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# Implied Hearsay

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## Implied Hearsay

**L**AWYERS sometimes exaggerate the significance of a single sentence or footnote in a court opinion.<sup>1</sup> At other times a single phrase may turn out to be a time bomb which subsequently explodes with far reaching results. Court watchers thus spend considerable time trying to discern what is implied within the literal language of a court's opinion. It is no small irony that one of the latest implications in a Virginia Supreme Court decision relates to the implications contained within an out-of-court statement that cannot be literally defined as hearsay. A modification of the hearsay rule, or at least the hearsay rule applicable to child molestation cases, may be contained within a single paragraph of the Virginia Supreme Court's opinion in *Church v. Commonwealth*.<sup>2</sup>

In *Church* the defendant was charged with sexual offenses against a seven year old girl. The victim did not appear at trial, but the victim's mother testified that the child became preoccupied with sex and told her mother that sex was "dirty, nasty, and it hurt." Defense counsel's hearsay objection to this statement was overruled. In its review of the case, the Virginia Supreme Court applied the classic definitions of hearsay and non-hearsay.

**HEARSAY**—extra-judicial statements "offered for a special purpose, namely, as assertions to evidence the truth of the matter asserted."<sup>3</sup>

**NON-HEARSAY**—out-of-court statements not offered to show their truth are not subject to the rule against hearsay, and are thus admissible if relevant.<sup>4</sup>

The Court noted that the Commonwealth did not offer the child's statement to prove the literal contents of the assertion that sex is "dirty, nasty, and it hurt." Rather the statement showed the child's attitude toward sex, "an attitude likely to have been created by a traumatic experience. . . . Thus, the child's out-of-court statement was not hearsay, but was admissible as circumstantial evidence tending to establish the probability of a fact in issue."<sup>5</sup> I.e. the *corpus delicti* of a sexual offense.<sup>6</sup> The Court's brief analysis correctly applied the literal definition of hearsay to the literal contents of the statement, but the Court did not address the more subtle aspects of applying the hear-

say rule to assertions implied within the literal contents of a statement.

Implied assertions focus, not on the literal contents of a statement, but upon the message impliedly contained within such statements. Certain implied assertions are so obvious that common sense dictates that they be recognized as hearsay. For example: A potential buyer asks: "Is this pure heroin?" To which the declarant responds: "Do cops wear blue?" Counsel offering this statement may contend that it is not hearsay because it is not offered for the truth of the literal statement that police wear blue. The mere uttering of such words is seen as an objective fact from which the jury may or may not infer something other than the truth of the matter asserted. E.g. infer that the heroin is pure. Although the inference is rather obvious, this does not convert the inference into an assertion by the declarant. Under this analysis, if the jury is not asked to accept the literal truth of the matter asserted, then the statement cannot be classified as hearsay.

Such superficial analysis is not convincing because counsel, judge, and jury will recognize the clear message contained between the lines of the declarant's colorful language. Common sense dictates treating such statements as hearsay. Unfortunately, implied assertions also come in much subtler forms than the above hypothetical. In many situations it is difficult to determine when it is appropriate to take the declarant literally, and when it is necessary to "read between the lines" in order to decipher what the declarant "really" meant.

Consider the following hypothetical:<sup>7</sup> The defense offers the statement of the alleged homicide victim who hugged the defendant and said: "I love you." Defense counsel may argue that such a statement is not hearsay because it is not offered for the truth of the literal contents of the statement. (Love being irrelevant to a homicide prosecution) Counsel will maintain that the mere uttering of the words (and the hug)<sup>8</sup> is an objective fact and is thus circumstantial evidence from which the jury may or may not draw inferences. E.g., if a victim would not love her assailant, then it can be inferred that the defendant is not the assailant. Defense counsel will point out that the

prosecution is free to argue possible counter inferences. E.g., the expression of love may have been an act of forgiveness and thus does not disprove the attack. Under the defense analysis the jury is not considering hearsay, but is discharging its traditional function when considering circumstantial evidence. I.e., the jury must choose between competing rational inferences.

The prosecution, however, may not accept a characterization of the "I love you" statement as non-hearsay. The prosecution may argue that the inference to be drawn by the jury is the very message contained between the lines of the declarant's literal statement. Thus the defense is seen to introduce an out-of-court statement that the defendant is not the assailant, offered to prove that the defendant is not the assailant. The difficult question for the judge is whether the assertion implied within the statement is hearsay, or whether the implication is merely a permissible inference to be accepted or rejected by the jury.

Applying the above considerations to the *Church* case, the Virginia Supreme Court did not address the assertion impliedly contained within the child's statement that sex was "dirty, nasty, and it hurt." What was the child trying to communicate to the Mother? If the child was "really" saying I think sex is nasty *because* I have had a traumatic sexual experience, then this is the very purpose for which the statement was admitted. The jury was asked to accept the truth of the child's out-of-court statement that she had had a traumatic sexual experience. When the statement is offered for the truth of the implied assertion the statement must be classified as hearsay.

If the child's statement is not offered for the truth of the implied assertion, then the mere uttering of the statement must somehow be probative of an operative issue. From the uttering of the statement the court inferred the child's "attitude toward sex,"<sup>9</sup> and from the existence of that attitude the court inferred the existence of a factual basis for the attitude (i.e., the occurrence of the sexual act).<sup>10</sup> Stringing these inferences together is a round-about way of reaching the same point reached by the concept of implied assertions. Under either analysis the child's statement is relevant only if the statement is accepted as evidence that a sexual act occurred. Hearsay analysis would regard the statement as *direct* evidence of the act, while non-hearsay analysis would regard the statement as *circumstantial* evidence of the act. This somewhat artificial distinction between direct and circumstantial evidence should not determine the evidence's admissibility. Yet that is precisely the result reached in *Church*. Had the statement been classified



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as hearsay, the statement would not be admitted in the absence of cross-examination to test the child's sincerity, memory, narration, and perception of the alleged sexual act.

The failure to permit cross-examination of the declarant lies at the heart of the hearsay rule, but the dangers of denying cross-examination are also present in *Church's* characterization of the statement as non-hearsay. If the child were on the witness stand the child could be asked: Why do you think sex is nasty? The possible answers include: (1) because such and such (the traumatic sexual experience) occurred; (2) because one of my friends said so; or (3) because I peeked in the bedroom and saw Mommy and Daddy doing nasty things to each other. These quite different answers demonstrate that it is not the child's attitude toward sex that is relevant. Rather, it is the factual basis of that attitude which may or may not be rele-

vant. The factual basis of that attitude cannot be developed when cross-examination is denied. Cross-examination is needed to test the child's sincerity, memory, narration, and perception of the factual situation which allegedly caused the child's attitude toward sex. The child's statement should be classified as hearsay in order to protect the fundamental right of cross-examination.

If a superficial formulation of the hearsay rule is mechanically applied, the rule may lead to the result in the *Church* case. If, however, the purpose of the hearsay rule (protection of the right of cross-examination) is given proper consideration, then the result in *Church* is difficult to defend in terms of Evidence Law. There are of course many legitimate interests in seeking to protect a victimized child from enduring the additional trauma of vigorous cross-examination.<sup>11</sup> Such policy considerations may justify the result reached in *Church*. But the decision in *Church* is not openly based on a legitimate concern for the child. The decision is phrased wholly in terms of a general application of the hearsay rule.

It is unfortunate that the Court did not utilize the *Church* case to clarify the Virginia position on implied assertions. The policy considerations in *Church* make it difficult to ascertain whether the decision was merely a hard case which led the Court to modify the hearsay rule in order to protect a young child, or whether the analysis in *Church* forbodes a relaxation in the general prohibition against the admission of hearsay evidence.<sup>12</sup>

#### FOOTNOTES

1. The famous footnote 4 of *United States v. Caroline Products Co.*, 304 U.S. 144 (1938) has produced volumes of analysis.

2. V.L.R. (1985).

3. *Church* at (original emphasis).

4. *Church* at.

5. *Church* at.

6. The *corpus delicti* relates to the body of the crime regardless of the identity of the perpetrator. Thus the child's statement is evidence that the crime occurred, but the statement itself does not link the defendant to the crime.

7. This hypothetical is suggested in Broun and Meisenholder, *Problems in Evidence* 97 (West 2nd ed.). The Virginia Supreme Court is not alone in classifying such situations as non-hearsay. See, e.g., *Bridges v. State*, 247 Wis. 350, 19 N.W.2d 529 (1945).

8. Assertions may be contained within conduct as well as within words. The hug may simply be another way of saying "I love you." The Federal Rules of Evidence provide that nonver-

bal conduct is a statement for purposes of hearsay only when the person intends the conduct as an assertion. Fed. R. Evidence 801 (a).

9. If the statement merely establishes the child's state of mind, it is academic whether the statement is classified as non-hearsay or falls within the State of Mind exception to the hearsay rule. See *United States v. Southland Corp.*, 760 F.2d 1366 (2nd Cir. 1985). (An outright assertion of one's existing state of mind is a hearsay exception. A statement which provides the basis for drawing a circumstantial inference as to the declarant's state of mind is non-hearsay.) Whether the child's statement is labelled non-hearsay state of mind or the state of mind exception to the hearsay rule, the inferences to be drawn from that state of mind remain the same. See footnote 10.

10. The inferences to be drawn from the child's statement would not have changed if the Court had invoked the state of mind exception to the hearsay rule. State of mind is admissible direct evidence whenever the declarant's state of mind is an operative issue of the case. This is not applicable in *Church* because mental distress is not an element of the offense charged. State of mind is also admissible as circumstantial evidence when the state of mind supports inferences which are probative of an operative issue. The child's state of mind (whether it be labelled non-hearsay or a hearsay exception) is probative of the *corpus delicti* only if the court accepts the underlying premise that every state of mind inherently has an accurate basis in fact. With no independent evidence of the factual foundation, can the mere existence of a state of mind support the inference that there is a factual basis for that state of mind? The answer must be no, because an affirmative answer produces ludicrous results. I.e., an in-court expression of state of mind must be based on an adequate foundation and must be subject to cross-examination, while an out-of-court expression of state of mind would not have to meet these requirements. The Court would thus reach the anomalous result that the requirements for admitting out-of-court statements are less stringent than the requirements for in-court testimony.

11. See generally, Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 *Columbia L. Rev.* 1745 (1983).

12. Would the Court apply the *Church* analysis to hearsay questions not involving a young victim of a sexual offense? For example: The declarant made an out-of-court statement that "the traffic light was green." The statement is not offered to prove the literal truth that the light was green. Rather, the statement is offered to establish the declarant's "attitude" (state of mind) regarding the light. It can then be inferred that this attitude must have been based on some experience, i.e., viewing the traffic light. Therefore, the statement is admissible to establish the "probability" that there was an operating light at the intersection. If the operation of the light is a material issue because of a party's contention that the light was inoperative, then the declarant's statement is circumstantial evidence that the light was in working order. This hypothetical use of "non-hearsay" presents the same dangers inherent in the denial of cross-examination. E.g., if the declarant were on the witness stand and asked why he thought the light was green, his answer might be: (1) because I saw it; (2) because someone told me; or (3) because green is my favorite color.