] See, for example, statements made in *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd* [1964] A.C. 465, 536 (H.L.); *Home Office v. Dorset Yacht Co. Ltd* [1970] A.C. 1004, 1058, 1025, 1026.

[1] [1972] A.C. 378. Judicial Committee of the Privy Council; Lord Reid, Lord Hodson, Lord Wilberforce, Lord Diplock and Lord Cross of Chelsea. It is also reported in [1971] 3 W.L.R. 930; [1971] 3 All E.R. 801; and in (1971) 45 A.L.J.R. 692.

hitherto unknown',[3] has reached Australia in earnest.[4] The hearsay rule has received particular attention, primarily because of the stimulus given to its reconsideration by the House of Lords in *Myers v. D.P.P.*[5] Presented with the alternatives of doing something fundamental to reform the law of hearsay, or continuing to tinker with an unsatisfactory body of exceptions, a majority of the House of Lords held that no new exceptions could be created. The implicit invitation was spelt out by Lord Morris: 'now for years past it has been recognized that legislation is needed in order to modify the created edifice of the law of evidence.'[6] It is, however, evident from the decision in *Ratten v. R.*,[7] that the Judicial Committee of the Privy Council did not perceive any opposition by the House of Lords to a comprehensive rationalisation of the hearsay rule in anticipation of statutory reforms.

The appellant in *Ratten v. R.* had been convicted of the murder of his wife. At his trial,[8] the evidence established that the shooting, from which the wife died almost immediately, must have taken place in their home between 1.12 p.m. and 1.20 p.m. The appellant's explanation, which he consistently maintained from his very first contact with the police, was that an old shotgun had accidently discharged while he was cleaning it. This explanation, however, was undermined by his inability to explain how the shotgun came to be loaded, and why, as an experienced hunter, he had not checked to see if the gun was loaded. On these facts, the Judicial Committee of the Privy Council held that there was a *prima facie* case against the appellant.

The critical piece of evidence was that of the telephonist at the local exchange. She testified that she received a call from the appellant's home telephone number at about 1.15 p.m.; that a female answered; and that the voice said hysterically, 'Get me the police please', later giving the address. The admissibility of this evidence was crucial.[9] If it were admissible, the telephonist's evidence would tend to refute the appellant's claim that he and not his wife had made the call and had in fact requested an ambulance and not the police. This contradiction would weaken the defence of accident. If it were inadmissible, there would be insufficient evidence to support a conviction for murder.[10] The appellant objected that the evidence was hearsay and did not come within any of the recognised exceptions to that rule. The Judicial Committee, however, overruled that objection, and upheld the admissibility of the evidence on several grounds. Consequently the conviction was affirmed.

The Judicial Committee first dealt with the admissibility of the telephonist's evidence in support of the inference that the voice was that of the deceased woman. In so doing, their Lordships seem to have heeded those contemporary

[2] See the reforms embodied in the Civil Evidence Act, 1968; the 17th *Report* of the Law Reform Committee and the 11th *Report* of the Criminal Law Revision Committee.

[3] Gooderson, 'Previous Consistent Statements' (1968) 26 *Cambridge Law Journal* 64.

[4] Evidence Ordinance 1971 (A.C.T.) and the investigation by the Law Reform Commission of N.S.W. into the Law of Evidence.

[5] [1965] A.C. 1001.

[6] [1965] A.C. 1001, 1028 (*per* Lord Morris of Borth-y-Gest).

[7] [1972] A.C. 378.

[8] Before Winneke C.J. and a jury.

[9] To discharge the burden of proof, the Prosecution had to satisfy the jury beyond reasonable doubt that the killing was deliberate, thereby refuting the appellant's defence of accident.

[10] This contention of the Defence was not challenged: see extracts from the argument [1972] A.C. 378, 380.

evidence writers who cogently argued that more emphasis should be placed on the rational process of weighing evidence and less on arbitrary rules of exclusion.[11] At the very beginning of the advice delivered by Lord Wilberforce, there is a strong indication that the trial judge did not sufficiently stress the incongruity and unreliability of the inference drawn by the telephonist. The Judicial Committee pointed out the inherent difficulties involved in accepting the fact of an uninterrupted telephone call by the deceased woman so shortly before the shooting. Further, the description of the appellant's voice by a police officer who telephoned just after the shooting, as hysterical and of a high inflexion, corresponded almost exactly with the description of the voice given by the telephonist. Although the Judicial Committee did not override the endorsement given the trial judge's direction to the jury by the Full Court of the Victorian Supreme Court,[12] it is apparent that they had deep misgivings about the sufficiency of that direction. Nonetheless, the passage is an important part of the judgment, since it heralds a new approach in which an accurate and probing direction to the jury will stimulate a fuller assessment of the probative value of the evidence.

There is a single fundamental issue raised by the facts of this case: does the evidence of the telephonist contain an element of hearsay? The answer, however, is neither easily discoverable nor easily stated—although the contrary impression is perhaps created by the advice of the Judicial Committee. A suitable starting point is the definitional test for hearsay enunciated by the Judicial Committee in *Subramaniam v. Public Prosecutor*:[13]

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

Thus, hearsay is defined in terms of the object of the evidence. Undoubtedly, the evidence, in its totality, was admissible so long as its objects were limited to rebuttal of the appellant's defence and explanation of the telephone call.[14] The Judicial Committee departed from the reasoning of the Full Court at this point, denying that the statement conveyed and implied assertion by the deceased that she was being attacked by her husband. In so doing, their Lordships recognised that the existence of such an implied assertion would

[11] For example, Goodhart, 'Changing Approaches to the Law of Evidence' (1965) 51 *Virginia Law Review* 759.

[12] [1971] V.R. 87, 94. Gowans, Gillard and Barber, JJ.

[13] [1956] 1 W.L.R. 965, 970.

[14] Both the Full Court and the Judicial Committee agreed that the words spoken were relevant and admissible. As Lord Wilberforce stated: 'The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called, is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken.' [1972] A.C. 378, 387. To be specific, the evidence would relate to verbal facts and would be admissible under the doctrine of *McGregor v. Stokes* [1952] V.L.R. 347. This was the view of the Full Court, and is born out by Lord Wilberforce's statement that 'they were relevant and necessary in order to explain and complete the fact of the call being made.' [1972] A.C. 378, 388. N.B. The call was only relevant if it came from the appellant's house—it would be hearsay if the only evidence of that was the caller's statement of her address. However, there was independent evidence of the place of origin of the call: the operator said that she plugged into Echuca 1494—the appellant's number. See [1971] *Criminal Law Review* 711.

taint the statement with an element of hearsay. This recognition settled an uncertain and controversial question, preferring the line of reasoning of *Teper v. R.*[15] and *Wright d. Tatham v. Doe*[16] to the arguments of Professor Cross and the example of the concisely formulated American Uniform Rules.[17] With all respect, it is submitted that this important principle was only recognised by default; it was forced from the Judicial Committee, despite their obvious reluctance to investigate the all too ill-defined 'periphery of hearsay'[18] by the necessity to explain the decision of the Full Court.

The Judicial Committee went on to show considerable inventiveness and agility in avoiding this recently discovered principle. It was held that the jury could, with all propriety, draw several highly prejudicial inferences about what was going on in the house at the time of the telephone call. It could be inferred that the deceased woman was in a state of emotion or fear, since that gave content to the telephone call. In addition, the fact that the caller desired the police justified the inference that the emotion detected was actually anxiety or fear at an existing or impending emergency. The Judicial Committee welcomed the use of these inferences by the jury to throw light on the situation developing in the house. If these inferences are permissible, why is an implied assertion inadmissible as hearsay, for even if they are distinguishable, each has the same effect? This is no simple uncomplicated question readily answerable by applying the definitional test for hearsay contained in *Subbramaniam v. Public Prosecutor*.[19] Quite the opposite: its resolution requires a detailed investigation of the unexplored 'periphery of hearsay'—that mental jungle where the Judicial Committee suggests a distinction can be drawn between logical inferences and implied assertions contained in a statement.

Clearly evidence will be hearsay when its object is to establish the truth of what is contained in the statement—but in a borderline case such as this, the first question must be what exactly is contained in the statement. The only rational explanation of the conclusion reached by the Judicial Committee is that the logical inferences which could be drawn from the statement did not follow with sufficient immediacy and strength to amount to an implied assertion. Nevertheless it was open for the jury to draw those conclusions, however weak. It is submitted that there could be no more obscure and artificial distinction than that which the Judicial Committee suggested between an implied assertion contained in a statement and a logical inference to be drawn from the statement. The artificiality of such a distinction was testified to by Professor Cross[20] when he said of *R. v. Rice*[21]

> It is little more than a quibble to argue that the ticket was tendered not as the equivalent of an assertion that it had been used by someone called Rice, but rather as an item of evidence from which it might be inferred that a person named Rice used the ticket because "an air ticket which has been used on a flight and which has a name upon it has more probably than not been used by a man of that name".[22]

[15] [1952] A.C. 480.
[16] (1837) 7 Ad. & E. 313.
[17] *Cross on Evidence*, (3rd edn.) 486.
[18] See Cross, 'The Periphery of Hearsay' (1969) 7 *M.U.L.R.* 1. In the course of this case note, the phrase is used in a non technical way to refer simply to the fuzzy edges of hearsay.
[19] [1956] 1 W.L.R. 965, 970.
[20] (1969) 7 *M.U.L.R.* 1, 10.
[21] [1963] 1 Q.B. 857.
[22] [1963] 1 Q.B. 857, 871.

Moreover, implied assertions and inferences are capable of having the same practical effect. The distinction in fact made by the Judicial Committee was merely between more obvious and less obvious inferences: but each inference may be perceived by the jury and given substantially the same probative value. With all due respect, the suggested distinction is arbitrary and irrational —it prevents the drawing of inferences from implied assertions, or put another way, it prevents the utilization of obvious inferences by labelling them hearsay, while allowing less obvious inferences to be drawn for the same purpose and to the effect as the hearsay. It is submitted that the best view is that of the Full Court of the Victorian Supreme Court: 'The facts which the statement tends to prove must include whatever the statement imports.'[23]

Even the established principle that whether a statement is inadmissible as hearsay will depend on its object is difficult to apply to cases on the 'periphery of hearsay'. The precise formulation of the inquiry is thrown in doubt by the confused terminology of the Judicial Committee's judgment: does the statement have to be 'tendered' by counsel as equivalent to an assertion of its truth, or 'admitted' to evidence as such, or is it sufficient that it may have been 'so understood by the jury'? Certainly the Full Court of the Supreme Court, and possibly the Judicial Committee who referred to the way in which the evidence was presented, seemed to have directed their attention to the purpose for which the judge admits evidence to the jury. Thus, attention is focused on the judge's direction to the jury; but it is submitted, with even deeper conviction if no valid distinction can be drawn between inferences and implied assertions, that the formulation of the direction must depend on the inferences which are likely to be drawn by a reasonable jury. The judge must look first at how the evidence will be understood by the jury, so that any dangerous inferences, importing an element of hearsay, might be guarded against in the direction. Whether evidence is hearsay or not depends primarily on the precautions the judge takes in his direction to the jury, but whether these precautions were sufficient can only be determined by looking at the inferences reasonably likely to be drawn by the jury. That, of course, would take into account the way in which evidence was presented by counsel, but would prevent any unnecessary limitation by that narrower consideration. The logic of this submission is easily demonstrated—if a statement relevant for some other purposes also has an element of hearsay, it should be accompanied by a direction that it is to be used only for those other relevant purposes and that no other inferences should be drawn from it;[24] that being the effect, the classification as hearsay should ultimately depend on the inferences which will be drawn from the statement by a reasonable jury. For these reasons, it is submitted that the decision of the Judicial Committee cannot be substantiated. Evidence that the deceased was in a state of emotion or fear when she made the telephone call invited the dangerous inference that it arose out of the appellant's actions.[25] The drawing of such a highly prejudicial inference, from

[23] [1971] V.R. 87, 94.

[24] The Full Court felt that the evidence was used testimonially, since the jury were told the evidence could be used to show the relations between the wife and the appellant in the house at the time. This was held to be hearsay since it sought to prove the relations between the couple, not by the evidence of witnesses who were actually present as in *Wilson v. R.* (1970) 44 A.L.J.R. 221, but by the narration of a third party. See also *Wilson v. R. supra.*—Statements were related as part of the evidence of a quarrel, but as Barwick C.J. said, 'care must be taken by appropriate directions to the jury to properly confine their use of such statements.' (1970) 44 A.L.J.R. 221, 222.

[25] Note, (1971) *Criminal Law Review* 710.

the telephonist's evidence of statements made to her by the deceased, was not prohibited by the trial judge. The evidence involved an element of hearsay, which was insufficiently controlled by the trial judge's directions to be admissible. That was the object of the evidence, and that was how it was understood, and it should not matter whether the link with the actual statement is labelled inference or implication.[26]

The rationalization of the hearsay rule achieved by the decision of the Judicial Committee in *Ratten v. R.* might yet come to be acclaimed as the vanguard of statutory modification and reform. Consequently it is regrettable that the Judicial Committee's judgment is marred by a failure to fully examine the confusing 'periphery of hearsay'. It is even more regrettable when it is appreciated that this failure was deliberate. It seems that the artificial distinction drawn between inferences and implied assertions was simply a device used by the Judicial Committee to contain the hearsay inquiry on a superficial level, so that attention might be directed away from the rule to its exceptions and to a fuller assessment of the cogency of the evidence.[26a] The tendency to classify evidence falling within the 'periphery of hearsay' as non-hearsay, without a full investigation, was previously demonstrated by the courts in *Gaio v. R.*[27] and *R. v. Rice*.[28] Now the Judicial Committee of the Privy Council has added its authority to that tendency. The effect of that tendency frequently will be to admit, as original evidence, testimony which is open to highly prejudicial inferences, and which could just as easily have been declared inadmissible as hearsay. There can be no doubt that it is a dangerous tendency since a jury might easily attach undue weight to such evidence—this possibility must arouse the greatest concern in criminal cases.[29] It also appears that the Judicial Committee underestimated this danger. Their belief that these dangers would be counterbalanced in future by a fuller and more careful assessment of the cogency of evidence is, in fact, better described as a frail hope. There is no assurance that this new approach will be adopted; in fact, its adoption must be doubtful in view of the extensive use of juries in criminal cases in Australia, and the doubts many members of the practising profession still hold about the rational capacity of the juries to assess evidence.[30]

In view of the very real dangers of injustice it is disturbing to see the Judicial Committee admitting a statement from the 'periphery of hearsay' when its nature has not been fully investigated—resultant allegations of injustice cannot always be dismissed with the statement that even if it was hearsay it was admissible as part of *res gestae*. The fact that the Judicial Committee was attempting to facilitate the statutory reform of the hearsay rule does not

[26] The Judicial Committee's view is contrary to that taken by the High Court of Australia in *Ramsay* v. *Watson* (1961) 108 C.L.R. 642.

[26a] In a later extra-Judicial statement, Lord Diplock indicated his dissatisfaction with the hearsay rule: (1971) 45 *Australian Law Journal* 569.

[27] (1960) 104 C.L.R. 419.

[28] [1963] 1 Q.B. 857.

[29] Harding, 'Modification of the Hearsay Rule' (1971) 45 *Australian Law Journal* 531, 536, 557.

[30] *Ibid.*, 537. The retention by the Judge of a discretion to exclude highly prejudicial evidence in criminal cases, and its more frequent exercise, would render the approach more practicable. However, the general tendency to classify borderline evidence as non-hearsay endorsed by the Judicial Committee seems to leave little room for the exercise of discretion.

It would also be more practicable if the judges took more advantage of their considerable leeway to comment on the evidence: *Schulmann v. Peters* [1961] A.L.R. 209; *R. v. Mawson* [1967] V.R. 205.

excuse its failure to fully investigate the borderland of hearsay—in fact it should have been a necessary and integral part of their rationalisation of hearsay. Even more unfortunate was the fact that omission obfuscated a basic principle of the hearsay rule which is well worth salvaging. The lesson to be learned is that the underlying principle of the hearsay rule, which protects the accused from evidence which he cannot challenge by cross-examination and which the jury might give undue weight to, should not be submerged in reformist zeal, especially in criminal cases.[31]

Many years have past since the *Evershed Committee on Supreme Court Practice and Procedure* declared that desirable reforms in the hearsay rule could be achieved 'by a liberal interpretation of the rule of evidence known as *res gestae*'.[32] In *Ratten v. R.* the Judicial Committee accepted that invitation, seizing the opportunity to undertake a complete restatement of the doctrine of *res gestae*. This readiness to deal with *res gestate,* on the assumption that the evidence was hearsay, is indicative of the reform-oriented approach of the whole judgment.

Res Gestae has been variously described as 'a final forensic formula' of admissibility[33] and as 'a respectable legal cloak' for 'a variety of cases to which no formula of precision can be applied'.[34] A comprehensive restatement of the doctrine was obviously called for, and as a first step the Judicial Committee outlined the three most important applications of *res gestae*:

1. The Judicial Committee pointed out that *res gestae* allows the admission into evidence of certain factual occurrences so closely associated with the act in question that they could not be separated from it without making it unintelligible.[35]

2. It was made clear that *res gestae* allows the admission of spoken words as such if they are relevant facts, quite apart from any consideration of the truth of what they convey.

   Thus, the actual words of the telephone call in this case could be proved: the words were admissible as verbal facts necessary to explain and give content to the telephone call.[36] However, the Judicial Committee went on to hold that the words were also admissible as original and not hearsay evidence of the physical or mental condition of the speaker.[37] This classification has already been challenged; here it is sufficient to point out that the classification is in conflict with the decision of the High Court in *Ramsay v. Watson.*[38]

3. The doctrine extends to hearsay statements made as part of *res gestae* —the actual terms used by the Judicial Committee to explain this application referred to the facts of the case and were not intended to exclude cases such as *Adelaide Chemical & Fertilizer Company Ltd v. Carlyle*[39] and *Davis v. Fortior Ltd.*[40]

[31] Harding, *op. cit.*, 536-537, 557.
[32] Cmd 8878, 88. See the article by Professor Nokes, '*Res gestae* as Hearsay', (1954) 70 Law Quarterly Review 370.
[33] *Ibid.*, 381.
[34] *Per* Lord Tomlin in *Holmes v. Newman* [1931] 2 Ch. 112, 120.
[35] *O'Leary* v. *R.* (1946) 73 C.L.R. 566, 577 (*per* Dixon J.).
[36] See *McGregor v. Stokes* [1952] V.L.R. 347.
[37] The conflicting views as to whether it is hearsay or original evidence are summarised by R. W. Baker in *The Hearsay Rule* (1950) 127 *et seq.* See also (1972) 35 *Modern Law Review* 541.
[38] (1961) 108 C.L.R. 642.
[39] (1940) 64 C.L.R. 514.
[40] [1952] 1 All E.R. 1359.

It should also be noted that, in accordance with the modern authorities,[41] statements are received under this head as an exception to the rule against hearsay.

Of greater importance, is the Judicial Committee's ennunciation of the general principles upon which hearsay evidence may be admitted as part of the *res gestae*. Dismissing the possibility of inaccuracies and uncertainties in the narration as a consideration going to weight, Lord Wilberforce pointed out that:

> The possibility of concoction, or fabrication, where it exists, is on the other-hand an entirely valid reason for exclusion, and is probably the real test which judges in fact apply. In their Lordships' opinion this should be recognised and applied directly as the relevant test: the test should be not the uncertain one whether the making of the statement was in some sense part of the event or transaction.[42]

The Judicial Committee substituted a test of 'spontaneity and involvement' for the old test of contemporaneity: the correct test is whether the statement was made in circumstances of spontaneity and involvement in the event, so that the possibility of concoction or fabrication can be disregarded.[43] Obviously this would exclude a statement made by way of narrative of a detached prior event. On the other hand 'if the drama, leading up to the climax, has commenced and assumed such intensity and pressure that the utterance can safely be regarded as a true reflection of what was unrolling or actually happening, it ought to be received'.[44] An immediate effect of the adoption of this test was to render the decision in *R. v. Bedingfield*[45] insupportable. Their Lordships agreed that where a victim cries out immediately upon her throat being cut, 'there could hardly be a case where the words uttered carried more clearly the mark of spontaneity and intense involvement.'[46]

The test of contemporaneity was completely purged by the Judicial Committee—apparently because of the imprecision and clumsiness involved in its application.[47] But the true explanation is probably that the test of contemporaneity simply did not suit the purposes of the Judicial Committee: it was constrained by a whole body of case law involving a comparatively illiberal approach to the admission of hearsay as part of *res gestae*.[48] The substitution of a new test would permit the extension of the doctrine of *res gestae* to allow the admission of greater volume of relevant evidence.

Lord Wilberforce went on to summarize the general principles governing the admission of hearsay evidence as part of *res gestae*:

> hearsay evidence may be admitted if the statement providing it is made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of

[41] *Teper v. R.* [1952] A.C. 480 and *R. v. McIntosh* (1968) Qd. R. 570.
[42] [1972] A.C. 378, 389.
[43] (1972) 36 *Journal of Criminal Law* 53.
[44] [1972] A.C. 378, 389-90.
[45] (1879) 14 Cox C.C. 341: see also the note in [1972] *Criminal Law Quarterly* 142.
[46] [1972] A.C. 378, 390.
[47] Note (1972) 36 *Journal of Criminal Law* 53 and the comments by Jean Campbell in (1972) 35 *Modern Law Review* 542.
In the course of the judgment Lord Wilberforce stated that the test to be applied should not be the uncertain one whether the making of the statement is in some sense part of the event or transaction because 'this may often be difficult to show'. [1972] A.C. 378, 389.
[48] *E.g. R. v. Bedingfield* (1879) 14 Cox C.C. 341; *Carlyle's* case (1940) 64 C.L.R. 514, 533 (*per* Dixon J.).

concoction or distortion to the advantage of the maker or the disadvantage of the accused.[49]

This formulation of the principle prompts two comments. First, it would have been preferable for Lord Wilberforce to have used the term 'deliberate distortion' rather than simply 'distortion'.[50] Not only does the fact that distortion is a frequent concomitant of spontaneity drain some of the meaning from the principle, but also in-accuracy and uncertainty had already been discounted as a basis of the test. It is submitted that effect should given to Lord Wilberforce's manifest intention by interpreting 'distortion' as 'deliberate distortion'. Secondly, the description of the test as one of 'spontaneity and involvement' might be slightly misleading. Spontaneity alone may not be sufficient: the language used by Lord Wilberforce seems to require a condition of involvement or pressure in the sense of some exciting event acting on the speaker—'a drama', 'climax' or 'crisis'.[51]

The final substantive feature countenanced by the judgment of the Judicial Committee was the nature of the proof required to establish the speakers involvement in the drama. Observing the absence of any precise rule, Lord Wilberforce pointed out that the trial judge must decide on the facts of each case whether this degree of involvement exists.[52] But while the statement itself is one of the things the judge may take into account, he should not allow it to elevate itself into the realm of admissibility. In the result, the Judicial Committee held, *obiter dicta,* that even if the evidence was hearsay, it was admissible as part of *res gestae*. The basis of this conclusion was the finding that the statement 'carried its own stamp of spontaneity' having been forced from the wife by the overhelming pressure of contemporary events. This is only a facade: quite obviously the content and manner of the statement are the most important indications of the speaker's involvement in the drama. In fact, the only other indication which the Judicial Committee cites is the close association, in time and place, of the statement and the shooting—that is contemporaneity. It follows that the principle motive for substituting the test of spontaneity must have been to permit greater regard to be had to the words of the statement in deciding whether that statement should be admissible. The frailty of this reasoning suggests that the Judicial Committee's treatment of the hearsay question may become increasingly controversial.

This judgment of the Judicial Committee of the Privy Council is noteworthy for the significant attempts at reform contained within it. The clear rationalization and extention of the *res gestae* doctrine is to be commended, as is the lead given towards the more rational assessment of the probative value of evidence. But both of these initiatives are undermined by the Judicial Committee's refusal to investigate the unexplored 'periphery of hearsay'. This case has been regarded as significant because of its clear restatement of the *res gestae* doctrine: most of the commentators seem to have overlooked the fundamental criticism that 'far greater uncertainty is likely to be produced by doubts concerning what a rule is than by doubts concerning the number of exceptions to it'.[53]

N. J. YOUNG

[49] [1972] A.C. 378, 391.

[50] Note, (1972) 14 *Criminal Law Quarterly* 142, 143-4.

[51] Note, (1972) 36 *Journal of Criminal Law* 53, 53-4; (1972) 35 *Modern Law Review* 541, 543.

[52] The requisite degree of involvement is such that the possibility of concoction or fabrication can be disregarded.

[53] Taken from an article by Professor Cross, 'The Periphery of Hearsay' (1969) 7 *M.U.L.R.* 1, 14.

One of the few commentators to have remarked on the hearsay aspect of the case is Lucie-Smith, [1971] *Criminal Law Review* 710-11.