Defining the Scope of the Hearsay Rule in Criminal Cases: A Comparative Perspective

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Abstract

This chapter offers, from a comparative perspective, a consideration of possible approaches to defining the scope of the hearsay rule in criminal cases. In *The Principles of Criminal Evidence* (1989), Adrian Zuckerman called for a more flexible approach to criminal hearsay doctrine than that prevailing in England and Wales at the time. Some three decades later, the major common law jurisdictions retain rules that have the effect, broadly speaking, of presumptively excluding hearsay evidence in criminal cases. There has been considerable judicial and academic focus in recent times on issues associated with the exceptions to such exclusionary rules. This chapter examines a related question that, although fundamental, has attracted far less attention and remains relatively under-explored: what is, and what should be, the precise scope of the rules that presumptively exclude hearsay evidence in criminal cases? It is noted that the decision of the Supreme of Court of Canada in *R v Baldree* (2013) offers a radically different approach to this question from that taken in the Criminal Justice Act 2003 (England and Wales), the US Federal Rules of Evidence, the Australian uniform evidence legislation, or the Evidence Act 2006 (New Zealand). In the light of a consideration of the approaches taken in various jurisdictions and the implications of these approaches, the chapter concludes that the Canadian approach provides the most sensible basis for possible reform. Some suggestions on the way in which the relevant law in England and Wales might be reformed are also offered.

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Keywords

Hearsay rule; Criminal; Definition; Implied assertions; England and Wales; USA; Australia; New Zealand; Canada; Ireland

1. Introduction

As with much else in the field of criminal evidence, hearsay doctrine in England and Wales has changed considerably since Adrian Zuckerman's *The Principles of Criminal Evidence* was published in 1989.[1] Roughly half way between 1989 and now, the law of criminal hearsay became embedded in provisions of the Criminal Justice Act 2003.[2] While it is axiomatic that a witness's oral testimony in court about an event allegedly witnessed may be unreliable because of defects in the witness's perception, memory, sincerity, or ability to communicate clearly, the traditional assumption has been that such testimony will be able to be 'tested' through observation of the witness's demeanour and through contemporaneous cross-examination. These 'tests' being unavailable where evidence of words spoken or written, or non-verbal conduct engaged in, out of court is later introduced in court as evidence of the truth of its contents, there is good reason, it is said, to be cautious about the reliability of such evidence.[3] In more contemporary times, however, scepticism about the effectiveness of the 'tests' of observation of demeanour[4] and contemporaneous cross-examination,[5] and empirical evidence questioning the assumption that juries in serious criminal cases are incapable of assessing the reliability of hearsay evidence competently,[6] have raised the possibility that, as a class, first-hand evidence may not be far superior to hearsay evidence. Thus the question is raised whether a more contextual approach to the admissibility of hearsay evidence—one that distances itself

[1] A A S Zuckerman, *The Principles of Criminal Evidence* (Clarendon Press 1989). This book, which Zuckerman completed while I was his doctoral student, later formed the basis of a co-written (with Paul Roberts) and more comprehensive treatment of criminal evidence: P Roberts and A A S Zuckerman, *Criminal Evidence* (OUP 2004); P Roberts and A A S Zuckerman, *Criminal Evidence* (2nd edn, OUP 2010).

[2] The hearsay provisions of this Act came into force on 4 April 2005.

[3] 'The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost': *Teper v R* [1952] AC 480 (PC) 486 (Lord Normand).

[4] See A L-T Choo, *Evidence* (5th edn, OUP 2018) 60–1.

[5] See A L-T Choo, *Evidence* (5th edn, OUP 2018) 265.

[6] See generally, for discussions of empirical evidence concerning the hearsay rule, R C Park, 'Empirical Evaluation of the Hearsay Rule' in P Mirfield and R Smith (eds), *Essays for Colin Tapper* (OUP 2003); R C Park, 'Visions of Applying the Scientific Method to the Hearsay Rule' [2003] Michigan State Law Review 1149; J Sevier, 'Popularizing Hearsay' (2016) 104 Georgetown Law Journal 643.

somewhat from the traditional suspicion with which such evidence was approached—might be appropriate.

Zuckerman argued persuasively for a less rigid and more nuanced approach to criminal hearsay which accommodates contemporary thinking of this nature,[7] and to some extent his wishes have been realized. One of the key features of the hearsay provisions of the Criminal Justice Act 2003 is a more liberalized régime for the admissibility of hearsay evidence, notably including a broad 'interests of justice' exception[8] to the rule against hearsay. More recently, courts[9] and academic commentators[10] have paid increasing attention to the implications of European human rights norms[11] for the admissibility of hearsay evidence.

This chapter considers an issue which has been somewhat neglected in academic commentary on criminal hearsay in the 2003 Act era: how the rule against hearsay is defined (or ought to be defined) in the first place. The importance of this issue as a matter of principle is self-evident, as the definition of the rule provides the starting point for consideration of the admissibility of particular evidence: depending on the precise definition of the rule adopted, the role for exceptions to it might be enhanced or diminished. Practically, the statutory definition of the rule has, as will be demonstrated, generated some apparent difficulty for the courts. Consideration of the issue is also of particular contemporary interest from a comparative perspective; we shall see in section 7 of this chapter that, after a period of uncertainty, Canada has opted for an approach that fundamentally differs from that taken in other major common

[7] A A S Zuckerman, *The Principles of Criminal Evidence* (Clarendon Press 1989) ch 11.
[8] Sections 114(1)(d) and 121(1)(c).
[9] See *Al-Khawaja and Tahery v UK*, App nos 26766/05 and 22228/06 (ECtHR, 15 December 2011); *Schatschaschwili v Germany*, App no 9154/10 (ECtHR, 15 December 2015); *Blokhin v Russia*, App no 47152/06 (ECtHR, 23 March 2016).
[10] See eg A L-T Choo, 'Criminal Hearsay in England and Wales: Pragmatism, Comparativism, and Human Rights' (2013) 17 Canadian Criminal Law Review 227.
[11] The general right of a person charged to a fair trial (European Convention on Human Rights, art 6(1)), and the right of such a person 'to examine or have examined witnesses against him' (European Convention on Human Rights, art 6(3)(d)).

law jurisdictions. Which of the competing approaches is preferable will form the basis of the discussion in this chapter.

2. *R v Kearley*: where it all supposedly went wrong

The much-criticized decision of the House of Lords in *R v Kearley*[12] illustrates neatly the state of hearsay doctrine prior to the 2003 Act. Kearley was charged with possession of a controlled drug with intent to supply. At issue was evidence that, following his arrest and while his house was being searched by the police, a number of telephone calls had been made to the house in which the callers requested to speak to him and asked to be supplied with drugs; and that a number of individuals had called at the house asking to be supplied with drugs. The following point of law of general public importance was certified for consideration by the House of Lords:

> Whether evidence may be adduced at a trial of words spoken (namely a request for drugs to be supplied by the defendant), not spoken in the presence or hearing of the defendant, by a person not called as a witness, for the purpose not of establishing the truth of any fact narrated by the words, but of inviting the jury to draw an inference from the fact that the words were spoken (namely that the defendant was a supplier of drugs).

The House of Lords split 3:2, the majority answering the above question in the negative. Lord Bridge, in the majority, stated:

> The sole possible relevance of the words spoken is that by manifesting the speaker's belief that the defendant is a supplier they impliedly assert that fact. This is most clearly exemplified by two of the requests made to police officers in the instant case by callers requesting drugs from the defendant where the speaker asked for a supply of his 'usual amount'. The speaker was impliedly asserting that he had been supplied by the defendant with drugs in the past. If the speaker had expressly said to the police

[12] [1992] 2 AC 228 (HL).

> officer that the defendant had supplied him with drugs in the past, this would clearly have been inadmissible as hearsay. When the only relevance of the words spoken lies in their implied assertion that the defendant is a supplier of drugs, must this equally be excluded as hearsay?[13]

The 'clear and unequivocal'[14] answer to this question was held to be 'yes', the applicable principle being that 'evidence of words spoken by a person not called as a witness which are said to assert a relevant fact by necessary implication [is] inadmissible as hearsay just as evidence of an express statement made by the speaker asserting the same fact would be'.[15] As the evidence at issue in this case was hearsay evidence to which no exception applied, it had to be excluded. While 'fully appreciat[ing] the cogency of the reasons advanced in favour of a limitation or exception to the operation of the hearsay rule which would allow the admission of implied assertions of the kind in question',[16] Lord Bridge considered it an established principle that any modification of hearsay doctrine could not be effected judicially.[17]

Kearley demonstrated that the spirit of *Wright v Doe d Tatham*[18] continued to live on more than a century and a half later. At issue in *Wright* was whether one Marsden had testamentary capacity, and the question arose whether three letters to him, written in such a manner as to suggest that the writers believed they were dealing with a person of reasonable understanding, were admissible in evidence. Representing the majority position, Parke B stated that

> proof of a particular fact … which is relevant … as implying a statement or opinion of a third person on [a] matter in issue … is inadmissible …; and, therefore, in this case the letters which are offered only to

[13] [1992] 2 AC 228 (HL) 243.
[14] [1992] 2 AC 228 (HL) 243.
[15] [1992] 2 AC 228 (HL) 245.
[16] [1992] 2 AC 228 (HL) 249.
[17] [1992] 2 AC 228 (HL) 249–51.
[18] (1837) 7 Ad & E 313; 112 ER 488.

> prove the competence of the testator, that is the truth of the implied statements therein contained, were properly rejected …[19]

Parke B provided further examples of evidence which, by analogy, would also be excluded under the hearsay rule as implied assertions:

(a) Evidence of a letter demanding a debt and treating the addressee as a debtor, to establish that the debt was really due.

(b) Evidence of a note congratulating someone 'on his high state of bodily vigour', to establish that that person was in good health.

(c) Evidence of

> the supposed conduct of the family or relations of a testator, taking the same precautions in his absence as if he were a lunatic; his election, in his absence, to some high and responsible office; the conduct of a physician who permitted a will to be executed by a sick testator; the conduct of a deceased captain on a question of seaworthiness, who, after examining every part of the vessel, embarked in it with his family; all these, when deliberately considered, are, with reference to the matter in issue in each case, mere instances of hearsay evidence, mere statements, not on oath, but implied in or vouched by the actual conduct of persons by whose acts the litigant parties are not to be bound.[20]

The above examples, especially the instances of evidence of non-verbal *conduct* provided in (c),[21] illustrate how potentially far reaching was the decision of the House of Lords in *Kearley* to cling steadfastly to the position in *Wright*. Controversial enough in the context of the result reached in the case, *Kearley* further confirmed the inadmissibility of a large swathe of evidence,

[19] (1837) 7 Ad & E 313, 388–9; 112 ER 488, 516–17.
[20] (1837) 7 Ad & E 313, 388; 112 ER 488, 516.
[21] Another hypothetical illustration commonly offered is that of the inadmissibility, as hearsay, of evidence that people were carrying opened umbrellas or wearing raincoats to establish that it was raining.

unless an available exception to the rule could come to the rescue in a particular case. Fundamental reform was finally implemented by the Criminal Justice Act 2003.

3. The Criminal Justice Act 2003: was it a purpose of the maker of the statement to cause another person to believe the matter or to cause another person to act on the basis that the matter is as stated?

In England and Wales, section 114(1) of the Criminal Justice Act 2003 provides that, in criminal proceedings, 'a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated' only in specified circumstances. Section 115(2) clarifies that a statement may be made by words or by non-verbal conduct: 'A statement is any representation of fact or opinion made by a person by whatever means; and it includes a representation made in a sketch, photofit or other pictorial form.' Crucially, in terms of the focus of this chapter, section 115(3) provides: 'A matter stated is one to which this Chapter applies if (and only if) the purpose, or one of the purposes, of the person making the statement appears to the court to have been (a) to cause another person to believe the matter, or (b) to cause another person to act … on the basis that the matter is as stated.'

The rationale for the focus on the state of mind of the maker of the statement is that the danger of insincerity will be reduced if the person responsible for the out-of-court words or actions did not consciously turn his or her mind to the matter in question. It is thought therefore that there is no need for evidence of such words or actions to be caught by any presumptive rule of inadmissibility. In the words of the Law Commission of England and Wales, whose recommendations formed the basis for the relevant provisions of the 2003 Act:

> Where there is a substantial risk that an out-of-court assertion may have been deliberately fabricated, … we think it right that the assertion should fall within the hearsay rule—whether it is express or implied. It follows that the rule should extend to any conduct which is intended to give the impression that a

> particular fact is true, and is adduced as evidence of that fact. But where that risk is not present—in other words, where the person from whose conduct a fact is to be inferred can safely be assumed to have believed that fact to be true—we do not think a court should be precluded from inferring that fact merely because that person may have been mistaken in believing it. And if that person did not intend anyone to infer it, it follows that that person cannot have been seeking to mislead anyone about it.[22]

This strategy was influenced by the approach that by then had been adopted in the Federal Rules of Evidence in the United States and by statute in parts of Australia, examined in sections 4 and 5 of this chapter respectively.

The choice of 'purpose' rather than the perhaps more orthodox concept of 'intention' as the relevant requirement may be traced to the recommendations of the Law Commission of England and Wales, which reasoned by first noting that

> the word 'intention' is ambiguous[,] [i]n some contexts … refer[ring] only to the *purpose* with which a person acts—the objective that that person hopes to achieve by acting as he or she does. In others, it includes not only purpose but also what is sometimes called 'oblique' intention. In this wider sense, a person 'intends' not only the consequences that he or she *wishes* to bring about, but also those that he or she knows to be an inevitable side-effect of the consequences that he or she desires.[23]

This, of course, is unanswerable: where intention is an element of a criminal offence in England and Wales, it is well established that the requirement may be satisfied by proof of intention in either the narrower or wider sense.[24] The width and, it is true, the ambiguity of the concept of intention are not therefore matters of much contemporary concern in that jurisdiction. The Commission continued:

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[22] Law Commission, *Evidence in Criminal Proceedings: Hearsay and Related Topics* (Law Com No 245, 1997) para 7.20.
[23] Law Commission, *Evidence in Criminal Proceedings: Hearsay and Related Topics* (Law Com No 245, 1997) para 7.36 (emphasis in original).
[24] *R v Woollin* [1999] AC 82 (HL).

> The point is perhaps unlikely to be of great practical importance, but we have considered whether the applicability of the hearsay rule to a particular statement should depend on the *intention* (in our wider sense) or only on the *purpose* with which the statement is made. Should a person's words or conduct count as a hearsay statement of a fact if that person does not positively desire that another should thereby be caused to believe that fact (or that another should be caused to act … on the basis that it is true), but knows that this will inevitably occur?
>
> [The argument] that, if [a] person is not seeking to convey a particular impression, it follows that he or she cannot be seeking to convey a *misleading* impression[,] … [and] the possibility of deliberate fabrication is thus ruled out[,] … seems equally applicable where, although he or she knows that a particular inference will inevitably be drawn, that is not his or her purpose. Moreover, if we were to include within the hearsay rule the case where he or she knows that a particular inference *will* be drawn, it is hard to see any rational basis for excluding the case where he or she knows that it *may* be drawn. We believe that the most defensible place to draw the line is between those consequences that it is the putative declarant's *purpose* to bring about, and those that it is not.[25]

This somewhat lightly argued rationalization suggests that the choice of 'purpose' was driven more by what appear to have been considerations of practicality than by considerations of principle. It may well also have been motivated by a desire to see the scope of the hearsay rule being confined as tightly as possible.

More fundamentally, the very notion of ascertaining the state of mind of the person responsible for the words or non-verbal conduct in question may be regarded as problematic, in essence 'requir[ing] the court to speculate on whether the declarant meant one thing when he said another—to search inside the declarant's head for what he really had "in mind"'.[26] This

[25] Law Commission, *Evidence in Criminal Proceedings: Hearsay and Related Topics* (Law Com No 245, 1997) paras 7.37–7.38 (emphasis in original).
[26] P S Milich, 'Hearsay Antinomies: The Case for Abolishing the Rule and Starting Over' (1992) 71 Oregon Law Review 723, 729.

will by its nature be no straightforward task, and indeed it is one which, as will be seen, has generated difficulties across jurisdictions.

Not long after the relevant provisions of the Criminal Justice Act 2003 came in force, the Court of Appeal confirmed that '[t]he view of the majority in *R v Kearley*, in relation to hearsay, has been set aside by the Act'.[27] The wording of the legislation, notably, suggests the necessity for a purpose to *communicate or relay* a message, or information, *to another*, rather than a purpose simply to articulate it. Thus in *R v Twist*,[28] the Court of Appeal provided the following rationalization of the earlier decision in *R v Singh*:[29]

> The court [in *Singh*] was … not considering a communication at all, but rather the note for himself that a mobile telephone user makes when he enters in the memory of his telephone the number of a contact. This was [a] similar case to a private diary entry which is written for oneself and no one else; the maker of the entry has no purpose to cause anyone else to believe or act upon the truth of the entry—it is entirely for his own use and for that reason is not hearsay. It was therefore admissible evidence to tend to prove that the telephone number in question was used by the defendant, the person to whom the entry was attributed.[30]

The landmark decision on the interpretation of section 115(3) is undeniably *R v Twist*,[31] where the Court of Appeal articulated the following approach:

[27] *R v Singh* [2006] EWCA Crim 660; [2006] 1 WLR 1564 [14].
[28] [2011] EWCA Crim 1143; [2011] 3 All ER 1055. See generally P Mirfield, 'A Final Farewell to *Kearley*' (2012) 128 Law Quarterly Review 331.
[29] [2006] EWCA Crim 660; [2006] 1 WLR 1564.
[30] [2011] EWCA Crim 1143; [2011] 3 All ER 1055 [23].
[31] [2011] EWCA Crim 1143; [2011] 3 All ER 1055. Shortly after the decision in *Twist* the Court of Appeal stated in *R v Mateza* [2011] EWCA Crim 2587 [23]: 'It seems to us for the future it is entirely unnecessary for any court to look at cases earlier than *Twist* because *Twist* sets out all of the relevant considerations and the correct approach. It is therefore unnecessary for us … to set out any further reasons why we consider that *Twist* is the case to be followed. We cannot in any way improve upon that analysis, but would merely commend it to the courts of the future.'

> Generally, … it is likely to be helpful to approach the question whether the hearsay rules apply in this way: (i) identify what relevant fact (matter) it is sought to prove; (ii) ask whether there is a statement of *that matter* in the communication. If no, then no question of hearsay arises (whatever other matters may be contained in the communication); (iii) if yes, ask whether it was one of the purposes (not necessarily the only or dominant purpose) of the maker of the communication that the recipient, or any other person, should believe *that matter* or act upon it as true? If yes, it is hearsay. If no, it is not.[32]

In *R v Midmore*[33] the defendant and a co-defendant, his half-brother, were charged with causing grievous bodily harm using sulphuric acid. The defendant contended that the acid had been purchased to unblock a drain. At issue was a WhatsApp message, sent by the co-defendant to his girlfriend, containing a picture of a box of One Shot sulphuric acid accompanied by the caption 'This is the one face melter'. The Court of Appeal held:

> The specific question in this case is whether the message was a statement of the current intention of the defendant's half-brother which he shared with the defendant. In other words, was the message itself evidence of the matter sought to be proved, namely that the purchase was made with the intention to use the product to cause harm to the complainant or was the message merely a comment and therefore only evidence from which the matter sought to be proved, the purchase with that intention, could be inferred?
>
> This is a short point on which views can differ. On balance, we think the better view is that it was an implied representation of the intention, not simply a comment from which the intention could be inferred. It therefore fell within the definition in section 115(2) as it was a statement of the matter intended to be proved.[34]

[32] [2011] EWCA Crim 1143; [2011] 3 All ER 1055 [17] (emphasis in original). The Court discussed the earlier cases of *R v Singh* [2006] EWCA Crim 660, [2006] 1 WLR 1564; *R v K* [2007] EWCA Crim 3150, (2007) 172 JP 538; *R v Leonard* [2009] EWCA Crim 1251, (2009) 173 JP 366; *R v Bains* [2010] EWCA Crim 873; *R v Chrysostomou* [2010] EWCA Crim 1403, (2010) 175 JP 112; *R v Elliott* [2010] EWCA Crim 2378, (2010) 175 JP 39.
[33] [2017] EWCA Crim 533; [2017] 4 WLR 107.
[34] [2017] EWCA Crim 533; [2017] 4 WLR 107 [38]–[39].

Such judicial musings on whether particular words might constitute a 'statement' in the first place present an unfortunate distraction from the key issues at hand. It would surely be more straightforward simply to acknowledge that the form of words used is irrelevant and that a 'statement' by words of any matter may be made expressly or impliedly (in the latter case constituting an implied assertion); there will be a statement so long as the relevant words can be interpreted as a representation, however indirect, of the matter in question. On this basis, there should have been no doubt that there was a relevant statement here.

The Court continued:

> However, even though the message fell within the definition in section 115(2) on the basis it was evidence of the intention to use it to cause harm and not merely a comment from which the intention could be inferred, we are firmly of the view that the statement or representation was not made to cause the girlfriend to believe the statement or to act on it as true. Nothing in the message could possibly suggest that it was sent to cause the girl friend to believe One Shot would actually melt a face or to cause her to act on that basis or to believe that it was his intention so to use it or to act on that basis. Thus even if the terms of section 115(2) were satisfied in that it was a representation of fact, the message did not in any event therefore satisfy the provisions of section 115(3) of the 2003 Act. It was not therefore hearsay.[35]

In conclusion, the Court resolved the appeal as follows:

> As the message was not hearsay within the meaning of the … 2003 [Act], the message was admissible provided it was relevant and not subject to the discretionary exclusion. In our judgment the message was

[35] [2017] EWCA Crim 533; [2017] 4 WLR 107 [40]. *R v Twist* [2011] EWCA Crim 1143; [2011] 3 All ER 1055 also provides an illustration of the Court's fixation with the issue of what precisely constitutes a 'statement', before similarly concluding that the issue was ultimately academic in the light of s 115(3) ([2011] EWCA Crim 1143; [2011] 3 All ER 1055 [15]): 'Some communications may contain no statement at all. If, for example, the communication does no more than ask a question, it is difficult to see how it contains any statement. A text message to someone asking "Will you have any crack tomorrow?" seems to us to contain no statement at all. But even if it be analysed as containing an "implied assertion" that the recipient is a drug dealer, that fact is still not a "matter stated" for the purposes of ss 114 and 115(3) because the sender does not have any purpose to cause the recipient to believe that fact or to act upon the basis that it is true. They both know it, and it is the common basis of their communication.'

> plainly relevant evidence and the judge was entirely correct in his decision not to exclude it under section 78 of the Police and Criminal Evidence Act 1984.[36]

The difficulties inherent in determining the purpose of the maker of the statement[37] are brought out very clearly by the facts of this case. Contrary to the decision of the Court, it would be a very plausible conclusion that the co-defendant's precise purpose had been to cause the recipient of the message, his girlfriend, to believe that his intention was to use One Shot to melt a face. McKeown notes succinctly that, while 'the court concluded that there was nothing in the representation which suggested [the co-defendant] intended to cause his girlfriend to believe *One Shot* would actually melt a face', '[w]ith respect, it is hard to see what else his intention could have been'. It is also interesting to speculate whether, had it been held to be hearsay, the evidence would have been considered a suitable candidate for admission under section 114(1)(d) of the Criminal Justice Act 2003, on the basis 'that it [was] in the interests of justice for it to be admissible'.[38]

It is worth noting that the phrase 'on the basis that the matter is as stated' may be regarded as somewhat ambiguous, even if it appears not to have troubled the courts to date. Consider *R v Twist* and some of the cases conjoined with it for consideration by the Court of Appeal. In both *Twist* and *Boothman* the prosecution sought to prove intent to supply drugs, and at issue in each case were messages received by the defendant containing requests that he supply drugs. The Court of Appeal held in *Twist*:

[36] [2017] EWCA Crim 533; [2017] 4 WLR 107 [41].
[37] In *R v Lam Hai Vo* [2013] EWCA Crim 2292 the Court of Appeal managed to avoid the need to engage with the issue, while somewhat confidently asserting that it was 'plain' ([2013] EWCA Crim 2292 [14]) that evidence of the text message in question did constitute hearsay.
[38] Considered, as required, in conjunction with s 114(2).

> In our view these messages were not hearsay. The matter sought to be proved was that the defendant was a supplier of drugs.… Even if [the messages] could be said to amount to an implied assertion that he was, the purpose of the senders did not include causing him or anyone else to believe that he was.[39]

And in *Boothman*:

> In our view these messages were not hearsay, for reasons largely the same as in the case of *Twist*. The fact sought to be proved was that the defendant was dealing in cocaine, as well as in cannabis.… [I]n none of the messages did the sender have it as one of his purposes to make the defendant believe that he was a supplier of cocaine, or to act on the basis that that representation was true. They no doubt wanted him to act on their orders, but that, for the reasons explained, is not the same thing as wanting him to accept the truth of their references to his cocaine dealing. The distinction … between express representations and those which are not express was relevant under *R v Kearley* … but is no longer so.[40]

In *Tomlinson and Kelly*, which concerned a prosecution for robbery, a crucial question for determination was whether the defendants had a gun in their possession at a particular time, and at issue was a message received by one of the defendants containing a request for a gun to be delivered to the sender. The Court of Appeal held:

> In our view, the message was not hearsay. The matter which it was sought to prove was that the defendants were in possession of a gun … [I]t was not one of the purposes of the sender to cause Tomlinson, or anyone else, to believe that Tomlinson had a gun in his possession. That was simply the common understanding of sender and recipient underlying the communication. Therefore the message was not within the 2003 Act's concept of hearsay.[41]

[39] [2011] EWCA Crim 1143; [2011] 3 All ER 1055 [29].
[40] [2011] EWCA Crim 1143; [2011] 3 All ER 1055 [32].
[41] [2011] EWCA Crim 1143; [2011] 3 All ER 1055 [37].

Applied to *Kearley* itself, this approach to interpreting the provisions of the 2003 Act would clearly yield a different result from that reached by the House of Lords, because the purpose of the callers would not be deemed to have been either to cause the recipients of the calls to believe that Kearley was a drug supplier, *or* to cause them to act on the basis that Kearley was a drug supplier. Yet an entirely plausible alternative view is that it *was* their very purpose to cause the recipients of the calls to act on the basis that Kearley was a drug supplier. Adopting this interpretation would mean that, completely contrary to what it intended, Parliament would have failed to overturn *Kearley*. It is perhaps of no surprise then that this interpretation has not received a great deal of airing. Such academic discussions as have touched on it have tended to shy away from endorsing it.[42]

4. US Federal Rules of Evidence: were the words or was the non-verbal conduct intended as an assertion?

As the basis for recognizing a general rule against hearsay,[43] the US Federal Rules of Evidence define hearsay as any out-of-court statement 'offer[ed] in evidence to prove the truth of the matter asserted in the statement',[44] with a 'statement', in turn, 'mean[ing] a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion'.[45] There is a subtle difference between this terminology and that used in the Criminal Justice Act

[42] Mirfield observes in relation to *R v Twist* [2011] EWCA Crim 1143; [2011] 3 All ER 1055 (P Mirfield, 'A Final Farewell to *Kearley*' (2012) 128 Law Quarterly Review 331, 335 (emphasis in original)): 'In the drugs case … the argument [accepted] is that all that matters to the caller is that the receiver *act* on the message, whether or not it be true, not that he does so *because it is true*, nor because he *assumes it to be true*. Looked at another way, the callers to Boothman's number might, by chance, have reached someone other than the previous supplier, but the receiver might still supply them with drugs.… Similarly, in the gun case, all that mattered to the caller was that the gun be returned to him, not who truly possessed it, or was assumed to do so. Still, the distinction is a close one, which may very well have the capacity to result in further difficulty for the courts.' See also I H Dennis, *The Law of Evidence* (6th edn, Sweet & Maxwell 2017) 725.

[43] US Federal Rules of Evidence, rule 802.

[44] Rule 801(c).

[45] Rule 801(a).

2003 in England and Wales; under the US Federal Rules, words or non-verbal conduct will qualify as a 'statement' in the first place only if there was an intention to assert.

Another point of distinction is that, beyond an intention to assert, there is in the US Federal Rules no further requirement that the assertion have been intended to be communicated or relayed to some other person. Thus evidence of an entry in a private diary, which would not constitute hearsay in England and Wales, would be so under the US Federal Rules. Reservations about such an outcome in England and Wales have been expressed by at least one US commentator.[46] In response, it might be suggested that, if the underlying concern of the focus on state of mind is the potential danger of insincerity, then the fact that insincerity typically connotes an outward-facing act must be acknowledged; as one might not be expected to lie to oneself, the approach in England and Wales is entirely justified in requiring foresight in relation to communication to another person. Yet this argument misses the point that, in reality, '[s]elf-deception is a defining part of our human nature'.[47]

The approach adopted in the US Federal Rules has formed the basis for all the other statutory approaches considered in this chapter. There appears to have been ready acceptance in the jurisdictions in question of that basic approach, as the following observations made in Australia, in a joint report of the Australian Law Reform Commission, New South Wales Law Reform Commission, and Victorian Law Reform Commission, illustrate:

> In the United States, the distinction between intended and unintended assertions has been codified in the *Federal Evidence Code* since 1975, and built on similar provisions in the *California Evidence Code* enacted in 1965. While the matter has not been free of controversy, a survey of the American case law

[46] Panel Discussion, 'The Philip D Reed Lecture Series: Symposium on Hearsay Reform' (2016) 84 Fordham Law Review 1323, 1348–9; M S Brodin, 'The British Experience with Hearsay Reform: A Cautionary Tale' (2016) 84 Fordham Law Review 1417, 1424–5.
[47] N Burton, *Hide and Seek: The Psychology of Self-Deception* (Acheron Press 2012) 223.

> and commentary leads the Commissions to the view that the United States provisions have operated satisfactorily and are conceptually sound.[48]

This may be too sanguine a perception, as *US v Torres*[49] illustrates. Torres was accused of knowingly transporting cocaine across the United States-Mexico border concealed in a specially constructed compartment of his pickup truck. He sought to testify about requests made to him by a friend, Fernando Griese, who he contended had manipulated him into unknowingly bringing drugs in his truck across the border by asking him for favours involving running errands in San Diego. The question for the US Court of Appeals for the Ninth Circuit was whether evidence of these requests constituted hearsay. Of interest—especially in the light of the perception that the hearsay provisions of the US Federal Rules are well established and that their operation has had a considerable time in which to 'bed in' properly—are the Court's preliminary observations that 'we have not previously addressed whether questions constitute hearsay',[50] and that there was a lack of consensus among the different circuits about such evidence: 'Some of our sister circuits have held that questions or requests are admissible as non-hearsay because questions are not intended to assert anything.'[51] The Court rightly regarded such an approach as unduly dogmatic: 'we think the issue is more nuanced and context specific. It is widely recognized that the grammatical form of a verbal utterance does not govern whether it fits within the definition of hearsay.'[52] Indeed, '[o]ther circuits have not foreclosed the possibility that questions can be classified as hearsay',[53] and this too was the approach that the Court thought should be taken: 'Because there may be instances where a party attempts to

[48] Australian Law Reform Commission, New South Wales Law Reform Commission, and Victorian Law Reform Commission, *Uniform Evidence Law: Report* (ALRC Report 102, NSWLRC Report 112, VLRC Final Report, 2005) para 7.33.
[49] 794 F 3d 1053 (9th Cir 2015).
[50] 794 F 3d 1053, 1061 (9th Cir 2015).
[51] 794 F 3d 1053, 1059 (9th Cir 2015).
[52] 794 F 3d 1053, 1060 (9th Cir 2015).
[53] 794 F 3d 1053, 1060 (9th Cir 2015).

admit hearsay by cloaking statements under the guise of a question, the focus of the inquiry should be on what the declarant intended to say, whether implied or directly asserted.'[54] The Court concluded:

> Fernando asked: Can you take my friend to the DMV [Department of Motor Vehicles]? Torres said no. Fernando asked a second time: Can you take my friend to the DMV? Torres said no. Fernando asked a third time: Can you take my friend to a tire shop? Torres said no. Fernando's intent in asking for Torres's truck on three separate occasions in the span of a week and a half is apparent: Fernando wanted control of Torres's truck on the US-side of the border. In other words, Fernando intended the implied assertion rather than the express one, and Torres offered the questions for this intended implied message to show it was Fernando who was calling the shots and who unknowingly set him up on the drug importation scheme. Thus, Torres offered the statements for the truth of the defense asserted. We hold the district court did not abuse its discretion in finding that Torres offered Fernando's inquiries for the truth of the matter asserted to prove his third-party culpability defense. Thus, the objections were properly sustained on hearsay grounds.[55]

It seems somewhat surprising that the relatively straightforward issues raised by this case appeared to exercise the Court to the extent that they did.

5. Australian uniform evidence legislation: was it the intention of the maker of the representation to assert the fact?

Like the Criminal Justice Act 2003 in England and Wales, the approach of the Australian uniform evidence legislation[56] to the definition of hearsay derives from the US Federal Rules

[54] 794 F 3d 1053, 1061 (9th Cir 2015).
[55] 794 F 3d 1053, 1061 (9th Cir 2015).
[56] This legislation applies in the Commonwealth jurisdiction (Evidence Act 1995 (Commonwealth)) and in New South Wales (Evidence Act 1995 (New South Wales)), Tasmania (Evidence Act 2001 (Tasmania)), Victoria (Evidence Act 2008 (Victoria)), the Australian Capital Territory (Evidence Act 2011 (Australian Capital Territory)), and the Northern Territory (Evidence (National Uniform Legislation) Act 2011 (Northern Territory)). See generally J D Heydon, *Cross on Evidence* (11th Australian edn, LexisNexis Butterworths 2017); A Ligertwood and G Edmond, *Australian Evidence: A Principled Approach to the Common Law and Uniform Acts*

of Evidence. Section 59(1) of the Australian uniform legislation[57] originally provided: '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.' In *Lee v R* the High Court of Australia observed of the effect of this provision:

> The [hearsay] rule's operation requires consideration first of why it is sought to lead evidence of something said or done out of court (a previous representation). What is it that that 'previous representation' is led to prove? In particular, is it sought to lead it to prove the existence of a fact that the person who made the representation intended to assert by it? The fact that the statement or the conduct concerned might unintendedly convey some assertion is not to the point. The inquiry is about what the person who made the representation intended to assert by it.[58]

In *R v Hannes*,[59] however, statements were made in the New South Wales Court of Criminal Appeal that appeared to endorse the widest possible approach to determining intention, such that 'intention' would very readily be inferred. The foundation of such an approach, in the words of Spigelman CJ, is 'that a person intends the natural consequences of his or her acts'.[60] 'If the word "intended" in s 59(1) requires some form of specific conscious advertence on the part of the assertor', '[t]he application of s 59 to implied assertions would be restricted to cases of deliberate allusion or hints'.[61] 'Nothing in … the text of the *Evidence Act* suggests so restricted an operation for the hearsay rule under that Act.'[62] On Spigelman CJ's approach:

(6th edn, LexisNexis Butterworths 2017); S Odgers, *Uniform Evidence Law* (13th edn, Thomson Reuters (Professional) Australia Ltd 2018); N Williams, J Anderson, J Marychurch, and J Roy, *Uniform Evidence in Australia* (2nd edn, LexisNexis Butterworths 2018); J Gans, A Palmer, and A Roberts, *Uniform Evidence* (3rd edn, OUP 2019); F Hum, B Jackman, O Quirico, G Urbas, and K Werren, *Australian Uniform Evidence Law* (CUP 2019).

[57] The legislation is not in fact fully uniform, and quotations provided in this chapter will be from the Commonwealth legislation.

[58] [1998] HCA 60 [22].

[59] [2000] NSWCCA 503.

[60] [2000] NSWCCA 503 [357].

[61] [2000] NSWCCA 503 [359].

[62] [2000] NSWCCA 503 [360].

> It is arguable that the scope of the word 'intended' in s 59(1) goes beyond the specific fact subjectively adverted to by the author as being asserted by the words used. It may encompass any fact which is a necessary assumption underlying the fact that the assertor does subjectively advert to. The Court was not addressed on the proper construction of the word 'intended' in s 59 and it is not necessary to express a final view.[63]

In a similar vein, Studdert J observed in relation to the facts at hand: 'Absent evidence to the contrary, it could not be inferred that the appellant did not intend to assert by what he wrote the very matters which the appellant contends emerged from a reading of the document.'[64]

Taken to its logical conclusion, such an 'objective' approach to the interpretation of section 59(1)[65] would appear to undermine substantially, if not completely, the very point of requiring an investigation into the (subjective) state of mind of the maker of the statement in the first place.[66] Consideration was given to the matter in the joint report by the Australian Law Reform Commission, New South Wales Law Reform Commission, and Victorian Law Reform Commission on the operation of the uniform evidence legislation, in which it was observed:

> On one view, Spigelman CJ's approach has no limitations[:] … a person making a simple representation in the form of an oral communication would be taken to intend to assert a very large number of facts. This is because the necessary assumptions of a simple oral representation include:
>
> • that the assumption is capable of being understood;

[63] [2000] NSWCCA 503 [361].
[64] [2000] NSWCCA 503 [477].
[65] Similar approaches to the interpretation of the US Federal Rules of Evidence have also been advocated on occasion. Writing in the context of a discussion of evidence of non-verbal conduct, Schaitkin notes (K A Schaitkin, '"Negative Hearsay"—The Sounds of Silence' (1979–80) 84 Dickinson Law Review 605, 612): 'Intent to communicate exists when a reasonable person in the position of the actor at the time and place under consideration would intend his conduct to be communicative. A subjective standard, based on the actual intent of the actor, seems unworkable since the primary source of establishing that intent, the testimony of the actor, is unavailable.'
[66] To 'treat[] a person as intending all the reasonably likely consequences of his acts, whether or not he desired them or even thought about them[,] … reduces intent to a fiction': O G Wellborn III, 'Definition of Hearsay in the Federal Rules of Evidence' (1982) 61 Texas Law Review 49, 76–7.

> • that other persons exist who have knowledge of the linguistic, social and other 'public conventions' relied on by the representor in making the oral assertion; and
>
> • that consequences will follow from breach of those norms, whatever those consequences may be.[67]

The undesirability of such a potentially 'limitless' judicial interpretation led to the recommendation in the report that '[t]he prospect of courts adopting a[n] … approach to "intention" … such as the approaches explored in *Hannes* … should be foreclosed' by way of amendment to the legislation.[68] This recommendation was implemented, so that the amended section 59(1) now provides: 'Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.' Further, a new subsection, subsection (2A), has been added to section 59: 'For the purposes of determining under subsection (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made.' One commentator has noted witheringly that 'the concept of what "may reasonably be supposed" to have been intended makes no sense in the law of evidence'.[69] As regards its interpretation, it is hard to disagree with the observation of Gans, Palmer, and Roberts that 'the reasons why [the amendment] would prevent a court from taking the approach taken in *Hannes* are not immediately obvious'.[70] Indeed, the Victorian Court of Appeal remarked in *Karam v The Queen* that 'the expression "it can reasonably be supposed that the person intended to assert"

[67] Australian Law Reform Commission, New South Wales Law Reform Commission, and Victorian Law Reform Commission, *Uniform Evidence Law: Report* (ALRC Report 102, NSWLRC Report 112, VLRC Final Report, 2005) para 7.43.
[68] Australian Law Reform Commission, New South Wales Law Reform Commission, and Victorian Law Reform Commission, *Uniform Evidence Law: Report* (ALRC Report 102, NSWLRC Report 112, VLRC Final Report, 2005) para 7.62.
[69] G Taylor, "'Let Them Say More That Like of Hearsay Well": Implied Assertions under the Hearsay Rule as Expressed in the Uniform Evidence Legislation' (2011) 35 Australian Bar Review 270, 271.
[70] J Gans, A Palmer, and A Roberts, *Uniform Evidence* (3rd edn, OUP 2019) 130. See also J Hunter, T Henning, G Edmond, R McMahon, J Metzger, and M San Roque, *The Trial: Principles, Process and Evidence* (Federation Press 2015) 318: 'it is not clear how [the amendment] displaces the decision in *Hannes*'.

in s 59(1) … carries with it the prospect that intention may properly be inferred objectively, thereby expanding the scope of the hearsay rule into the realm of implied assertions'.[71] In the same court in a subsequent case, *Fletcher v The Queen*, Priest JA, clearly no fan of the wording of section 59(1), went so far as to describe it as being 'expressed in terms that would make Sir Humphrey Appleby proud'.[72]

While the Australian experience itself has not been entirely straightforward, on one issue at least there appears to be greater clarity than in England and Wales. The Dictionary accompanying the Australian legislation specifically provides that the word 'representation' is to be taken to include 'an express or implied representation (whether oral or in writing)' and 'a representation to be inferred from conduct'. This is welcome, as it forestalls speculation about the status of particular implied oral representations of the type in which the Court of Appeal of England and Wales has engaged, allowing attention to be focused instead on the crucial question of the intention of the maker of the representation.

That the requirement in England and Wales for some communication to another to be envisaged by the maker of the statement is—as in the US Federal Rules of Evidence—absent in the Australian uniform evidence legislation is made plain by the definition of a representation as including 'a representation not intended by its maker to be communicated to or seen by another person'.[73] All that is required to bring evidence of out-of-court words or non-verbal conduct within the definition of hearsay is an intention to assert.

[71] [2015] VSCA 50 [62] fn 16.
[72] [2015] VSCA 146 [9] fn 5. An expert in verbal obfuscation, Sir Humphrey was the fictional Permanent Secretary and later Cabinet Secretary in the television series *Yes, Minister* and *Yes, Prime Minister*: see https://www.bbc.co.uk/programmes/b006xtc5; https://www.bbc.co.uk/programmes/b00lplrt; https://www.bbc.co.uk/programmes/b00ltsml; https://www.bbc.co.uk/programmes/b00m01h7; https://www.bbc.co.uk/programmes/b00m01jl (all accessed 30 April 2019).
[73] Dictionary accompanying the uniform evidence legislation.

6. New Zealand: was it a spoken or written assertion, or non-verbal conduct intended as an assertion?

As the basis for recognizing a general rule against hearsay,[74] the Evidence Act 2006 of New Zealand defines a hearsay statement as an out-of court statement 'offered in evidence … to prove the truth of its contents', with a statement in turn 'mean[ing] (a) a spoken or written assertion by a person of any matter; or (b) non-verbal conduct of a person that is intended by that person as an assertion of any matter'.[75] In common with the US Federal Rules of Evidence and the Australian uniform evidence legislation, the requirement in England and Wales for foresight of some communication to another is absent here. What is immediately noteworthy on a reading of the New Zealand provisions is that the requirement of intention formally attaches only to non-verbal conduct and does not cover words. Interpreted literally, then, the effect of the provisions is that unintended assertions by words are caught by the hearsay rule, so that evidence such as that at issue in *Kearley* and similar cases would be hearsay. The New Zealand High Court gave extensive consideration to the point in *R v Holtham*.[76] Noting that '[a]ssertion is not defined in the Act',[77] the Court, after quoting three dictionary definitions of the word,[78] concluded:

> The consistent inference from these definitions is that an essential characteristic of an assertion is that the person asserting is intending to make a statement, or assert a fact or opinion.
>
> [A]n intention to assert something is [therefore] seen as an integral part of the concept of 'assertion' … Once para (a) of the definition is read in this way, para (b) can be seen as inclusory. Its

[74] Evidence Act 2006 (NZ), s 17.
[75] S 4, which deals with matters of interpretation.
[76] [2007] NZHC 2153; [2008] 2 NZLR 758.
[77] [2007] NZHC 2153; [2008] 2 NZLR 758 [41].
[78] These were: 'a confident statement of fact or belief', in *The Concise Oxford Dictionary* ([2007] NZHC 2153; [2008] 2 NZLR 758 [41]); 'the act of asserting; a positive or definite statement or affirmation concerning some particular thing, advanced without accompanying proof; declaration', in *Funk and Wagnall's New Standard Dictionary of the English Language* (1924) ([2007] NZHC 2153; [2008] 2 NZLR 758 (42]); and 'a declaration; a forthright statement', in *The New Zealand Oxford Dictionary* ([2007] NZHC 2153; [2008] 2 NZLR 758 [43]).

> role is to make it clear that conduct can also be a statement as long as the person doing the conduct is intending to assert. Paragraph (b) therefore confirms that the essence of a statement, be it verbal or by conduct, is the intention to assert.[79]

Such an interpretation, the Court thought, was consistent with the senses in which the word 'statement' was used elsewhere in the Evidence Act 2006; a 'review of the Act suggests that there is no obvious place where interpreting statement to mean "intentional assertion" would make the Act unworkable or unintelligible'.[80] The New Zealand Court of Appeal has subsequently endorsed this interpretation.[81] As under the US Federal Rules of Evidence, but unlike in England and Wales, therefore, particular words or non-verbal conduct will qualify in New Zealand as a 'statement' in the first place only if the person responsible had the relevant intention.

7. Canada: defending *R v Kearley*

The rule against hearsay is not defined legislatively in Canada. *R v Baldree*[82] provided the Supreme Court of Canada with the opportunity of finally addressing in detail the issue of implied assertions, on the basis of facts which it recognized to be similar to those of *R v Kearley*[83] in the sense that a request to purchase drugs was involved, albeit that there was only a single telephone call at issue here. The Court noted:

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[79] [2007] NZHC 2153; [2008] 2 NZLR 758 [44]–[45].
[80] [2007] NZHC 2153; [2008] 2 NZLR 758 [49].
[81] *McKenzie v R* [2013] NZCA 378 [22] (application for leave to appeal to New Zealand Supreme Court declined: *McKenzie v The Queen* [2013] NZSC 109); *Preston v R* [2016] NZCA 568; [2017] 2 NZLR 358 [43] ('An assertion requires an intention to assert. If the speaker intended to convey the meaning relied upon, the statement falls within the definition. If the speaker did not so intend but reliance is nevertheless sought to be placed upon the inferences sought to be drawn from the statement, the statement will fall outside the definition').
[82] [2013] 2 SCR 520; 2013 SCC 35. See generally G Ferguson and B L Berger, 'Recent Developments in Canadian Criminal Law' (2013) 37 Criminal Law Journal 315; C Hunt and M Rankin, 'Hearsay by Implication: *R v Baldree*' (2014) 18 International Journal of Evidence and Proof 181; C de Sa, 'Revisiting *Baldree*: Analyzing the Underlying Basis for the Admission of Implied Assertions' (2017) 22 Canadian Criminal Law Review 121.
[83] [2013] 2 SCR 520; 2013 SCC 35 [57].

> Had the caller stated that he wanted to buy drugs from Mr Baldree because *Mr Baldree sells drugs*, this would have amounted to an express assertion that Mr Baldree is a drug dealer. Thus framed, the caller's assertion would doubtless have constituted hearsay.
>
> But the caller stated instead that he was calling because he wished to *purchase drugs from Mr Baldree*. His assertion that Mr Baldree is a drug dealer was no less manifest in substance, though implicit rather than explicit in form.[84]

In the Court's view,

> the hearsay nature of this evidence cannot be made to depend on how the declarant framed his request.…
>
> There is no principled or meaningful distinction between (a) 'I am calling Mr Baldree because I want to purchase drugs from him' and (b) 'I am calling Mr Baldree because he sells drugs'. In either form, this out-of-court statement is being offered for an identical purpose: to prove the truth of the declarant's assertion that Mr Baldree sells drugs. No trier of fact would need to be a grammarian in order to understand the import of this evidence.…
>
> Accordingly, there is no principled reason, in determining their admissibility, to distinguish between express and implied assertions adduced for the truth of their contents. Both function in precisely the same way. And the benefits of cross-examining the declarant are not appreciably different when dealing with one form of testimony than the other. If an out-of-court statement implicates the traditional hearsay dangers, it constitutes hearsay and must be dealt with accordingly.[85]

The Court justified its conclusion that the evidence at issue should be treated as hearsay in Canada, *irrespective of what the caller might have intended*, by refuting the arguments commonly put forward in support of the opposing view.

[84] [2013] 2 SCR 520; 2013 SCC 35 [40]–[41] (emphasis in original).
[85] [2013] 2 SCR 520; 2013 SCC 35 [42]–[43], [48].

7.1 Refuting the argument that 'the danger of lack of sincerity is sometimes diminished for implied assertions'[86]

The Court noted that this will not necessarily be the case, quoting Rice's view that

> [i]t is illogical to conclude that the question of sincerity is eliminated and that the problem of unreliability is reduced for unintended implications of speech if that speech might have been insincere in the first instance … If potential insincerity is injected into the utterance of words that form the basis for the implied communication, the implication from the speech is as untrustworthy as the utterance upon which it is based.[87]

An illustration of this point may be provided with reference to *Wright v Doe d Tatham*. Even if the writers of the letters to Marsden had not intended to assert that he was a person of reasonable understanding, the danger of insincerity on their part might still have been considerable, if rather subtle: the writers may well have been aware that Marsden was not a person of reasonable understanding, but have decided to write in the manner in which they did because of a desire to act kindly and spare his feelings, or simply because of social convention.[88] Further, the Court in *Baldree* noted that, regardless of any considerations of insincerity, 'the other hearsay dangers clearly remain operative, and may in fact increase when an individual "states" something by implication'.[89] It will be recalled that the Law Commission of England and Wales was somewhat dismissive about any potential danger of mistake ('we do not think a court should be precluded from inferring [a] fact merely because th[e] person may have been mistaken in believing it'[90]). As a warning of the potential hearsay dangers

[86] [2013] 2 SCR 520; 2013 SCC 35 [45].
[87] P R Rice, 'Should Unintended Implications of Speech Be Considered Nonhearsay? The Assertive/Nonassertive Distinction under Rule 801(a) of the Federal Rules of Evidence' (1992) 65 Temple Law Review 529, 534.
[88] See A L-T Choo, *Hearsay and Confrontation in Criminal Trials* (OUP 1996) 85.
[89] [2013] 2 SCR 520; 2013 SCC 35 [46].
[90] Law Commission, *Evidence in Criminal Proceedings: Hearsay and Related Topics* (Law Com No 245, 1997) para 7.20.

inherent in implied assertions, the following two illustrations offered by Zuckerman are instructive:

> A much-discussed example is the utterance 'Hello, Mr Smith' adduced to support a conclusion that Smith was present at the time and place where the words were spoken. In this kind of situation the risk of misinterpretation is particularly serious because, first, it is easier to mishear or misinterpret short exclamations than long utterances that are made in some explanatory context, and, secondly, the evidential value of greetings and the like depends on the degree of acquaintance between the persons involved and on the circumstances of the greeting. In the absence of cross-examination it is very difficult to assess these factors and to place much reliance on such utterances.[91]

Secondly, in addressing the ship captain hypothetical scenario from *Wright v Doe d Tatham*, Zuckerman observes that

> the danger of misinterpretation [of the evidence] is very considerable. The captain may have examined his ship for some reason other than to determine its seaworthiness. Since the inference from such conduct entails an inference about the captain's state of belief an inference has to rely on his powers of perception, judgment, and memory …[92]

In the light of such considerations, the Supreme Court of Canada was clearly right in not being swayed by what has become the prevailing legislative approach in other jurisdictions of treating unintended implied assertions as constituting a *class* of evidence presumptively raising fewer hearsay concerns.[93]

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[91] A A S Zuckerman, *The Principles of Criminal Evidence* (Clarendon Press 1989) 198 fn 76. Zuckerman goes on in the same footnote to observe: 'Situations are, however, likely to arise where the utterance is of such compelling probative force that the courts would find admissibility irresistible.'

[92] A A S Zuckerman, *The Principles of Criminal Evidence* (Clarendon Press 1989) 199.

[93] This prevailing approach has been (somewhat optimistically) defended on the ground that it is sufficient for the presence of any 'dangers' other than insincerity to be left to be detected on a case-by-case basis, leading to the exclusion of the evidence where appropriate. Writing of evidence of the type at issue in *Kearley*, Mueller notes (C B Mueller, 'Incoming Drug Calls and Performative Words: They're Not Just Talking about It, Baron Parke!'

7.2 Refuting the 'too much evidence would be caught by the hearsay rule' argument

In responding to the argument that treating all implied assertions as subject to the hearsay rule would result in the presumptive exclusion of too much evidence, the Supreme Court noted, without deciding the matter, that it might be appropriate to confine its holding to evidence of *words* alone:

> [W]e are not concerned on this appeal with the application of the hearsay rule to assertions implied through non-verbal conduct. Our concern, rather, is with a quintessentially *verbal* statement.
>
> The issue of the applicability of the hearsay rule to inferences that can be drawn from non-verbal conduct is best left for another day.[94]

In a case involving evidence of non-verbal conduct the following year, the Ontario Court of Appeal was equally evasive, noting that, '[f]or the purposes of this case, it is unnecessary to state a general principle as to whether inferences from non-verbal conduct should be treated as hearsay',[95] but then proceeding to apply to the evidence precisely the type of analysis that would be applied if it were to be classified as hearsay.

Further, the Supreme Court in *Baldree* noted that, while automatic exclusion of the evidence in *R v Kearley* followed from the treatment by the House of Lords of the evidence as hearsay, this would not be the case in Canada, where hearsay evidence might be admitted if it did not fall within a traditional exception but nonetheless satisfied the criteria of necessity and

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(1995) 16 Mississippi College Law Review 117, 123 (emphasis in original)): 'Nonhearsay treatment does not mean throwing caution to the wind. Exclusion may be justified even if the incoming calls are *not* hearsay. Callers or visitors may lack reliable knowledge, having been misinformed or misled. This risk can be addressed by argument or cautionary instructions. It could also be addressed by requiring proof of knowledge as a matter of conditional relevance. Calls could be excluded unless knowledge were shown or circumstances, such as repetition by numerous callers, suggest the knowledge was there because too much baseless coincidence is implausible. (The jury could resolve this issue if facts or circumstances justify a positive finding but leave room for the opposite conclusion too.) And calls could be excluded under Federal Rule of Evidence 403 as confusing or misleading.'

[94] [2013] 2 SCR 520; 2013 SCC 35 [62]–[63] (emphasis in original).

[95] *R v Badgerow* 2014 ONCA 272 [134].

reliability. On this basis, 'implied assertions that are necessary and reliable may be admitted while those that are unreliable or unnecessary will be excluded'.[96] Of course, the observation that the law in Canada would not necessarily require the evidence in *Kearley* ultimately to be excluded, even if the conception of hearsay in *Kearley* were adopted, is also true now of England and Wales and other jurisdictions. More liberal admissibility of hearsay evidence is hardly a phenomenon that remains unique to Canada.

7.3 The holding on the facts

The Supreme Court found the evidence of the single telephone call in this case to be insufficiently reliable,[97] but cautioned that this holding was one confined to the facts. Thus, '[f]or example, where the police intercept not one but several drug purchase calls, the quantity of the calls might well suffice in some circumstances to establish reliability'.[98] Indeed, this consideration has proved crucial in decisions of provincial Courts of Appeal in subsequent cases. In *R v Gerrior*, Beveridge JA, giving judgment for the Nova Scotia Court of Appeal, held:

> [I]n the case at bar, there was not just one call, but three coded conversations, which … were about obtaining cocaine from the appellant. Does this make a difference? In these circumstances, I find that it does.…
>
> Here, two of the out-of-court statements were recorded by the mobile service provider, and reproduced by means of a production order. There could be no dispute about the completeness of the communications or the absent declarant having misperceived the actual exchange of information

[96] [2013] 2 SCR 520; 2013 SCC 35 [66].
[97] [2013] 2 SCR 520; 2013 SCC 35 [69]. The Court also found that the criterion of necessity had not been established: 'the police *made no effort at all* to secure the evidence of the declarant: they never sought to interview or even find him, though *he gave them his address*. Moreover, there was no explanation offered as to why no efforts were made to locate the declarant' ([2013] 2 SCR 520; 2013 SCC 35 [68] (emphasis in original)). Moldaver J dissented on this point: [2013] 2 SCR 520; 2013 SCC 35 [109].
[98] [2013] 2 SCR 520; 2013 SCC 35 [71].

> contained in the text messages, nor accurately recalling what was said. In my opinion, this goes a long way towards satisfying the threshold requirement of reliability.…
>
> [T]he Crown points to the evidence within the text messages themselves, and to the considerable body of other circumstantial evidence, including a number of pre-arrest texts for commerce in cocaine, all of which tend to support the reliability of the implied assertion that the appellant was an individual who trafficked in cocaine. I agree.[99]

Again, the Ontario Court of Appeal in *R v Malcolm-Evans* distinguished *Baldree* as follows:

> Unlike the circumstances in *Baldree*, which involved evidence of a single drug purchase call and no other evidence connecting the accused to drug dealing, in this case there were multiple calls, which the *Baldree* court … recognized may establish reliability. In addition, in this case, there was significant confirmatory evidence that the appellant was a drug dealer.[100]

Any future developments in the Supreme Court of Canada on matters relating to implied assertions will clearly be watched with interest.

8. Ireland

In 2016, the Law Reform Commission of Ireland, noting that there had been 'scant discussion of implied assertions in this jurisdiction',[101] was able to examine the issue with the benefit of consideration of the experience of other jurisdictions. The Commission ultimately

[99] 2014 NSCA 76 [44], [46], [48].
[100] 2016 ONCA 28 [7].
[101] Law Reform Commission, *Report: Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117-2016) para 2.36. The judgment of Kingsmill Moore J in *Cullen v Clarke* [1963] IR 368, 378, was interpreted as apparently favouring the view that the *Kearley* approach did not represent the law in Ireland. For the position in Scotland (which also appears to be characterized by uncertainty) see P Duff, 'Hearsay Issues: A Scottish Perspective' [2005] Criminal Law Review 525; P Duff, 'The Uncertain Scope of Hearsay in Scots Criminal Evidence: Implied Assertions and Evidence of Prior Identification' [2005] Juridical Review 1. For discussions of the position in Hong Kong and Singapore respectively, see E Y N Hong, C J Yao, and A L Yang, 'Rethinking the Admissibility of Implied Assertions as Evidence in Hong Kong's Criminal Cases' (2017) 8 Queen Mary Law Journal 51; T Y Chin, 'Hearsay Reforms: Simplicity in Statute, Pragmatism in Practice?' (2014) 26 Singapore Academy of Law Journal 398.

'recommend[ed] that implied assertions be allowed in evidence, save where it can reasonably be supposed that the purpose of making the statement was to cause another person to believe the matter implied',[102] thus favouring an approach in line with that of England and Wales. In doing so, the Commission appears to have been persuaded by the orthodox justifications for such an approach:

> Submissions received by the Commission generally favoured the admissibility of implied assertions, noting that while hearsay dangers are not entirely absent from implied assertions, they are much reduced.
>
> However, one submission argued strongly against their admission in evidence. It was argued that 'logically there is little difference between classic hearsay and an implied assertion.' The view was expressed that the same reliability dangers present themselves in the case of an implied assertion; it is an out-of-court statement which cannot be tested which is relied upon to prove that which is asserted, even though the assertion is indirect. This analysis is surely correct. The same barrier to the interrogation of the evidence presents itself in the case of implied assertion; there is no way to challenge the assertion in the absence of the declarant.
>
> However the argument in favour of their admission asserts that fabrication in such a situation is so unlikely as to warrant a general rule in favour of their admission, even in the absence of the opportunity to cross-examine. It is also … very difficult to square implied assertions with any existing definition of hearsay.[103]

It is disappointing that the Commission did not explain more thoroughly why it considered the arguments advanced in the one 'dissenting' submission, which it appeared to think had considerable merit, to be ultimately outweighed by the opposing arguments. The final sentence of the quotation, referring to the difficulty of aligning implied assertions with any established definition of hearsay, is also obscure. Certainly the standard legislative definition of hearsay

[102] Law Reform Commission, *Report: Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117-2016) para 2.48.
[103] Law Reform Commission, *Report: Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117-2016) paras 2.45–2.47.

across the major common law jurisdictions removes ‘unintended’ implied assertions from the scope of the hearsay rule, but it would be misguided to allow the weight of numbers alone to justify emulating this approach. A hearsay rule that does not account specially for implied assertions would be entirely straightforward to define. But above all else, it appears to be a fundamental omission that the Commission’s trawl through the approaches of other jurisdictions had failed to uncover the radically different position adopted in Canada.

9. Conclusion: a return to *R v Kearley*

One of the central themes developed by Adrian Zuckerman in *The Principles of Criminal Evidence* was that evidence law should be characterized by greater flexibility which better reflected the rationale(s) for treating particular evidence with caution. The hearsay provisions of the Criminal Justice Act 2003 have partially achieved this by allowing, through the operation of revised and liberalized exceptions to the hearsay rule, freer admissibility of hearsay evidence that appears sufficiently reliable for the trier of fact to be trusted to evaluate. The provisions of the 2003 Act provide, as the starting point for analyzing non-first-hand evidence, what is perhaps the most sophisticated of the legislative definitions of hearsay examined in this chapter; and this definition may also be the most far-reaching in the sense that it has the potential to shield the greatest amount of evidence from the hearsay prohibition. The definition, we have seen, raises two broad issues of concern. First, the definition, close variants of which are to be found in the US Federal Rules of Evidence, in the Australian uniform evidence legislation, and in New Zealand, fails properly to reflect the rationale(s) for treating non-first-hand evidence with caution; it is focused on only one of the four ‘hearsay dangers’, and even then may not address that danger adequately. The purpose or intent of the person responsible for the words or non-verbal conduct in question is elevated to a status it does not deserve. The second issue is practical: there appear to be considerable difficulties involved in successfully encapsulating,

in statutory wording that the courts can easily work with, the crucial essence of such purpose or intent.[104] To put it simply, the hearsay provisions of the 2003 Act may be viewed as the proverbial sledgehammer being deployed to crack the nut, but then, in this instance, succeeding in cracking it only partially: while the decision of the House of Lords in *R v Kearley* clearly demonstrated that hearsay doctrine was in need of reform, the strategy of *both* liberalizing the exceptions régime *and* confining the scope of the rule itself smacks of overreaching. The result in *R v Kearley* may well have been unjustifiable, but simply adopting the former strategy would have sufficed to address the underlying problem. In essence, this is the reasoning of the Supreme Court of Canada in *R v Baldree*. Here again, though, the experience of England and Wales has not exactly been unique, as the US Federal Rules of Evidence, Australian uniform evidence legislation, and Evidence Act 2006 of New Zealand have attempted a broadly similar strategy.

All this points to the 'outlier' approach adopted by the Supreme Court of Canada as providing the most sensible basis for the way forward. The precise route by which reform of the position in England and Wales should be achieved, however, requires careful thought. Some might argue, for example, that simply to revert to the pre-2003 Act, *Kearley* position on implied assertions would result in too much evidence being categorized as presumptively inadmissible as hearsay, especially in the light of the requirements imposed on a party to provide notice of its intention to introduce such evidence.[105] In response to this, it would be possible to offer solutions that seek to address any such concern.

One strategy might be to treat words and non-verbal conduct differently. Where words are concerned, the above discussion has pointed already to the conclusion that there is no justification for distinguishing between express assertions and implied assertions; both should

[104] Spencer (J R Spencer, *Hearsay Evidence in Criminal Proceedings* (2nd edn, Hart Publishing 2014) 92) writes that 'the new definition of hearsay, if better than the old one, is neither sound as a discriminator between statements that are reliable and unreliable, nor easy to apply'.
[105] Criminal Procedure Rules, rule 34.

be covered by the hearsay rule without any investigation into the intent or purpose of the source of the words. In the case of non-verbal conduct, however, the reach of the hearsay rule might be able to be restricted to any such conduct as appears to the court to assert the matter in question *expressly*—for instance, the act of pointing out something or someone. Notably, the Court of Appeal appeared in no doubt in *R v Twist* that an implied assertion inferred from non-verbal conduct, as opposed to words, could never constitute a 'statement' in the first place:

> If there is a queue of young people outside a building at midnight, obviously waiting for an evening out, that is some evidence tending to prove that the building is being operated as a club, which may be the matter which it is sought to prove, perhaps in licensing proceedings. There is no statement of that matter for the purposes of the 2003 Act.[106]

Such an approach would seem to flow logically from acceptance of the reality that, in Zuckerman's words, '[m]uch proof in criminal cases depends on drawing inferences from conduct which is relevant because it displays the actor's belief in the fact in issue'.[107] Excluding from the definition of a 'statement' non-verbal conduct such as that discussed in the hypothetical scenario offered in *Twist*—the action of simply queuing outside particular premises—would mean that the necessity of ascertaining the purpose of the actor would not arise.[108] Building on this, it is worth pondering whether it might not in fact be too large or radical a step to take to argue that evidence of *any* non-verbal conduct—including that which expressly asserts a fact—should be excluded entirely from the reach of the hearsay rule. We might say, putting it another way, that the consequence of such an approach is that 'see-do'

[106] [2011] EWCA Crim 1143; [2011] 3 All ER 1055 [14].
[107] A A S Zuckerman, *The Principles of Criminal Evidence* (Clarendon Press 1989) 200. See also C R Callen, 'Interdisciplinary and Comparative Perspectives on Hearsay and Confrontation' in P Roberts and M Redmayne (eds), *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (Hart Publishing 2007).
[108] See also C R Williams, 'Implied Assertions in Criminal Cases' (2006) 32 Monash University Law Review 47.

evidence[109] would never constitute hearsay evidence. The potential difficulty of determining whether an assertion by non-verbal conduct is express or merely implied is avoided.

Again, it might specifically be provided that any 'revised' hearsay rule would cover prosecution evidence only,[110] leaving non-first-hand evidence sought to be introduced by the defence outside the reach of the rule. The provisions of the Civil Evidence Act 1995 abolishing the hearsay rule in civil cases, but offering guidelines on the weight to be attached to particular evidence, could provide a model here. More specifically, consideration could be given to restricting the reach of the hearsay rule to a particular *type* of prosecution evidence, along the lines suggested, if not entirely enthusiastically, by Spencer as follows:

> If it was really necessary to draw a line between out-of-court statements which are prima facie excluded and only exceptionally admitted and those that are admitted automatically, the proper distinction to have drawn, I believe, would have been between statements made to the authorities in the course of their investigations, and everything else.… [It is] once a crime has been committed, and the police are investigating it, [that] risks of invention and distortion start to become important, and from that point on, it is right and proper for the law to expect the maker of the statement to come to court to give his evidence again orally, so that the defendant can dispute it.[111]

The underlying premise of this would appear already to be established in the law: in addition to the standard requirements to be satisfied for the admissibility in evidence of statements in what might broadly be termed 'business documents', section 117 of the Criminal Justice Act 2003 imposes additional requirements for any statement 'prepared for the purposes of pending or contemplated criminal proceedings, or for a criminal investigation'.[112] There is also an

[109] See J F Falknor, 'The "Hear-Say" Rule as a "See-Do" Rule: Evidence of Conduct' (1961) 33 Rocky Mountain Law Review 133.
[110] This might bring hearsay doctrine in closer alignment with the requirements of art 6 of the European Convention on Human Rights.
[111] J R Spencer, *Hearsay Evidence in Criminal Proceedings* (2nd edn, Hart Publishing 2014) 92.
[112] S 117(4)(a).

analogy to be drawn here with the US Supreme Court's conception of a 'testimonial statement'. Such a statement is described by the Court as one that is 'procured with a primary purpose of creating an out-of-court substitute for trial testimony',[113] in the context of the Court's interpretation of the so-called 'Confrontation Clause' of the Sixth Amendment to the US Constitution[114] as operating to prevent the 'admission of testimonial statements of a witness who [does] not appear at trial unless he [is] unavailable to testify, and the defendant [has] had a prior opportunity for cross-examination'.[115]

Which of these (or which combination of these) possible paths to reform is preferable would require a more thoroughgoing review of hearsay doctrine than is possible in this chapter.[116]

Earlier in his career, Adrian Zuckerman was one of the pioneers of a more contemporary, more reflective, and less rigid approach to evidence scholarship in England and Wales. Such an approach has proved influential in subsequent years in shaping the development of the law and of academic thinking. The hearsay provisions of the 2003 Act may be said to reflect this influence, but only partially. It is my hope that Zuckerman would broadly approve of the arguments made in this chapter.

[113] *Michigan v Bryant* 562 US 344, 358 (2011). See generally W E O'Brian Jr, 'Confrontation and Ongoing Emergencies: *Michigan v Bryant*' (2011) 15 International Journal of Evidence and Proof 357.
[114] This guarantees the accused the right 'to be confronted with the witnesses against him'.
[115] *Crawford v Washington* 541 US 36, 53–4 (2004). See generally A L-T Choo, '*Crawford v Washington*: A View from Across the Atlantic' (2004) 2(1) International Commentary on Evidence; H L Ho, 'Confrontation and Hearsay: A Critique of *Crawford*' (2004) 8 International Journal of Evidence and Proof 147; R M Cassidy, 'Reconsidering Spousal Privileges after *Crawford*' (2006) 33 American Journal of Criminal Law 339.
[116] For sustained treatments of criminal hearsay, the former now very dated, see A L-T Choo, *Hearsay and Confrontation in Criminal Trials* (OUP 1996); J R Spencer, *Hearsay Evidence in Criminal Proceedings* (2nd edn, Hart Publishing 2014).