Hearsay: A Definition that Works

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Introduction

The current editions of *Cross on Evidence* state the effect of the hearsay rule as follows: 'an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted'.[1] Although this definition works well for 'express assertions', it has two significant drawbacks. First, it attempts to deny that which is now undeniable: that the hearsay rule does extend to 'implied assertions'.[2] Secondly, it does not even

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1 See C Tapper, *Cross on Evidence* (7th ed, Butterworths, 1990) p 42; D Byrne and J Heydon, *Cross on Evidence* (4th Australian ed, Butterworths, 1991) p 46.

2 Tapper has admitted that the definition was deliberately drafted so as to exclude unintentional or implied assertions from the scope of the rule: see C Tapper, 'Hillmon Rediscovered and Lord St Leonards Resurrected' (1990) 106 *LQR* 441, 452. For clear authority that the rule does extend to implied assertions, however, see, inter alia, *Walton v R* (1989) 166 CLR 283 at 292 per Mason CJ, and at 304 per Wilson, Dawson and Toohey JJ; *R v Benz* (1989) 168 CLR 110 at 118 per Mason CJ, at 133 per Dawson J, and at 143 per Gaudron and McHugh JJ; *R v Kearley* [1992] 2 AC 228 at 245 per Lord Bridge, at 255 per Lord Ackner, and at 264 per Lord Oliver; and *Pollitt v R* (1992) 174 CLR 558 at 620 per McHugh J. The extension of the hearsay rule to implied assertions may, however, prove only to be a temporary phenomenon. Section 59(1) of the *Evidence Act* 1995 (Cth), which came into force on 18 April 1995, states the hearsay rule as follows: 'Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person *intended* to assert by the representation' (emphasis added). The definition is clearly intended to eliminate the problem of 'implied assertions' and in this is consistent with the position in the United States: see Rule 801(a) of the Federal Rules of Evidence. Whether the definition will be successful in this aim is, however, another matter: see, for example, R Park, '"I Didn't Tell Them Anything About You": Implied Assertions as Hearsay Under the Federal Rules of Evidence' (1990) 74 *Minn LR* 783. Although the Commonwealth *Evidence Act* is intended to form the basis for uniform evidence legislation throughout Australia, it seems unlikely that this will be achieved in the near future. So far, New South Wales

purport to answer the question of what constitutes an implied assertion. In this article I argue that the definition in *Cross* needs to be supplemented with a new definition capable of overcoming both of these drawbacks. The definition I argue for is as follows:

> An out-of-court act is inadmissible as evidence of the truth of any belief which is asserted by or which can be inferred from that act.

Although this definition is capable of dealing with express assertions, it is unnecessarily complex when used for that purpose and the definition in *Cross* should be preferred. But when it comes to implied assertions, the definition above has several advantages over that in *Cross*. First, it recognises the extension of the hearsay rule to implied assertions through the use of the words 'which is asserted by or which can be inferred from that act'. The choice of the word 'act' is intended to emphasise that the hearsay rule is equally capable of applying to both verbal statements and non-verbal conduct.[3]

Most significantly, however, the definition is actually capable of determining whether or not a non-assertive act or statement is being used as an assertion. This is achieved through the replacement of the word 'assertion' with the word 'belief'. It is the major contention of the first part of this article that by using this word the definition accurately identifies the only inference which calls for a consideration of the hearsay rule: the inference from a person's *belief* in the existence of a particular fact[4] to the existence of the fact believed. Only the inference from belief to truth of belief has, it will be argued, been brought within the scope of the hearsay rule by virtue of its extension to implied assertions. Thus, in the second section of the first part of the article I show that courts have never considered it hearsay to make an inference from a state of mind other than belief; and in the third section I show that courts have never

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is the only jurisdiction to have indicated an intention to introduce legislation based on that enacted by the Commonwealth Parliament, and whether that intention will survive the recent change of government in New South Wales is an open question. An accurate definition of the hearsay rule at common law is therefore likely to continue to be a matter of some importance for some time yet.

3 For ease of understanding, however, I will sometimes use the phrase 'act or statement', even though the latter is included in the former. I do not in this article consider whether the words 'or omission' should be added to the definition to take account of cases such as *R v Shone* (1983) 76 Cr App R 72.

4 This phrase is used as shorthand for the more complete, but rather clumsy, phrase 'a belief in the existence or non-existence of a particular fact'; a 'fact' can of course be many things including the happening of an event or the existence of a state of affairs.

considered it hearsay to make an inference from belief to something other than the truth of that belief.

Both of these arguments depend, however, on a fundamental but often overlooked aspect of the hearsay rule, an aspect which is discussed in the first section of the first part of the article. This is that the hearsay rule does not prevent a person's acts - including the making of statements - being offered as evidence of that person's state of mind - including his or her beliefs. This means that the hearsay prohibition only ever applies to the inference from state of mind to fact, and never to the inference from act to state of mind.

The second part of the article deals with an entirely different definitional problem, namely the apparent suggestion in some of the judgments in *Walton v R*,[5] *R v Benz*[6] and *Pollitt v R*[7] that it is not hearsay to use an out-of-court act as *circumstantial* evidence of the truth of a belief which is asserted by or which can be inferred from that act. If this suggestion is right, then the definition of hearsay for which I am arguing would have to be amended to read:

> An out-of-court act is inadmissible as *direct* evidence of the truth of any belief which is asserted by or which can be inferred from that act.

Any such redefinition would clearly have the most radical implications for the scope and operation of the hearsay rule.

I Defining hearsay

My purpose in this part of the article is to explain and justify the unamended definition of the hearsay rule for which I am arguing. Let me begin with the classic statement of the hearsay rule in *Subramaniam v Public Prosecutor*:[8]

> It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.[9]

This test is easy to apply when the statement expressly asserts something and that which is sought to be proved is the truth of that assertion. However the extension of the hearsay rule to 'implied assertions' means that, for the purposes of the hearsay rule, more is

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5 (1989)166 CLR 283; 84 ALR 59.

6 (1989) 168 CLR 110; 89 ALR 339.

7 (1992) 174 CLR 558; 108 ALR 1.

8 [1956] 1 WLR 965 at 970

9 Id.

'contained' in a statement than simply that which the speaker intended to assert. The statement must be taken to 'contain', in addition, those things which are 'implicit in or to be inferred from something that was said' or done.[10] Although the statement or act now 'contains' more, the hearsay rule still only applies 'when the object of the evidence is to establish the truth of what is contained in the statement'. This means that of the many things which can be inferred from a statement or act, the hearsay rule is only concerned with those which are capable of being true. It is only these things which can be referred to as 'implied assertions'. Something which cannot be true cannot be used as an assertion of its truth. It cannot, therefore, be described as an 'implied assertion'.

So which of the many things which can be inferred from a statement or act can be used as an assertion? It is my argument that it is only the state of mind called belief which can be used in this way. Other states of mind, such as fear or intention, cannot be 'true'; they cannot, therefore, be used as assertions of their truth. In theory, this should mean that inferences can be drawn from all states of mind other than belief without infringing the hearsay rule; in the second section below I show that this is exactly how the hearsay rule has been applied. However states of mind such as fear or intention can only be used if they can first be permissibly inferred from the statement or act. I show that they can, even when the state of mind is asserted by the speaker, in the first section below.

A Inferring States of Mind

There is overwhelming authority for the proposition that a person's state of mind can always be established by his or her out-of-court statements and non-verbal conduct.[11] This is true whatever the state of mind and despite the fact that it is precisely this inference which gives rise to the often identified hearsay danger of insincerity. Thus, a person's knowledge, belief, fear, intention and other states of mind

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10 *R v Kearley* [1992] 2 AC 228 at 261 per Lord Oliver. See also *Walton v R* (1989) 166 CLR 283 at 292 per Mason CJ: 'An implied assertion is one which can be inferred or implied from a statement or from conduct, and will generally not be deliberately intended by the author'.

11 See, for example, *Sugden v Lord St Leonards* (1876) 1 PD 154 at 251 per Mellish LJ; *Lloyd v Powell Duffryn Steam Coal Co Ltd* [1914] AC 733 at 751 per Lord Moulton; *R v Blastland* [1986] AC 41 at 54 per Lord Bridge; *Walton v R* (1989) 166 CLR 283 at 288 per Mason CJ, at 300 per Wilson, Dawson and Toohey JJ, and at 307 per Deane J; *R v Baker* [1989] 1 NZLR 738 at 741 per Cooke P, and at 743 per Casey J; *Pollitt v R* (1992) 174 CLR 558 at 564 per Mason CJ, at 578 per Brennan J, at 602 per Dawson and Gaudron JJ, and at 609 per Toohey J; and *Neill v North Antrim Magistrates' Court* [1992] 1 WLR 1220 at 1228 per Lord Mustill.

and emotion can all be established by what he or she did or said outside court. Although this proposition is well-established, there are 'few reported cases on the subject and its limits have not been fully explored'.[12] It is, therefore, not entirely clear whether the inference is permitted because the use of out-of-court acts in this way is an exception to the hearsay rule or an example of a circumstantial inference which is outside the scope of the hearsay rule altogether. *Cross* treats it as an exception, although it admits that this is 'an entirely dogmatic assertion' and that the contrary view could be advanced with 'equal justice'.[13] In Australia at least, the contrary view appears to have prevailed,[14] with the following justification being offered:

> Such statements are not hearsay because they are not adduced for the purpose of proving the truth of the statements... Their evidentiary value is derived from experience of human behaviour which indicates that people tend to express their intentions or their states of mind. For that reason what a person says is some evidence of what they are thinking.[15]

In many cases, though, the first part of this justification is simply untrue. If we are to infer that a person intended to go downtown from the fact that they said 'I intend to go downtown' then we are clearly using the statement to prove the truth of what was asserted, that the speaker did in fact intend to go downtown. For this reason, the admissibility of out-of-court acts for the purpose of proving state of mind might better be viewed as an exception to the hearsay rule, an exception which could be justified on the dual grounds of necessity[16] and reliability:

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12 *Walton v R* (1989) 166 CLR 283 at 302 per Wilson, Dawson and Toohey JJ.

13 D Byrne and J Heydon, *Cross on Evidence* (4th Australian ed, Butterworths, 1991) p 1098.

14 Of the current High Court, Brennan J is unsure which view is the correct one: see *Pollitt v R* (1992) 174 CLR 558 at 578. But other members of the High Court have explicitly endorsed the view that such evidence is original: *Walton v R* (1989) 166 CLR 283 at 289 per Mason CJ, at 302 per Wilson, Dawson and Toohey JJ; *Pollitt v R* (1992) 174 CLR 558 at 609 per Toohey J. See also *Nash v Commissioner for Railways* (1963) 63 SR (NSW) 357 at 360, and *Dobson v Morris* (1986) 4 NSWLR 681 at 681 per Reynolds JA. The question seems to have received less attention in England, but in *Neill v North Antrim Magistrates' Court* [1992] 1 WLR 1220 at 1229, Lord Mustill referred - without appearing to give the matter any great thought - to an 'exception' to the hearsay rule.

15 *R v Hendrie* (1985) 37 SASR 581 at 585 per King CJ.

16 'Now it is well established in English jurisprudence, in accordance, with the dictates of common sense, that the words and acts of a person

Such statements will rarely be purely assertive. Ordinarily they are reactive and are uttered in a context which makes their reliability the more probable.[17]

This no doubt explains why the 'exception' described in *Cross* is restricted to 'statements concerning the maker's *contemporaneous* state of mind or emotion'. Statements concerning a person's past state of mind or emotion are not spontaneous and reactive but narrative in nature, and should not, therefore, be admitted. If, on the other hand, the use of an out-of-court act in this way is viewed as original evidence then a slightly different limitation might be considered necessary, for example, that suggested by Wilson, Dawson and Toohey JJ in *Walton*:

> If a statement by a person about his state of mind is a bare assertion not amounting also to conduct from which a relevant inference can be drawn, then it ought to be excluded as hearsay.[18]

Whichever is the correct view, however, the more important point is that assertions by a person about his or her state of mind can be used as evidence of that state of mind without there being any infringement of the hearsay rule. There is, therefore, and subject to the limitations described above, no hearsay problem in inferring from the fact that a person said 'I am afraid' that they were indeed in a state of fear; or in inferring from the fact that a person said 'I intend to go shopping this afternoon', that they did so intend. And in Baron Parke's famous example of the sea captain who carefully inspects his ship before embarking with his family, it is not hearsay to infer from these acts the captain's belief that the ship was seaworthy; the hearsay problem lies, if at all, in using that belief as evidence that the ship was in fact seaworthy.[19]

It is undoubtedly an oddity that the hearsay rule allows the drawing of these inferences even though the tribunal of fact's decision about whether or not to draw the inference in question may well turn on the view they take of the declarant's sincerity, a question of credit; but the hearsay rule abounds with oddities. This particular oddity is, however, absolutely foundational to the rest of the arguments in this part of the article, because it explains why a great deal of evidence which is often thought to give rise to hearsay problems does not in

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are admissible as evidence of his state of mind. Indeed they are the only possible evidence on such an issue': *Lloyd v Powell Duffryn Steam Coal Co Ltd* [1914] AC 733 at 751 per Lord Moulton; see also *Sugden v Lord St Leonards* (1876) 1 PD 154 at 251 per Mellish LJ.

17 *Walton v R* (1989) 166 CLR 283 at 304 per Wilson, Dawson and Toohey JJ.

18 Ibid.

19 *Wright v Doe d Tatham* (1837) 7 Ad & El 313 at 388; 112 ER 488 at 516.

fact do so. Moreover, it is an oddity the importance of which has not before been recognised.

Of course the inference from a person's out-of-court acts to his or her state of mind can only be drawn if the state of mind is a fact in issue, or is relevant to a fact in issue, and relevant in a way which does not contravene any of the exclusionary rules of evidence, including the hearsay rule. This being so, the chief question in any case will not be whether a particular state of mind can be inferred from a person's out-of-court acts, but whether the state of mind so inferred can be used in a way which does not infringe the hearsay rule.

B Inferences From States of Mind Other than Belief

I argued above that in theory the hearsay rule ought not to apply to inferences based on states of mind other than belief. I now want to show how this is generally consistent with the case law. Before doing so, however, it is important to note that a person may advance reasons why he or she possesses a particular state of mind; or it may be possible to infer those reasons from the evidence from which the state of mind is itself inferred. As Lord Browne-Wilkinson commented in *R v Kearley*, '[a]ny action involving human activity necessarily implies that the human being had reasons and beliefs on which his action was based'.[20] Because it would be hearsay to use these beliefs as evidence of the truth of that which is believed, it is important to keep a person's state of mind distinct from the beliefs which might have caused that state of mind.

Inferences from fear

The difficulty of drawing this distinction is, however, highlighted by cases where the state of mind from which an inference is to be drawn is fear. Fear is essentially a response to belief. A person who does not believe that there is anything to be afraid of, will not be afraid. If the evidence is used to prove that there really was something to be afraid of, then clearly it is being used to prove the truth of the belief, a hearsay use. If, however, the person's fear is relevant regardless of whether or not the beliefs on which it is based are true then the evidence can be used without infringing the hearsay rule.

R v Matthews provides an example.[21] There the accused was charged with the rape and murder of his estranged wife. At trial he alleged consent as a defence to the rape, and provocation - in the form of alleged taunts about his sexual prowess - as a defence to the murder.

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20 [1992] 2 AC 228 at 280; see also *Walton v R* (1989) 166 CLR 283 at 303 per Wilson, Dawson and Toohey JJ.

21 (1990) 58 SASR 19.

In the months before her death, the deceased had made several statements to the police, to her boyfriend and to a female friend, from which it could be inferred that she was terrified of the accused, whom she feared might kill her. The trial judge held that this evidence was relevant to the issue of consent because the deceased's fear of the accused made it very unlikely that she would have consented to having intercourse with him. Her fear of the accused was relevant to the issue of consent whether or not it was soundly based; that is to say, whether or not her belief that the accused was dangerous was true.[22]

However beyond this the evidence could not have gone. It could not have been used, for example, to prove the identity of the murderer if that had been in issue. The only relevance of the evidence to the issue of identity would be in providing the basis for an inference that the deceased believed that the accused might kill her, and then using that belief as an assertion of its truth. That would be hearsay. Nor could the deceased's fear of the accused be relevant to the accused's state of mind. That issue arose in *R v Frawley*,[23] where the accused was charged with murdering his de facto wife. His defence was that he was so affected by drugs and alcohol at the time of the stabbing that he was incapable of forming the intent to kill or cause grievous bodily harm. There was again evidence of statements made by the deceased from which it could be inferred that she was afraid of the accused and feared that he might kill her. However the deceased's state of mind was not, per se, relevant to the accused's intent. The evidence was only relevant to intent if it could be used to prove that the deceased's fear of the accused was well-founded. That, of course, would have been a hearsay use.[24]

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22 There was a suggestion by Bollen J, with whom Jacobs ACJ and Mullighan J agreed, that the evidence was also relevant to the murder: (1990) 58 SASR 19 at 39. This was on the basis that her fear of him was inconsistent with his story that on the evening of the murder there had been, prior to her alleged taunts, a reconciliation between them. See also *R v Baker* [1989] 1 NZLR 738 where the accused was similarly charged with the rape and murder of his estranged wife; as in *Matthews*, the fact that the deceased was afraid of the accused was inconsistent with his version of events, which was that she had asked him to come around with his rifle in order to shoot some stray cats. The New Zealand Court of Appeal accordingly held that statements by the deceased evidencing her fear of the accused were admissible.

23 *Maurice Peter Frawley* (1993) 69 A Crim R 208; noted by C Cato, (1994) 18 *Crim LJ* 165.

24 (1993) 69 A Crim R 208 at 223 per Gleeson CJ, with whom Carruthers J agreed, and at 228 per Shellar JA.

However it is not always so easy to distinguish between fear and the beliefs on which the fear is based. Indeed, the case which is usually cited as authority for the proposition that the hearsay rule permits the drawing of inferences from a person's state of mind shows just how difficult the distinction can be. In *Ratten v R*[25] the accused was charged with murdering his wife with a shotgun. The prosecution was allowed to lead evidence of a phone call which had been made from the accused's home during the eight minute period in which the shooting must have occurred. The relevance of the evidence was assessed on the basis that the caller was the deceased, although this was certainly open to question.

It was, according to Lord Wilberforce, 'a matter for the jury to decide what light (if any) this evidence ... threw upon what situation was occurring, or developing at the time'.[26] From the tone of the caller's voice and her manner, Lord Wilberforce suggested, it could be inferred that the caller was in a state of great emotion.[27] This fact was relevant (although perhaps only marginally) on the basis that it was inconsistent with the defence of accidental shooting that the deceased should be in a state of great emotion shortly before she was shot. No hearsay problem there.

However Lord Wilberforce also suggested that from the fact that the caller asked for the police, could be inferred 'the nature of the emotion - anxiety or fear at an existing or impending emergency'.[28] When coupled with Lord Wilberforce's comment that the evidence was relevant to the 'situation [which] was occurring, or developing at the time' these words seem to suggest that the evidence could be used to prove that the situation was in fact an 'existing or impending emergency'. However used for this purpose the evidence would clearly have been hearsay. It would have been used to prove the truth of the belief on which the fear was based. This was recognised by Lord Oliver in *Kearley*, who commented that:

> in so far as it was considered permissible in *Ratten* to draw from the contents of the call the inference that the deceased was saying that she was under attack from her husband and that that was true, that could be justified only by treating the contents as part of the *res gestae*.[29]

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25 [1972] AC 378.

26 Id at 388.

27 Id at 387-8.

28 Id at 388.

29 [1992] 2 AC 228 at 267. Another case demonstrating the difficulty of ensuring that a person's fear is not used as the basis for inferring that there must have been reasons for that fear, and that those reasons must be true, is *R v O'Loughlin* [1988] 3 All ER 431. There the issue was the

If Lord Oliver's interpretation of Lord Wilberforce's rather ambiguous judgment is accepted, then *Ratten* is consistent with the definition argued for in this article.

The difficulty of drawing the distinction between a person's fear and the beliefs on which that fear is based does suggest, however, that an appropriately worded judicial direction may not be effective in ensuring that evidence of this kind is only used for the purpose for which it is admitted. Where there is a risk that even a properly directed jury might use the evidence as the basis for an impermissible hearsay inference, the safest course may be to exclude the evidence altogether. This result could be achieved by the recognition - as suggested by Dawson and Gaudron JJ in *Pollitt v R*[30] - of a discretion to exclude non-hearsay evidence when there is too great a danger that it will be used for a hearsay purpose.

Inferences from intention

A statement such as 'I intend to go downtown' is, of course, an assertion; it is an assertion that the speaker does have that intention. Like any assertion, it can be true or false, sincere or insincere. But we have already seen that an intention, like any other state of mind, can be inferred from such an assertion without infringing the hearsay rule. The question is whether the hearsay rule permits any further inferences to be drawn. Once inferred, intention is - like fear, but unlike belief - a state of mind which can be neither true nor false, it

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admissibility of the sworn depositions of witnesses who did not wish to testify at trial. The witnesses had told the police that they had received threats and were afraid to testify. Their statements that threats had been received - the reason for their fear - was merely hearsay. But Kenneth Jones J held that evidence of the statements in which the witnesses expressed their fear 'is evidence which can be given': [1988] 3 All ER 431 at 434. If the prosecution had merely been required to show that the witnesses did not testify through fear - as they now are under s 25 of the *Criminal Justice Act* 1988 - the statements would clearly have been relevant: see *Neill v North Antrim Magistrates' Court* [1992] 1 WLR 1220 at 1228-9 per Lord Mustill. But s 13(3) of the *Criminal Justice Act* 1988, which was in force at the time, actually required the prosecution to prove that the witnesses had been 'kept out of the way by means of the procurement of the accused'. To that issue the mere fact that the witnesses were in a state of fear was irrelevant. It could only be relevant if one inferred from it that they had good reason to be afraid: but that is as much hearsay as would have been the use of the witnesses' express statements about the reasons for their fear. The evidence should not, therefore, have been admitted.

30 (1992) 174 CLR 558 at 603; unfortunately, Dawson and Gaudron JJ failed to recognise that the evidence in *Pollitt* clearly gave rise to this very danger.

simply is. There is no such thing as a 'false' intention. The state of mind called intention cannot, therefore, be used as an assertion.

This is not to deny, however, that there is an element of belief in intention. A person can only rationally intend to do something which he or she believes to be capable of doing.[31] This means that we must again be careful to distinguish between intention and belief. If the statement of intention is really being used for the purpose of proving that the person was *capable* of doing the intended act, then it might well be classified as hearsay. But if there are other grounds for believing the person to have been capable of doing the act, or if it seems inherently likely that were so capable, then we are not relying on the element of belief implicit in the intention and are justified in disregarding it for the purposes of the hearsay rule. That being so, it should be possible to use evidence of a person's intentions without infringing the hearsay rule; and this is, again, precisely what the cases say.

The obvious use is, of course, to offer an intention as evidence from which the tribunal of fact can infer, if it chooses, that the intention was carried out. Thus in *Walton v R*, the deceased had told several witnesses of her intention to meet the accused in the Elizabeth town centre on the night on which she was murdered. A majority of the High Court held that 'her intention was relevant because it might be inferred that she acted in accordance with that intention'.[32] It might be so inferred on the basis that the existence of an intention to do an act makes it more likely that the intended act was done. One might question the plausibility of this generalisation, and hence the relevance of an intention to do an act to the issue of whether the act was done. In some cases the relevance of the intention to the doing of the act will no doubt be marginal,[33] but it will always be for the

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31 Of course, a person may intend to try and do something about which they have no such belief: but then the intention is to try rather than to succeed, and the person could only intend to try if they believed themselves to be capable of trying.

32 (1989) 166 CLR 283 at 300 per Wilson, Dawson and Toohey JJ; see also at 290 per Mason CJ. Deane J disagreed: (1989) 166 CLR 283 at 307. *Walton* was followed in *R v Astill* (1992) 63 A Crim R 148 at 162-3 per Smart JA.

33 As with Tapper's example of Georgina Washington's intention to win a hole of golf as evidence that she did win the hole (rather than as evidence of the fact that she tried to win the hole): 'Hillmon Rediscovered and Lord St Leonards Resurrected' (1990) 106 *LQR* 441 at 447.

tribunal of fact to determine whether or not to draw the desired inference.[34]

If *Walton* is correct, however, then the hearsay rule has no role to play in determining whether or not the evidence should be admitted; that will instead depend entirely on whether the evidence satisfies the requirement of relevance. In *R v Hendrie*,[35] for example, the accused was a home renovator charged with the rape and murder of a woman with whom he was on familiar terms. Her body was found in the bedroom of the house, which was the only room in which there was any evidence of a struggle. The deceased had discussed with her husband her intention to have a window in their bedroom converted into a door. This intention provided an explanation - consistent with the perpetrator being the accused - why the deceased might have gone into her bedroom with the perpetrator without a struggle, and why it was that the bedroom window curtains and fittings might have been taken down.[36]

Although the decision in *Walton* that statements of intention fall outside the scope of the hearsay rule was viewed by some as heretical,[37] it is in fact reasonably consistent with authority. In *Lloyd v Powell Duffryn Steam Coal Co Ltd*,[38] for example, an illegitimate child born after the work-related death of his putative father claimed compensation from the deceased's employers under the *Workmen's Compensation Act* 1906. There were two issues. First, was the deceased the father of the child? and secondly, was the child dependent upon the earnings of the deceased? Before his death the deceased had made several statements in which he acknowledged his paternity of the child, and had also expressed his intention to marry the mother and set up house with her before the child was born. Two intentions could be inferred. First, that which the deceased had expressly asserted, namely that he intended to marry the mother. Earl Loreburn LC held that this intention could be used to prove dependency:

> The evidence in question went to shew that if the father had not prematurely died this child would have been born legitimate, and

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34 See *Walton v R* (1989) 166 CLR 283 at 291 per Mason CJ. There might also be a threshold question for the judge, with Mason CJ at one point suggesting that statements of intentions might only be admissible for this purpose 'subject to remoteness in time and indications of unreliability or lack of probative value' (1989) 166 CLR 283 at 290.

35 (1985) 37 SASR 581.

36 Id at 585 per King CJ, and at 587 per Cox J.

37 See, for example, Tapper, 'Hillmon Rediscovered and Lord St Leonards Resurrected' (1990) 106 *LQR* 441.

38 [1914] AC 733.

> its father would have been legally bound to maintain it, which is a strong fact to prove dependency.[39]

This could only have been on the basis that the statements of intention were admissible to prove that the intention would have been carried out; that is, that the deceased would have married the mother.[40] The second intention inferred by Lord Moulton was an intention to support the child. This inference depended as much on the deceased's statements acknowledging paternity as on his statements of intention. But although his belief that he was the child's father could be inferred from his acknowledgment of paternity, the inference that he intended to support the child in no way depended on the truth of that belief. Like Earl Loreburn LC, Lord Moulton thought that the deceased's intentions could be used as evidence that the intentions would have been carried out:

> It can scarcely be contested that the state of mind of the putative father and his intentions with regard to the child are matters relevant to the issue, whether there was a reasonable anticipation that he would support the child when born.[41]

The decision in *Walton* is also consistent with the decision in *R v Buckley*.[42] There the deceased, a police constable, had told his inspector on the night on which he was last seen alive, that the accused 'was at his old game of thieving again' and that he therefore intended to watch his movements that night. The evidence was held to be admissible, although Lush J did not specify the purpose for which it could be used. It seems, however, that it was not offered as evidence that the accused was in fact thieving again; that would have been hearsay. But it was a circumstance from which it could be inferred that the deceased did in fact watch the accused that night, and that it might have been because of this that he met his death.

Evidence of a statement of intention was, however, excluded in *R v Wainwright*. In that case the two accused were charged with the murder of a woman. Before leaving her lodgings on the day on which she was thought to have been murdered, the deceased said to a witness that she was going the premises where her body was

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39 [1914] AC 733 at 738.

40 Although the deceased's ability to achieve this intention clearly depended on the willingness of the mother to marry him, there was no need to rely on his belief that she would marry him in order to prove that they would have married. This is because it was implicit in her testimony that she did intend to marry him: see [1914] AC 733 at 742 per Lord Atkinson.

41 [1914] AC 733 at 751. See also *Nash v Commissioner for Railways* (1963) 63 SR (NSW) 357 at 360 where Lord Moulton's views were applied.

42 (1876) 13 Cox CC 293.

interred.[43] Lord Cockburn CJ held the evidence to be inadmissible on the grounds that 'it was only a statement of intention which might or might not have been carried out'.[44] This reads as much like a comment on the relevance of the statement of intention as an application of the hearsay rule; despite the result, the case is therefore at least arguably consistent with the proposition that the admissibility of statements of intention is a question of relevance.

This leaves only *R v Thomson*[45] which is perhaps best explained as the result of defence incompetence. There the accused was charged with using an instrument on a woman for the purpose of procuring a miscarriage. The woman died before the trial, for reasons unconnected with the charge. The accused's defence was that she had performed the operation on herself. For that purpose he wished to lead evidence of two statements she had made. First, that some weeks before the date of the alleged operation she had said that she intended to procure a miscarriage herself; secondly, that shortly after the date of the alleged operation she said that she had performed such an operation on herself. Use of the second statement would clearly have been hearsay, but Lord Alverstone CJ held them both to be inadmissible. Although the hearsay rule was invoked, counsel for the defence made no attempt to argue that statements of intention fell outside the scope of the hearsay rule, arguing instead that the hearsay rule did not apply to exculpatory evidence.

What all this suggests is that there is simply no need for an exception for 'contemporaneous declarations of intent' of the kind discussed by Tapper,[46] and, with respect, it seems to me that the chief authority which Tapper cites for such an exception - the case of *Sugden v Lord St Leonards*[47] - is in fact far more equivocal on this point than Tapper suggests.[48] Tapper is clearly correct in his claim that Lord Cockburn

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43 Or, at least, this is what the brief report says. It is, however, entirely unclear from the report how it was known that the body found at the premises was that of Harriet Louisa Lane, the woman who made the statement in question. Indeed, one count of the indictment charged the accused with the murder of Ms Lane, while another charged them with the murder of a person unknown. If the body could not be properly identified, this would explain why the prosecutor wished to lead evidence of Ms Lane's statement, to prove that the body was hers.

44 (1875) 13 Cox CC 171 at 172.

45 [1912] 3 KB 19.

46 'Hillmon Rediscovered and Lord St Leonards Resurrected' (1990) 106 *LQR* 441, 454.

47 (1876) 1 PD 154.

48 'Hillmon Rediscovered and Lord St Leonards Resurrected' (1990) 106 *LQR* 441, 459.

CJ admitted the declarations of intention in that case as an exception to the hearsay rule;[49] but Jessel MR commented, after analysing the hearsay rule, that the declarations of intention were admissible 'on a somewhat different ground' from the post-testamentary declarations.[50] That ground seems simply to have been the circumstantial relevance of the pre-testamentary declarations, and there is no suggestion in his judgment that an exception to the hearsay rule was necessary.

The judgment of Mellish LJ points even more strongly to the fact that declarations of intention are admissible as original evidence. He held, without even mentioning the hearsay rule, that such declarations were admissible,

> because it is more probable that the testator has than that he has not made a particular devise, or a particular bequest, when he has told a person previously that he intended to make it.

His Honour then went on to specifically state that the post-testamentary declarations could only be admitted if an existing exception to the hearsay rule applied, which it did not.[51] *Sugden* is, therefore, at least as consistent with the argument in this article that statements of intention fall outside the hearsay rule as it is with Tapper's argument that they are only admissible under an exception to that rule.

A difficulty does arise, however, when the speaker's ability to achieve his or her intention depends on the actions of others. In *Walton*, for example, the deceased did not just say that she intended to go to the town centre; she said that she intended to meet the accused there. There was in fact other, independent evidence, from which it could be inferred that the accused also intended to meet the deceased that night[52] Because of this it was unnecessary for the court to consider the problem and only Mason CJ did so. Taking the contrary view to that taken by Traynor J in *People v Alcalde*[53] - where Traynor J held that one person's intention cannot be used as evidence of what another person did - Mason CJ held that the deceased's

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49 Although there is nothing in *Doe v Palmer* (1851) 16 QB 747; 117 ER 1067, the case relied on by Lord Cockburn CJ as authority for his exception, to suggest that the court in that case thought it necessary to recognise an exception to the hearsay rule in order to rule admissible the pre-testamentary declarations of intention.

50 (1876) 1 PD 154 at 242.

51 Id at 251.

52 See (1989) 166 CLR 283 at 291 per Mason CJ and at 300 per Wilson, Dawson and Toohey JJ.

53 148 P (2d) 627 at 633 (1944).

intention could be used as evidence that she did in fact meet the accused.

The truth is, however, that on its own, evidence of the deceased's *intention* was utterly incapable of proving that she actually met the deceased. This is because the occurrence of the meeting depended as much on the accused's actions and intentions as they did on the deceased's. Her statements of intention were only relevant to her own actions; indeed the state of mind called intention can only ever be concerned with the actions of the person whose intention it is. I can hope, fear or believe that you will do something; but I cannot 'intend' it. Accordingly, it was only in combination with her *beliefs* about the accused's intentions - in particular, her belief that the accused had arranged, and intended, to meet her - that the deceased's intention could be used as the basis for an inference that the meeting took place. Evidence of the deceased's intentions could, as it were, be used to place her there; to place the accused there as well required reliance on her beliefs. That it was necessary to rely on the deceased's beliefs as well as her intentions is even apparent from the justification which Mason CJ advanced for allowing the deceased's 'intention' to be used as evidence that she met the accused:

> It would make little sense to reject the deceased's statements on the grounds that they relate to the future action of another when the statements evidence her *belief* that the person she was to meet was the applicant. After all, her *belief* that she was to meet the applicant made it the more probable that she travelled to the Town Centre.[54]

Moreover, the inference that the deceased actually met the accused - as distinct from the inference that she travelled downtown in order to meet him - depended entirely on the *truth* of her belief that the deceased had arranged and intended to meet her. To use her belief as the basis for such an inference was, therefore, to use it as an assertion. In short, to use one person's intentions to prove the actions of another is impossible; to use one person's beliefs about the intentions of another in order to prove that other's actions is hearsay.

C Inferences From Belief to Something Other than Truth of Belief

Belief, like fear and intention, is a state of mind which simply is; but unlike either fear or intention, its content - that which is believed - must be either true or false. It can, therefore, be used as an assertion; indeed it is the only state of mind which can be used in this way. However it is only when used as an assertion that the hearsay rule is infringed. The fact that a person believes something can also constitute a circumstance from which a relevant inference can be

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54 (1989) 166 CLR 283 at 292; emphasis added.

drawn. We have already seen, for example, that in *Lloyd v Powell Duffryn*, Lord Moulton was prepared to infer the deceased's intention to support the child from his belief that he was the father; this did not infringe the hearsay rule because the strength of this inference in no way depended on the truth of that belief. Similarly, in *Hughes v National Trustees, Executors and Agency Co of Australasia* a majority of the High Court held that the testatrix's statements about her son could not be used to prove that he was guilty of misconduct which would disentitle him from the relief of the court. That would have been hearsay. However her belief that her son had treated her badly could have been used in other ways. If motive had been relevant, for example, her belief could have been used to explain her reasons for disinheriting him.[55]

In many cases, though, the belief may only be relevant if true. Even in these cases, however, the belief can still be used as the basis for a permissible inference if the relevance of the belief lies in the fact that it was held, and its truth is proved by other means. A person's belief in the existence of a fact might, for example, be used as the basis for an inference that he or she *knew* about the fact's existence, if such knowledge is relevant to an issue at trial. The possession of such knowledge might be a fact in issue as in *Thomas v Connell*,[56] where a bankrupt's statement that he knew he was insolvent was admissible to prove that he did in fact know that he was bankrupt. Alternatively, the possession of particular knowledge may merely be a relevant circumstance from which the existence of the facts in issue may be inferred. In *R v Matthews*, for example, the accused's diary entry for the day after the murder read 'Liz dead, 27 years five months nine days'. He admitted to the police that this might actually have been written on the night of the murder. His story at that time was that he had raped the deceased but had not killed her. He explained the diary entry as merely a reference to the state of his relationship with the deceased following the rape and other events of that evening. Jacobs ACJ pointed out that in their natural meaning the words attributed to the accused an esoteric knowledge of the death which was highly incriminating.[57]

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55 (1979) 143 CLR 134 at 137 per Barwick CJ, at 149 per Gibbs J, with whom Mason and Aickin JJ agreed, and at 159 per Murphy J. See also *Shepard v US* 290 US 96 (1933), discussed by A Rein, 'The Scope of Hearsay' (1994) 110 *LQR* 431, 440-1. In *Shepard* the deceased's belief that the accused had poisoned her was offered as evidence to rebut his defence that she had committed suicide.

56 (1838) 4 M & W 267; 150 ER 1429.

57 (1990) 58 SASR 19 at 23.

The important point about both of these cases is that in neither of them are we using the statement of belief to prove the truth of that belief. The truth of the belief - that the bankrupt was insolvent, that the deceased was dead - is proved by other means. Indeed, until the existence of the fact has been proved, the actor's belief in it cannot be characterised as 'knowledge'. Distinguishing knowledge from belief is, of course, the central concern of epistemology, and the law no doubt overlooks many of the theoretical niceties in inferring that someone 'knows' something from the fact that they hold true beliefs. Of course, it is up to the tribunal of fact to decide whether or not to draw this inference, and it is only likely to be drawn when 'knowledge', rather than a lucky guess, is the most plausible explanation for a person holding a particular belief.[58]

The real question, though, is not whether the inference can be drawn, but what can be done with it. In my view, the hearsay rule has no application because the knowledge is not being used to prove the truth of that which is known. This accords with the comment of Baron Parke in *Thomas v Connell* that 'if a fact be proved aliunde, it is clear that a particular person's knowledge of that fact may be proved by his declaration'.[59] The only limitation, therefore, is the requirement of relevance. This is actually consistent with the comment of Lord Bridge in *R v Blastland* that:

> the admissibility of a statement tendered in evidence as proof of the maker's knowledge or other state of mind must always depend on the degree of relevance sought to be proved to the issue in relation to which the evidence is tendered.[60]

One may of course disagree with Lord Bridge's conclusions about the relevance of the evidence from which the witness' knowledge of the murder could be inferred,[61] but this is not a disagreement about the scope of the hearsay rule.

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58 See, for example, *Pollitt v R* (1992) 174 CLR 558 at 620 per McHugh J.

59 (1838) 4 M & W 267 at 269; 150 ER 1429 at 1430. See also the comment of Brennan J in *Pollitt v R* (1992) 174 CLR 558 at 578 that 'where a statement is tendered to prove the maker's knowledge of a fact and that knowledge is used to found an inference of fact other than the truth of the fact known, the statement is not classified as hearsay but as original evidence'.

60 [1986] 1 AC 41 at 62.

61 As it happens I do, for the reasons expressed by D Birch, 'Hearsay-logic and hearsay-fiddles: *Blastland* revisited' in P Smith (ed), *Criminal Law: Essays in Honour of JC Smith* (Butterworths, 1987) at p 35.

II Redefining hearsay

By showing why inferences from act to state of mind, from states of mind such as fear and intention, and from belief to something other than truth of belief, fall outside the scope of the hearsay rule, the rule has been whittled back to the definition for which I am arguing. That is, *an out-of-court act is inadmissible as evidence of the truth of any belief which is asserted by or which can be inferred from that act.*

The purpose of this part of the article is to test the remaining prohibition by examining some recent judgments which appear to be inconsistent with it. These judgments suggest that sometimes the inference from belief to truth of belief is permitted. They do so by relying on the distinction between the testimonial and circumstantial use of evidence from which a person's belief can be inferred. If the judgments are right, then the definition above should be amended by the insertion of the word 'direct' before the word 'evidence'.

A Testimonial and Circumstantial Reasoning

The distinction between the testimonial and circumstantial use of an out-of-court act is not to be found in the ultimate conclusion which can be drawn from that act; rather, it relates to the manner in which that conclusion is reached. When a statement is used testimonially its cogency depends on the credit to be given to the speaker.[62] The tribunal of fact is asked to conclude that a particular fact exists because the speaker has said so. They are asked to take the speaker's 'word' for it. Before concluding that the particular fact does exist, the jury will want to be satisfied that the speaker was neither insincere nor mistaken. This task is obviously much easier when the speaker is testifying in court: then the speaker's demeanour can be assessed and his or her evidence tested under cross-examination. Hence the hearsay rule's undoubted prohibition on the testimonial use of an out-of-court statement.

When an out-of-court statement is used circumstantially, on the other hand, its cogency is - in theory at least - completely independent of the credit of the speaker. Rather, it depends on the strength of the inference which can be drawn from the fact that the statement was made in the circumstances in which it was made. We have already seen this process of reasoning operating in relation to statements of intention and fear. The question is always one of the relevance of the act or statement to the fact in issue. In that regard, Australian courts have obviously accepted that the fact that a person has a particular intention is evidence from which it can be inferred that the intention was carried out. This is based on ordinary considerations of

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62 See *Pollitt v R* (1992) 174 CLR 558 at 571-2 per Brennan J.

relevance. The existence of the one fact - the intention - is said to increase the probability of the existence of the other fact - the doing of the intended act.

Similar arguments can be made in relation to acts which either expressly assert or which provide a basis for inferring the speaker's belief. Rather than using the act or statement testimonially as an assertion, we could instead infer from it that the speaker believed in the existence of a particular fact, and then infer from the belief the existence of the fact. The ultimate conclusion is, of course, the same as if we had used the act or statement testimonially. Nevertheless, we have already seen that the first step of this double circumstantial inference is permitted; a person's out-of-court acts are admissible evidence of his or her state of mind, including his or her beliefs. The question to be considered in this part of the article is whether the second step is also permitted.

The evidence must, of course, be capable of satisfying the requirement of relevance. This means that a person's belief in the existence of a particular fact can only be admissible evidence of the existence of that fact if the fact that the person held such a belief is itself a circumstance which renders more probable the existence of the fact believed. If we know nothing about the circumstances in which the belief came to be held then we will probably decline to hold the belief relevant. But if the circumstances are such that the belief is likely to be true, then the mere fact that the belief is held may well be probative of the truth of the belief. If, for example, there is evidence which establishes that the person whose belief it is actually witnessed the event in question, then we might consider that his or her belief was a circumstance which rendered more probable the occurrence of the event believed. Similarly, we might consider that a person's belief in, for example, the existence of a close family relationship is itself a fact which renders more probable the existence of that relationship.

If such arguments are acceptable then evidence from which a belief can be inferred could be used circumstantially to prove the truth of the belief, provided, that is, that the hearsay rule does not forbid this. It would perhaps seem surprising if it did not, for, as Wigmore noted, if evidence of belief:

> ... were allowed to come in as circumstantial, could not any and every hearsay statement be brought in upon the same plea, by resolving it into a double inference, namely by translating A's assertion that he saw M strike N, into an inference from his utterance to his belief and from his belief to the fact asserted?[63]

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63 *Wigmore on Evidence* (3rd ed, Little, Brown and Co, 1940) p 93.

The answer is that, subject to the requirement of relevance, it could. No doubt for this reason, Thayer claimed that:

> 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 been made under such and such circumstances.[64]

Prohibition (b) is, of course, only a secondary prohibition designed to ensure that the primary prohibition against the testimonial use of out-of-court acts or statements is not too easily evaded. The fact is, however, that this secondary prohibition has never been absolute; that is, there have been cases where the courts have been prepared to allow the circumstantial use of evidence to prove the very thing which could not be proved testimonially. In *Lloyd v Powell Duffryn Steam Coal Co*, for example, Lord Shaw[65] and Lord Atkinson[66] both delivered judgments in which they held that statements by the deceased expressly acknowledging his paternity of the child, and his conduct in becoming engaged to a woman whom he knew to be pregnant, were admissible evidence on the issue of paternity. Indeed, Lord Atkinson stated that a mere proposal of marriage in such circumstances would be admissible evidence, on the basis of what he believed to be the:

> ... great improbability that any man with the ordinary feelings of a man would marry a woman whom he believed, or knew, to be pregnant if he did not *believe* he was the father of the child.[67]

The deceased's belief that he was the father was, thus, a circumstance from which could be inferred the truth of that belief. It might be tempting to dismiss *Lloyd v Powell Duffryn* as an isolated anomaly were it not for the House of Lord's earlier decision in the case of *The Aylesford Peerage*.[68] After the death of the seventh Earl of Aylesford his brother made a petition in which he submitted that he had succeeded to the Earlship. The seventh Earl's estranged wife, Edith Lady Aylesford, opposed the petition on behalf of her infant son, Guy Bertrand. The issue was whether the child was the son of the

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64 J Thayer, *Legal Essays* (Harvard University Press, 1907) at p 270; approvingly quoted in *Cross on Evidence* (7th ed, Butterworths, 1993) at p 514 and *Cross on Evidence* (4th Australian ed, Butterworths, 1991) at p 804.

65 [1914] AC 733 at 748.

66 Id at 739-40. Earl Loreburn LC also held that 'the evidence was properly allowed on the issue of paternity', but gave no reasons: Id at 738.

67 Id at 740; emphasis added.

68 (1885) 11 App Cas 1.

seventh Earl. The child was born in 1881, six years after Lady Aylesford had left the seventh Earl for the Marquis of Blandford. One of the questions the House of Lords had to determine was the admissibility of certain letters written by Lady Aylesford and Lord Blandford to the child's nanny in which both concurred in expressly asserting Lord Blandford to be the father of the child.

The House of Lords held that the letters were admissible for the purpose of proving that the Earl of Aylesford was not the child's father. The Earl of Selborne declared that 'these declarations are facts as well as statements. It is a fact that for some purpose or other the mother wrote a letter containing such statements'.[69] Lord Blackburn held that 'they come within the class of evidence of conduct ... leading to the conclusion that the child was not legitimate'.[70] Lord Bramwell described the letters as evidence of 'conduct of the parent shewing that the child was a bastard'.[71] He went on to give, as a further example of admissible evidence of a child's illegitimacy, the fact that the husband 'always treated the child unkindly or distantly, and in his will gave money to his other children but gave none to this child'.[72] Lord Bramwell's example is obviously impossible to reconcile with the comments of Baron Parke in *Wright v Tatham*. The only basis on which the statements in the letters, or the conduct in Lord Bramwell's example, could be relevant is as evidence of the truth of the belief which was asserted in the letters or which could be inferred from the conduct.

The cases show how the hearsay rule can be evaded if the secondary prohibition is lifted. They could, however, be seen as authority for several different approaches. First, they could be seen as authority for a very limited exception to the secondary prohibition, such as that 'statements acknowledging paternity do not come within the scope of the hearsay rule'.[73] This view might encourage the recognition of further limited exceptions. Secondly, they could be seen as authority for the broader view that the secondary prohibition can be lifted whenever the fact that a person holds a particular belief

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69 (1885) 11 App Cas 1 at 10. He added that 'Your Lordships will not take them as proving the fact' - by which I assume he meant that the statements could not be used testimonially - but that the fact that the statements were made was a 'fact' which 'ought not to be excluded from consideration'.

70 (1885) 11 App Cas 1 at 10-11.

71 Id at 11.

72 Id at 12.

73 This is the proposition for which Mason CJ cited *Lloyd v Powell Duffryn* in *R v Benz* (1989) 168 CLR 110 at 116; see also *Wigmore on Evidence* (3rd ed, Little, Brown and Co, 1940), §267-272.

has genuine circumstantial relevance to the existence of the fact which is believed. Thirdly, they could be seen as early examples of the admission of 'reliable' hearsay on the kind of basis suggested by Mason CJ in *Walton v R.*[74] Finally, they could be viewed as historical anomalies, best forgotten.

On this question, Australian and English courts have parted ways. In England, the majority decision in *R v Kearley*[75] appears to have closed off any arguments that the hearsay rule can be avoided by the use of circumstantial inference. In Australia, several recent judgments have had the opposite effect.

B England: Maintaining the Secondary Prohibition

In *Myers v DPP*,[76] the Court of Criminal Appeal endorsed an argument which - if accepted by the House of Lords - would have meant the complete abrogation of the secondary prohibition:

> In our view the admission of such evidence does not infringe the hearsay rule because its probative value does not depend upon the credit of an unidentified person but rather on the circumstances in which the record is maintained and the inherent probability that it will be correct rather than incorrect.[77]

In the House of Lords, only Lord Donovan found this argument acceptable; the majority of course rejected it, and Lord Pearce preferred to base his decision on the recognition of a new exception to the hearsay rule.[78] The argument resurfaced in *R v Kearley.*[79] Nothing turns on the fact that *Myers* was a case involving express assertions and *Kearley* a case involving implied assertions. The argument that the hearsay rule permits the circumstantial use of an out-of-court act is equally applicable to both express and implied assertions.

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74 'When the dangers which the rule seeks to prevent are not present or are negligible ... there is no basis for a strict application of the rule. Equally, where in the view of the trial judge those dangers are outweighed by other aspects of the case lending reliability and probative value to the impugned evidence, the judge should not then exclude the evidence by a rigid and technical application of the hearsay rule': *Walton v R* (1989) 166 CLR 283 at 293. See S Odgers, '*Walton v The Queen* - Hearsay Revolution?' (1989) 13 *Crim LJ* 201 at 214.

75 *R v Kearley* [1992] 2 AC 228.

76 [1965] AC 1001

77 Id. at 1008.

78 Id at 1023-4 per Lord Reid; at 1027 per Lord Morris of Borth-y-Gest; at 1030, 1034 per Lord Hodson; at 1044 per Lord Pearce; and at 1048 per Lord Donovan.

79 [1992] 2 AC 228.

In *Kearley* the police suspected the accused of dealing in drugs. He was arrested and his home was searched. The police found only a small quantity of drugs, not enough to raise an inference that the accused was in possession of the drugs with intent to supply. As this was the offence with which the police wished to charge the accused, they sought to raise that inference by other means. They therefore led evidence that while they were searching the house eleven people phoned, asked for the accused and then for drugs (some asked for the 'usual'), and that seven people called at the house offering to buy drugs for cash. None were detained or identified by the police.

Now it could clearly be inferred from this evidence that the callers believed that the accused supplied drugs, and were willing to buy drugs from him. The evidence was therefore capable of being used, testimonially, as an assertion; but such a use of the evidence was prohibited by the hearsay rule. Could the evidence be used circumstantially instead, without infringing the hearsay rule? Lords Griffiths and Browne-Wilkinson thought that it could. Lord Browne-Wilkinson argued that the evidence was admissible because 'the existence of a contemporaneous potential market to buy drugs from [the accused], by itself, shows that there was an opportunity for the accused to supply drugs'.[80]

Proof that there was such a market in no way depended on an inference that the callers' beliefs were true; the market might have existed even if all of the callers were mistaken. This clearly means that the existence of the market could be established without any infringement of the hearsay rule. However what relevance does the existence of such a market have? As Lord Browne-Wilkinson himself said, it shows only that there was an *opportunity* for the accused to supply drugs. The issue in *Kearley*, however, was intention to supply and surely the relevance of opportunity to intention is so slight[81] that if this really is what made the evidence relevant then it should have been excluded in the exercise of the general discretion to exclude evidence more prejudicial than probative. Lord Griffiths, on the other hand, asked:

> ... why did all these people believe they could obtain drugs from the appellant? The obvious inference is that the appellant had established a market as a drug dealer by supplying or offering to supply drugs and was thus attracting customers.[82]

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80 Id at 279.

81 See comments of Lord Oliver, id at 271.

82 Id at 238; Lord Griffiths apparently overlooked the fact that - quite apart from the hearsay rule - this argument contravenes the rule against propensity (or similar fact) evidence. This is because the jury is being invited to infer that the accused intended to supply drugs on the occasion in question from the fact that he 'had established a market as

In other words, the inference to be drawn from the fact that so many people believed that the accused supplied drugs was that the accused did supply drugs. However Lord Griffiths did not think that the hearsay rule applied because:

> The evidence is offered not for the purpose of inviting the jury to draw the inference that the customers believed they could obtain drugs but to prove as a fact that the telephone callers and visitors were *acting* as customers or potential customers which was a circumstance from which the jury could if so minded draw the inference that the appellant was trading as a drug dealer; or to put it in the language of the indictment that he was in possession of drugs with intent to supply them to others.[83]

If the existence of persons 'acting as customers' entails the existence of someone (the accused) 'acting as a drug dealer' then the evidence might well have been relevant to the issues without there being any reliance on the callers' beliefs, and hence no infringement of the hearsay rule. But the majority clearly took the view, expressed by Baron Parke in *Wright v Doe*, that the only magic in the fact that someone is prepared to act on their belief - as the callers did when they 'acted' as customers - is to provide evidence of the strength with which the belief is held.[84]

It might well be argued that the fact of the callers' belief was circumstantially relevant to the accused's intention on the basis of a generalisation, such as that 'when a large number of people share a belief that a person is a drug dealer and are willing to act on that belief by attempting to buy drugs from that person, then the belief is probably true'. Lord Griffiths apparently accepted some such generalisation; Lords Ackner and Oliver did not;[85] Lord Bridge may well have.[86] The question of relevance could only be determinative of admissibility, however, if the hearsay rule allowed the circumstantial use of such evidence for such a purpose, while

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a drug dealer by supplying or offering to supply drugs' on other occasions.

83 Ibid; emphasis added. Cf *Davidson v Quirke* [1923] NZLR 552 at 555 per Salmond J: 'Such a practice does not arise by accident or mistake, and points logically to the inference that such use of the telephone by outsiders has its source in the agreement and purpose of the occupier himself'.

84 (1837) 7 Ad & El 313 at 387; 112 ER 488 at 516.

85 [1992] 2 AC 228 at 254 per Lord Ackner, and at 273 per Lord Oliver.

86 See id at 247, where he comments: 'Of course I appreciate the probative force of a plurality of requests'.

prohibiting its testimonial use for the same purpose.[87] The majority in *Kearley* clearly held that it did not.[88]

C Australia: Lifting the Secondary Prohibition

If the secondary prohibition was upheld in *Kearley*, in Australia it seems to be crumbling. In *Walton v R*, Mason CJ said that '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',[89] a definition which seems to have been deliberately intended to lift the prohibition on the *circumstantial* use of out-of-court acts. It is consistent with this definition that Mason CJ, as we have already seen, held that the hearsay rule did not prevent an inference that the deceased met the accused being drawn from the combination of the facts that she intended to travel downtown in order to meet him and *believed* that he intended to do the same. One could of course argue that the fact that the deceased was prepared to act on her belief by travelling downtown showed that the belief was a reliable one; but this does not alter the fact that the deceased's belief was admitted to prove the truth of her belief.

In the same case, Wilson, Dawson and Toohey JJ claimed that the distinction between hearsay and original evidence was that:

> ... between evidence of conduct which, even though it may contain an assertion, is tendered as a relevant fact or a fact relevant to a fact in issue and is therefore admissible and evidence of conduct which has no probative value other than as an assertion and is therefore not admissible.[90]

This formulation obviously has a great deal in common with the approach suggested by Lord Griffiths in *Kearley;* so it should come as no surprise to find that it was relied on by the Supreme Court of South Australia as a justification for reaching the same conclusion as Lord Griffiths did in *Kearley* in a case where the facts, issues and disputed evidence were all substantially the same.[91] The difficulty with this formulation is, however, in deciding whether or not the

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87 It is therefore interesting to note the comment of Brennan J in *Pollitt* (1992) 174 CLR 558 at 577, that the 'points of departure between the majority in *Kearley* and the minority in that case ... are to be found in the differing opinions as to the relevance of the fact that the callers had sought to buy drugs ... to the question of the nature of the activity being carried on by the person charged'.

88 See [1992] 2 AC 228 at 243-5 per Lord Bridge, at 255 per Lord Ackner, and at 264 per Lord Oliver.

89 (1989) 166 CLR 283 at 288; emphasis added.

90 Id at 304.

91 *R v Firman* (1989) 52 SASR 391 at 396.

probative value of the 'conduct' really does depend on the 'assertion' contained in it.

The difficulty of drawing the distinction is illustrated by the judgment of Dawson J in *R v Benz.*[92] In that case the two accused, mother and daughter, were charged with the murder of the mother's de facto husband. There was evidence that two people - who it could be inferred were the murderers[93] - were seen by a witness, on the night of the murder, on the bridge from which the deceased's body must have been dumped. The witness testified that as he drove across the bridge he wound down the window of his car and asked if everything was all right. One of the two people turned around and replied that it was all right, her *mother* was just feeling sick. The issue was the admissibility of this evidence to prove identity. Deane, Gaudron and McHugh JJ clearly thought the evidence was hearsay and discussed its admissibility in terms of the *res gestae* exception to the hearsay rule.[94] But Mason CJ and Dawson J denied that the evidence was hearsay, both citing as authority for this conclusion *Lloyd v Powell Duffryn*[95] and *The Aylesford Peerage* case.[96]

Dawson J characterised the evidence in *Benz* as 'conduct', arguing that:

> ... in referring to the older woman as her mother, the younger woman was *acting* in accordance with the relationship known to exist between the respondents and it was that fact which was relevant...The making of the statement constituted *conduct* which went to the identity of the two women on the bridge and was admissible, not as an exception to the hearsay rule, but as a relevant fact.[97]

While conceding that the statement contained an implied assertion that the older woman was the speaker's mother, Dawson J argued that it was not being used to prove the truth of that assertion. It was not part of the Crown case, he said, to prove that the two persons on the bridge were mother and daughter.[98] This seems unpersuasive. If the 'conduct' was not being used as the foundation for an inference that the speaker was in fact the daughter of the other woman then how could it possibly have shown that the two accused and the two

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92 (1989) 168 CLR 110

93 See (1989) 168 CLR 110 at 115, 119 per Mason CJ, and at 142 per Gaudron and McHugh JJ.

94 See id at 121 per Deane J, and at 143-4 per Gaudron and McHugh JJ.

95 [1914] AC 733.

96 (1885) 11 App Cas 1.

97 (1989) 168 CLR 110 at 134; emphasis added.

98 Id at 133.

murderers shared the characteristic of being mother and daughter? This point is not, however, fatal to Dawson J's claim that the evidence was original.

There are still two ways of looking at his Honour's judgment. On the one hand, it can be argued that the recharacterisation of the statement as 'conduct' cannot change the fact that the statement was only relevant to the existence of a mother-daughter relationship between the two women because we could infer from it the speaker's *belief* in the existence of such a relationship. On the other hand, it can be argued that the existence of a mother-daughter relationship can be directly inferred from the behaviour of the two women without there being any need to make an intermediate inference as to the speaker's beliefs. I consider that the latter view is correct. Just as one could infer that two people were lovers from the fact that they behaved towards one another as lovers do, so it seems one should be able to infer that two people stand in a parent-child relationship from the nature of their behaviour. Justice Dawson's approach therefore seems successfully to avoid the hearsay rule altogether.

Justice Brennan's judgment in *Pollitt v R*, however, clearly fails to do so. In *Pollitt* the Crown case was that the accused had murdered one Simpson, having mistaken him for Williams, whom Allen had allegedly hired him to kill. The defence was one of identity. Given the Crown's case, it was obviously relevant to show that there was an agreement between the accused and Allen for the murder of Williams. The trial judge admitted evidence from a Mr and Mrs Berry who had been at Allen's house the day after the murder of Simpson. They testified that Allen received a phone call, and that during the course of the conversation he became angry and said to the caller, 'You get the rest of the money when you do the job properly'. On appeal the defence conceded that this evidence was properly admitted and concentrated their arguments on the admissibility of certain other statements made by Allen to the Berrys, including a statement made immediately after the telephone conversation in which Allen identified the accused as the caller.[99]

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99 The court also had to consider the admissibility of a further statement made immediately after the telephone conversation in which Allen added that 'I have already given him five thousand, he expects me to give him another five for something he hasn't done'; and a statement made some days later in which Allen said to them 'Ray got the wrong one and wants to be paid for it'. Dawson and Gaudron JJ, (1992) 174 CLR 558 at 603, held that all of the statements, including those made during the course of the telephone conversation, were admissible as original evidence that Allen had arranged to kill Williams. This was clearly a non-hearsay use of the evidence, although it is questionable whether the evidence was sufficiently relevant for this purpose that it ought to have been admitted given the high risk that the jury would

Mason CJ and Deane J held that this latter statement could be used to identify the accused as the caller;[100] Brennan J relied on the testimony of an accomplice of the accused, one Jones, as a basis for the same inference. I am not concerned, however, with the means by which it was inferred that the accused was the caller; rather, I am interested in the use to which the statements made during the telephone conversation could be put, once that inference was drawn. In particular, my interest is in the use to which Brennan J suggested that the evidence could be put.[101]

Brennan J conceded that Allen's statement that 'You get the rest of the money when you do the job properly' could be viewed as a statement implying that the other party to the telephone conversation had made a contract with Allen which he had failed to perform properly. If this was the only way in which the evidence could be used then it would be inadmissible as hearsay. However Allen's statement to the caller that 'you get the rest of the money when you do the job properly' was also a *promise* to pay the caller:

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use it as a basis for inferring that the accused was the other party to this arrangement, a hearsay use. Disagreeing on the relevance to the guilt of Pollitt of Allen's involvement in an arrangement to kill Williams, the other members of the court all held that this evidence was simply hearsay and inadmissible: (1992) 174 CLR 558 at 567 per Mason CJ, at 585 per Brennan J, at 597 per Deane J, at 609 per Toohey J, and at 622 per McHugh J.

100 On the basis that there is an exception to the hearsay rule for statements made by one party to a telephone conversation identifying the other party to the conversation. The exception was first suggested by Deane J in *Walton v R* (1989) 166 CLR 283 at 308. In *Pollitt v R* the exception was endorsed - albeit with varying degrees of enthusiasm and subject to disagreements about its scope - by four members of the court: (1992) 174 CLR 558 at 566 per Mason CJ, at 596 per Deane J, at 611 per Toohey J, and at 621-2 per McHugh J; Brennan J at 582, and Dawson and Gaudron JJ at 605 all refrained from expressing a concluded view on the matter, although Dawson and Gaudron JJ did comment that they had 'some difficulty in extracting any principle upon which such an exception could be based'.

101 Because of counsel's concession, the question may not have received the attention it deserved: Mason CJ simply assumed that the evidence was relevant once the caller could be identified, without specifying why, and Dawson and Gaudron JJ thought that no objection 'is or could be taken' to the evidence, although again no reasons were given: (1992) 174 CLR 558 at 603. Deane J did give the question some consideration and held that the evidence could either be used as an implied admission (in the absence of any indication of dissent), or as evidence of a step in the furtherance of a common criminal purpose: (1992) 174 CLR 558 at 592.

> From the *making* of that promise and from the fact that Allen had remonstrated with the caller, an inference could be drawn that the caller had undertaken to perform some service for Allen and had not then performed it. The evidence was therefore admissible as original evidence if [this fact] ... was relevant to a fact in issue.[102]

It obviously was. Once the accused was identified as the caller, then the evidence of what Allen said to the caller could be used to found an inference that there was a contract between Allen and the accused for the murder of Williams. Like Dawson J in *Benz*, Brennan J thus attempted to avoid the operation of the hearsay rule by recharacterising the evidence as conduct. However as McHugh J pointed out,[103] the mere fact that Allen promised to pay the accused some money in the event that he performed a particular act was not itself relevant to the existence of an earlier arrangement to kill Williams. That can only be inferred from the reasons given for the making of the promise namely, Allen's apparent belief that an agreement already existed between himself and the caller.

In other words, the evidence was not just of a promise, it was of a promise based on a *belief*, and it was from the belief, rather than from the promise, that the existence of the earlier agreement could be inferred. The fact that Allen was prepared to promise to pay a large sum of money on the strength of his belief may have suggested that the belief was reliable. However this cannot change the fact that Brennan J held the evidence to be admissible to prove the truth of the belief which could be inferred from it, a use which clearly contravenes the secondary prohibition.[104]

It is the judgment of Mason CJ in *Benz*, however, which contains the most explicit endorsement of the view that a person's beliefs can sometimes be used as circumstantial evidence of the truth of those beliefs. Mason CJ held the evidence in that case to be admissible to prove identity on the following basis:

> As a matter of everyday life people behave and speak in a way that reflects their beliefs as to their relationships with other persons. Our experience of human affairs shows that these expressions of belief are, generally speaking, reliable, at least in the case of close relationships such as parent and child, brother and sister. There is, accordingly, a strong foundation for receiving utterances reflecting the speaker's *belief* in his or her close relationship with another as evidence of that relationship and for regarding the admission of

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102 (1992) 174 CLR 558 at 584; emphasis in original.

103 (1992) 174 CLR 558 at 621.

104 Although the fact that earlier in his judgment he denied that it was 'permissible to infer the truth of a statement from the fact of the maker's belief in what he stated' may suggest that he was unaware that this was what he was doing: see (1992) 174 CLR 558 at 577.

> that evidence as standing outside the operation of the hearsay rule.[105]

Mason CJ thus endorsed precisely the generalisation about beliefs in close family relationships described above, a generalisation justifying the circumstantial use of a person's beliefs as evidence of the truth of that which is believed. The statement by the woman on the bridge - that her mother was feeling sick - was therefore admissible to prove that the two women were, like the accused, mother and daughter. This approach clearly falls within the scope of the secondary prohibition, and can only be explained on the basis that the prohibition will in certain circumstances be lifted. The requirement suggested by Mason CJ seems to be that the belief in question must belong to a class of beliefs which can generally be considered reliable.

At present, however, the exact state of the law is unclear. Mason CJ, Brennan J, and arguably also Dawson J, have shown themselves willing to lift the prohibition against the circumstantial use of a person's beliefs as evidence of the truth of those beliefs; but there is little guidance in their judgments as to when such inferences will be permitted. Of the present High Court, only McHugh J has taken an unequivocal stance against this, commenting that:

> The hearsay rule would be meaningless in practice if it prohibited a statement being used directly to prove a fact contained in the statement but allowed the statement to be used circumstantially to prove a state of mind from which could be inferred the existence of the very fact which could not be proved directly.[106]

The restriction of the hearsay rule to intentional assertions under the proposed uniform evidence legislation will not solve this problem. Although the court's willingness to lift the secondary prohibition is obviously greatest when the evidence contains only unintentional or implied assertions, this is not because express assertions can not be used circumstantially. Rather, it is because it is less obvious in the case of unintentional assertions that the permitted circumstantial use of the evidence is in many respects equivalent to the prohibited testimonial use. Yet it is hard to see why it should have made any difference to Brennan J's reasoning in *Pollitt*, for example, if Allen had actually said to the caller, 'We agreed that you would kill Williams and I will pay you when you do the job properly', or to

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105 (1989) 168 CLR 110 at 117; emphasis added. The words at the end of the extract suggest that Mason CJ considered the statement to be admissible as original evidence rather than under an exception to the hearsay rule. The judgment was certainly viewed in this way - and viewed approvingly - in *Pollitt v R* (1992) 174 CLR 558 at 602 per Dawson and Gaudron JJ.

106 *Pollitt v R* (1992) 174 CLR 558 at 620.

Mason CJ's in *Benz* if the younger woman had said, 'It's OK. She is my mother and she is just feeling a little unwell'.

The issue is, therefore, a live one. How should it be resolved? The emphasis on reliability in the judgment of Mason CJ in *Benz* suggests that there might ultimately be some convergence between the lifting of the secondary prohibition and the approach suggested by Mason CJ in *Walton*, an approach which permits the lifting of the hearsay prohibition altogether in cases where hearsay evidence is considered to be sufficiently reliable to warrant admission.[107] The latter approach, or one similar to it, has already been followed in several Australian cases since *Walton*,[108] has been unanimously adopted by the Supreme Court of Canada,[109] is consistent with the position in the United States under the Federal Rules of Evidence,[110] and is reflected in the *Evidence Act* 1995 (Cth).[111]

Indeed, it is hard to see how the courts could determine the extent to which the possession of a particular belief affects the probabilities of the existence of the fact believed, without entering into some assessment of the reliability of the belief. In other words, a finding that the existence of the belief is circumstantially relevant to the truth of the fact believed is likely to depend upon a prior finding that the belief in question is reliable. In deciding whether the belief is likely to be reliable, the court could take into account circumstances such as the fact that the belief was acted on (as Brennan J did in *Pollitt*), or that it belongs to a class of beliefs which are generally true (as Mason CJ did in *Benz*). If there is nothing to suggest that the belief is reliable, then it is hard to see how it could be circumstantially relevant.

Viewed in this way, the lifting of the secondary prohibition can be seen as part of a broader movement towards a more flexible

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107 (1989) 166 CLR 283 at 293.

108 See *R v Glen Andrew Daylight* (1989) 41 A Crim R 354 (QSC); *R v Momir Miladinovic* (1992) 60 A Crim R 206 (ACTSC); *R v Stephen Lorne Astill* (1992) 63 A Crim R 148 (NSWCCA); *R v Roderick William Radford* (1993) 66 A Crim R 210 (VCCA).

109 *R v Smith* (1992) 94 DLR (4th) 590; see P Carter, 'Hearsay: Whether and Whither?' (1993) 109 *LQR* 573.

110 See Rules 803(24) and 804(b)(5).

111 Section 65(2)(c) of the Act provides that a hearsay statement can be admitted in criminal proceedings if it was 'made in circumstances that make it highly probable that the [statement] is reliable'. See also J Hunter, 'Unreliable Memoirs and the Accused: Bending and Stretching Hearsay - Part One' (1994) 18 *Crim LJ* 8 and 'Unreliable Memoirs and the Accused: Bending and Stretching Hearsay - Part Two' (1994) 18 *Crim LJ* 76.

approach to the hearsay rule, an approach which places greater emphasis on the reliability of putative hearsay evidence than on its exact status as hearsay or non-hearsay.[112] Viewed in any other way, however, the lifting of the secondary prohibition is only likely to result in further complexity and confusion in the operation of a rule already bedevilled by both.

Conclusion

The main problem with the courts' extension of the hearsay rule to implied assertions is that they did not at the same time provide an adequate means for determining whether or not a particular piece of evidence constituted an implied assertion and therefore fell within the scope of the rule. As a result, the distinction between hearsay and original evidence seemed to become impossibly difficult, and utterly unpredictable. In fact - as this article has shown - the case law is remarkably consistent, and certainly capable of providing the basis for a workable definition of hearsay.

The case law shows, for example, that it is never hearsay to use a state of mind such as fear or intention as the basis for an inference. Such states of mind have no truth value and can not be used as assertions. The case law also shows that while a person's beliefs do have a truth value and can therefore be used as assertions, the hearsay rule has no role to play when a belief is used to prove something other than that the belief is true. Perhaps most importantly - because so often overlooked - the case law shows that the hearsay rule does not prevent an inference from out-of-court act to state of mind, even though this is the very inference which is most subject to the hearsay danger of insincerity. What the case law quite clearly does show is that the only inference which calls for a consideration of the hearsay rule is the inference from belief to truth of belief. Because of this, the hearsay rule is actually much narrower in scope than is usually thought. It is also much easier to apply.

However, just as the difficulties caused by the extension of the hearsay rule to implied assertions are being resolved, new and perhaps more intractable problems have appeared on the horizon. The partial lifting of the secondary prohibition against the circumstantial use of a person's belief as evidence of the truth of that belief has the potential to cause even greater confusion and uncertainty than was caused by the problem of the implied assertion. Indeed, the effect of the judgments considered in the second part of

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112 This new reliability-based approach to hearsay is discussed at length in A Palmer, 'Reliability-Based Approach to Hearsay' (1995) 17 *Sydney LR* (forthcoming, December 1995).

this article can not be stated any more precisely than this: the secondary prohibition may (but may not) be lifted when the possession of a particular belief is itself relevant to the facts in issue. The difficulty of defining with any degree of exactitude the circumstances when this will be the case suggests that the solution to this problem may not be definitional. Rather, it may lie in the exact opposite direction, in the trend towards a greater emphasis on the reliability of putative hearsay than on its precise status as hearsay or original evidence.