Methodology in Evidence — Facts in Issue, Relevance and Purpose

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The purpose of this article is two-fold: first, to focus attention upon three concepts which are fundamental to the effective use of the rules of evidence and, second, to stress and demonstrate the value of a systematic approach to problems of evidence.

The three concepts are, first, 'facts in issue', second, 'relevance'[1] and third, the 'purpose' for which evidence is intended to be used. All three concepts are discussed with reference to particular cases and I have provided an expansive illustration of 'facts in issue' and 'relevance' in the context of circumstantial evidence by offering an analysis of one of the trials recorded in the *Notable British Trials* series. The concept of 'purpose' is discussed in the context of two recent decisions of the High Court of Australia dealing with the hearsay rule.

This article is not intended to be cast in the mould of the conventional academic article. It is intended to serve a practical purpose and it seeks to do this by following, in part at least, a format which is really more akin to a demonstration than an exegesis in the conventional sense. My own experience as a teacher of Evidence has strongly suggested that there is some justification for such an approach; it attempts to give a clear shape to concepts whose outlines may not always be as clear in our minds as they should be. Accordingly, my concern is not so much to analyse the rules of evidence as such as to illustrate the application of certain basic concepts in a more expansive manner than is to be found in the textbooks. In keeping with this approach I have refrained from extensive citation of secondary sources in favour of providing practical examples of the concepts in question. In particular, I offer an extensive analysis of the trial of Herbert Rowse Armstrong in the *Notable British Trials* series.

Facility in the use of legal as of other kinds of rules and skills places a premium upon a methodical, structured approach to the application of the rules to fact situations and particularly is this the case when addressing problems of evidence. It is, however, easy to lose grasp of such an approach and when this

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[1] I have referred to 'relevance' as though it were an independent concept, which is misleading because 'relevance' does not exist *in vacuo*; facts offered in evidence possess 'relevance' only if their existence is probative of other facts — ultimately, of the facts in issue. I have cited it as a separate concept instead of subsuming it under 'facts in issue' in the interests of explicitness, since it is a theme of this article that explicitness in identifying basic concepts is integral to a methodical approach to problems of evidence.

happens a failure of knowledge occurs. A structured approach is not merely an 'extra' to be regarded as standing outside the understanding of legal rules; it is integral to such an understanding and its absence signifies defective understanding. A structured approach requires the effective use of key concepts, and if key concepts cannot be used effectively, they have not been understood in any true sense notwithstanding that it remains possible to give a verbal definition or description of them.

Problems of evidence at all levels are rendered more tractable if they can be approached from the perspective afforded by a consciously adopted procedure. The procedure will be more or less helpful to the extent to which it reflects a dynamic, or internal logic, even in a body of rules as apparently uncoordinated as the rules of evidence. The description and explanation of such a dynamic may form the subject of a large-scale theoretical work. On a smaller scale, however, a measure of coherence in the way the rules work may be perceived through the conscious and systematic use of certain key concepts and it is to such use that I wish to draw attention in this article.

THE FACTS IN ISSUE

The concept of 'facts in issue' is the key to problems of evidence and is an indispensable tool in the analysis of such problems. While most textbooks on Evidence contain a description or definition of facts in issue, and Cross states that, 'Failure to discriminate clearly between different issues is one of the most potent, and least recognised sources of confusion and difficulty in the law of evidence',[2] not all discussions of the concept succeed in conveying a cogent sense of its primacy.

What, then, are 'facts in issue' and how are they to be identified in a given case? When a legal proceeding, whether civil or criminal, is commenced the party responsible for initiating the proceeding must make a number of factual allegations in an appropriate document. In a civil case these will be set forth in the statement of claim. In a criminal case they will be contained in the presentment (in the County and Supreme Courts of Victoria) or indictment (which is the equivalent of a 'presentment' in other jurisdictions) while in the Magistrates Court of Victoria the appropriate document is a 'charge' (formerly called an 'information'). The factual allegations contained in these documents must be sufficient to found the cause of action on which the plaintiff relies or the offence charged, so that failing a good defence the plaintiff or prosecutor would be entitled to succeed on the facts alleged. The factual allegations must be such that on being proved they realise or fulfil the elements of the cause of action or offence.

But the defendant may wish to make certain factual allegations of his own in reply. In a civil case he will make them in pleading his defence. In a criminal

[2] D Byrne, J D Heydon, *Cross on Evidence* (4th Australian ed, Butterworths, 1991) p 15 (emphasis added).

case he does not have to disclose his defence in advance (unless it is an 'alibi' defence)[3] and accordingly his defence will consist in the case as opened by his counsel and in the evidence which is adduced in support of that case. If the defence is one known as an 'affirmative' defence (usually a statutory defence) the defendant bears the legal burden of proof (on the balance of probabilities) in establishing the elements of that defence. The defence of insanity is the best-known non-statutory example of such a defence.

The facts in issue in a particular case may therefore be defined as the principal facts to be proved by the party bearing the burden of proof on a particular issue. The 'principal' facts are those which, if unchallenged, would of themselves suffice to establish the plaintiff's cause of action or the commission of the offence charged. In practice, of course, there will usually be a host of subsidiary facts which have to be proved in order to establish the principal facts and these subsidiary facts will be admissible in evidence if they are relevant to the principal facts and are not caught by some exclusionary rule.

How, then, are the facts in issue to be discovered? How does the person responsible for drafting a statement of claim or a presentment know what factual allegations to include in it? The answer is that the drafter must have resort to that part of the substantive law in which the elements of the selected cause of action or offence are defined. The rules of evidence have nothing to say about the objects of proof but are only concerned with the means of proof. (Henceforth, I shall confine my illustrations and discussion to the criminal context but they would apply equally to civil cases).

The first steps in the procedure which I suggested at the outset should be consciously followed when a problem of evidence arises can now be stated. First, the offence with which the accused is charged should be expressly noted. Secondly, the offence should be deliberately analysed into its constituent legal elements. Thirdly, the facts in issue should be identified and framed for each of the elements of the offence noted at stage two. This analysis should be performed even though the evidence may put only some of the elements in issue. Fourthly, the items of evidence should be distributed among the facts in issue or such of them as the evidence bears upon so as to produce a framework in which each item of evidence can be seen to be directed to its object of proof.

This suggested exercise in analysis is not a difficult matter; it can be done in a matter of seconds. The essential thing is that it is done as part of a deliberate process intended to bring into consciousness the concepts employed in the course of producing a reasoned approach to the problem. It is this exercise that constitutes the system of approaching problems of evidence which is illustrated in detail hereinafter.

[3] *Magistrates' Court Act* 1989 (Vic) s 47; *Crimes Act* 1958 (Vic) s 399A.

RELEVANCE AND CIRCUMSTANTIAL EVIDENCE

The necessity for keeping the facts in issue consciously in mind is most clearly demonstrated when questions of relevance arise. The threshold condition of admissibility of evidence is that the evidence be relevant.[4] But there is no such thing as relevance in a vacuum. If evidence is to be relevant it must be relevant *to* something. It is to the facts in issue that evidence must be relevant if it is to qualify for admission.

However, in cases depending on circumstantial evidence,[5] many items of evidence will bear an immediate relevance not to the facts in issue themselves but rather to facts which fall short of being themselves facts in issue but which are more or less valuable in establishing the facts in issue. In *Shepherd* v *The Queen*[6] these facts were termed intermediate or primary facts and their value lies in the extent to which cumulatively they justify an inference of the requisite standard of proof as to the existence of a fact or facts in issue. Typically, then, in cases relying on circumstantial evidence a conclusion on the ultimate issue — ie whether the defendant is guilty — will rest on inferences drawn from facts which are not themselves facts in issue. This circumstance does not mean that we should be less attentive to keeping the facts in issue in view but rather that we should be more so. In cases of circumstantial evidence the evidentiary net is likely to be cast quite wide and it is therefore essential that the pieces of potential evidence which get caught up in it should be carefully scrutinised for their ultimate bearing upon what has to be proved.

What is involved in this process is a constant awareness of the place of each item of circumstantial evidence in the chain of reasoning of which it is intended to form part and of the inference which that reasoning is intended to support. Circumstantial evidence derives its force from the extent to which cumulatively it is able to exclude any reasonable possibility of an explanation for the events in question consistent with the defendant's innocence so that the conclusion of guilt is drawn as an irresistible inference. In achieving this result the evidence may range widely so that individual items of evidence may at first blush appear to have little connection with the issues. In order, therefore, to keep a check on the relevance of such items it is essential to keep to the

[4] *Wilson* v *The Queen* (1970) 44 ALJR 221.

[5] Circumstantial evidence may be defined as evidence of facts which are not facts in issue but which, if they are established:
'lead the mind to believe that the facts in issue are more or less probable than otherwise they would have been. They are facts tending to prove (or to disprove) the facts in issue, and for that reason they are often termed *facta probantia*' — J Stone and WAN Wells, *Evidence, Its History and Policies* (Sydney, Butterworths Pty Ltd, 1991) 129.

[6] (1990) 170 CLR 573. This case has made it clear that it is not the law that, in cases depending on circumstantial evidence, the jury must not convict unless satisfied beyond reasonable doubt of the truth of each item of circumstantial evidence on which they have relied in reaching their verdict. It follows that the trial judge is not required as a matter of law to give a direction to this effect to the jury in such cases. Such a direction has come to be known as a *Chamberlain* direction because it was thought that the High Court in *Chamberlain* v *The Queen* (No 2) (1984) 153 CLR 521 laid down that the direction had to be given as a matter of law in all cases depending on circumstantial evidence.

forefront of the mind not only the facts in issue themselves but also the steps in the chain of reasoning by which each fact in issue is to be proved.

For a judicial exposition of the sort of reasoning to which the use of circumstantial evidence is likely to give rise readers are referred to the judgments of Dawson and McHugh JJ in *Shepherd* v *The Queen*.[7] In this case Dawson and McHugh JJ refer to the distinction between *basic facts* and *intermediate (or primary) facts*. Basic facts consist of individual items of evidence (such as the evidence of a particular witness) while intermediate facts are facts established by or inferred from the basic facts, and which are likely to form the basis of the ultimate conclusion of guilt or innocence at least in cases of any complexity where the incriminating facts are likely to be numerous.[8] This distinction provides a useful tool in analysing the steps in the chain of reasoning by which proof from circumstantial evidence characteristically proceeds and will be further referred to shortly.

The *Armstrong* Case

The *Armstrong* case[9] provides an interesting example of the way in which circumstantial evidence typically works.

Armstrong was a solicitor practising in the small Welsh border town of Hay-on-Wye in the years immediately following the First World War. In February 1921 his wife died and in early 1922 he was charged with murdering her by poisoning her with arsenic. He was tried before Darling J and a jury, convicted and hanged. He bears the unhappy distinction of being the only solicitor to be hanged in Britain this century.[10]

The first point to note is the charge, namely, murder, which is the unlawful killing of a human being with malice aforethought. The Crown had therefore to prove that Armstrong, with intent to do so, caused the death of his wife. The second point to note is the particularised allegation of the means whereby he killed his wife, namely, by the administration of arsenic. The third point to note is the facts in issue, which are straightforward. The Crown had to prove that:

[7] Ibid.

[8] There appears to be some variation in the terminology of this distinction. Dawson J treats the term 'primary facts' as synonymous with 'intermediate facts' whereas McHugh J appears to treat 'primary facts' as synonymous with 'basic facts'. I will attempt to avoid confusion by confining the terms of the distinction to 'intermediate facts' and 'basic facts'.

[9] Filson Young (ed) *The Trial of Herbert Rowse Armstrong* (Edinburgh, William Hodge, 1927).

[10] He is not, however, the only solicitor to have been tried for murder in Britain this century. A short time before Armstrong committed his crime a solicitor also practising in Wales had been tried for the murder of his wife by poisoning and had been acquitted. See *The Trial of Harold Greenwood* in the *Notable British Trials* series. It has been suggested that Armstrong took heart for his crime from Greenwood's acquittal. There is also the case of Thomas Ley, a former Minister of Justice for New South Wales. He was convicted in London of murder and sentenced to death. However, before the sentence was carried out he was found to be insane and was removed to the institution for the criminally insane at Broadmoor where he died a couple of years later. See *The Trial of Ley and Smith* in the *Notable British Trials* series.

1) Mrs Armstrong was dead;
2) her death was due to arsenical poisoning;
3) the arsenic that killed her had been administered by Armstrong;
4) Armstrong had administered the arsenic with intent thereby to cause the death of his wife.

Of the above facts in issue, the facts of Mrs Armstrong's death and that it was due to arsenical poisoning were not in contest and could hardly have been contested. The real issue was therefore whether it was Armstrong who administered the arsenic which caused his wife's death. At this point it is worth considering the possible 'defences' that Armstrong could have raised. He could have agreed that he administered the arsenic but that he did so by accident in the belief, for example, that it was one of the homoeopathic medicines which his wife was in the habit of taking, or that while knowing that it was arsenic that he was giving to her he intended to administer only a tonic dose and not a fatal dose. Alternatively, while accepting (as he did) that his wife died from the administration of arsenic, he could have maintained (as he in fact did) that he had nothing to do with it. This latter position would leave the Crown with two possibilities which would have to be excluded beyond reasonable doubt, namely, that Mrs Armstrong had committed suicide or that some third person had administered the arsenic to her. Given the position which the defence in fact adopted, proof that it was Armstrong who administered the arsenic would almost certainly establish as an irresistible inference the fourth of the above facts in issue, namely, the mental element of the intent to kill.

Of course, the Crown did not know which of the above positions or 'defences' the defence would take. At the earlier committal proceedings the Crown had disclosed its case so that the defence knew what it had to meet but the defence case was reserved. Consequently, the Crown had to prepare its case in such a way as to enable it to exclude whatever foreseeable explanation the defence might offer as to the manner in which Mrs Armstrong was poisoned — that it was an accident on the part of Armstrong, that it was suicide or that it was murder by a third party. However, none of these possibilities constitutes a separate fact in issue — they are part and parcel of the two outstanding facts in issue, namely, whether Armstrong in fact administered the arsenic to his wife and if so whether he did so with intent to kill her. Given the position actually adopted by the defence, the issue of intent would be virtually decided upon the issue whether it was Armstrong who administered the arsenic.

Of course, no one actually saw Armstrong give arsenic to his wife. There was thus no direct evidence of administration. That is why the case was one of circumstantial evidence. From the evidence given, inferences had to be drawn which would in turn lead inevitably to the ultimate conclusion of guilt. In his opening statement to the jury at the trial the Attorney-General[11] outlined the matters to which his evidence would be directed and which would, if established to the jury's satisfaction, compel the drawing of the necessary

[11] Sir Ernest Pollock, KC, who later as Lord Hanworth became Master of the Rolls.

inferences. These matters were, first, that Armstrong had the means of killing his wife in the manner alleged, that is, he was at the operative times in possession of arsenic; second, that he had the opportunity to use those means; third, that no one else had an opportunity to do so; and, fourth, that he had a motive for killing his wife. Let me illustrate the steps in the reasoning process which constitute proof in this type of case. In doing so I shall be able to employ the distinction made in *Shepherd*[12] between basic facts and intermediate facts. In terms of that distinction the matters enumerated above may be characterised as intermediate facts.

Clearly, the Crown would not move very far with its case unless it was able to lead convincing evidence that at the material times Armstrong had arsenic in his possession. Consequently, evidence was led from the chemist in Hay that Armstrong had bought arsenic from him shortly before his wife's death in a quantity sufficient to provide a fatal dose, and also that on previous occasions over a number of years arsenic, whether as such or in the form of weed-killer, had been bought by Armstrong or his gardeners on his behalf. Evidence was led from gardeners employed by Armstrong that arsenic was kept at Armstrong's home. These witnesses were cross-examined for the purpose of showing that the arsenic was for an innocent purpose only, namely, killing weeds but the essential thing from the Crown's point of view was to establish by means of these particular witnesses that Armstrong at the material times had arsenic in his possession. The evidence of these witnesses constituted the basic facts which, if accepted by the jury, established the intermediate fact of possession.

But while the fact of possession of arsenic was indispensable to proof of the Crown's case it could not of course justify an inference that it was Armstrong who had administered it to his wife. Proof of this issue involved not only showing that Armstrong had the opportunity to administer the arsenic but also excluding the reasonable possibility that any other person including Mrs Armstrong herself could have administered it to her. As long as such a possibility remained it could not be said that Armstrong's guilt had been proven beyond reasonable doubt.

Proof that Armstrong had the opportunity to administer the arsenic to his wife consisted in items of evidence — basic facts — from household servants and nurses as to the manner in which Mrs Armstrong's meals were prepared, what they consisted of and where the food from which they were made was kept. Milk and a syphon of soda water were kept in Mrs Armstrong's bedroom after she had been taken ill and when Armstrong visited his wife, as he did from time to time, he could have introduced arsenic into those liquids. Furthermore, a preparation of invalid's food was kept in the larder downstairs to which Armstrong would have had access.

But other persons also had access to these items of food and drink and the Crown had therefore to eliminate them from the reckoning. It did this firstly by leading evidence to show that in the August preceding Mrs Armstrong's death — August 1920 — she had exhibited unmistakable symptoms of

[12] (1990) 170 CLR 573.

arsenical poisoning. These symptoms had cleared after Mrs Armstrong was admitted to a private mental hospital although they continued to manifest themselves for a short period after her admission. At the time they were not recognised for what they were but their true nature was established later in the light of subsequent events. She was discharged from the mental hospital in January 1921 — about a month before her death — and within a matter of days she again began to exhibit symptoms similar to those of the previous August. The Crown was able to show that the only person who was a member of the household at the times when the arsenic, which was responsible both for the symptoms of the preceding August and for Mrs Armstrong's actual death, must have been administered was Armstrong (if we except for the moment Mrs Armstrong herself). Evidence — basic facts — in support of this fact showed changes of staff among the domestic servants between the August and the following January and also that the housekeeper, who remained in the Armstrongs' employ over the whole period, was taking her summer holiday at the relevant time in August. On this state of the evidence the theory of murder by a third party would have had to postulate two different poisoners — one who was responsible for the August poisoning and the other who was responsible for the fatal poisoning.

The improbability of such a postulate was obviously appreciated by the defence because it became apparent at an early stage in the trial that the defence 'theory' of the case was suicide. Much was made by the defence of the fact that Mrs Armstrong was apparently of a neurotic disposition and had made remarks which could be interpreted as indicating suicidal tendencies. Indeed, after her discharge from the mental hospital a psychiatric nurse had been employed to look after Mrs Armstrong at home. To eliminate the suicide hypothesis the Crown called impressive medical evidence[13] to prove that a fatal dose of arsenic had been given to Mrs Armstrong within 24 hours of her death and other, direct, evidence to prove that for the last four days of her life she had been totally bed-ridden and helpless. She could not sit up in bed or feed herself without assistance at any time during that period. Consequently, she could not have administered to herself the fatal dose. Furthermore, the fact that her death occurred nearly a month after the onset of the symptoms of arsenical poisoning which followed her return from the mental hospital was inconsistent with a suicidal resolve which one would expect to be put into effect with much greater immediacy.

But however strong the Crown case in establishing the 'intermediate facts' — and its strength lay in its medical witnesses — that case would be somehow lacking in credibility if it could not be shown to fit within the jury's sense of the probabilities of human behaviour. The case needed a psychological explanation consistent with the jury's own experience of the reasons which might lead a person to behave in a particular way. In short, the case needed a motive. This was all the more necessary since all the appearances were that Mr and Mrs Armstrong had been a contentedly married couple living on terms of equable if undemonstrative affection. Indeed, it might well be supposed that

[13] Including Sir Bernard Spilsbury, the noted Home Office pathologist.

the Crown had a considerable hurdle to face here since what was involved was the demolition of Armstrong's public character as the epitome of respectability and its replacement with the reality of the sadistic, secret poisoner who would not scruple to take his opportunities both in the sick-room and at the tea-table.[14] Armstrong's domestic life was, by all appearances, one of unvarying propriety; he was the principal solicitor in the town and his clients included local landed interests; he was clerk to the Hay justices and to the local Commissioner of Taxes; he was a member of two County Clubs and he retained his military title of Major which was the rank he had achieved while serving in the Army during the First World War and by which he was referred to even during his trial. It says much for the strength of the other evidence against Armstrong that the jury convicted him despite the flimsiness of the evidence of motive, which was the weakest part of the Crown's case.

The motives offered by the Crown were, first, money and, second, another woman. The evidence for the second motive was slight; that for the first motive consisted of testimony concerning two wills apparently made by Mrs Armstrong. The first will was made early in 1917 and evidence of it was given by Mrs Armstrong's sister to whom it had been entrusted. Mrs Armstrong was possessed of certain property coming to her from the estates of her deceased parents of an appreciable value by today's standards and most of this had by her 1917 will been tied up in trust for her children with a small annuity of 50 pounds for her husband. However, this was not the will that was proved after her death but a later one made in July 1920 (about six weeks before Mrs Armstrong entered the mental hospital) in Armstrong's own handwriting. Under this will Armstrong was a beneficiary to the extent of 2,300 pounds. The Crown attempted to cast suspicion upon the manner in which this will was made and executed. Evidence was led from household servants who had attested the will in order to show that Mrs Armstrong was not present at the time of attestation. If this were true the will would, of course, have been invalid as Armstrong, a solicitor, would have known. The suggestion was that Armstrong had forged his wife's signature to the will and that this was why she was not present when it was attested. The evidence from the servants was, however, conflicting, one of them being treated by the Crown as hostile.

There was also evidence from another solicitor practising in Hay, Mr Martin, favouring the inference that Armstrong was experiencing money problems which were causing him professional embarrassment in a property transaction in which Armstrong was acting for the vendor and Martin for the purchasers. Armstrong had received the purchasers' deposits as stakeholder but unaccountably the transaction had failed to complete despite pressing demands from Martin.

None of the items of evidence in the *Armstrong* case to which I have thus far referred raised problems of admissibility. They were contentious in the sense that the defence either denied the facts asserted by the evidence or sought to

[14] Filson Young, in his preface to the *Armstrong* volume in the *Notable British Trials* series, refers to Armstrong as 'the tea-time poisoner' through whose story there runs 'the tinkle of tea-cups . . . if people would only come to tea.'

place a different construction upon them but the evidence was clearly relevant to the case presented by the Crown. I have referred to this evidence at some length in order to show in detail how proof in a case such as this depends on being able to connect the facts in issue with the individual items of evidence through a chain of reasoning which admits of only one reasonable conclusion. It is really the chain of reasoning which constitutes the proof, and it does so by showing how all the individual pieces of evidence would have a coherence based upon the probabilities of human experience if the facts in issue were true, which they would lack on some other explanation of events. Thus, if it were the fact that Mrs Armstrong was suffering from arsenical poisoning in August 1920 as well as February 1921, we can make sense of the two acts of poisoning only by finding a link between them which satisfies our sense of probabilities. Such a link would be found if it could be shown that the same person was responsible for both acts of poisoning whereas, in the absence of additional evidence, we would remain dissatisfied with the hypothesis that a different person was independently responsible for each act. Where the evidence is wide-ranging as it is quite likely to be in such a case as that of Armstrong it will be only too easy to lose track of the connections or links between the different items if the facts in issue are not constantly kept in view. A conclusion on the facts in issue is the product of the cumulative probabilities revealed by the items of evidence and the connections between them, but those probabilities can only be realised when they are tested against the facts in issue.

In the *Armstrong* case itself much attention was focussed upon events in August 1920 — seven months before Mrs Armstrong died — and in the view of Armstrong's counsel[15] those events were at the heart of the Crown case. In order to deal with them the defence went even further back in time — to 1915 — in order to show that the symptoms from which Mrs Armstrong was suffering at the time she went into the mental hospital in August 1920, and for some days thereafter, were not those of arsenical poisoning but were merely a recurrence of similar symptoms from which she had suffered from time to time during the war years, when Armstrong was away on active service, and so could not possibly have been responsible for them. If the defence could have succeeded in raising a reasonable doubt as to whether Mrs Armstrong was suffering from arsenical poisoning in August 1920 it would have knocked away a major prop of the prosecution case. Proof of the fact that Armstrong was the only person who was a member of the household in both August and February would have been robbed of much of its force. At the same time, the defence theory of suicide would have been bolstered by the argument that Mrs Armstrong had been more or less continuously suffering from debilitating physical and mental symptoms due to an innate condition since August 1920, and that at the time she took the final dose of arsenic she had despaired of ever recovering her health.

Again, there was no question of the relevance of this evidence to the issues raised by the Crown case notwithstanding that much of it at first blush would

[15] Sir Henry Curtis Bennett, KC.

seem far removed from the question whether Armstrong killed his wife with arsenic in February 1921.

Before leaving the *Armstrong* case, however, I should like to refer to one piece of evidence for the Crown, the relevance of which was strongly disputed; its admission must have had devastating consequences for the defence. At an early stage in the trial the defence sought a ruling in the absence of the jury as to whether the Crown should be allowed to lead evidence of an alleged attempt by Armstrong on the life of his 'opposite number' in Hay, the solicitor Martin.[16] The circumstances allegedly were that at the end of October 1921 — some eight months after the death of Mrs Armstrong — Armstrong invited Martin to afternoon tea at his home. Martin arrived at the house shortly after five o'clock pm, Armstrong having arrived home from his office somewhat earlier. At this time professional relations between the two solicitors were rather strained as Martin was pressing for the long-overdue completion of the property transaction earlier, while Armstrong was pleading for more time.

The tea consisted of bread and butter, currant loaf and scones, together with a pot of tea. The food was prepared by the housekeeper and taken into the dining-room by a maid who then left the room. The only persons at tea were Armstrong and his guest. According to Martin's evidence, at one point Armstrong picked up a scone from the cake-stand and deposited it on Martin's plate with the words, 'Excuse fingers!' Armstrong denied this, saying that he had handed the cake-stand to Martin, who helped himself.

Martin left the house for his own home at about six-thirty pm and reached home feeling a little unwell. Later that evening he became extremely ill and vomited violently. A urine sample taken from him some five days later showed a significant trace of arsenic, suggesting that he must have taken a dose sufficient to have been fatal had he not got rid of a good part of it by vomiting.

Naturally, attention focussed upon the tea provided by Armstrong, and at the trial evidence was given by the housekeeper and the maid who had taken the food into the dining-room that the scones served at the tea were not buttered when laid on the table. Martin, however, gave evidence that when he sat down to tea the scones were already buttered and Armstrong's initial statement to the police agreed with this. So who had buttered them? The suggestion was that Armstrong had used the interval between his getting home from the office on the day of the tea-party and the later arrival of Martin to butter the scones and to lace with arsenic the butter placed on the scone given to Martin.

If Armstrong did attempt to poison Martin it was his undoing. It was the finding of the arsenic in Martin's urine, and the recognition first by the local chemist and later by the doctor who treated Martin, who was the same doctor as had previously attended Mrs Armstrong, of the similarity of Martin's

[16] 'Opposite' in two senses: Martin was acting for the purchasers in the property transaction already referred to in which Armstrong was acting for the vendor; and the offices from which he practised were (and are) directly opposite those of Armstrong in the main street of Hay.

symptoms to those of Mrs Armstrong, that led to the exhumation of Mrs Armstrong's body. Large deposits of arsenic were found in it. Had Armstrong been acquitted on the charge of murdering his wife he would almost certainly have faced a further trial on the charge of attempting to murder Martin.

The question is, however, what is the relevance of what Armstrong is alleged to have done to Martin in October 1921 to the fact in issue, which is, whether he administered the arsenic which killed his wife in the previous February? The sort of reasoning summed up in the phrase, 'The leopard does not change its spots' is generally outlawed in the Anglo-Australian system of evidence.[17] The only ground upon which evidence of the events in October could have been admitted on the charge of murdering Mrs Armstrong was that the evidence was exceptionally probative of the facts in issue on that charge. The prejudicial effect of the evidence must have been enormous, particularly when it was shown that following Martin's recovery Armstrong was profuse in the number of further invitations which he issued to Martin to come to tea at his office. When Armstrong was arrested in his office he was found to have in his coat pocket a packet of arsenic sufficient to provide a lethal dose for a human being. The Court of Criminal Appeal upheld the admission of the evidence[18] on the authority of *R* v *Geering*,[19] a readily distinguishable case, and on the ground that it showed that Armstrong was prepared to use arsenic for a murderous purpose, thereby refuting the defence case that the purpose for which he had bought the arsenic was an innocent one.

When *Perry* v *The Queen*,[20] a modern case having some similarities with the Armstrong case, was before the High Court on appeal from the Supreme Court of South Australia, Gibbs CJ briefly considered the judgment of the Court of Criminal Appeal in *R* v *Armstrong*[21] and was clearly unhappy with it. Had there been evidence of an act of administration of arsenic by Armstrong, as would have been the case if the defence had been accident, then according to Gibbs CJ the evidence relating to Martin would have been relevant, its relevance then being to the issue of intent. Defence counsel had, however, at the outset of the trial, disclaimed a defence of accident and had in the early stages of cross-examination of Crown witnesses indicated clearly what the defence would be — suicide. Gibbs CJ considered that in these circumstances, 'The manner in which the poison was used eight months later hardly seems relevant to the question for what purpose it had been kept at the time of the murder'.[22]

It may be asked why the evidence relating to Martin should have been admissible if the defence were accident rather than suicide (and defence counsel agreed that in this event it would have been admissible). The answer is

[17] See, for example, *Makin* v *Attorney-General (NSW)* [1894] AC 57.
[18] [1922] 2 KB 555.
[19] (1849) 18 LJMC 215.
[20] (1982) 57 ALJR 110.
[21] [1922] 2 KB 555.
[22] (1982) 57 ALJR 110, 114.

that such a 'defence'[23] denies a different fact in issue from that which is denied by the 'defence' of suicide. Such a defence (ie suicide) is merely a way of denying that the accused *did* the act alleged to have caused the death and consequently one would expect the focus of the evidence to be on this fact in issue. But where the accused says that the death was an accident he is admitting that which is denied by the suicide defence. If Armstrong had relied on accident (or perhaps, more correctly, mistake) he would have been acknowledging that he did in fact administer the arsenic, and the fact in issue that he would have been denying was that he had the intent to kill. This intent would have been denied equally whether his case was that he administered the arsenic in the belief that it was some other, harmless substance, or that, while knowing that it was arsenic, he intended to give no more than a tonic dose.

Consider what the effect of Martin's evidence would have been in these circumstances. A man whose case is that in February 1921 he did not know the difference between, say, arsenic and bismuth or between a tonic and a fatal dose of arsenic is convincingly shown to have such a familiarity with arsenic eight months later as to be able to use it in a deliberate attempt upon another man's life. The almost certain destruction of the defence by this evidence would virtually establish the requisite intent for the February killing.

The point being made is that the position adopted by the defence can virtually determine the structure of a case by highlighting one fact in issue rather than another with consequential effects on the admissibility of particular items of evidence. The Crown has to prove all of the facts in issue, but the 'dynamics' or actual course of a case may be such as to throw the weight of the case on one fact in issue rather than the others. Proof of the fact may then virtually subsume proof of the others. It is therefore essential to have regard not only to the abstract statement of the facts in issue, but to the developments in the course of a trial which could cause the focus to shift from one fact in issue to another. Such developments are particularly likely to be due to changes of ground by the defence.

PURPOSE AND THE HEARSAY RULE

Even where evidence is relevant its admissibility may well depend upon the particular way in which it is intended to be used. Items of evidence may present a choice of ways in which they might be used, and they may be admissible if used in one way but not if used in another. It is therefore essential to differentiate between the purposes or uses to which a particular piece of evidence may be put. Nowhere is it more necessary to do so than in cases where the evidence is potentially hearsay.

The definition of hearsay evidence itself emphasises that it is the purpose

[23] In strict legal usage, neither 'accident' nor 'suicide' is correctly termed a defence, being no more than a denial of one or more of the definitional elements of the offence on which the prosecution bears the burden of proof. See G L Williams, *Textbook of Criminal Law* (2nd ed, London, Stevens & Sons, 1983) p 50.

for which evidence of an out-of-court statement is given that makes it hearsay. Not all instances of out-of-court statements become hearsay when evidence of them is given. It is only when evidence of the statement is given for the purpose of proving the truth of any fact asserted in the statement that the evidence is hearsay. Evidence of out-of-court statements may be given for purposes which do not include proving that any fact asserted in the statement is true, in which case the evidence is not hearsay.

Furthermore, in the two recent cases of *Walton* v *The Queen*[24] and *The Queen* v *Benz*[25] the High Court has recognised the possibility, at least in cases of so-called 'implied' hearsay, that evidence may be admissible notwithstanding that on a strict application of the hearsay rule the evidence would contain an element of hearsay.

The first step when dealing with questions of hearsay evidence, as with other kinds of evidence, is to ask: To what fact in issue does this evidence relate, whether directly or indirectly?

The next step, in a case of circumstantial evidence, is to ask: To what fact or inference necessary to establish the fact in issue is the evidence directed?

The third step is to ask: In what way *precisely* does the evidence bear on the fact in issue or the fact or inference necessary to establish the fact in issue? This question focusses attention on the immediate purpose or use to which the evidence is to be put.

None of the above steps is peculiar to hearsay evidence, but they provide a framework in which potentially hearsay evidence can be more readily identified as such.

It should be remembered, particularly when asking the third of the above questions, that the way in which evidence of an out-of-court statement is to be used is determined by the purpose of the party seeking to use the evidence and not by the purpose of the person who made the statement. In other words, it is the purpose of the party that counts, not that of the maker of the out-of-court statement, in determining whether evidence of the statement is being used in a way that would make the evidence hearsay. The out-of-court statement is merely the raw material of evidence. It becomes evidence when it is offered in due form in court in aid of the case of the party relying upon it. In the transformation of the raw material into evidence, the intentions of the maker of the statement may become of little or no significance. Thus, a person may intend only to utter a greeting or an expression of emotion, yet when the utterance becomes evidence it may be used to establish a fact or circumstance of which the person was quite unconscious at the time of making the utterance. For example, the greeting 'Good evening, Jones' is not usually intended by the speaker to assert that it is evening. Yet if the issue in legal proceedings is the time at which a particular event occurred, a witness who heard those words spoken may refer to them in evidence as the means by which he was able to fix the time of the event. The words spoken could also serve other purposes equally far from the speaker's mind when they were uttered, such as

[24] (1989) 166 CLR 283.
[25] (1989) 168 CLR 110.

indicating that the speaker knew Jones, or that the speaker and Jones must have been near to each other when the greeting was given. In each case, it is the needs of the party relying on the words which confer on them their assertive character.

Alternatively, although the maker of the statement may have intended to assert something by the statement, when the statement becomes evidence it may be used as an assertion of something quite different. The point is that the raw material of evidence has no intrinsic or inherent evidential quality or character. Its quality or character is conferred upon it as a function of its use in evidence.

Walton v *The Queen*[26]

In *Walton's* case the applicant (D) was convicted of the murder of his former de facto spouse. Her body had been found in a country area, severely battered about the head and with stab wounds. D appealed from his conviction on the ground that the trial judge had wrongly admitted the evidence of four Crown witnesses concerning statements made to them, or in their presence, by the deceased (V).

The evidence of the first witness (W1) was to the effect that she had been present in V's house when V received a telephone call. A conversation then took place on the telephone between V and the caller during which arrangements were made for V to meet the caller at the Elizabeth Town Centre on the evening of the following day. During the conversation V used words and expressions which impliedly asserted that the caller was D. Moreover, at one point V broke off the conversation by turning to her three year-old son and telling him that 'Daddy' was on the telephone. In fact, D was not the boy's father but there was evidence that D was the only person he ever called 'Daddy'. The boy then spoke to the caller on the telephone, greeting him with the words, 'Hello Daddy.' A few words passed between them and then V resumed her conversation with the caller. At the conclusion of the conversation V turned to W1 and told her that the caller was D and that he wanted to meet her at the Town Centre on the following evening.

The evidence of the other three witnesses — W2, W3 and W4 — was all to the effect that V had told them, either on the day of the telephone conversation or on the following day, that she was going to meet D on the evening of the latter day at the Town Centre. The evidence of these witnesses did not refer to the fact that V had received a telephone call from D arranging the meeting on the day before it took place, whereas the evidence of W1 did refer to this fact.

The first step in analysing W1's evidence is to identify the facts in issue to which the evidence is relevant. The charge — murder — and its elements should be noted. The nature of V's injuries clearly precluded suicide as an explanation of her death and equally clearly indicated a deliberate murderous

[26] (1989) 166 CLR 283.

attack. The only real fact in issue was, therefore, whether it was D who made that attack.

The second step is to enquire where in the chain of evidence the intended evidence fits. The case was one of circumsantial evidence as no one saw D attack V. W1's evidence has to be placed in the context of other evidence that V did not return home after she left the house on the evening of the day following the telephone converation, that she was later found dead, and that she must have met her death at some time during the night that followed her leaving home. It was therefore necessary to know as much as possible of V's movements after she left the house. W1's evidence would, if admissible, be of great assistance here as it would indicate V's intentions as to those movements. Clearly, W1's evidence could not prove, of itself, that it was D who killed V, nor even that she actually met D at the Town Centre. But that evidence could, in conjunction with other evidence, lay a foundation for the drawing of inferences on these matters.

The third step, therefore, concerns the correct way in which W1's evidence should be used.

Consider these alternatives:

i) the evidence could be offered by the Crown as proof that the person who made the telephone call was D, that in consequence of what was said during that call V left the house for the purpose of meeting D at the Town Centre, and that she did in fact meet him there;

ii) the evidence could be used to indicate V's probable state of mind when she left the house — namely, her intention at that time to go to the Town Centre to meet D. This intention would then provide some explanation of what she did and could, with other evidence, justify an inference that she acted in accordance with her intention. The other evidence included a bus ticket found on V's body, and the evidence of the bus driver who sold it, tending to show that V had caught a bus to the Town Centre on the evening in question.

It is essential to distinguish between these alternatives because the first is hearsay, and inadmissible as such, while the second is admissible as 'original circumstantial evidence' according to the majority in *Walton's* case.[27] So what is the distinction between these alternatives?

If the Crown had sought to use W1's evidence in the first way it would have offered the evidence 'testimonially' — that is, as an assertion of the truth of the matters referred to in it. On the basis of this evidence the Crown would have been inviting the jury to conclude as facts: 1) that the person who made the telephone call was D; 2) that V went to the Town Centre pursuant to that telephone call; and 3) that D met her there.

Viewed in the second way, the evidence is not 'direct and testimonial' but is, rather, circumstantial. It is not offered in proof of its contents but rather as the basis for drawing inferences. First and foremost, those inferences relate to V's state of mind. If a person's state of mind at a particular time is relevant then the things that that person says or does at that time will often reflect that

[27] Ibid.

state of mind. There is some divergence between the judgment of Mason CJ and the joint judgment of Wilson, Dawson and Toohey JJ as to whether statements or conduct which reflect a state of mind necessarily involve hearsay. Mason CJ prefers the view that they do not and should be regarded as 'original', independent evidence of the state of mind.[28] One person's state of mind cannot be observed by another except by behaviour or conduct of some sort from which it may be inferred. This conduct may take the form of statements, and in this case they should be seen not as assertions offered in evidence 'testimonially', but simply as the behaviour by which the state of mind is most immediately manifested.[29] The statements are to be relied on not for what they *say* expressly or impliedly as to the speaker's state of mind, but rather as an actual reflection of it at the time of the utterance.

The joint judgment, on the other hand, favours the view that on some occasions at least, a person's statements about her state of mind will involve an element of hearsay, if only to the extent of impliedly asserting that the statements are truthful and accurate.[30] Thus, in the present case, V's statements to W1 (and other witnesses) that she intended to go to the Town Centre to meet D could only have probative value in the evidence of those witnesses if they could be accepted as truthful and accurate expressions of her intention. The joint judgment goes on, however, to point out that this degree of hearsay is normally accepted without question and does not deprive the statements which it informs of their essential character as non-assertive evidentiary conduct which may form the basis of an inference of state of mind.

The evidence of W1 was therefore admissible as 'circumstantial' evidence of V's state of mind — what V said to W1 or in her presence was 'some' evidence of her state of mind, on which a final conclusion should be reached only in the light of all the relevant evidence. (This case, incidentally, demonstrates the importance of considering the whole of the available evidence when deciding how any particular item of evidence is to be used.)

In some cases a person's state of mind may be the sole subject of enquiry. But in many cases, including the present one, a person's state of mind may be relevant only in so far as it has some connection with objective facts. V's intention to go to the Town Centre was relevant to the objective fact of her actually going there. It was therefore circumstantial evidence which, along with the other relevant evidence on this question, could justify the inference that she did go there. Viewed in this way the evidence was circumstantial at two levels — first, V's words were offered as 'some' evidence of her state of mind and, second, a conclusion as to V's state of mind would afford, together with other evidence (such as the bus ticket found on her body), evidence that she acted in accordance with her intention.

[28] Id 288–9.

[29] This is not to say that a statement by a person *about* her state of mind may not be hearsay if the statement is a detached declaration of what that state of mind is. The distinction is between an utterance which reveals the speaker's contemporaneous state of mind given the circumstances in which it is made and an utterance which is merely descriptive of that state of mind. A statement referring to what the speaker's state of mind was on a previous occasion would almost certainly fall into this latter category.

[30] (1989) 166 CLR 283, 302.

It is instructive to contrast the use of W1's evidence as described above with the part of her evidence which related to the identity of the telephone caller. W1's evidence included statements made by V which showed that the caller was D. The majority were prepared to accept this evidence not as *proof* of the identity of the caller but as evidence of V's *belief* as to his identity. But what, it may be asked, was the relevance of V's belief as to the caller's identity if not to found an inference that the caller was indeed D? To use the evidence in this way, however, would render it hearsay. It is one thing to use evidence of a person's intentions as circumstantial evidence that she acted in accordance with those intentions; it is another to use a person's belief in an existing objective fact which is independent of that belief as evidence of that fact. The difficulty cannot be side-stepped by interposing an inference between the belief and the fact, and characterising the belief as circumstantial evidence of the fact via the inference. It is hearsay if the inference depends to any extent upon the truth of the belief from which the inference is drawn. So what was the probative value of the evidence of V's belief? The majority do not answer this question, but it may be supposed that the belief was relevant as showing V's object in intending to go to the town centre — it explained that intention by showing that she expected to meet D there. But it was not evidence, circumstantial or otherwise, either that she did in fact meet D there or that the person to whom she was talking on the telephone was D. The Crown had to ensure that it confined its use of the evidence both of V's intention and of her belief in the identity of the caller to a role as circumstantial evidence of her movements on the evening before she was murdered, and of the expectations which prompted them. A nice discrimination was thus required to keep the evidence within permissible bounds.

The Queen v *Benz*[31]

It is natural to compare *Walton's* case[32] with the later case of *Benz*, the two cases being separated by about a year. In the latter case a mother and daughter were convicted of the murder of the mother's de facto partner. Their appeals to the Court of Criminal Appeal of the Supreme Court of Queensland succeeded, entirely so in the case of the daughter (Benz) in respect of whom an order of acquittal was entered, while in the case of her mother (Murray) a new trial was ordered. The case came before the High Court by way of an application by the Crown for special leave to appeal against these orders.

The Crown case against the respondents was that they had beaten the deceased (V) violently about the head after he had gone to bed in the house where he and Murray lived, thereby rendering him unconscious, and inflicting injuries that would have caused his death within a few hours. They then placed his body in the car used by Murray (and it would have been impossible for this to have been done by one of them unaided since V was a large man weighing 18 stone) and drove for a distance of about 70 kilometres until they

[31] (1989) 168 CLR 110.
[32] (1989) 166 CLR 283.

reached a bridge over a river. The time was shortly after 3 am. They then stabbed V in the neck and chest, one of the cuts severing the carotid artery so that V, who was still alive, would have died from loss of blood within a couple of minutes. However, before his death from this cause could occur, he was dragged from the car and onto the bridge from which he was pushed into the river. The actual cause of his death was therefore drowning. His body was recovered from the river five days later.

The evidence in issue was that of one Saunders who, as a Crown witness, testified that shortly after 3 am on the morning in question he was driving home from work, and when he came to the bridge over the river he saw two women standing in the middle of it on the left hand side. He drove up to them, lowered the window, and asked if everything was alright. The younger of the women turned to him and said, 'It's alright, my mother's just feeling sick'. It was this statement given in Saunders' evidence that was in question before the High Court as hearsay.

Again, the issues raised by this evidence cannot be resolved until it is placed in context. The relevant fact in issue was whether the acts causing V's death had been committed by the respondents. Putting aside any special defences such as insanity, it was quite clear from V's injuries and the other circumstances of the case that V's death was murder and not suicide or an accident. What the Crown needed to do, therefore, was to establish the identity of the two women seen by Saunders on the bridge with the respondents. While a positive conclusion on this issue is not in terms a conclusion that the respondents murdered V, the latter conclusion would tend to follow irresistibly given the evidence as a whole. In effect, therefore, the Crown sought to prove the identity of the women on the bridge with the respondents by using the reference to the older woman as 'my mother' in the reply made by the younger woman to Saunders' enquiry on the bridge as an assertion that the two women stood in a mother–daughter relationship, which was the same relationship as that between the respondents. Given the virtual certainty that the two women on the bridge were the murderers it would be beyond credible coincidence for those two women to be a mother and daughter and yet not be the respondents.

It will be seen from the foregoing that in so far as the Crown wished to use the above evidence in proof of the fact that the two women on the bridge were actually mother and daughter as the basis for identifying those women with the respondents, the evidence was in acute danger of being hearsay. The hearsay would be 'implied' because the statement made by the younger woman would not have been intended by her as an assertion of her relationship with the other woman on the bridge. She was not intending to make a declaration that the other woman was her mother. She was merely wishing to explain their presence on the bridge in a way which would obviate further enquiry. It was the Crown and not the speaker that perceived in the statement an assertion of relationship and wished to use it as such.

The majority of the High Court held that it was not open to the Crown to use the evidence in this way. If we put aside the reasons of Deane J, however, it appears that if the Crown had approached the evidence somewhat differently

it would have been admissible. The case has some complicating features which appear to have raised differing conceptions of the judicial role as between Gaudron and McHugh JJ (who gave a joint judgment) on the one hand and Mason CJ and Dawson J on the other. It appears that the hearsay issue was only squarely raised when the case reached the High Court. There had been no objection to the evidence on this score at the trial. On appeal to the Court of Criminal Appeal it had arisen only incidentally in the course of submissions on the question whether the verdicts of guilty should be set aside as unsafe and unsatisfactory. Consequently, developed argument on the point was delayed to the High Court where the Crown sought to bring the evidence within the doctrine of *res gestae*[33] as an exception to the hearsay rule.

Gaudron and McHugh JJ were not prepared to admit the evidence on this basis. They considered that in the absence of proper directions from the trial judge as to how the evidence should have been used there was a danger that the jury would have used it, first, to establish that the women on the bridge were the respondents and, secondly, to conclude from this fact that they must therefore have been the murderers and were on the bridge to dispose of the body. This would be placing the *res gestae* doctrine back to front. The jury should have been warned that before they could have regard to Saunders' evidence they should first be satisfied that the two women on the bridge had murdered V and had just disposed of his body. Only if so satisfied could they then go on to accept the evidence of Saunders as evidence identifying the women on the bridge with the respondents on the basis of the relationship of mother and daughter common to both sets of women.

In their joint judgment Gaudron and McHugh JJ adverted to the possibility that the evidence, though hearsay, might have been admissible under a 'general exception' to the hearsay rule to be applied where the evidence possesses a high degree of reliability arising from the practical absence of any opportunity for concoction or fabrication. The possibility of such an exception was referred to by Mason CJ and Deane J in *Walton's* case[34] where it was said that the hearsay rule should not be applied inflexibly.[35] The conditions for the application of this exception are most likely to be found where, as here, the hearsay is implied rather than express. It may be inferred that Gaudron and McHugh JJ would have allowed the evidence to be admitted under this exception had it been argued before them. No such argument was offered and they were not prepared to seek grounds of admissibility outside that which counsel actually placed before them, which was confined to the *res gestae* doctrine.

This view of the judicial role which would confine judges when deciding a case to the material placed before the court by the parties represents the norm

[33] *Res gestae* is the doctrine that allows evidence to be received even when it would otherwise fall foul of some exclusionary rule (such as the hearsay rule) if it is so intimately related to the events constituting the commission of the crime that it cannot realistically be severed from them. For a discussion of the different situations in which the doctrine may operate see Lord Wilberforce's judgment in *Ratten* v *R* [1972] AC 378 388.

[34] (1989) 166 CLR 283.

[35] Id 293, per Mason CJ, and 308, per Deane J.

for common law judges.[36] This norm is an aspect of that principle of natural justice expressed in the maxim, *audi alteram partem* — hear the other side. Decisions reached on grounds discovered by the judges themselves, without referring those grounds to the parties, are objectionable in that the party against whom the decision goes will have been deprived of notice of the grounds on which it was made and of the opportunity to make submissions on them.

Both Mason CJ and Dawson J considered that the evidence was admissible as part of the *res gestae*. Given this conclusion, their discussion of other bases of admissibility may be regarded as obiter dicta. However, it is not entirely satisfactory to leave the matter there because the *res gestae* doctrine needs to be invoked only when the evidence in question would otherwise fall foul of some exclusionary rule — in this case, the hearsay rule — and the main thrust of the two judgments now under consideration is to the effect that the evidence was not hearsay anyway and so it was unnecessary to rely on *res gestae*.[37] In discussing the reasons why the evidence should not be regarded as hearsay these two judgments obviously canvass matters which it is fair to assume were not raised by counsel in the case. Inasmuch, therefore, as Mason CJ and Dawson J would have allowed the appeal on the strength of these reasons it may be said, with respect, that they have adopted a more latitudinarian view of the judicial role than would find favour in all quarters.

It is, nevertheless, natural in view of the judgments in *Walton's* case[38] to enquire whether that case did not afford the Crown grounds for seeking the admission of the evidence on the footing that it was not hearsay at all. *Walton's* case[39] is authority for saying that a statement by a person as to that person's state of mind may be used as evidence of conduct from which an inference as to that state of mind may be drawn, provided that the state of mind is relevant to some issue in the case. In the present case, the statement by the younger woman on the bridge referring to the older woman as her mother evidenced a state of mind of the speaker — namely, a *belief* that the other woman was her mother. Evidence of a belief in the existence of such a close relationship expressed by a party to it would be highly probative since people are not normally mistaken or deceptive about such matters.

One of the grounds on which Mason CJ was prepared to admit the statement was that it was evidence of such a belief. He did not refer to *Walton's* case but relied on the judgments in *Lloyd* v *Powell Duffryn Steam Coal Co Ltd.*[40] Those judgments concerned the narrower issue of belief in paternity,

[36] See the remarks by Dawson J in *Autodesk Incorporated* v *Dyason* (1992) 104 ALR 563, 574.

[37] See, for example, the statement:
'But it was unnecessary for the Crown to rely upon the doctrine of res gesta because evidence of the statement was not excluded by the hearsay rule. It was not excluded and was admissible on the ground of relevance alone.' — per Dawson J (1989) 168 CLR 110, 135.

[38] (1989) 166 CLR 283.

[39] Ibid.

[40] [1914] AC 733.

and could be extended to a belief in maternity or, indeed, to any similarly close relationship by analogy. The problem is, however, that the joint judgment in *Walton's* case had shown, when dealing with W1's evidence of expressions used by V in the telephone conversation that impliedly identified the caller as D, that evidence of out-of-court statements indicating a person's belief in a fact that exists independently of the belief is hearsay if it relies to any extent on the truth of the belief for the purpose of proving that fact. It is not altogether clear whether the Chief Justice regards *Lloyd's* case[41] as an exception to the hearsay rule or as not within the rule at all. Some discussion of *Walton's* case[42] would have been helpful.

The language of Dawson J more closely echoes the language of the majority judgment (to which he was a party) in *Walton's* case[43] but again *Walton's* case[44] is not expressly referred to in support. In *Walton's* case[45] Wilson, Dawson and Toohey JJ had referred to a person's statements as to his state of mind as 'conduct from which an inference can be drawn rather than as an assertion which is put forward to prove the truth of the facts asserted'.[46] In *Benz*[47] Dawson J characterises the statement by the younger woman as 'conduct from which, together with the other evidence, it might be inferred that the two women on the bridge were the respondents'.[48] The making of the statement was, in its reference to the older woman as 'my mother', conduct such as would be expected of one who stood in the relation of daughter to the other woman. But was it not also hearsay? Whether it was hearsay or not depended on the object of proof. It would be hearsay if the object was to prove that the women on the bridge stood in the relationship of mother and daughter, either as the ultimate object of proof (which, of course, it was not in the present case) or as a subordinate object of proof, on which proof of the ultimate object depended. It would be hearsay equally whether the words spoken by the younger woman were relied on directly in proof of that relationship or as evidence of her belief in the relationship from which the existence of the relationship could be inferred, for the inference would then depend upon the truth of the belief.

It appears that Dawson J is not, in fact, treating the younger woman's words on the bridge as evidence of a state of mind — ie a belief — at all, but simply as a manifestation of the conduct one would expect of one who stood in the relation of daughter to the other woman. What counts is the conduct because it is the coincidence of that conduct with the conduct known to characterise the relations between the respondents that affords the evidence of the identity of the women on the bridge with the respondents.

Viewing the evidence in this light one may make sense of the statement of Dawson J that whether the respondents were actually in the relationship of

[41] Ibid.
[42] (1989) 166 CLR 283.
[43] Ibid.
[44] Ibid.
[45] Ibid.
[46] Id 302.
[47] (1989) 168 CLR 110.
[48] Id 134.

mother and daughter was not an issue in the case.[49] Indeed, it may not be going too far to say that the evidence would have been equally probative even if the respondents were not mother and daughter, provided there was evidence that they behaved as though they were. In other words, Dawson J appears to be focussing on the behaviour of the women on the bridge as an objective fact and not as the reflection of a belief. Objectively considered, that behaviour matches that known to characterise the respondents' relations, and it is this coincidence of behaviour that is significant on the issue of identity. While admittedly the younger woman, in referring to the older one as her mother, was indicating her belief that the older woman was her mother, the belief as such was irrelevant because the relationship between them was not an object of proof. It was neither a fact in issue nor a fact relevant to a fact in issue. What had to be proved was the identity between the two sets of women and that depended neither upon proof that a mother–daughter relationship existed as a biological or legal fact nor upon treating the younger woman's belief in that relationship as true; it depended rather upon showing that both sets of women behaved *as though* the relationship existed, and that is a different thing from having to show that it did in fact exist. Treated in this way the evidence of what was said by the younger woman on the bridge was circumstantial evidence of identity which, together with all the other evidence on that issue, could justify an inference that the women on the bridge were the respondents.

What it is important to grasp is that whether this evidence was hearsay or circumstantial depended upon identifying the issue to which it was directed and then analysing the precise manner in which it was probative of that issue. The issue being identity, it could have been proved by showing that the respondents were in fact mother and daughter, and then using the evidence of the words spoken on the bridge as evidence, either directly or via the speaker's belief, that the two women on the bridge were also mother and daughter. As we have seen, used in this way the evidence would have been hearsay because proof of identity would have been made to depend upon proving that relationship. Alternatively, the evidence could be used, together with all the other evidence bearing on the issue, to found an inference of identity, the words spoken by the woman on the bridge being treated in an objective way as conduct common to both the respondents and the women on the bridge. While the conduct could be characterised as belonging to a mother–daughter relationship, the existence in fact of that relationship was not something that had to be proved either directly or indirectly. While Dawson J does not articulate his reasoning in the terms offered here I suggest that they lie behind some of the more cryptic statements in his judgment.

Benz's case[50] demonstrates the prudence of not placing all one's eggs in one basket and of being prepared to argue alternative bases of admissibility if there is any doubt of the evidence being admissible on the preferred basis.

[49] (1989) 168 CLR 110, 133.
[50] (1989) 168 CLR 110.

SUMMARY

Effective use of the rules of evidence requires knowledge of what has to be proven in a given case and of how to prove it with the available evidence. The concepts discussed in this article underlie this knowledge. They are organising concepts in the sense that they pose questions which are designed to bring the evidentiary material into order and under control; into order, by showing its bearing upon the facts in issue; under control, by leading to the recognition that the use to which an item of evidence is to be put is a function of the needs of the user as they are affected by the rules of evidence, and not an inherent attribute of the piece of evidence itself. The way in which the evidence is to be used is therefore a matter for critical consideration.

Identification of the facts in issue is the corner-stone of a methodical approach to problems of evidence. They provide the organising structure and they operate at the highest level of generality because the resolution of nearly all questions concerning particular items of evidence depends upon maintaining a lively sense of what ultimately has to be proved. Once the facts in issue in a particular case are clear then attention can be focussed on the precise manner in which the evidence in question is probative of them. The hearsay rule is the context which brings this part of the exercise into the sharpest relief but it is an exercise which needs to be performed for all types of evidence. Character evidence, for example, often requires great discrimination as to the manner in which in any particular case it is claimed to be probative of the issue on which it is offered.

The rules of evidence have evolved in a practical context — the courtroom. They are used daily in the courts. They must, therefore, be workable. To be workable they must reflect a logic of their own from which a practical system can be deduced. The rules have to be understood, but they can be understood more efficiently if they can be fitted into such a system. It has been the purpose of this article to describe and illustrate a system so deduced by focussing upon three underlying concepts which are fundamental to a methodical approach to problems of evidence.