EVIDENCE—*RES GESTA*—STATEMENT OF INTENTION AS PROOF OF FACT—WHETHER ADMISSIBLE AGAINST ACCUSED AS PART OF *RES GESTA*

The decision of Mr. Justice Milvain in *R. v. Workman and Huculak* and its subsequent approval by the Alberta Appellate Division[1] marks, it is submitted, still another occasion in which the confusion as to the admissibility of evidence under the doctrine of *res gesta* is perpetuated. The accused Workman and Huculak were charged and convicted of the capital murder of one Frank Willey under section 202 of the Canadian Criminal Code.

The theory of the Crown was that the accused executed a plan which they had formed to lure Willey, a professional golfer, to a certain house where he was to be killed. An essential ingredient of this contention was that Willey had in fact gone to the house "on the hill" where the alleged murder was to have occurred. The court's approval of the Crown's submission that this fact was sufficiently proved by evidence admitted under the doctrine of *res gesta* is the point to be examined in this comment.

The evidence in question was given by Charles Cairns, an assistant professional at the Riverside Golf course and an employee of Mr. Willey. He testified that on the afternoon of April 19, 1962 Mr. Willey instructed him to purchase a set of ladies' right hand golf clubs not exceeding $225.00 in value. After purchasing the clubs Cairns picked up two golf bags and club covers at the club house and then placed all these items in the back seat of Willey's car. Cairns further stated that after the clubs were placed in the car, Willey told him that he had received a phone call from a person from Vancouver who had just moved to Edmonton. The caller informed Willey that he had been recommended to him by a professional in Vancouver and that he wanted to buy a set of ladies' right hand golf clubs as a surprise for his wife. Willey then stated he was going to deliver the clubs to the caller's home that evening, the location being "up on the hill". Willey disappeared that same evening and his body has never been located. A large quantity of blood was discovered next day in the house where, allegedly, Willey was to have gone, and a set of golf clubs stained with human blood were found later in his abandoned car.

The Appellate Division of the Supreme Court of Alberta upheld the ruling of the Trial Judge that the statement made by Mr. Willey to Mr. Cairns of his intention to deliver the clubs to the house on the hill was admissible. The statement in question was said to be admissible under the doctrine of *res gesta* and was evidence of the truth therein stated.

In delivering the judgment of the Appellate Division, Chief Justice Smith stated:

> "My view is that it is clear in the circumstances of the case at bar that Willey's actions were so interwoven with words that the significance of his action cannot be understood without the correlative words, and that disassociation of the words from the action would impede the discovery of the truth. I am satisfied that Willey's statement was so closely associated with his disappearance in time,

1 (Alta. C.A.) [1963] 1 C.C.C. 297 *aff'd* on other grounds [1963] S.C.R. 266.

> place and circumstance, that it was part of the thing being done and hence an item or part of real evidence and not merely a reported statement."[2]

and further that:

> "In my view, the statements of Willey to his assistant were receivable in evidence as truth of the contents, as real evidence and not merely a reported statement, and as relevant in considering the mental state and conduct thereafter of Willey."[3]

It is apparent that the evidence in question was admitted to prove that Willey had in fact carried out his intention which he had expressed to Mr. Cairns.

Analyzing the evidence admitted and upon consideration of the principle by which it was admitted, it is submitted that such evidence was irrelevant and that the doctrine of *res gesta* was incorrectly applied.

The doctrine of *res gesta* is a rule of evidence which mitigates the effect of the hearsay rule. The hearsay rule is an exclusionary principle of evidence which is justified on the basis that reported statements are untrustworthy evidence of the facts therein stated. To this rule there has developed a number of inclusionary exceptions, one of the least understood being that of *res gesta*. The misapprehension in relation to this doctrine is well expressed by Julius Stone in his article, *Res Gesta Reagitata*:[4]

> "No part of the common law is more dependent upon a consistent use of conceptions than the law of evidence, and in no part is the consistent use of them more difficult . . . No evidential problem is so shrouded in doubt and confusion as the doctrine of *res gesta*."

The Appellate Division cited *Howe* v. *Malkin* which well states the principle underlying the doctrine of *res gesta*.

> ". . . though you cannot give in evidence a declaration *per se*, yet when there is an act accompanied by a statement which is so mixed up with it as to become part of the *res gesta*, evidence of such statement may be given."[5]

It is submitted that the above principle formed the basis of the court's decision as great emphasis was placed upon the "continuous transaction" aspect of the evidence in question. The decision of Chief Justice Smith clearly supports this submission as Mr. Willey's statement was said to be "interwoven" and "closely associated" with his disappearance. Although the above definition correctly states the underlying principle of the *res gesta* doctrine it is not in itself a sufficient criterion for the application of the doctrine. The correct view, it is submitted, is that the doctrine of *res gesta* is comprised of several aspects and there is no single governing criterion in its application.

> . . . "Consistent reasoning is only possible on the condition that *res gesta* be analyzed into the various conceptions, and the rules appropriate to each conception be attributed to each. To attribute the rules governing one of them to all the others would be—fallacious . . . and its consequences have made law as to *res gesta* what it is; namely the lurking place of a motley crowd of conceptions in mutual conflict and reciprocating chaos."[6]

The application of the *res gesta* doctrine is essentially a two stage operation. Firstly it is necessary to ascertain the particular aspect within which the evidence falls and secondly the relevant criterion must be satisfied before the evidence is admitted. The failure of the Appellate

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2 [1963] 1 C.C.C. at 306.
3 *Id.*, at 307-08.
4 Stone, *Res Gesta Reagitata*, (1939) 55 L.Q.R. 66.
5 (C.P.D. 1878), 40 L.T. 196.
6 *loc. cit. supra*, n. 4.

Division to apply the proper criterion to the particular concept has resulted in an anomolous decision. An examination of the various circumstances in which the *res gesta* doctrine is applicable and the authorities upon which the court relied will, it is suggested, support this submission.

There are essentially three exceptions to the hearsay rule associated with the doctrine of *res gesta.*

(i) Statement of contemporaneous physical sensation

(ii) Statement of contemporaneous mental state

(iii) Spontaneous statements made in an emergency.

The evidence in question was clearly a statement of contemporaneous mental state and this was recognized by the Appellate Division when it stated the evidence was

> . . . relevant in considering the mental state and conduct thereafter of Willey.[7]

The principle underlying this exception is that

> "a person's declarations of his contemporaneous state of mind or emotion are admissible as evidence of the existence of such state of mind or emotion."[8]

To determine whether or not a statement of *intention* is admissible as the truth contained therein one must consider the purpose for which such statements are to be used. There are two distinct situations in which this exception of a contemporaneous mental state might arise. Firstly there is the case where the statement is used to show a state of mind at the time it was made. In this instance it is admissible under the doctrine of *res gesta* as an exception to the hearsay rule and is therefore admitted as the truth of the matter therein asserted. It is the existence of the intention that is relevant here and not whether it was to be fulfilled. In *Lloyd* v. *Powell Duffryn Steam Coal Co. Ltd.*[9] the deceased had told the witness that he considered the child in question his own and thus acknowledged paternity.

The evidence was relevant to the issue before the court and the House of Lords admitted the evidence as warranting an inference that he actually felt the child was his.

> "The case may be treated as authority for the proposition that verbal conduct relied on as equivalent to an assertion of the actor's contemporaneous state of mind does not come within the hearsay rule.[10]

Thus the statement of contemporaneous mental state was admitted under the doctrine of *res gesta* as evidence of his belief.

Secondly there is the case where the statement of intention is tendered to prove the performance of a subsequent act. The evidential question under discussion here falls squarely within this particular category and it was the failure of the court to recognize fully this situation which led to what appears to be the wrong result. The Appellate Division recognized correctly that the doctrine of *res gesta* is an exception to the hearsay rule and that the evidence in question related to Mr. Willey's contemporaneous state of mind. Having reached this point the court reasoned on the basis of authority that such evidence was admissible as it was part of a continuous transaction. It accepted

7 *Supra*, n. 1 at 308.

8 Cross, *Evidence*, 377 (1st ed. 1958).

9 (H.L.(E)) [1914] A.C. 733.

10 *op. cit. supra*, n. 8 at 355.

the Crown's contention that those events which transpired from the time of the phone call until the murder constituted an indivisible scheme. The court relied on the statements by Lord Normand in *Teper* v. *R.*,[11] and that of Cockburn C.J. in *R.* v. *Bedingfield*[12] to admit the evidence as being part of a continuous transaction.

> "The rule against the admission of hearsay evidence is fundamental. . . Nevertheless, the rule admits of certain carefully safeguarded and limited exceptions, one of which is that words may be proved when they form part of the *res gesta*. . . . it is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it, in time, place and circumstances, that they are part of the thing being done, and so an item or part of real evidence and not merely a reported statement.[13]
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> . . . and whatever may be said by either of the parties during the continuance of the transaction, with reference to it, including herein what may be said by the suffering party, though in the absence of the accused, during the continuance of the action of the latter, actual or constructive as *e.g.* in the case of flight or application for assistance—form part of the principal transaction, and may be given in evidence as part of the *res gesta*, or particulars of it."[14]

It is undeniable that both authorities relied upon by the court correctly state the principle in relation to the doctrine of *res gesta*. There is however, one serious consideration which, it is suggested, the court in the *Willey* case overlooked. The authorities relied upon related to spontaneous statements made in an emergency and have no bearing on the particular category within which the evidence in the present case falls. This is what Julius Stone meant when he said that *res gesta* is composed of several conceptions and that rules appropriate to each must be attributed to each. Failure to follow this proposition negatives consistent reasoning.

What then is the proper criterion to determine whether a statement of intention is admissible to prove the performance of a subsequent act? The test is one of relevance and it is upon this basis that the authorities have held against the admissibility of such statements.

> "The admissibility of evidence—depends first on the concept of relevance of a sufficient high degree and secondly on the fact that the evidence does not infringe any of the exclusionary rules that may be applicable to it."[15]

Thus, in order that evidence be admitted, the tests of both relevance and non-infringement of the exclusionary rules must be satisfied. The absence of discussion by the court in relation to relevance and the appropriate authorities leads one to conclude that the first barrier was ignored, and that the second hurdle was the prime concern. It is submitted that the court was incorrect in so doing and the proposition enunciated is a reflection of this error. The court held that a statement by a person that he *intends* to perform an act is admissible as evidence of its actual performance. This is an astounding proposition which contradicts an overwhelming majority of English and Canadian cases which never permitted such evidence to pass the hurdle of relevance.

Before examining the authorities which support the foregoing submission it is proposed to outline briefly the question of relevance in relation to the issue before the court. In *Hollingham* v. *Head*[16] the

11 (P. C. (Br. Guiana)) [1952] A.C. 480.
12 (Assizes 1879), 14 Cox C.C. 341.
13 *Supra*, n. 11.
14 *Supra*, n. 12.
15 *op. cit. supra*, n. 8 at 20.
16 (1858), 4 C.B.(N.S.) 388, 140 E.R. 1135.

defence to an action for the price of guano was that an express condition in the contract of sale provided that the goods should be equal to Peruvian guano. The defendants wished to call witnesses to swear that the plaintiff had entered into contracts with other customers containing a term similar to that for which he contended, but the courts held he was not entitled to do so.

> "It may be often difficult to decide upon the admissibility of evidence, where it is offered for the purpose of establishing probability, but to be admissible it must at least afford a reasonable inference as to the principal matter in dispute."[17]

On the basis of this reasoning, even though it could be proved that Mr. Willey was always a man of his word, and that he had never missed an appointment in thirty years, it would still not prove that Mr. Willey had in fact carried out his intention on this occasion. Such declaration of intention was therefore irrelevant. The following authorities support the above proposition.

In *R.* v. *Wainwright*[18] the prosecution sought to call a witness to say that the girl, of whose murder the accused was charged, told her on leaving the house that she was going to the accused's premises. The court rejected the contention of the Attorney General who argued that the statement was part of the act of leaving and thus admissible as part of the *res gesta*. Cockburn C.J. held that:

> "The fact that some statement was made is undoubtedly admissible. It was no part of the act of leaving, but only an incidental remark. *It was only a statement of intention which might or might not have been carried out.* You may get the fact that on leaving she made a statement, but you must not go beyond."[19] [Emphasis added]

In *R.* v. *Thomson*[20] the accused was charged with the abortion death of a woman and in defence tendered evidence of a conversation between the deceased and a witness. The deceased had stated that she intended to perform the abortion on herself and later said she had in fact done so. The Court of Appeal upheld the ruling that such evidence was inadmissible on the basis of *R.* v. *Wainwright*,[21] thus holding that declarations of intention are irrelevant and not evidence of the truth therein stated. A similar result was reached in *Cuff* v. *Frazee Storage and Cartage Company*.[22] A witness questioned at an earlier trial was not produced at a subsequent trial as counsel informed the court that the witness was out of the jurisdiction. Evidence to support this allegation was tendered in the form of a statement by the witness to a third party that he was going to the United States. The evidence was held to be inadmissible as it was not of sufficent relevance to be admitted.

In that case the evidence was inadmissible as it did not satisfy the requirement of relevance. In other words the evidence failed to satisfy the initial barrier as to the admissibility of evidence; thus the question of hearsay and the inclusionary rules was not dealt with at all. In none of the cases was there a sufficient probability that the expressed intention was carried out. On the basis of this reasoning, it is submitted, that the statement made by Mr. Willey should not have been admitted.

17 *Ibid.*
18 (Cent. Crim. Ct. 1875), 13 Cox C.C. 171.
19 *Id.* at 172.
20 (C.C.A.) [1912] 3 K.B. 19.
21 *Supra*, n. 18.
22 (1907), 14 O.L.R. 263.

Two cases to the contrary should be mentioned. In *R.* v. *Buckley*[23] the deceased police officer made a statement to his superior in the morning that he intended to go in search of the accused after dark. The court in this early English case admitted the statement to show the probability that the deceased carried out his intention. The decision is in direct conflict with the later authorities and it cannot be justified on the basis that the statement was a declaration in the course of duty. There was no evidence of the existence of such a duty and also the statement related to a future act. The case is an exception to the prevailing view in the English and Canadian cases and is regarded by authorities as an anomalous decision. The United States Supreme Court in *Mutual Life Insurance Company* v. *Hillmon*[24] admitted a letter written by the deceased that he intended to go on a trip with the accused as evidence tending to prove that he in fact did so. The court held the evidence relevant because

(*a*) "The declarations in the letter tended to prove Walter's intention of going, and of going with Hillmon."

(*b*) thus rendering it "more probable that he did go and that he went with Hillmon".

(*c*) which increased probability in turn made possible the inference that he was murdered.[25]

It is not intended here to launch into a detailed discussion as to the degree of relevance necessary before a statement is admissible. The overwhelming majority of Canadian and English cases express the better view and no better criticism can be made of the *Hillmon* case's reasoning than the remark by Mr. J. M. Maguire in *The Hillmon Case—Thirty-Three Years After.*

> "If the state of mind which we call intention, proved in the standard manner by declaration of the person entertaining the intention, is considered material to an effort to prove the occurrence of the intended act, so likewise is the state of mind which we call memory, similarly proved, to be considered material to an effort to prove a past fact. This proposition is disquieting because it undermines our whole general doctrine of excluding hearsay evidence."[26]

The above quotation well expresses the illogical position which can be reached on the basis of the rationale in the Hillmon case. The essential question in admitting declarations of intention is clearly one of relevance and it is submitted that the reasoning used in *R.* v. *Wainwright*[27] and later cases has correctly stated the principle to be applied.

It is respectfully submitted, therefore, that the court in *R.* v. *Workman and Huculak*[28] has admitted irrelevant evidence owing to the misapplication of the *res gesta* doctrine. This resulted because of the failure to recognize that the doctrine of *res gesta* is composed of several distinct concepts, and that considerations in relation to one have no application in relation to another. The evidence in question concerned the contemporaneous mental state of the accused, and in particular the case where a statement of intention is tendered to prove the performance of a subsequent act. The court correctly recognized the particular concept

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23 (Assizes 1873), 13 Cox C.C. 293.

24 (1892), 145 U.S. 285.

25 Maguire, *The Hillmon Case—Thirty-three Years After*, (1925), 38 Harv. L. Rev. 709.

26 *Ibid.*

27 *Supra*, n. 18.

28 *Supra*, n. 1.

but was mistaken in the choice of the proper criterion. The Appellate Division used the criterion of the 'continuous transaction' which is concerned with spontaneous declarations made in an emergency. The criterion which should have been applied was that of relevance and had this been done it is exceedingly doubtful if such a decision would have been rendered. The confusion which exists and persists in applying the doctrine of *res gesta* results from the application of the doctrine as a single criterion whereas the correct view is to apply the relevant criterion to the various concepts. As stated earlier,

> "... it must be obvious that consistent reasoning is only possible on the condition that *res gesta* be analyzed into the various conceptions, and the rules appropriate to each conception attributed to each."[29]

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[29] loc. cit. supra, n. 4.