Unravelling the Hearsay Riddle: A Novel Approach

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1. *Introduction*

It is often said that "very few things in law are certain," and the present chaotic state of the Hearsay Rule affords new vitality to this hackneyed expression. While it is true that the Hearsay Rule has been the topic of enormous debate and scholarship over the years, the fact remains that this has done little to quell the controversy and vagaries that have afflicted the rule since time immemorial. The reasons for such controversy are many, not the least of which is that lawyers, judges and academicians have explained the rule in vernacular which is often ambiguous, confusing and, in many instances, inconsistent with the views of other respected authorities on the subject. This problem is exemplified in the litany of varied hearsay definitions that one typically encounters in evidence treatises and other scholarly writings.[1] Another glaring example of the lack of doctrinal consistency surrounding the rule is the divergence of opinion among Australian authorities as to whether certain classes of out-of-court utterances should be classified as original evidence rather than recognised exceptions to the Hearsay Rule.[2] In any event, most, if not all experienced practitioners would agree that there has never been a clear consensus within the legal community as to how the Hearsay Rule applies, or, for that matter, what hearsay evidence is. To the extent that the interests of justice demand a minimal degree of certainty and doctrinal consistency in the legal doctrines which comprise the backbone of the law, the present state of the Hearsay Rule is anathema to these interests — so much so that the Law Reform Commission has called for radical reform in this area.[3] Succinctly stated, many now question whether the rule in its present state can survive a cost-benefit analysis where the interests of justice are concerned. In particular, the vagaries of the rule make adequate trial preparation difficult, reliable and highly probative evidence is often excluded, and the consequences for the litigants involved can be far reaching.

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1 See, eg, Gobbo J A, Bryne, D and Heydon, J D, *Cross on Evidence* (2nd Aust edn, 1979) at 456; Byrne, D and Heydon, J D, *Cross on Evidence* (3rd Aust edn, 1986) at 728; Buzzard, J H, May, R and Howard, M N, *Phipson on Evidence* (13th edn, 1982) at 329; Maguire, J M, "The Hearsay System: Around and Through the Thicket" (1961) 14 *Vand LR* 741 at 768.

2 See, eg, *Peipman v Turner* [1961] NSWR 252; *Nash v Commissioner for Railways* [1963] SR (NSW) 357 at 360; *Dobson v Morris* [1986] 4 NSWLR 681; *Walton v R* (1989) 166 CLR 283 at 289 (per Mason CJ). For an American perspective, see Wigmore, J H, *Evidence* (Chadbourn rev 1976) vol 6 par 1715.

3 Australian Law Reform Commission, *Evidence* (1987) Report No 38, ss56–61; see also Waight, P K and Williams, C R, *Evidence, Commentary and Materials* (3rd edn, 1990) at 760.

In an attempt to temper the forces calling for radical reform, Andrew Ligertwood has, according to some,[4] ingeniously redefined the Hearsay Rule through a restrictive approach which arguably provides a conceptual framework through which the rule can be applied with an acceptable degree of consistency and fairness.[5] The discussion to follow will ultimately explore the question of whether Ligertwood's formulation is truly a panacea for the rule's many deficiencies, or merely another futile attempt to reconcile the cacophony of logic and vernacular which has prompted calls for its radical reform. As a prelude to the assessment of Ligertwood's formulation, however, attention will focus on the traditional definition of hearsay and two important decisions which serve well to illustrate the difficulties courts have encountered in applying it correctly.

2. *A Definition of Hearsay*

Although the Hearsay Rule has been beset with many problems, a paucity of attempts to define it is not among them. One need look no further than such respected authorities as *Cross on Evidence*,[6] *McCormick on Evidence*,[7] *Phipson on Evidence*,[8] and *Essays on the Law of Evidence*[9] — to discover that no single formulation of the Hearsay Rule has gained universal acceptance. In light of the High Court's decisions in *Walton v R*,[10] *R v Benz*,[11] and *Pollitt v R*,[12] it is now settled that implied assertions are caught by the Hearsay Rule and thus, it is probably safe to say that the most current and widely accepted definition of hearsay is stated as follows:

> [E]xpress or implied assertions of persons, other than the witness who is testifying, and assertions in documents produced to the court when no witness is testifying, are inadmissible as evidence of the truth of that which was asserted.[13]

While this and other definitions of hearsay are easy enough to state, it must be re-emphasised that none have made significant inroads in eliminating the confusion and controversy surrounding the rule. In particular, much of the confusion and controversy has centred around the precise meaning to be ascribed to that portion of the hearsay definition which requires that the statement in question be offered "as evidence of the truth of that which was asserted".[14] How does one determine whether a statement is being offered for this purpose?

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4 Id at 883.
5 Ligertwood, A, *Australian Evidence* (2nd edn, 1993) at 428–55.
6 Byrne, D and Heydon, J D, *Cross on Evidence* (4th Aust edn, 1991) at 800, 806.
7 Cleary, E W, *McCormick on Evidence* (2nd edn, 1972) at 584.
8 *Phipson on Evidence*, above n1.
9 Cowan, Z and Carter, P B, *Essays on the Law of Evidence* (1956) at 1.
10 Above n2 at 293–6 (per Mason CJ) and 303–4 (per Wilson, Dawson and Toohey JJ).
11 (1989) 168 CLR 110 at 118 (per Mason CJ); at 133 (per Dawson J); at 143 (per Gaudron and McHugh JJ).
12 (1992) 174 CLR 558 at 565–6 (per Mason CJ); at 577 (per Brennan J); at 595 (per Deane J); at 620 (per McHugh J).
13 *Cross on Evidence* (2nd Aust edn, 1979) above n1 at 456.
14 Ibid; see generally above n6 at 799-862; above n7 at 579–613; Cross, R, "The Scope of the Rule against Hearsay" (1956) 72 *LQR* 91; Morgan, E, "Hearsay and Non-Hearsay" (1935) 48 *Harv LR* 138.

3. *The Meaning of "Offered As Evidence of the Truth of the Matter Which Was Asserted"*

It is axiomatic that for any evidence to be admissible, it must be relevant to some matter which is at issue in the proceeding.[15] The question of what is at issue, of course, depends upon a combination of the substantive law and pleadings which govern the proceeding. In a murder prosecution, for example, a plea of not guilty places all of the elements of the crime of murder at issue and either side may present evidence which tends to make the existence of these elements more or less probable than would otherwise be the case if the evidence were not adduced. In addition, the defendant may interpose certain defences which place other facts at issue, and there are always issues going to the credit of witnesses upon which evidence may be adduced.[16] Similarly, what is at issue in a civil case will depend upon which facts must be pleaded and proved as a matter of substantive law and which of the averments contained in the pleadings are admitted or denied by the parties; the same issues concerning the credit of witnesses also pertain to civil cases and evidence relevant for such purposes may be received.

It follows that in addressing the vexing question of whether an out-of-court utterance is being offered for the truth of the matters asserted, the initial consideration that arises is whether the utterance in question is relevant to any matter at issue in the case as determined by the substantive law and pleadings.[17] If the utterance is relevant, or arguably so, to proving or disproving some identifiable matter at issue, the ultimate question is whether the utterance would have probative value in this regard irrespective of whether the facts asserted in the utterance are true.[18] If the answer is "yes", then the utterance is not being offered for the truth of the matters asserted, but merely as evidence that the statement was made — and the utterance does not fall within the hearsay prohibition. It is outside the hearsay prohibition because its evidentiary value is in no sense dependent upon the credit of the declarant; that is, it is not dependent upon the declarant's veracity, memory, or ability to accurately observe the facts asserted in the utterance.[19] Thus, if the declarant's utterance is reported from the witness box by another witness who heard it, the jury need only be concerned with the credit of the witness who is testifying.[20]

On the other hand, if the answer to the above question is "no", then the utterance is being offered as evidence of the truth of the matters asserted and will be excluded under the hearsay prohibition unless it falls within a recognised exception to the rule. It is hearsay because its probative value vis-a-vis the proposition it is being offered to prove or disprove rests, in part, upon the credit of the declarant. When this is so, the jury must be concerned with the

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15 *Hollingham v Head* [1858] 4 CB (NS) 388–9; Waight and Williams, above n3 at 1; above n7 at 434–5.

16 Above n6 at 464–73, 526–34.

17 Ferguson, J, "Aspects Of The Hearsay Evidence Rule" in Glass, H, *Seminars on Evidence* (1970) at 112.

18 Above n7 at 584–5, 588.

19 Ibid; above n6 at 803–6.

20 Above n17 at 114.

credit of both the declarant and the witness who is reporting the declarant's out-of-court utterance from the witness box.[21] Where the declarant is available and compellable as a witness, the jury's task in assessing his or her credit in making the out-of-court utterance becomes less problematic. If the witness' testimony is consistent with his or her out-of-court statement, then the statement will of course be subject to cross-examination while the witness is under oath and the jury can observe his or her demeanour. Under these circumstances, it is evident that such factors as lack of oath, cross-examination, and ability to observe the declarant's demeanour contemporaneous with the making of the out-of-court utterance are of little significance.[22] Even in the event that the witness's testimony is inconsistent with the out-of-court statement, the statement can be admitted for the purpose of impeaching his or her credit (or as evidence of the truth of the matters asserted therein if the utterance falls within a recognised exception to the Hearsay Rule).[23] When the declarant is unavailable to testify, however, the party against whom the out-of-court utterance is offered is completely deprived of the opportunity to test his or her credit through cross-examination.[24] It is situations such as these — where the potential for miscarriage of justice is both palpable and intolerable — that constitute the core justification for the hearsay prohibition.[25] In this type of scenario, it is difficult to find fault with the logic of excluding hearsay utterances which do not fall within recognised exceptions to the Hearsay Rule. While there is much to be said for the view that not all hearsay utterances falling within recognised exceptions are necessarily reliable — and many falling outside recognised exceptions are quite reliable[26] — this is not, by itself, a sufficient justification for dispensing with the rule. Parliament and the courts can and should exercise their respective powers to address these shortcomings and provide the reforms which the interests of justice demand. Having said that, it is appropriate to focus on two controversial decisions which vividly illuminate some of the theoretical and practical difficulties in applying the rule.

4. Ratten's *Case*

In *Ratten v R*,[27] the defendant was charged and convicted of murdering his wife. As a defence, the defendant claimed that his wife was killed when his gun discharged accidentally.[28] The prosecution adduced testimony from a telephone operator that at or near the time of the shooting, a woman speaking

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21 Ibid.

22 Above n6 at 805, 808.

23 *Hammer v S Hoffnung & Co Ltd* [1928] SR (NSW) 280 (FC); *R v Askew* [1981] Crim LR (CA).

24 Above n6 at 803–5; above n7 at 583; Wigmore above n2, vol 5, par 1362. Wigmore writes: "The theory of the Hearsay Rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of cross-examination ... the hearsay rule, as accepted in our law, signifies *a rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of Cross-examination*". See also above n17 at 114.

25 Ibid.

26 Above n5 at 429–31; Waight and Williams, above n3 at 652.

27 [1972] AC 378.

28 Ibid.

in an hysterical voice called and said, "[g]et me the police please".[29] In addition, the prosecution adduced evidence that the call had originated from the defendant's residence where the deceased's body was later discovered.[30] On appeal, the Privy Council held that the words uttered by the caller were not hearsay, but merely words which attended and afforded meaning to the otherwise ambiguous act of dialling a telephone number.[31] In an often quoted passage from his opinion, Lord Wilberforce wrote:

> They were relevant and necessary, evidence in order to explain and complete the fact of the call being made. A telephone call is a composite act, made up of manual operations together with the utterance of words ... To confine the evidence to the first would be to deprive the act of most of its significance. The act had content when it was known that the call was made in a state of emotion. The knowledge that the caller desired the police to be called helped to indicate the nature of the emotion — anxiety or fear at an existing or impending emergency.[32]

The foregoing passage has been the subject of much criticism and not without justification. While it is most assuredly true that the act of dialling the number had little or no significance in the absence of the caller's request that the police be called, this does not lead inexorably to the conclusion that the caller's explanatory words are outside the hearsay prohibition. The question is not whether an out-of-court utterance explains or gives meaning to an equivocal act, rather it is whether the utterance contravenes the hearsay prohibition because it is being offered as evidence of the truth of the matter asserted therein. This question, as indicated earlier, must be determined in light of the issues raised by the substantive law and pleadings — and ultimately turns on the connection, if any, between the out-of-court utterance and the proposition it is offered to prove or disprove. If the connection is such that the probative value of the utterance rests upon the credit of the out-of-court declarant, the utterance is caught by the hearsay prohibition.

Take, for example, the situation where a disgruntled heir claims that a diamond ring was merely loaned to a friend of the testator and consequently, the ring belongs to the estate to be distributed under the terms of the testator's will. The recipient of the ring, on the other hand, claims that the testator made an inter vivos gift of the ring and refuses to return it. If we assume that the question of gift depends upon the testator's subjective intent or lack thereof to make a gift when he delivered the ring, then the testator's stated intention to make a gift would clearly be compelling evidence on this issue. While it is true that the act of handing over the ring was an equivocal one which acquired added significance through the words of the testator, the fact remains that the utterance is inadmissible unless it is relevant to proving or disproving some fact at issue in the proceeding. In this fact pattern, it is apparent that the utterance is relevant only to establish that the testator intended to make an inter vivos gift to the recipient. It is equally apparent that the probative value of the utterance in establishing this fact hinges on whether the testator spoke truthfully. If that

29 Ibid.
30 Id at 378, 385–6.
31 Id at 388.
32 Ibid.

is so, the utterance is hearsay and inadmissible unless it falls within a recognised hearsay exception. While some have espoused the view that words which accompany and explain relevant acts constitute such an exception,[33] this was clearly not the view expressed by the Privy Council in *Ratten*.

Applying these principles to *Ratten*, it is apparent that the utterance in question was being offered for the truth of the matter asserted. What fact at issue was the utterance in *Ratten* offered to prove? The defendant claimed the shooting was accidental and in any murder prosecution, the Crown must prove that an intentional killing occurred without lawful justification or adequate provocation to reduce the offence to manslaughter. To meet this burden, the Crown must negate the possibility of accidental death beyond any reasonable doubt. Therefore, based upon the substantive law and pleadings, the caller's words only had relevance in disproving the defendant's claim of accidental shooting and thereby proving the requisite intent to kill. If the utterance was offered for this purpose, it had no probative value unless the caller was speaking truthfully when she said, "[g]et me the police please". If the caller had been joking or insincere in making this request, the utterance would have little or no tendency to prove that the shooting was intentional.

While one could argue that the Hearsay Rule applies only to out-of-court "statements" or "assertions" of observed fact — and a demand to call the police does not so qualify[34] — there are strong countervailing arguments to consider. First, there is no tenable distinction to be drawn between the expressions, "[g]et me the police please" and "I want the police". Should the result in *Ratten*, not to mention the application of the hearsay prohibition generally, turn on the fortuitous circumstance that the caller happened to use the former rather than the latter expression? Secondly, if *Ratten* were to be decided today, it appears highly probable that the caller's words would be regarded as containing an implied "assertion" that the caller wanted the police, or something had occurred which required the police, or some similar assertion to the same effect.[35] Whatever the form of the implied assertion, the caller's words in *Ratten* were relevant only to the extent that they involved a chain of reasoning which depended upon the credit of the caller. Here, the chain of reasoning would be that if the caller was sincere in wanting the police then this, along with the other circumstantial evidence, was capable of founding an inference that the call was made by the deceased at a time when she feared for her life — from which a further inference could be drawn that the shooting was not accidental. Again, this chain of reasoning hinges on the sincerity of the caller in saying, in effect, "I want the police".

Apparently cognisant of the tenuous underlying rationale for its decision, the Privy Council went on to conclude in dicta that the caller's words could also be admitted under the res gestae exception to the Hearsay Rule. The Council wrote :

> [T]here is ample support for the principle that hearsay evidence may be admitted if the statement providing it is made in such conditions (always being

33 Waight and Williams, above n3 at 708; above n6 at 1074–8.
34 Above n5 at 441, 450.
35 Above n6 at 809–20.

> those of proximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused.[36]

Notwithstanding this dicta, the actual holding in *Ratten* has been followed in many recent decisions to admit evidence of telephone calls seeking to place bets at locations reputed to be used for illegal gambling purposes. Courts have repeatedly held that utterances making wagers are not hearsay, but words which accompany and explain the equivocal acts of dialling telephone numbers.[37] This faulty logic is exacerbated by the fact that the High Court has yet to formally repudiate this line of reasoning. The result is that one is left to speculate as to how *Ratten* would be decided by the High Court today. Would the Court adhere to the holding in *Ratten* out of respect for precedent? Would the Court agree in principle with the reasoning of the Privy Council? Might the Court decide *Ratten* on the basis of the Privy Council's dicta that the utterance fell within the res gestae exception to the Hearsay Rule? Might the Court agree with those who contend that words which accompany and explain relevant acts should be recognised as an exception to the Hearsay Rule?[38] Finally, might the Court adopt an approach which recognises that the caller's words contained an implied assertion, but admit the evidence by conceptualising it as conduct from which the caller's state of mind could be inferred indirectly and circumstantially — rather than directly and testimonially — and thereby circumvent the Hearsay Rule altogether?[39] However this question is ultimately answered, the present state of the hearsay prohibition is a veritable nightmare from the standpoint of doctrinal consistency. With this thought in mind, let us now turn our attention to the High Court's perplexing decision in *Walton v R*.[40]

5. *The* Walton *Decision*

In *Walton v R*,[41] the defendant was charged and convicted with the murder of his estranged wife.[42] At trial, the prosecution adduced evidence that on the day prior to the murder, the defendant told a witness that he planned to meet his wife at the Town Centre the following day.[43] This witness also gave evidence that on the day after the murder, the defendant admitted to killing his wife.[44] The major issues on appeal concerned the testimony of four prosecution witnesses, all of whom testified that on the day of and before the killing, the deceased had told them of her plans to catch the bus to the Town Centre to meet the defendant.[45] One of these witnesses also testified to overhearing a

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36 above n27 at 391.
37 *Davidson v Quirke* [1923] 42 NZLR 552 (FC); *Lenthall v Mitchell* [1933] SASR 231 (FC); *Marsson v O'Sullivan* [1951] SASR 244; *McGregor v Stokes* [1952] VLR 347; *Marshall v Watt* [1953] Tas SR 1 (FC).
38 Waight and Williams, above n3 at 708; above n6 at 1074–78.
39 Id at 817–9.
40 Above n2 at 283.
41 Ibid.
42 Id at 284.
43 Ibid.
44 Ibid.
45 Ibid.

telephone conversation between the deceased and a caller in which the deceased was heard arranging to meet the caller at the Town Centre.[46] This witness further testified that during the course of the conversation, the deceased said to M, her three year old son, "M, Daddy's on the phone".[47] Finally, the witness reported that M eventually spoke on the phone and said, "[h]ello Daddy".[48] Evidence was also adduced by the prosecution that M had never referred to anyone other than the defendant as "Daddy".[49]

In the majority opinion of Wilson, Dawson and Toohey JJ, the Court held that the deceased's statements of intention to meet the defendant at the Town Centre were properly admitted as original evidence of her state of mind — her present intention to meet the defendant at the stated location.[50] Based upon similar reasoning, the Court held that while the deceased's statement, "Daddy is on the phone" was likewise admissible as original evidence of the deceased's state of mind — her present belief that the person she was arranging to meet was the defendant — it was inadmissible hearsay when offered as evidence of the identity of the caller.[51] Lastly, the Court held that the words "[h]ello Daddy" were inadmissible hearsay because they contained an implied assertion that the person to whom the child was speaking was the defendant; as the child's state of mind was not probative of any issue in the case, the Court reasoned that the implied assertion was only relevant for the hearsay purpose of proving the identity of the caller.[52] The Court's reasoning in arriving at these conclusions is difficult to reconcile with the traditional concept of hearsay. More importantly, the Court's reasoning has ominous and far reaching implications concerning the continued vitality of the Hearsay Rule as a fundamental source of protection against the use of unreliable evidence.

The majority's view was that a person's state of mind, where relevant to an issue in a proceeding, may always be proved by the person's out-of-court utterances.[53] In this case, the deceased's intention and belief that she was to meet with the defendant on the day of the murder, if established to the jury's satisfaction, could be used as circumstantial evidence to found an inference that the deceased acted in accordance with that intention and belief and did in fact meet the defendant at the stated location. This chain of reasoning, when considered along with evidence that the defendant admitted to planning and committing the murder as well as his intention to meet the deceased at the same location, clearly demonstrates that the deceased's state of mind was relevant to a matter at issue in the case; namely, to establish the identity of the killer. On this point, it is difficult to find fault with the Court's reasoning. But was the Court correct in concluding that the deceased's statements reported by the four witnesses were admissible as original evidence to prove the deceased's state of mind? If the statements were relevant as circumstantial evidence of the

46 Ibid.
47 Ibid.
48 Ibid.
49 Ibid.
50 Id at 305 per Wilson, Dawson and Toohey JJ.
51 Id at 305–6.
52 Id at 306.
53 Id at 300–4. Although the majority did not expressly state this view in clear and unambiguous language, it does appear to be the thrust of their opinion.

identity of the killer, one need only return to the methodology outlined earlier to determine whether the statements were hearsay when offered to prove identity. Reverting back to the chain of reasoning through which the deceased's intention could provide circumstantial evidence on the question of identity, it is apparent that this chain of reasoning collapses unless it can be assumed that the deceased spoke truthfully of her intention to meet the defendant at the Town Centre. If the deceased had been insincere about her intention, then her statements were of no probative value in establishing identity or any other fact at issue in the case.

Aware of this dilemma, the Court embarked upon a novel and hyper-technical approach which, for practical purposes, has weakened the hearsay prohibition to such an extent that many believe the time has come for its radical reform. The Court reasoned that where a person's state of mind is relevant and that person makes statements reflecting his or her state of mind, such statements are per se outside the ambit of the hearsay prohibition,[54] provided the jury is directed that such statements are only to be considered as evidence of the declarant's state of mind.[55] The Court reasoned that where state of mind is relevant, a person's statements reflecting that state of mind may be conceptualised as conduct in the same sense as other forms of conduct which are not intended to be communicative.[56] When so conceptualised, the person's statements are merely a circumstance, like any other piece of circumstantial evidence, from which inferences can be drawn.[57] Thus, what a person says may be viewed as conduct from which it can be inferred that the declarant's state of mind was that reflected in his or her statement.[58]

This approach is problematic for several reasons. If out-of-court statements are automatically outside the hearsay prohibition when offered as conduct from which the declarant's state of mind, where relevant, can be inferred, why not allow other reasonable inferences to be drawn from such statements? If X says, "I recall seeing Y kill Z", the Court's reasoning would permit X's statement to be received as original evidence of the state of mind reflected by the utterance, but not as original evidence that Y did in fact kill Z.[59] The Court would regard the latter use of the statement as inadmissible hearsay unless it falls within a recognised hearsay exception. But why should a statement conceptualised as mere conduct — circumstantial evidence from which reasonable inferences can be drawn — be restricted only to founding an inference as to the declarant's state of mind? In principle, there is no logical reason why it should. If this principle were to be extended to its logical conclusion, there is little doubt that this would emasculate the purpose and effect of the Hearsay Rule beyond recognition.[60] It is submitted that this is precisely the reason why the Court has declined to do so.

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54 Id at 305–6.
55 Ibid.
56 Id at 302–6.
57 Ibid.
58 Ibid.
59 Id at 305–6.
60 Thayer, J B, *Legal Essays* (1908) at 270. Thayer states: "The hearsay rule operates in two ways: (a) it forbids using the credit of an absent declarant as the basis of an inference, and (b) it forbids using in the same way the mere evidentiary fact of the statement as having

The Court's reasoning is also tenuous for another important reason. In *Walton*, one only has to posit the question of whether the deceased's statements, even if conceptualised as conduct, would lead to the desired inference unless her statements were truthful. Unless the jury were to assume that the deceased was sincere in her stated intention, there is no logical basis for them to infer that she had that intention, much less draw the further inference that she acted in accordance with such an intention. In the final analysis, there is no escaping the conclusion that however the statements are conceptualised, their probative value vis-a-vis the proposition they are offered to prove rests upon the credit of the declarant in making the statements.

Finally, the majority's reasoning assumes that juries are capable and willing to follow a direction that statements such as "Daddy is on the phone" are not evidence of the identity of the caller, but only evidence of declarant's belief that the person she was arranging to meet was the defendant. It is probably unreasonable to expect that juries are capable of understanding such directions, and even more unreasonable to expect that they would be willing to follow them. The Court cannot help but appreciate that for all practical purposes, the effect of their decision is to allow the admission of inadmissible hearsay via the backdoor method.

If one accepts that the probative value of the statements, however they be conceptualised, rested upon the credit of the declarant, then what was the theoretical basis for the Court's position? Although the Court's subsequent decisions in *R v Benz*[61] and *Pollitt v R*[62] shed additional light on this question, Mason CJ's opinion in *Walton* provides a valuable clue. In addressing the question of whether a person's statements of intention should be regarded as hearsay or original evidence, Mason CJ wrote:

> Wigmore on Evidence ... suggests that such statements are an exception to the hearsay rule on the ground that a statement about a person's intentions is *direct and testimonial*, whereas *conduct* indicative of such intentions is *indirect and circumstantial* [emphasis added].[63]

The Chief Justice provided additional guidance when he added: "The hearsay rule applies only to out-of-court statements tendered for the purpose of directly *proving* that the facts are as asserted in the statement" [emphasis added].[64]

While the distinction between the use of an utterance as direct and testimonial as opposed to indirect and circumstantial is interesting in theory, one need only revert back to the meaning of "offered for the truth of the matter asserted" to appreciate that the determination of whether evidence is hearsay cannot turn on such artificial distinctions. The immutable fact is that rank hearsay does not shed its pernicious character simply because it is wrapped in a sugar-coating which bears the inscription "indirect and circumstantial". If the determination of hearsay could be made to depend on such a distinction, then why has the Court refused to allow out-of-court utterances to be treated

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been made under such and such circumstances". Ibid.

61 Above n11.

62 Above n12.

63 *Walton*, above n2 at 289.

64 Id at 288.

as conduct in order to found inferences of other facts asserted in the utterances? To recall the earlier example in which X states that he recalls observing Y kill Z, why shouldn't the distinction between direct-testimonial (hearsay) and indirect-circumstantial (non-hearsay) be capable of founding all reasonable inferences to be drawn from X's statement, including the inference that Y did in fact kill Z?[65] If the distinction suggested by Mason CJ is truly a viable basis for avoiding the hearsay prohibition, it follows that there is no logical reason for the Court to prohibit the utterance from being used in this manner. Again, it is submitted that the explanation lies in the Court's tacit recognition that such an approach would swallow up the Hearsay Rule in its entirety.

It must be said, however, that the occasional description of hearsay as an out-of-court statement offered testimonially to prove the facts asserted therein has genuine significance in Ligertwood's attempt to redefine the hearsay prohibition. This brings us at last to Ligertwood's formulation.

6. *A New Concept of Hearsay*

When one examines the various definitions of hearsay offered by such respected authorities as Cross,[66] Phipson,[67] Stephen,[68] McCormick,[69] Maguire,[70] and others, it is apparent that expressions such as "offered testimonially" and "relied upon testimonially" are not included within these definitions. Nonetheless, it has been suggested that most, if not all of the well-recognised definitions "seek to limit the term 'hearsay' to situations where the out-of-court assertion is offered *as equivalent to testimony to the facts so asserted by a witness on the stand"* [emphasis added].[71] In *Ratten,* for example, the Privy Council stated in dicta that "[a] question of hearsay only arises when the words spoken are relied 'testimonially,' i.e., as establishing some fact narrated by the words".[72] Thus, there have been occasional expressions of support for the notion that out-of-court statements are only hearsay when offered "as equivalent to testimony to the facts so asserted by a witness on the stand". But what is meant by this expression? Is this just another glorified means of emphasising that an out-of-court utterance is hearsay when its probative value rests upon the credit of the declarant? When a witness gives sworn testimony from the witness box as to what he or she observed, is it not correct to say that the probative value of the testimony hinges on whether the witness is reporting his or her observations truthfully and accurately? In this sense, it is quite true that out-of-court utterances are only hearsay when offered "as equivalent to testimony to the facts so asserted by a witness on the stand".

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65 Above n17 at 115–6. Ferguson J's view is that all reasonable inferences can be drawn from out-of-court utterances without violating the hearsay prohibition.

66 *Cross on Evidence* (3rd Aust edn, 1986), above n1 at 728.

67 *Phipson on Evidence*, above n1.

68 Stephen, J, *Digest of the Law of Evidence* (1893) at 15.

69 *McCormick on Evidence*, above n7 at 584.

70 Maguire, above n1.

71 *McCormick on Evidence*, above n7 at 585.

72 Above n27 at 387.

But there is another viable construction to be accorded this quotation. Witnesses who give testimony in court must do so in the form prescribed by the rules of evidence. Generally speaking, these rules restrict witnesses to reporting what they have actually observed in narrative form; that is, in a form which recounts their past observations of facts or events. If one were arguing in favour of a narrow view of the hearsay prohibition, an argument could be constructed that only out-of-court utterances which are stated in such narrative-testimonial form are within its scope. It is this reasoning which provides the foundation for the restrictive hearsay definition which Ligertwood espouses. In the most recent edition of his treatise, *Australian Evidence*, Ligertwood writes:

> I would suggest that, overall, the authorities show that the common law hearsay prohibition is not so wide as is generally assumed. Not *all* evidence dependent for its reliability upon an out-of-court assertion of fact is excluded. As a rule only hearsay evidence in testimonial form — in the form, that is, in which observations are normally reported directly to a court — are excluded by courts. Observations are normally reported through statements narrating the past observation of facts or events. As a rule the hearsay prohibition extends only to the reception of out-of-court statements tendered to prove asserted facts or events narrated in such statements.[73]

But where is the authority to support such a restrictive view of the hearsay prohibition? If there is no such authority, then on what principled basis can Ligertwood justify this view? Ligertwood urges that the Hearsay Rule should be regarded as a manifestation of a procedural system which prefers that witnesses report their observations directly to the court where they can be effectively evaluated through the test of cross-examination.[74] Thus, Ligertwood reasons, this preference is maintained by prohibiting evidence of out-of-court statements which are capable of effective repetition from the witness box.[75] Ligertwood further reasons that because out-of-court statements made in narrative-testimonial form meet this criterion, it is they and only they which are caught by the hearsay prohibition.[76] Statements which are not in narrative-testimonial form, according to Ligertwood, are incapable of effective repetition in court because their probative value rests, in part, on the time when they are made — and timing is an element that cannot be effectively recaptured by having the declarant repeat the utterance from the witness box.[77]

To illustrate, if A witnesses a collision between drivers B and C and thirty minutes later recounts his observations to a police officer, A is speaking in narrative-testimonial form. In this instance, there is no apparent reason why A cannot effectively make the same assertion directly from the witness box. Using this same fact pattern, if A had said to a bystander just seconds before the collision, "[m]y God, B is driving like a madman", Ligertwood would argue that this non-narrative utterance could not be effectively reproduced if A were to repeat it in court. Ligertwood writes:

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73 Above n5 at 432.
74 Id at 447.
75 Ibid.
76 Id at 447–8.
77 Ibid.

> Consequently, the hearsay prohibition should not be interpreted to exclude out-of-court statements which *may be reliable* and are not capable of effective repetition in court. Statements asserting the past observation of facts or events are *generally* capable of effective repetition in court and therefore should be made there. But statements made during events, spontaneously or as commentary upon continuing events, are not capable of repetition in this way ... Their probative weight lies in the time at which the assertion is made, and this element cannot be reproduced by later making the same assertion in court [emphasis added].[78]

Thus, Ligertwood urges that the traditional broad definition of hearsay deprives the fact-finder of reliable and probative evidence, notwithstanding that its reception would not offend his notion that the hearsay prohibition is only designed to exclude utterances which are capable of effective repetition in court.[79]

At first glance, Ligertwood's formulation provides an ingenious framework for the elimination of most, if not all of the lack of doctrinal consistency besetting the hearsay prohibition. Casting aside the myriad of difficulties associated with the concept of implied assertions,[80] cases such as *Ratten* and *Walton* could be easily decided by labelling the statements in question as non-narrative and therefore, outside the scope of the hearsay prohibition. To be sure, scores of controversial decisions could be resolved in similar fashion. Therefore, one must ask, why has this formulation been overlooked by so many renowned jurists and scholars?

To begin with, the notion that the Hearsay Rule is designed to exclude only utterances which are capable of effective repetition in court has little or no historical underpinnings. It is surely no coincidence that Ligertwood cites but one judicial authority and only two secondary sources in support of this notion;[81] the judicial authority being an opinion by Mahoney JA in *Jones v Sutherland Shire Council.*[82] On the other hand, the mere absence of authority is not a legitimate reason to be dismissive of ideas which are novel, progressive, and well-reasoned. Therefore, the ultimate test of Ligertwood's formulation is whether it can withstand careful analysis.

One difficulty with Ligertwood's formulation is that its application hinges on the ability to distinguish between narrative and non-narrative utterances. Although Ligertwood's definition of a narrative statement as one which narrates "the past observation of facts or events" appears to be straightforward, in practice it can be difficult to apply. Ligertwood adroitly addresses this issue when he writes:

> Unless one is prepared to conclude that intentions cannot have an existence separate from the statements manifesting them, so that the statement contains no assertion of *observed fact* but is itself the intention (and courts have never approached proof of intent in this Wittgensteinian manner), express statements of intent do appear to be statements containing *assertions* of *observed*

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78 Id at 447.
79 Id at 429–32, 447–8.
80 Above n6 at 809–20.
81 Above n5 at 434, n8.
82 [1979] 2 NSWLR 206 at 230.

> *fact.* The only way of escaping the hearsay prohibition altogether (rather than avoiding the prohibition by way of exception) is to argue that statements of intention are not in *narrative form* ... [emphasis added].[83]

If Ligertwood is willing to concede that statements of present intention contain assertions of observed fact, does this not amount to a tacit recognition that such statements — to some extent — represent a narration of "the past observation of facts or events"? Indeed, it is difficult to conceive of any utterance, however contemporaneous it may be with the event to which it relates, that is totally bereft of some narrative component. The potential difficulty in distinguishing between narrative and non-narrative utterances is exemplified in the following example. Suppose that X, whose father has been diagnosed with terminal cancer, says to a friend, "[m]y father is dying of cancer". In this situation, X could just as easily have said, "[m]y father has been diagnosed with terminal cancer". Employing Ligertwood's definition of "narrative", would the former statement be characterised as "non-narrative" since X is commenting upon a continuing event? Would the latter statement be characterised as "narrative" on the basis that X is narrating "the past observation of facts or events?" Does the foregoing example entail the conclusion that a person's choice of words in describing what is in substance the same event can be dispositive of the question of whether an utterance is narrative or non-narrative? Or, on the other hand, would Ligertwood contend that although the latter statement is in narrative form, it is in substance non-narrative because the process of dying of cancer is one continuous event? Finally, might Ligertwood contend that in substance, both statements are narrative because X could only have learned of his father's condition through the statements of others? If the admissibility of out-of-court utterances is to turn on the distinction between narrative and non-narrative, then of course the answers to these questions must be forthcoming. In any event, if one accepts the notion that all utterances, to some extent, contain a narrative component, then it is certainly arguable that the distinction between narrative and non-narrative utterances is more a question of degree than fact. Although Ligertwood appears to acknowledge the tenuous nature of this distinction, his formulation is conspicuously devoid of any attempt to brighten the line of demarcation between the two. Since the distinction between narrative and non-narrative constitutes the gravamen of Ligertwood's formulation, his failure to propose a methodology for drawing this distinction looms as a potential source of difficulty with his approach.

Regrettably, Ligertwood's formulation is problematic for additional reasons. As Ligertwood readily concedes, not all non-narrative statements are reliable and not all narratives are capable of effective repetition in court.[84] To be sure, it may be just as easy to concoct a statement regardless of whether its form is characterised as narrative or non-narrative. If X states that he would like to kill Y, there is no reason to assume that X is speaking truthfully because his statement is in non-narrative form. Depending on the circumstances in which X's statement is made, it may or may not be reliable. Similarly, if X witnesses the murder of his wife and minutes later describes the incident to police with tears in his eyes, it is probably accurate to say that X's narrative

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83 Above n5 at 453.
84 Id at 447.

statement is no more capable of effective repetition in court than, for example, the non-narrative plea of a robbery victim urging his or her assailant to desist. Are we to expect judges to decide which non-narratives offered for their truth are sufficiently reliable to warrant admission? If so, what standards are to be applied in making these determinations? Are we to expect judges to decide which narratives offered for their truth are not capable of effective repetition in court? If so, should those which are incapable of effective repetition be admitted as original evidence under Ligertwood's formulation? These issues are certainly germane to Ligertwood's approach, yet his failure to address them suggests that all non-narrative statements offered for their truth are outside the hearsay prohibition notwithstanding considerations of reliability. It also appears that all narrative statements offered for their truth would be subject to the hearsay prohibition regardless of whether they are capable of effective repetition in court. It is submitted that such an approach represents an important internal conflict within Ligertwood's formulation and more importantly, flies in the face of the very danger which the Hearsay Rule was designed to eliminate.

Ligertwood does not argue, nor could it be argued, that "non-narrative" utterances possess a talismanic quality which somehow eradicates the intrinsic dangers in hearsay evidence. Indeed, as noted earlier, Ligertwood acknowledges that not all non-narrative utterances offered for their truth are necessarily reliable. Despite this acknowledgment, Ligertwood would admit these utterances on the basis that their probative value rests largely upon an element of timing which cannot be effectively recaptured by having the declarant repeat the utterance in court. While there is much to be said for Ligertwood's view that non-narratives are generally incapable of effective repetition in court, the fact remains that the probative value of any non-narrative offered for its truth — as with any other type of out-of-court utterance offered for its truth — ultimately rests upon the credit of the declarant in reporting his or her observations sincerely and accurately. To be sure, it is precisely the fact that the declarant's credit cannot be tested through cross-examination that provides the major justification for the existence of the Hearsay Rule.[85] It is therefore apparent that the element of timing is hardly a sound basis for exempting all non-narratives from the ambit of the hearsay prohibition. Stated differently, notwithstanding that the timing component of a non-narrative statement offered for its truth has some probative value, one cannot escape the fact that the statement's ultimate probative value rests upon the credit of the declarant. Ligertwood's approach, therefore, is seriously flawed in that it substantially ignores the concerns which lie at the core of the hearsay prohibition.[86] Had Ligertwood merely advocated an expansion of the res gestae exception to include non-narratives which are made under circumstances indicating a likelihood of reliability, the tenor of the foregoing discussion would have been very different. It is clear, however, that Ligertwood's formulation is concerned not with the expansion or creation of hearsay exceptions, but with the redefinition of the fundamental nature of what hearsay evidence is.

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85 Above n6 at 805, 808; above n7 at 583; Wigmore, above n2, vol 5, par 1362.
86 Ibid.

7. *Conclusion*

Andrew Ligertwood's novel approach to the hearsay riddle is very seductive in that it provides a framework for an easy resolution to many of the contentious issues in the law of hearsay. Difficult cases such as *Ratten* and *Walton*, for example, could be resolved on the simple basis that the statements at issue were in non-narrative form and therefore outside the hearsay prohibition. On the other hand, it is often said with justification that for every complicated problem, there is always a quick, simple, and patently wrong solution. It is respectfully submitted that Ligertwood's attempt to redefine the Hearsay Rule represents a classical example of this cliche. Little purpose would be served in rehashing the multitude of reasons why Ligertwood's redefinition does not withstand careful scrutiny. Suffice it to say that however badly the Hearsay Rule is in need of reform, any proposal which effectively emasculates its status as a fundamental source of protection against the use of unreliable evidence must be rejected — unless, of course, the underlying objectives of the prohibition have changed. If they have, then Parliament and the judiciary should redefine what those objectives are and institute reforms which the interests of justice demand. Indeed, anything less would merely pay lip service to the tenet that a free society accords the highest priority to a fair and effective system of justice.