WALTON V THE QUEEN, *THE QUEEN V BENZ* AND BEYOND: A NEW DIRECTION IN HEARSAY

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It is established law that subject to "certain carefully safeguarded and limited exceptions,"[1] "the rule against the admission of hearsay evidence is fundamental".[2] However, recent judicial trends in both English and Australian courts have expanded these exceptions, especially in the area of implied assertions which are based on evidence which otherwise falls within the rule against hearsay.[3] The High Court of Australia recently considered the admissibility of assertions expressly or impliedly based on hearsay evidence in *Walton v The Queen*[4] ("*Walton*") and *The Queen v Benz*[5] ("*Benz*"). Additionally, these cases suggest the possibility of the admission of evidence falling squarely within the rule against hearsay.

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1. *Lejzor Teper v The Queen* [1952] AC 480 Lord Normand, 486.
2. Ibid.
3. See generally D M Byrne and J D Heydon *Cross on Evidence* 3rd edn (Sydney: Butterworths, 1986) 737-742.
4. (1989) 166 CLR 283.
5. (1989) 168 CLR 110.

WALTON

In *Walton*, the relevant facts were that the appellant, Walton, was charged and convicted of murder. The grounds of appeal centred on evidence allowed by the trial judge which, it was argued, fell within the rule against hearsay. First, objection was taken to the admission of evidence that the deceased had told witnesses, Harvey, Stitt and Nicholas, that she was going to catch a bus to the town centre. It was relevant that a bus ticket was found on the deceased's body, as other evidence was led that the ticket was sold on a bus route which included a stop where the deceased might have been expected to board the bus if going to the town centre. Secondly, it was argued that evidence of a telephone conversation overheard by the witness Bowett was inadmissible as hearsay. During the telephone conversation the deceased had arranged to meet the caller at the town centre and had said to her three year old son, "Daddy's on the 'phone". The child spoke on the telephone saying "Hello Daddy." Additional evidence was led that the child called the appellant and no-one else "Daddy". It is notable that the trial judge gave a clear warning in his direction to the jury that Bowett's evidence could not go to identify the applicant directly. Significantly, the evidence which was challenged was led to corroborate testimony given by Bragg, Walton's accomplice. Bragg's evidence was that the appellant went to the town centre in order to meet the deceased. *Walton* is unusual in that all the evidence impugned as hearsay corroborated other evidence.

State of Mind

The Court first addressed the evidence relating to the deceased's intention to go to the town centre. Chief Justice Mason held that the statements of future intent were admissible as they were led to establish a state of mind and were not relied on to prove the truth of the statements. Evidence led to establish state of mind is a recognised exception to the rule against hearsay.[6] As to the admissibility of evidence going to

6. See for example *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 (hearsay statement admissible to support the accused's contention that he was acting under duress); *Ratten v The Queen* [1972] AC 378 ("*Ratten*") (hearsay statement admissible to demonstrate that the deceased was distressed); *The Queen v Hendrie* (1985) 37 SASR 581 ("*Hendrie*") (hearsay statement admissible to explain why deceased would allow a stranger to enter her bedroom before offering resistance).

intention, from which a jury might properly infer execution of the intention, Chief Justice Mason stated:

> Viewed in this way, the evidence is circumstantial as well as testimonial and, being circumstantial, it stands outside the hearsay rule.[7]

His Honour also considered that statements with independent evidentiary value in proving the author's intention, such intention being a fact in issue or relevant to a fact in issue, were original and not hearsay evidence.[8] He continued:

> The admissibility of evidence of statements of intention to do an act as proof that the act was subsequently undertaken rests on probability. It is for the tribunal of fact to decide whether it will infer that the author of the statement carried out his intention.[9]

Justices Wilson, Dawson and Toohey in their joint judgment substantially agreed with Chief Justice Mason, adopting the principle stated by Chief Justice King in *Hendrie*[10] that a person's state of mind may be proved by contemporaneous statements made by that person.[11]

Justice Deane agreed with the legal principle as stated by Chief Justice Mason and Justices Wilson, Dawson and Toohey[12] but considered that the statements of the deceased that she was going to the town centre were neither facts in issue nor relevant to any fact in issue. Justice Deane considered that the evidence needed to be relevant to whether the deceased went to the town centre to meet Walton or not. Mere intention to go to the town centre was not by itself relevant to any fact in issue.[13] Justice Deane's reasoning expressly bars litigants from calling in evidence previous statements to buttress a case against a stranger to those statements.[14] His Honour considered it unfair to require a party to litigation

7. Supra n 4, 288.
8. Ibid, 289.
9. Ibid, 291.
10. Supra n 6, 585.
11. Supra n 4, 302.
12. Ibid, 307.
13. Ibid.
14. Ibid. It is ironic that this "floodgates" argument against the admissibility of statements of intent was raised by the very judge who pioneered the principle of recovery for any proximate damage in tort. See for example *Jaensch v Coffey* (1984) 155 CLR 549, 579-580; *The Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424, 506-507; *Stevens v Brodribb Sawmilling Company Proprietary Limited* (1986) 160 CLR 16, 51-52.

> to do battle with the intangible shadows of such subjective intentions on the basis of some generalization (such as that people commonly do what they say they will)....[15]

However, whilst such evidence may operate unfairly or prejudicially, the trial judge retains a discretion to exclude the evidence in favour of the accused.[16] Additionally, restriction of such an exception to statements made contemporaneously with the events in issue, significantly limits the number and intangibility of shadows that an accused person must confront.[17]

Implied Assertion

The remaining issue before the court concerned the evidence of Bowett that the deceased had arranged to meet at the town centre with the person with whom she had spoken on the telephone. The caller was implicitly asserted to be the appellant. The evidence that the deceased had stated that she intended to meet the appellant at the town centre raises the inference that she then did so. Justices Wilson, Dawson and Toohey uncontroversially held that such an implied assertion was admissible as it related to the deceased's state of mind, intention being a state of mind. They considered that a distinction ought to be drawn between implied

15. Supra n 4, 307.
16. *The King v Lee* (1950) 82 CLR 133; *Van der Mere v The Queen* (1988) 62 ALJR 656.
17. The result is similar to that reached by the Full Court of the Supreme Court of South Australia in *Hendrie* supra n 6. In that case the accused, a painter and decorator, was charged with the murder of a woman who had been strangled following a struggle in the bedroom of her house. Nothing outside the bedroom had been disturbed, suggesting that the murderer had gained access to the bedroom with her consent. A statement by the deceased's husband that he and the deceased had discussed renovations to their bedroom was admitted into evidence as establishing the state of mind of the deceased, having allowed a stranger to progress that far into the house before struggling. In effect, the court is accepting that because the deceased had said she was going to allow someone into her bedroom, she subsequently might have done so, much the same as the deceased in *Walton* may have executed her stated intention to go to the town centre.

and express assertions. An express assertion will not be admissible whereas an implied assertion may be.[18] Their Honours held that

> [w]hilst the statements by the deceased were clearly admissible to establish the belief of the deceased that the person whom she was arranging to meet was the applicant, they were otherwise merely hearsay assertions concerning the identity of the caller on the other end of the line.[19]

Hence, in their Honours' view, the trial judge was correct in admitting the evidence to prove the deceased's state of mind while warning the jury that it constituted no evidence as to the identity of the caller. Any assertion that the caller was the appellant would be inadmissible as an express assertion as to identity. In contrast, an assertion that the deceased had arranged to meet with someone whom she *believed* to be the appellant is admissible as it goes to establish the deceased's state of mind.

Chief Justice Mason similarly held that implied assertions having their basis in hearsay were admissible.

> [W]here an assertion is not made directly by the words or actions of a person, but is derived by implication from those words or actions there will, depending on the relevant circumstances of the case, often be special considerations relevant to the determination of admissibility.[20]

After considering the statements of the deceased in conjunction with the evidence of Bragg, the Chief Justice had no compunction in holding that the inference was validly drawn. "After all, her belief that she was to meet the applicant made it the more probable that she travelled to the Town Centre."[21]

The Chief Justice considered that the ordinary rules of hearsay and the various exceptions to the general exclusionary rule, while applicable where such evidence might be dangerous to admit as hearsay, were not necessarily applicable to implied assertions as:

> [I]t is necessary for the judge to balance the competing considerations in order to determine admissibility, since the dangers associated with hearsay evidence will not all necessarily be present.[22]

18. Supra n 4, 303.
19. Ibid, 306.
20. Ibid, 292-293.
21. Ibid, 292.
22. Ibid, 293.

Chief Justice Mason considered that the same approach could apply to express assertions for the same reasons.[23] However, His Honour did recognise that it would be uncommon for an express assertion to be admitted unless it fell within a recognised exception to the hearsay rule. In particular, an express assertion more readily lends itself to a suspicion of concoction. Such assertions are therefore intrinsically less reliable.

Justice Deane likewise considered the evidence revealing the deceased's intention to go to the town centre to meet the applicant admissible.

> Clearly, the fact that such an arrangement had been made was, if established, a material and admissible piece of circumstantial evidence against the applicant.[24]

It was common ground amongst their Honours that Bowett's evidence of statements made by the deceased's son were purely assertion that the caller the son was speaking to was the appellant. This was clearly an express assertion and therefore inadmissible but its admission did not cause a miscarriage of justice, there being other evidence upon which such an inference could be drawn.[25]

Walton stands as authority for the proposition that implied assertions based on hearsay will be admissible as evidence, thus constituting an exception to the rule against hearsay. Additionally, the Court extended the "state of mind" exception to include statements of future intention as a basis for inferring later execution of such an intention.

Flexibilty and Reliability

The most interesting aspect of *Walton* is statements made by Chief Justice Mason and Justice Deane regarding the admissibility of hearsay evidence generally. These comments have been noted to be, at least arguably, revolutionary.[26] Their insurgent aspect arises from express statements of Chief Justice Mason, implicitly supported by Justice Deane,

23. Ibid, 293-294.
24. Ibid, 308.
25. Ibid Mason CJ, 296; Wilson, Dawson and Toohey JJ, 306; Deane J, 309.
26. S Odgers "Walton v The Queen - Hearsay Revolution?" (1989) 13 Crim LJ 201, 214.

that the hearsay rule is a flexible doctrine. The Chief Justice was of the opinion that

> [t]he hearsay rule should not be applied inflexibly. When the dangers which the rule seeks to prevent are not present or are negligible in the circumstances of a given case there is no basis for a strict application of the rule. Equally, where in the view of the trial judge those dangers are outweighed by other aspects of the case lending reliability and probative value to the impugned evidence, the judge should not then exclude the evidence by a rigid and technical application of the rule against hearsay.[27]

This broad statement was qualified by a recognition that the dangers against which the rule is directed may be extensive, "as evidenced by the need for the rule itself".[28] However, these "dangers" appear from the context to be lack of reliability and therefore probative force rather than the traditional objection against admissibility that the evidence is unable to be tested by cross-examination.[29] The Chief Justice also cited *R v Andrews*[30] ("*Andrews*") adopting the view of the Privy Council in *Ratten*[31] which emphasised that the spontaneity of an assertion evidenced that it was not concocted. His Honour acknowledged that those cases related to res gestae[32] but considered that spontaneity was applicable to "the scope and operation of the hearsay rule".[33] Further, His Honour expressly adopted[34] the Privy Council's formulation that

> there is ample support for the principle that hearsay evidence may be admitted if the statement providing it is made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused.[35]

This is contrary to statements of Chief Justice Barwick in *Vocisano v Vocisano*[36] in which contemporaneity rather than spontaneity or reliability was stated as the basis for the res gestae exception to the hearsay

27. Supra n 4, 293.
28. Ibid.
29. See generally supra n 1.
30. [1987] AC 281, 300-301.
31. Supra n 6, 388-391.
32. Meaning "past action or deed"; that is, words made contemporaneously with the action in question.
33. Supra n 4, 294.
34. Ibid, 295.
35. Supra n 6, 391.
36. (1974) 130 CLR 267, 273.

rule. Chief Justice Mason in *Walton* considered these statements to be "quite clearly obiter" and in any case, merely an explanation of the law prior to *Ratten* rather than an exposition of the law as it existed subsequent to that decision. The judgment of the Court in *Vocisano* could not prevent the Court from considering such issues on an appropriate occasion[37] (which, incidentally, *Walton* did not happen to be). The inference to be drawn from the judgment of the Chief Justice is that he considers that reliability is itself an exception to the rule against hearsay. In contrast, Justices Wilson, Dawson and Toohey, in relation to the res gestae exception, preferred the authority of *Vocisano*.[38] However, as the question was not directly before the Court, the statements on this matter are obiter dicta. The issue therefore remains open.

Justice Deane was silent as to the appropriate basis of the res gestae exception to the hearsay rule. However, in the circumstances of the case he considered that the inflexible application of the rule would preclude the identity of a party to a conversation being established by contemporaneous statements made by the other party to the conversation.[39] His Honour considered this to be highly undesirable, stating:

> The hearsay rule should not, however, be inflexibly applied but should be qualified where the circumstances are such that its inflexible application would confound justice or common sense or produce the consequence that the law was unattuned to the circumstances of the society which it exists to serve.[40]

This closely resembles the position of Chief Justice Mason. It appears that Justice Deane is also suggesting that reliability is an appropriate exception to the rule excluding hearsay evidence. This view is supported by his further statement that:

> Once Miss Bragg's evidence was accepted and the obvious inference was drawn that what Miss Bowett overheard was the deceased's part of the conversation which the applicant admitted having had with her, Miss Bowett's evidence was direct and confirmatory (albeit incomplete) evidence of the making of the relevant arrangement between the applicant and the deceased.[41]

37. Supra n 4, 295.
38. Ibid, 304. "The unlikelihood of concoction or distortion is not sufficient of itself to render a hearsay statement admissible...."
39. Ibid, 308. Telephone conversations are an illustration of technology eclipsing the utility of the common law rule. However, it seems that Deane J may have been sympathetic to a "telephone exception" to the hearsay rule even in the absence of corroborative evidence.
40. Ibid.
41. Ibid, 309.

Bowett's evidence, being corroborative of that of Bragg, was therefore inherently more reliable as the evidence of Bowett by itself is direct evidence only of the deceased's state of mind. Justice Deane's view was that Bowett's evidence, by itself, established only that the deceased had arranged to meet someone whom she believed to be the appellant.

In short, the statements of Chief Justice Mason and Justice Deane went further than was necessary to resolve the issues before the Court. Their statements on reliability as a basis for exception to the hearsay rule are therefore obiter dicta. Additionally, Justices Wilson, Dawson and Toohey, representing the majority, were silent on this point, but, in contrast to Chief Justice Mason, expressly approved the statement of principle from *Vocisano* regarding the res gestae exception to the hearsay rule. However, one ought to hesitate before labelling an apparently coterminous opinion of Chief Justice Mason and Justice Deane as inconsequential.

Walton opens the arena for argument that the basis for exclusion of hearsay evidence ought to be want of reliability and, consequentially, that "reliable" hearsay evidence ought to be admissible. Additionally, the express adoption by Chief Justice Mason of spontaneity and reliability as the bases of the res gestae exception raises the possibility that English authority, exemplified by *Ratten* and *Andrews*, may be followed notwithstanding the majority's apparent rejection of these bases for the admission of hearsay evidence. The statement of Justices Wilson, Dawson and Toohey that "[t]he unlikelihood of concoction or distortion is not sufficient of itself to render a hearsay statement admissible"[42] does not definitively settle this area of law. The addition of reliability as a factor in the equation may well be sufficient to render such a statement admissible.

BENZ

The application of the rule against hearsay and the basis of the rule were also considered in *Benz*. Unfortunately, the possible "flexible application" of the rule referred to by Chief Justice Mason and Justice Deane in *Walton*[43] was not raised. However, to some extent, four members of the Court approved the principles espoused in *Walton*.

42. Ibid, 304.
43. Ibid Mason CJ, 293; Deane J, 308.

The respondents, Benz and her mother, Murray, were convicted of the murder of Murray's de facto husband. The evidence in the case was primarily circumstantial. Evidence was led that a witness, Saunders, had seen two women on a bridge at three o'clock on the morning of the murder, leaning out over the side of the bridge. He had stopped to inquire whether they were all right. He testified that the younger of the two had replied "It's all right, my Mother's just feeling sick." The deceased's body was later found a short distance downstream. Other evidence established that his body had been dumped from the bridge.

The Crown relied on the statement of the younger woman to establish the relationship of mother and daughter between the women on the bridge. This circumstantially supported the Crown's case by implicitly identifying the respondents. Saunders was not called by the Crown to identify the respondents.

Statements of "Close Relation"

Both Chief Justice Mason and Justice Dawson considered whether statements of relationship contravened the rule against hearsay. Justice Dawson considered that the statement was circumstantial evidence, from which it might be inferred that the women on the bridge were the respondents.[44] That is, he considered the issue to be the same as that raised in *Ratten*. The statement relied on was not testimonial and hence did not fall within the rule against hearsay.

Chief Justice Mason considered statements acknowledging paternity and "close relationships" to be admissible.

> 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.[45]

However, as pointed out by Odgers,[46] Chief Justice Mason stated that the statement was hearsay as it contained an implied assertion[47] but admissible on the basis that it was reliable:

44. Supra n 5, 134.
45. Ibid, 117.
46. S Odgers "Criminal Cases in the High Court of Australia: Benz" (1990) 14 Crim LJ 206, 209.
47. Supra n 5, 117.

> It was a spontaneous utterance, made in response to the sudden and unexpected arrival of a stranger upon the scene, an event which must have taken the younger woman by surprise. Her response in this situation should be treated as trustworthy and reliable....[48]

The emphasis on spontaneity and reliability in determining the admissibility of the hearsay evidence accords with the House of Lords' basis for admitting res gestae evidence in *Andrews*.[49]

Res Gestae

The Crown argued for the admissibility of the statement on the ground that it was part of the res gestae.[50] Having found the statement admissible as a reliable implied assertion, Chief Justice Mason addressed the issue of res gestae merely by noting that the doctrine has been criticised for lacking a "theoretical and principled foundation". Referring to *Walton*, he stated that the uncertain foundations of both the res gestae and hearsay exceptions invite re-examination.[51]

Justice Dawson held, on an orthodox analysis, that the statement was part of the res gestae as it was made contemporaneously with the relevant act.[52] He further noted that the question whether strict contemporaneity was required for the statement to form part of the res gestae did not arise for consideration.[53]

The analysis applied by Justices Gaudron and McHugh is, respectfully, quite wrong. Their Honours considered that admissibility of such evidence was conditional on findings of the jury. Admissibility is a question for the trial judge, not for the jury.[54]

Reliability and Flexibility

Despite some degree of confusion in Chief Justice Mason's judgment, the clear basis for his holding the evidence admissible was its reliability.[55] Justice Deane referred with approval to the recognition in *Walton*

48. Ibid, 118.
49. Supra n 30.
50. Supra n 5 Deane J, 121-122.
51. Supra n 5, 117-118.
52. Ibid, 134-135.
53. Ibid, 135.
54. See Odgers supra n 46.
55. Supra n 5, 118. See also Ogders ibid, 209.

of the need to apply the hearsay rule more flexibly.[56] Disappointingly, neither Chief Justice Mason nor Justice Deane elaborated on these principles further than referring to *Walton* with approval. However, Justices Gaudron and McHugh did, stating:

> There is, however, much to be said for the view that the rationale of the exceptions to the rule which prohibits the admission of hearsay evidence falling within the exceptions has a high degree of reliability and can be acted upon safely.... If this is the rationale of the exceptions to the hearsay rule then, notwithstanding the decision in *Myers. v Director of Public Prosecutions* [[1965] AC 1001], a strong case can be made for developing and applying the common law rules of evidence by reference to the principle that hearsay evidence will be admitted when it appears to have a high degree of reliability.[57]

BEYOND *BENZ*

Commentary on both *Walton* and *Benz* has been rather conservative. Odgers considered *Walton* to be merely arguably revolutionary.[58] Referring to Chief Justice Mason's view that reliability is the appropriate basis for the admissibility of hearsay evidence, Odgers stated:

> While the logic of this analysis is not entirely clear, it may open up the possibility of considerable broadening of traditional hearsay exceptions, perhaps even the creation of new exceptions, quite apart from the development of a more flexible hearsay rule.[59]

With respect, the logic of the argument is quite clear and was lucidly stated by Justices Gaudron and McHugh. The hearsay rule originated to exclude unreliable evidence. Additionally, the reliability ground has implicitly underlaid the application of the res gestae exception in decisions preceding *Walton*. Only recognition of the reliability ground for the admission of such evidence can reconcile the otherwise conflicting decisions which illustrate the uncertain basis of the res gestae exception.[60] Moreover, flexible application of the hearsay rule and admission

56. Supra n 5, 121.
57. Ibid, 143-144. *Myers v Director of Public Prosecutions* [1965] AC 1001 is commonly cited for the proposition that exceptions to the rule against hearsay are closed.
58. Supra n 26, 214.
59. Supra n 46, 209.
60. Compare for example *Adelaide Chemical and Fertilizer Company Limited v Carlyle* (1940) 64 CLR 514 where a few minutes deprived a statement of sufficient contemporaneity, with *O'Leary v The King* (1946) 73 CLR 566 where events of the previous day were held to be part of the res gestae. See also *The Queen v Heidt* (1976) 14 SASR 574 Bray CJ, 579-580.

of evidence on the basis of reliability are not severable. The flexible application of the hearsay rule in both *Walton* and *Benz* put the reliability of the evidence in question. Admission of reliable evidence which would otherwise be hearsay presupposes a flexible approach to the application of the rule.

In *Walton*, Chief Justice Mason and Justice Dawson sowed the seeds of change, emphasising that the basis of the admissibility of hearsay evidence was reliability. These seeds germinated to some extent in *Benz* where four members of the Court approved this change in emphasis. Additionally, Chief Justice Mason expressly invited re-examination of the basis of both the rule against hearsay and the res gestae exception. The same invitation can be implied from the judgments of Justice Deane and Justices Gaudron and McHugh. It will be most interesting to observe the result when the basis for the admissibility of this type of evidence is squarely argued before the Court.