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IMPLIED ASSERTIONS IN EVIDENCE LAW: A RETROSPECTIVE

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I. INTRODUCTION

The hearsay rule "rests on a simple, commonsensical idea: if you are trying to find out what happened, it is best to hear directly from someone who was there. Call it the principle of the horse's mouth."[1] This seemingly simple concept has grown into a rather complicated legal thicket. This essay will address one part of the hearsay thicket: implied assertions.

Conduct not intended to be an assertion is commonly labeled an "implied assertion."[2] What exactly does this mean? Two examples are illustrative: (1) a person opening an umbrella as evidence of rain and (2) a driver moving forward from a stopped position as evidence that the traffic light changed from red to green.[3]

The fires of controversy were stoked for years in this area of law, with scholars debating whether implied assertions should be classified as hearsay, non-hearsay, or a hearsay exception.[4] Under the common law, as crystallized in the seminal case *Wright v. Tatham*,[5] implied assertions were classified as hearsay. Fuel was thrown onto the scholarly fire when the Federal Rules of Evidence came down on one side of the issue, defining

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* Attorney, Helmerich & Payne, Inc. This article is dedicated to my beloved wife, Lauren Miller.

1. David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 11 (2009).

2. The term "implied assertion" is misleading. *See* Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 418 n.153 (1992) ("But 'implied assertion' is a singularly inept and artificial umbrella term. It requires us to understand 'imply' in the weak sense of 'suggest' to 'indicate,' not in the usual strong sense of describing what a person means to convey. It divorces 'assertion' from normal usage, making it mean essentially 'evidence' and severing it from expressive or communicative purpose."); Roger C. Park, *"I Didn't Tell Them Anything About You": Implied Assertions as Hearsay Under the Federal Rules of Evidence*, 74 MINN. L. REV. 783, 788 (1990) ("The term 'implied assertion' has become a term of art for hearsay writers, who tend to give it a meaning somewhat broader than that which it may connote to many readers. To say an utterance is offered as an 'implied assertion' is not to say that the declarant intended to insinuate the fact the proponent is trying to prove. It merely means the trier is being asked to infer that fact from the declarant's utterance.").

3. *See* Judson F. Falknor, *The Hearsay Rule as a "See-Do" Rule: Evidence of Conduct*, 33 ROCKY MTN. L. REV. 133 (1961).

4. *See id.*; Ted Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 STAN. L. REV. 682 (1962); Charles T. McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489 (1930); Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948).

5. Wright v. Doe d. Tatham, 112 Eng. Rep. 488 (Exch. Ch. 1837), *aff'd*, 7 Eng. Rep. 559 (H.L. 1838).

implied assertions as non-hearsay.[6] This was a dramatic shift from the common law approach, as embodied in *Wright v. Tatham.*[7]

It must be noted that hearsay scholars have been much more focused on the implied assertion problem than judges.[8] In fact, the courts rarely address the issue of "whether implied assertions are hearsay, whether the doctrine of *Wright v. Tatham* survived adoption of the Federal Rules, or whether a statement that depends for value on the declarant's credibility should be treated as hearsay even when offered to prove a matter other than what the statement directly asserts."[9] One can only speculate as to why courts rarely explore the contours of implied assertions. It could be the case that judges would rather not get lost "in this evidence teachers' briar patch, and would rather spend energy on the great issues of the day. Perhaps judges and lawyers trying to get good evidence past hearsay barriers find it easier to go through one of the familiar exceptions than to navigate the territory of implied assertions."[10] It is apparent that scholars have gotten a lot of mileage out of implied assertions, so it is useful to look back and distill the issues surrounding this topic.

This essay will explore the historical treatment of implied assertions. Part II provides an overview of the common law view of implied assertions as embodied in *Wright v. Tatham.* Part III examines the treatment of implied assertions in the Federal Rules of Evidence, while Part IV sheds light on federal court outliers in reference to implied assertions. Part V highlights the treatment of implied assertions in the UK, Canada, and Australia in order to provide international context and comparison. This essay will conclude by explaining why the current state of the law in dealing with implied assertions is at a high water mark that does not need to be reversed.

II. IMPLIED ASSERTIONS IN *WRIGHT V. TATHAM*

At issue in *Wright v. Tatham* was whether John Marsden was competent to make a will.[11] To prove his competency, Wright, who was the beneficiary, presented letters that had been written to Marsden.[12] These letters did not assert that Marsden was competent, but they did indicate that the letter-writers believed him to be competent.[13] As such, the triers-of-fact had to decide whether or not this implied assertion was hearsay. In other

6. *See* Craig R. Callen, *Hearsay and Informal Reasoning*, 47 VAND. L. REV. 43 (1994); Michael H. Graham, *"Stickperson Hearsay": A Simplified Approach to Understanding the Rule Against Hearsay*, 1982 U. ILL. L. REV. 887 (1982); Paul R. Rice, *Should Unintended Implications of Speech be Considered Nonhearsay? The Assertive/Nonassertive Distinctions Under Rule 801(a) of the Federal Rules of Evidence*, 65 TEMP. L. REV. 529 (1992).

7. 112 Eng. Rep. 488 (1837).

8. Park, *supra* note 2, at 802.

9. *Id.* (citing J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 801(a)[01], at 801–56 (1988)).

10. *Id.* at 803 n.84.

11. 112 Eng. Rep. at 488.

12. *Id.* at 490–91.

13. *Id.*

words, "if one of the letters had said, 'Marsden, you are competent to make a will,' it would clearly fall within the definition of hearsay as an out-of-court assertion offered to prove the truth of the matter asserted, but that was not the case."[14] From the content of the letters, Wright wanted the triers-of-fact to draw the inference that Marsden was indeed competent.[15] Wright did not prevail.[16] The holding was well-summarized by Baron Parke:

> The conclusion at which I have arrived is, that proof of a particular fact which is not of itself a matter in issue, but which is relevant only as implying a statement or opinion of a third person on the matter in issue, is inadmissible in all cases where such a statement or opinion not on oath would be of itself inadmissible; and, therefore, in this case the letters which are offered only to prove the competence of the testator, that is the truth of the implied statements therein contained, were properly rejected, as the mere statement or opinion of the writer would certainly have been inadmissible.[17]

In reaching this holding, the Exchequer Chamber used several examples to illustrate its points. Among these examples were (1) a person's election to office as evidence of that person's sanity and (2) the conduct of a captain inspecting a ship prior to boarding it with his family as evidence of its seaworthiness.[18] According to the House of Lords, these two examples were equivalent to out-of-court statements by the voters and the captain.[19] Accordingly, the House of Lords ruled the letters inadmissible hearsay.[20] This position is rejected by the Federal Rules of Evidence.[21]

III. Implied Assertions in the Federal Rules of Evidence

The definition of hearsay in Rule 801 of the Federal Rules of Evidence has two primary components. First, a "statement" is defined as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."[22] Second, "hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[23] This definition of hearsay "does not in terms say that everything not included within the definition is not hearsay, but that was the intended effect

14. 2 McCormick on Evidence § 250, at 144 (Kenneth S. Broun et al. eds., 6th ed. 2006).
15. *Wright*, 112 Eng. Rep. at 516.
16. *Id.*
17. *Id.* at 516–17.
18. *Id.* at 516.
19. *Id.*
20. *Id.*
21. *See* Fed. R. Evid. 801(a); Fed. R. Evid. 801(a) advisory committee's note.
22. Fed. R. Evid. 801(a).
23. Fed. R. Evid. 801(c).

of the rule, according to the Advisory Committee's Note."[24] In other words, if a person's nonverbal conduct is not intended to be an assertion, then it is excluded from the hearsay rule. The Advisory Committee's Note states clearly that the "key to the definition is that nothing is an assertion unless intended to be one."[25]

It must be remembered that "the hearsay rule is designed to guard against . . . imperfections of perception, memory, narration, and particular sincerity."[26] The Advisory Committee's Note on Rule 801 explains that the dangers listed above, which are inherent in hearsay,

> are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity.[27]

With this analysis, the Advisory Committee rejected "the view that nonassertive nonverbal conduct, from which . . . produced the belief, is the equivalent of an assertion that the event happened and hence hearsay."[28]

The umbrella and stop light examples used above illustrate the point. For example, "[p]rior to raising their umbrellas, people do not say to themselves in soliloquy form, 'It is raining,' nor does the motorist go forward on the green light only after making an inward assertion, 'The light is green.' "[29] These two examples show that the "conduct offered in one instance to prove it was raining and in the other that the light was green involves no intent to communicate the fact sought to be proved, and purposeful deception is much less likely in the absence of intent to communicate."[30]

At bottom, the federal drafters classified implied assertions as nonhearsay because they believed that "if a person does not intend to make an assertion, insincerity issues are significantly reduced or eliminated."[31] Any hearsay dangers that remain "should affect the weight accorded to the evidence, not its admissibility."[32] In practice, this "rule is so worded as to

24. 2 MCCORMICK ON EVIDENCE, *supra* note 14, § 246, at 129 (citing FED. R. EVID. 801(a) advisory committee's note).

25. FED. R. EVID. 801(a) advisory committee's note.

26. 2 MCCORMICK ON EVIDENCE, *supra* note 14, § 250, at 142.

27. FED. R. EVID. 801(a) advisory committee's note.

28. 2 MCCORMICK ON EVIDENCE, *supra* note 14, § 250, at 142.

29. *Id.*

30. *Id.* (citing Eustace Seligman, *An Exception to the Hearsay Rule*, 26 HARV. L. REV. 146, 148 (1912) ("[O]nly conduct apparently intended to convey thought can come under the ban of the hearsay rule.")).

31. PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE 444 (3d ed. 2009).

32. ROGER C. PARK ET AL., EVIDENCE LAW § 7.02, 266 (2d ed. 2004) (citing FED. R. EVID. 801 advisory committee's note).

place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility."[33]

IV. Implied Assertions: Federal Court Outliers

A. *Third Circuit Court of Appeals*

U.S. v. Reynolds[34] was a case involving two co-conspirators, Parran and Reynolds, who were attempting to cash a stolen check.[35] Prior to the arrest of Reynolds, postal inspectors observed Parran speak to Reynolds and then proceeded to walk down the street as Reynolds entered a nearby bank.[36] Reynolds attempted to cash the check, but the bank refused to do so because he did not have an account there.[37] Immediately thereafter, Reynolds exited the bank and began looking in the direction of Parran.[38] Reynolds then crossed the street and was arrested by postal inspectors for possession of a check that was stolen from the mail.[39] The postal inspectors testified that after Reynolds was arrested, Parran approached him and Reynolds addressed him saying, "I didn't tell them anything about you."[40]

The trial judge allowed the statement to come in as evidence of Parran's guilt of the crime charged.[41] On appeal, the government argued that Reynolds's statement "I didn't tell them anything about you" was admissible because it is was not offered to prove the truth of the matter asserted.[42]

The Third Circuit disagreed.[43] In crafting the rationale behind its holding, Judge Leon Higginbotham wrote:

> As the government uses it, the statement's probative value depends on the truth of an assumed fact it implies. Unless the trier assumes that the statement implies that Reynolds did not tell the postal inspectors that Parran was involved in the conspiracy to defraud, even though Parran was in fact involved, the statement carries no probative weight for the government's case. For if the trier assumes that the statement implied that Reynolds did not tell the postal inspectors that Parran was involved because there was nothing to tell, the statement has no relevance to the government's case. Its only relevance to the government's case is tied to

33. Fed. R. Evid. 801(a) advisory committee's note.
34. 715 F.2d 99 (3d Cir. 1983).
35. *Id.* at 101.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 100.
42. *Id.* at 102–03.
43. *Id.* at 104.

> an assumed fact of petitioner's guilt that the government argues the utterance proves.[44]

The court was clear in its assessment of implied assertions when it stated: "statements containing express assertions may also contain implied assertions qualifying as hearsay and susceptible to hearsay objections."[45] Thus, the Third Circuit endorsed the *Wright v. Tatham* position[46] in defiance of the Federal Rules of Evidence.[47]

B. Sixth Circuit Court of Appeals

Lyle v. Koehler[48] was a case involving a joint murder trial of Lyle and Kemp.[49] While in jail, Kemp wrote two letters, which detailed the alibi he wanted his friends to testify to.[50] One letter instructed the recipient to say that Kemp and Lyle were at the recipient's house when the murder took place.[51] Both letters instructed the recipient to testify that neither Kemp nor Lyle knew the third suspect.[52] The letters also instructed the recipients to destroy the letters after the contents had been memorized so they would not fall into the wrong hands.[53] Kemp gave the letters to his sister so that she could deliver them, but they were intercepted by law enforcement.[54]

At trial, the prosecution offered the letters in evidence under the theory that attempting to set up a false alibi implies guilt of the accused.[55] In other words, the prosecution claimed the letters were admissible because they were not offered to prove the truth of the matter asserted.[56] On habeas petition to federal court, Lyle asserted a Confrontation Clause violation took place when the trial court judge allowed the letters in evidence.[57] In analyzing the issue, the Sixth Circuit assumed that if the letters were not hearsay, no confrontation issue would be implicated.[58] But the court did determine the letters to be hearsay, adopting Morgan's 1948 view of hearsay, stating that "[u]nder Morgan's view, the inference of Kemp's guilty mind, as reflected in the letters, is not severable from Kemp's raw statements; the letters accordingly present a hearsay problem."[59] The court

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44. *Id.* at 103 (citations omitted).
45. *Id.*
46. *Id.*
47. *See* FED. R. EVID. 801(a); FED. R. EVID. 801(a) advisory committee's note.
48. 720 F.2d 426 (6th Cir. 1983).
49. *Id.* at 429.
50. *Id.* at 429–31.
51. *Id.*
52. *Id.* at 430.
53. *Id.* at 430–31.
54. *Id.* at 429.
55. *Id.* at 432.
56. *Id.*
57. *Id.* at 431.
58. *Id.* at 431–33.
59. *Id.* at 433 (citation omitted).

concluded that the use of the letters constituted hearsay, which was a violation of the right to confrontation.[60] Like the Third Circuit, the Sixth Circuit in this case crafted a holding that was in direct conflict with the treatment of implied assertions in the Federal Rules of Evidence.[61]

V. International Approaches to Implied Assertions

Apart from the interesting implications of implied assertions themselves is the interesting fact that treatment of implied assertions in the United Kingdom, Canada, and Australia is similar to the treatment of implied assertions under the Federal Rules of Evidence. The approach to implied assertions in these countries will be examined in brief below in order to provide context and comparison to the approach found in the Federal Rules of Evidence.

A. United Kingdom

In 2003, the United Kingdom's Parliament passed the Criminal Justice Act 2003 (CJA) into law. Part 11 of the CJA "sets out to modernise [sic] the hearsay rule, framing it in 'more positive and transparent terms' so as to send 'a clear message that, subject to the necessary safeguards, relevant evidence should be admitted where that is in the interests of justice.' "[62] Among the reforms in the CJA was its treatment of implied assertions.[63]

The conundrum associated with implied assertions was brought to the forefront in the United Kingdom in the case *Regina v. Kearley*.[64] In *Kearley*, the prosecution was attempting to prove that the defendant possessed the intent to sell the drugs found in his possession.[65] To prove this, the prosecution attempted to offer the contents of phone calls and "visits made to Kearley's premises shortly after his arrest by an array of determined would-be customers, all asking to buy drugs."[66] All this evidence was rejected as hearsay because it was classified as an out of court assertion.[67] Essentially, the holding in *Kearley* was the *Wright v. Tatham* approach of classifying implied assertions as hearsay.[68]

The CJA significantly changed the rule set out in *Kearley*. Section 115(3) of the CJA "provides that a matter is a 'matter stated' for purposes of the hearsay rule only where the person making the statement appears to the court to have had the purpose . . . of causing another to believe the matter . . . ."[69] This rule embodied in the CJA tracks the Federal Rules of

60. *Id.*
61. *See* Fed. R. Evid. 801(a); Fed. R. Evid. 801(a) advisory committee's note.
62. Di Birch, *Hearsay: Same Old Story, Same Old Song?*, 2004 Crim. L. Rev. 556, 556 (July 2004).
63. *Id.* at 564–66.
64. 2 App. Cas. 228 (H.L. Eng. 1992).
65. Birch, *supra* note 62, at 564.
66. *Id.*
67. *Id.*
68. *See supra* Part II.
69. Birch, *supra* note 62, at 565.

Evidence.[70] In both bodies of law "nothing is an assertion unless intended to be one,"[71] therefore, unintended assertions or implied assertions are classified as non-hearsay. Just as the Federal Rules of Evidence rejected the *Wright v. Tatham* approach to implied assertions, so did the Criminal Justice Act 2003.

B. Canada

In the early 1990's the Supreme Court of Canada affected sweeping hearsay reform.[72] At the heart of this reform was the "principled exception" to the hearsay rule.[73] The principled exception is comprised of two factors: necessity and reliability.[74] This exception to the hearsay ruled has provided Canadian courts "with a potentially broad discretion in assessing admissibility on the facts of any particular case."[75]

While the principled exception was a sweeping reform to the hearsay rule in Canada, on its face it did not confront the treatment of implied assertions.[76] In other words, while the Canadian Supreme Court's principled exception did not resolve "the definitional problem directly, it does present a rational solution if implied assertions in conduct are defined as hearsay because of the presence of hearsay dangers."[77] This is so because the courts are free to make an exception to the hearsay rule if the necessity and reliability factors are present.[78] However, even though the Canadian Supreme Court did not classify implied assertions as non-hearsay, in practice "Canadian courts have tended to admit such evidence on the ground that it is not hearsay."[79] Either way, the notion of admitting implied assertions in evidence has been given great latitude in Canada.

C. Australia

Australian law concerning implied assertions reached a turning point beginning in 1989, when courts began excluding implied assertions from the hearsay rule.[80] Implied assertions were also described in other terms such as "original circumstantial evidence not tendered for the truth of its contents"[81] or "inherently reliable utterances."[82] Regardless of the terminology, Australian courts were content with classifying implied assertions as

70. *See* FED. R. EVID. 801(a); FED. R. EVID. 801(a) advisory committee's note.

71. FED. R. EVID. 801(a) advisory committee's note.

72. Bruce P. Archibald, *The Canadian Hearsay Revolution: Is Half a Loaf Better Than No Loaf at All?*, 25 QUEEN'S L.J. 1, 4 (1999).

73. *See id.* at 26.

74. *Id.* at 26.

75. *Id.*

76. *Id.* at 14.

77. *Id.* at 16.

78. *Id.* at 15–16.

79. *Id.* at 15 (citing R. v. Fialkow, [1963] 2 C.C.C. 42 (Ont. C.A.)).

80. Marian K. Brown, *Reform and Proposed Reform of Hearsay Law in Australia, New Zealand, Hong Kong, and Canada, with Special Regard to Prior Inconsistent Statements*, 2007 ANN. CONF. OF THE INT'L SOC'Y FOR THE REFORM OF CRIM. L. 8, http://www.isrcl.org/Papers/2007/Brown.pdf.

81. *Id.*

non-hearsay.[83] The trend resulted in "[l]engthy studies by the Australian Law Reform Commission [that] resulted . . . in the 1995 Commonwealth Evidence Act (Evidence Act), governing the federal courts and the courts of the Territories."[84] The Evidence Act, like the Federal Rules of Evidence, codified the hearsay rule, while excluding implied assertions from the hearsay definition.[85] Section 59(1) of the Evidence Act states, in pertinent part, "[e]vidence 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."[86] This definition rejects the *Wright v. Tathem* approach to implied assertions and closely tracks the hearsay definition in the Federal Rules of Evidence.[87]

Broadly speaking, the United States, the United Kingdom, Canada, and Australia stand shoulder to shoulder in their rejection of *Wright v. Tathem* and their acceptance of implied assertions as reliable evidence.

VI. CONCLUSION

The hearsay rule is designed to keep imperfections of perception, memory, narration, and sincerity away from the trier of fact.[88] If one were to take an uncompromising stance in guarding against these hearsay dangers, one would have to take a different stance than that which has emerged in contemporary law. An uncompromising stance would mean that hearsay would encompass

> (1) all conduct of a person, verbal or nonverbal, intended by him to operate as an assertion when offered either to prove the truth of the matter asserted or to prove that the asserter believed that matter asserted to be true, and (2) all conduct of a person, verbal or nonverbal, not intended by him to operate as an assertion, when offered either to prove both his state of mind and external event or condition which caused him to have that state of mind, or to prove that his state of mind was truly reflected by that conduct.[89]

But defining hearsay in this manner, which is a definition of hearsay expanded "to the outer limits suggested by logic and analysis,"[90] is undesirable because it introduces "needless complication [which] outweigh[s] any supposed advantage."[91] In this same vein, the contemporary treatment of

82. *Id.*
83. *Id.* at 8–9.
84. *Id.* at 8.
85. *Id.* at 8–9.
86. Commonwealth Evidence Act § 59(1) (1995).
87. *See* FED. R. EVID. 801(a); FED. R. EVID. 801(a) advisory committee's note.
88. *See* 2 MCCORMICK ON EVIDENCE, *supra* note 14, § 250, at 142.
89. Edmund M. Morgan, *Hearsay and Non-Hearsay*, 48 HARV. L. REV. 1138, 1144 (1935).
90. 2 MCCORMICK ON EVIDENCE, *supra* note 14, § 250, at 146.
91. *Id.*

implied assertions as outside the reach of the hearsay rule "reflects ultimately a compromise between theory and the need for a relatively simple and workable definition in situations where hearsay dangers are generally reduced."[92]

But the contemporary view of implied assertions has not just made sense in theory; it has proven itself in practice. A look at the

> "case law does not reveal any obvious signs of injustice. There are no anguished judicial cries for change, or complaints about being bound by an inflexible code that only Congress can change. . . . Courts applying the definition seem to have accomplished good results in almost every published case."[93]

Moreover, a look at the case law reinforces the theory behind the contemporary approach to implied assertions. The cases in which implied assertions are involved "generally involve utterances classed as non-hearsay that raise no real insincerity dangers affecting the purpose for which they are being used."[94] For instance, "[t]he persons who made the intercepted calls to bookmakers are very unlikely to have been consciously plotting to incriminate the bookmakers."[95]

The contemporary approach to implied assertions as embodied in the Federal Rules of Evidence and also in the laws of the United Kingdom, Canada, and Australia has proven itself to be sound. This approach, which treats implied assertions as non-hearsay or a hearsay exception, has cut through the thicket of the hearsay rule and emerged battered by hearsay scholars, but vindicated in practice.

92. *Id.*
93. Park, *supra* note 2, at 836.
94. *Id.* at 836–37.
95. *Id.* at 837.