CURRENT TRENDS IN THE LAW OF EVIDENCE†

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Sir Winston Churchill is said once to have returned a pudding to the chef on the ground that it lacked a theme. The same want exists in the various forces which influence the law of evidence and its future.

In certain respects the subject is quite technical — as much lawyers' law as anything could be, and as little to be governed by the convenience or concerns of anyone but practising lawyers engaged in litigation. But some parts of the subject are moulded by pressures which do not proceed from litigants or their advisers — the interest of the state and others in keeping some information confidential, the interest of civil libertarians in reducing police power, the interest of women's groups in destroying evidentiary barriers to rape convictions and evidentiary rules which may cause pain to rape victims. And there is a diversity of forms through which legal change may occur: some new rules may aptly be introduced by judicial means, others require Parliamentary action, and others, it seems, call for a long period of public education and a series of gradual statutory reforms. The reasons offered for changing an evidentiary rule are also diverse: some proposed changes are intended to make more evidence admissible, as with hearsay reform; some to remove internal anomalies in the law, as with permitting a witness's previous statements to be evidence of the truth of the facts asserted; some to reduce jury confusion, as with corroboration reforms; some to minimize jury prejudice, as with attempts to prevent disclosure of the accused's record. The basis upon which changes should be considered excites differences of opinion: should reforms only be proposed after a long consideration of the effects of the present rules on actual or mock juries,[1] which may be expensive or even impossible, or should reliance simply be placed on considerations of principle

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[1] E.g., H. Kalven and H. Zeisel, *The American Jury* (1966); S. McCabe and R. Purves, *The Jury at Work* (1972).

and the experience and intuition of those involved in the system?[2]

In considering some of the major current trends in the law, it is necessary to be very selective. What follows attempts to avoid undue detail, and the discussion of already much-discussed problems; and to avoid dealing with areas of the law which are well-settled or inactive, however much they may in fact merit reform. The result is an unrealistic picture. The main attention will be given to the hearsay rule and its exceptions, particularly the confessions exception; corroboration; evidence of identity; improperly obtained evidence; and the problem of the accused's record.

The Hearsay Rule and its Exceptions; Confessions

The judicial and legislative reform of the rule against hearsay is a matter of immense practical importance. But much less space will be devoted to it here than it merits, because the problems are well known. There is, of course, great pressure for reform, because of the difficulty of justifying the present hearsay rules. The want of an oath is not usually now regarded as a guarantee of unreliability: much unsworn and uncross-examined evidence may be worth acting on. Many hearsay statements are in fact the best evidence if their makers are dead or not easily to be made available. The dangers of mistakes arising through repetition apply to oral hearsay, but much less to written. Modern jurymen, properly directed, may be thought to have a greater capacity to assess hearsay evidence than their seventeenth and eighteenth century predecessors. Expense and the desire to use only the best evidence would make the parties unlikely to call superfluous evidence if hearsay became more widely admissible. The possible risk that if the hearsay rule and the rule against admission of a witness's prior statements were relaxed there would be a wholesale manufacture of evidence is usually thought to be overrated. The risk of surprise, if it exists, could be overcome by notice procedures, compulsory or semi-voluntary (i.e., subject to loss of costs or adjournments). The effect of the traditional law is to exclude much reliable evidence, to increase the cost of proving a case, to inconvenience busy witnesses, and to disturb the natural flow of a witness's testimony. The complications, uncertainties, anomalies, and irrationalities which flow from the exceptions to the rule are striking even by the standards of the law of evidence. There are great problems in jury direction as to the difference between a statement going to credibility only and a statement admitted as evidence of the facts it asserts.

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[2] The proposers of the Californian Code of Evidence have been strongly attacked for taking the latter course (K.W. Graham, "California's 'Restatement' of Evidence. Some Reflections on Appellate Repair of the Codification Fiasco" (1971) 4 *Loyola Univ. L.R.* 279), as was the 11th Report of the English Criminal Law Revision Committee, *Evidence (General)* (*Cmnd.* 4991, 1972) (C. Tapper, "Evidence (General). Eleventh Report of the Criminal Law Revision Committee" (1972) 35 *M.L.R.* 621 at 622-23; C. Tapper "Criminal Law Revision Committee 11th Report: Character Evidence" (1973) 36 *M.L.R.* 56 at 56-57; W. Twining. "The Way of the Baffled Medic: Prescribe First; Diagnose Later — if at all" (1973) 12 *J.S.P.T.L.* 348 at 354).

It seems that courts bound by the House of Lords are now probably precluded from effecting any major change such as the creation of new common law exceptions for business records.[3] Change can now only occur in four ways.

The first way is to tinker with the details of particular exceptions. Hence, the House of Lords has held that in order to render a confession inadmissible an inducement need not "relate to the prosecution".[4] The Privy Council has perhaps cast doubt on the rule that an inducement must proceed from a "person in authority".[5] Though it has been said in the House of Lords that the law of inducements is "not wholly rational . . . [and] only Parliament can modify it now",[6] one may ask, what is "modification"? In that very case the House adopted a requirement that, on the facts of the particular case, the inducement must be shown to cause the confession; a requirement which mitigates one defect of the law, namely that very trivial inducements can be held to have the effect of excluding a confession.

Secondly, the rigours of the hearsay rule can be softened by Nelsonian judges who do not exclude hearsay evidence not objected to by the parties and who do not remind parties of its nature.[7] The rigours of the rule can also be softened by like-minded judges who press parties not to insist on a hearsay objection which seems technical or pettifogging if the evidence is reliable; and by counsel who anticipate such a response to an objection.

Thirdly, we must consider that potent agent of legal change, incomprehension or misapplication of existing rules. The true ambit of the hearsay rule has been a matter for much debate. We have a more or less agreed definition, but there is much dispute as to its true application. An out-of-court statement is "hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the

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[3] *Myers* v. *Director of Public Prosecutions* [1965] A.C. 1001; *cf. Ares* v. *Venner* (1971) 14 D.L.R. (3d) 4 (business records); *Smith* v. *Police* [1969] N.Z.L.R. 856 (witness's statement of his own age admitted); *Jorgensen* v. *News Media (Auckland) Ltd.* [1969] N.Z.L.R. 961 (rule in *Hollington* v. *F. Hewthorn & Co. Ltd.* [1943] K.B. 587 abolished). A limited exception has been recognized in the High Court by which the results of a system of accounting are admissible "as proof, not of the occurrence of some particular fact recorded or indicated by a specific entry or narration, but of the financial progress or result of business operations conducted on a large scale": *Potts* v. *Miller* (1940) 64 C.L.R. 282 at 303, *per* Dixon, J. See also *R.* v. *Seifert* (1956) 73 W.N. (N.S.W.) 358, doubted in *Commissioner for Motor Transport* v. *Collier-Moat Ltd.* (1959) 60 S.R. (N.S.W.) 238 at 243.

[4] *R.* v. *Harz and Power* [1967] 1 A.C. 760.

[5] *Deokinanan* v. *R.* [1969] 1 A.C. 20 at 32.

[6] *Director of Public Prosecutions* v. *Ping Lin* [1975] 3 All E.R. 175 at 182 *per* Lord Hailsham; see also at 178-79.

[7] It has been argued that such evidence is inadmissible: W. N. Harrison, "Hearsay Admitted Without Objection" (1955) 7 *Res Judicatae* 58; *Collins* v. *Morgan* [1972] *A.L.M.D.* 4544 (Tasmania Supreme Court, Chambers, J.). The contrary view is preferable, if only to prevent a large jump in the number of possible appeals based on the hearsay rule.

evidence, not the truth of the statement, but the fact that it was made".[8] A hearsay purist may find much that is objectionable in the reasoning of decisions which seek to apply such a definition — decisions, however, which are perfectly just in their result, in the sense that they add to the stock of reliable evidence before the court.

(a) The narration to the court by a police officer of an interpreter's translation of an accused person's confession in a language unknown to the officer has been held admissible by the High Court,[9] the South African Appellate Division[10] and the British Columbia Court of Appeal[11]. But a purist might say that the police officer is putting forward the interpreter's statements as evidence that the accused made that confession, a matter of which the policeman has no first-hand knowledge.

(b) The English Court of Criminal Appeal has held that a used air ticket made out in the name of Rice for a particular flight was evidence that a man called Rice travelled on that flight.[12] Yet on one view, the ticket, reliable evidence though it may have been, should have been excluded, for it would seem to have contained a booking clerk's report of what someone else said to him when booking the ticket, and to be tendered to prove the truth of what was said.

(c) A statement made by a person not called as a witness who said he was an agent of the accused has been held admissible by the English Queen's Bench Divisional Court to prove that he was an agent for the purpose of the vicarious admission rules.[13]

(d) A telephonist's evidence that a hysterical female voice said "Get me the police please" in a call from the accused's house about the time the accused's wife was shot by a bullet fired from the accused's gun has been held to be hearsay by the Victorian Full Court[14] so far as it was tendered to prove the bad relations between the spouses at the time, but not by the Privy Council.[15] The words were said only to be "verbal facts" or "acts" showing the caller to be afraid and were said not to be tendered as evidence of the truth of some proposition implicit within them. But a purist might ask: what is the relevance of proving fear if not to show that the caller

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[8] *Subramaniam* v. *Public Prosecutor* [1956] 1 W.L.R. 965 at 970, *per* Mr. L.M.D. De Silva.

[9] *Gaio* v. *R.* (1960) 104 C.L.R. 419; *cf. R.* v. *Wong Ah Wong* (1957) 57 S.R. (N.S.W.) 582; *R.* v. *Attard* (1958) 43 Cr. App. Rep. 90.

[10] *R.* v. *Mutche* 1946 A.D. 874.

[11] *R.* v. *Kores* (1970) 15 C.R.N.S. 108, reversing the trial judge: [1970] 5 C.C.C. 55.

[12] *R.* v. *Rice* [1963] 1 Q.B. 857. *Cf. Kenny* v. *Hornberg* (*No.* 2) (1963) 37 A.L.J.R. 162; *Re Gardner; ex parte R.J. Gardner Pty. Ltd.* (1967) 13 F.L.R. 345; *R.* v. *Clune* (*No.* 1) [1975] V.R. 723.

[13] *Edwards* v. *Brookes (Milk) Ltd.* [1963] 1 W.L.R. 795; *cf. Chappell* v. *A. Ross & Sons. Pty. Ltd.* [1969] V.R. 376.

[14] *R.* v. *Ratten* [1971] V.R. 87.

[15] *Ratten* v. *R.* [1972] A.C. 378.

believed, and was "impliedly asserting", that she was about to be attacked?

(e) Police officers who answer telephones at premises allegedly used for illegal betting are sometimes allowed to tell the court what the callers said on the ground that the statements are "operative words" or "verbal acts".[16] Yet if "implied assertions" are hearsay, these statements must be hearsay, for the conclusion that the premises are used for betting depends on tender of the statements as evidence of the truth of the callers' belief that the premises are being so used.

In all these instances of possible error, the purist objection is not necessarily to the evidence being admitted; it is to the evidence being admitted without an existing exception being pointed to or a new one created explicitly.

A fourth way of changing or modifying the hearsay rule is by Parliamentary legislation. What kind of statute should be used to reform the hearsay rule? The traditional technique has been to create piecemeal exceptions as occasion demands. Thus *Myers* v. *Director of Public Prosecutions*[17] was speedily enough reversed.[18] The drawback is that the law becomes complicated by a long list of overlapping and therefore sometimes irrational exceptions;[19] and the judges are left without a means of generating new exceptions through some general principle of trustworthiness. A second possibility is the complete abolition of the hearsay rule, leaving admissibility to depend entirely on relevance (perhaps coupled with a discretion to exclude unreliable evidence). This is unlikely to be acceptable to legislatures. Indeed there are serious dangers in such a course. Multiple oral hearsay will quite often be of dubious reliability. The task of distinguishing between wholly unreliable evidence and that which is worth considering or leaving to the jury would increase judicial burdens. The unregulated nature of the system would produce great uncertainty for the parties in preparing their cases. A third possibility is to make the law of hearsay entirely statutory and to bring some greater breadth and consistency into the exceptions.

In the last decade many statutes have been enacted or proposed. The normal statute makes admissible first-hand oral hearsay emanating from persons who cannot testify for some good reason; sometimes permits documentary hearsay to be more widely admitted, particularly if it is computer-produced or forms part of a business record;[20] and attempts occasionally to make the previous consistent and inconsistent statements

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[16] E.g., *McGregor* v. *Stokes* [1952] V.L.R. 347.

[17] [1965] A.C. 1001.

[18] E.g., Criminal Evidence Act, 1965 (U.K.); Evidence (Amendment) Act, 1966 (N.S.W).

[19] The American Uniform Rules list thirty-one.

[20] Business records are made admissible on a very generous basis by the Evidence (Amendment) Act 1976 (N.S.W.).

of witnesses evidence of the truth of the facts asserted.[21] But many more specific reforms have been proposed to meet particular problems. They include making admissible works of authority on historical, scientific and like matters; statements made on goods in the course of their manufacture or distribution; and statements on matters of public interest, or interest to persons in particular occupations, contained in registers, periodicals, directories, and similar published compilations. In order to ensure that the hearsay rule and its exceptions do not remain rigid and inflexible, it has been proposed that there should be a discretion to admit any reliable statement, and (in criminal proceedings) any statement which it was not reasonably open to the accused to tender under any exception and which is sufficient to justify his acquittal.[22]

The vexed problem of confessions in criminal cases usually receives special treatment. The tendency is to make the rule less kind in one respect to the accused by making the likelihood of unreliability the sole factor relevant to the admission of confessions not induced by violence.[23] A more novel proposal turns on the need for better resolution of conflicts between accused persons and the police as to whether confessions were made and, if so, what was said, and what the surrounding circumstances were. These conflicts at present have to be resolved on the *voir dire,* with its undesirable interruption of the main trial. They consume much time and money. It cannot be easy to determine who is telling the truth. It is tempting for an accused person to allege police coercion and misconduct even if the police are likely to disprove this, so that the public reputation of the police tends to decline even if the court believes their story. The Australian Law Reform Commission's draft Bill therefore requires the jury to be warned that where a disputed confession has been admitted they should, in considering whether it was in fact made, have regard to:

(a) whether the accused person acknowledged its making in writing;

(b) whether it was mechanically recorded;

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[21] Examples of the statutes include Civil Evidence Act 1968 (U.K.); Evidence Ordinance 1971 (A.C.T.), ss. 21-45; Evidence (Documents) Act 1971 (Vic.); Evidence Act 1974 (Tas.); Ghana Evidence Decree 1975 (enacted but speedily repealed); Evidence (Amendment) Act 1976 (N.S.W.). Examples of proposed Reforms may be found in the New Zealand Report of the Torts and General Law Reform Committee on *Hearsay Evidence* (1967); Scottish Law Commission; *Draft Evidence Code (First Part)* (Memorandum No. 8); English Criminal Law Revision Committee 11th Report: *Evidence (General)* (*Cmnd.* 4991, 1972); Criminal Law and Penal Methods Reform Committee of South Australia, 3rd Report on *Court Procedure and Evidence* (1975); Law Reform Commission of Canada, draft Code (1975); Queensland Law Reform Commission, Report on *The Law Relating to Evidence* (1975); N.S.W. Law Reform Commission Working Paper on *The Rule Against Hearsay* (1976). Reference may also be made to the most recent American code, the Federal Rules of Evidence (1975).

[22] See N.S.W. Law Reform Commission Working Paper on *The Rule Against Hearsay* (1976), paras. 3.77-3.84.

[23] See Evidence Ordinance 1971 (A.C.T.), s. 68, following Evidence Act 1958 (Vic.), s. 149. See also Model Code, r. 505 (a)(ii); American Uniform Rules, r. 63(6); Australian Law Reform Commission Report No. 2, *Criminal Investigation* (1975), draft s. 34(2)(b); N.S.W. Law Reform Commission Working Paper, *The Rule Against Hearsay* (1976), draft s. 14J(4)(d)(ii).

(c) whether it was made in the presence of a magistrate, or the accused person's friend or relative, or one of a class of persons declared appropriate by regulation, or a lawyer present at the request of such a person;

(d) whether the accused read the confession and assented to it in the presence of a person mentioned in (c) above.[24]

No doubt a court would take similar factors into account in deciding voluntariness on the *voir dire,* for express statutory duties are imposed on the police to carry out the procedures indicated. Further, the court has a discretion to exclude a confession obtained where it was practicable to use the suggested safeguards but none of them is employed. It may be thought that scope for disputes between prosecution and accused about the collateral issue of practicability will remain; that room for other forms of corroboration should be left; and that something should be done to meet the case of an accused person who, though he knows well what happened at the interview, refuses to testify about what he knows while his counsel attacks the police.

The N.S.W. Law Reform Commission has made a proposal which is similarly motivated but slightly different in form. Section 14J(4)(d)(iii) of the proposed Evidence Act, Part IID, requires (*inter alia*) that the party tendering admissions should prove that they are reliably reported to the court. Under s. 14J(5), the onus of proof under s. 14J(4)(d)(iii) is to be reversed where the party tendering the admission proves that —

(a) the admission was mechanically recorded;

(b) the admission was made in the presence of a person independent of the prosecution;

(c) the admission was put to the accused in the presence of such a person and the accused assented to it;

(d) a record, written and signed by the accused person, of any questions and answers leading to the admission and the admission itself is proved; or

(e) the reliable reporting of the admission is otherwise corroborated.

At present the legal burden of proving that the admission should be received remains on the prosecution even if it produces a signed record of interview written by the accused (and not all records of interview are so written). But the adverse effect of (d) on the accused would be slight as a practical matter, because, other things being equal, the production of such a record must go far towards discharging the prosecution's legal burden of proving that the confession was made. A typed record signed by the accused might not.

One possible effect of the above proposals would be to compel an accused person to support his allegations of fabrication rather than to rely on the burden of proof in his favour. He may be able to do so without testifying, but the writer cannot see that an injustice would result

[24] See draft s. 34(4).

from compulsion in this sense to answer the case against him, particularly since the jury is absent. Compulsion to testify generally is doubtless another matter.

Another method usually canvassed to deal with the problem of voluntariness is a requirement of compulsory taperecording. Only a minority of three members of the English Criminal Law Revision Committee were prepared to recommend this.[25] The arguments for and against are too well known to be repeated here. The N.S.W. Law Reform Commission did not propose compulsion, though an incentive to the use of tape-recording is given by the reversed burden of proof proposal just discussed. The Australian Law Reform Commission proposed that the use of tape-recorders be compulsory where it is not "in all the circumstances impracticable" and where an independent witness is not present.[26] It proposed safeguards to overcome some of the dangers of the recording being tampered with and the fact that it may contain irrelevant, defamatory, prejudicial or otherwise inadmissible matter; and it proposed destruction of recordings not used in prosecutions.

Another possible device to overcome the confession problem is to provide that confessions should be inadmissible unless made before a magistrate. This too has not found favour among law reform agencies;[27] the familiar arguments against it have outweighed those for it. However, it exists in various parts of Asia and Africa under the Indian Evidence Act 1872, and in many cases in Italy;[28] and in France police interrogation occurs only at the delegation of a magistrate (*juge d'instruction*).

There are also advocates of an importation of the rather cumbersome American law on confessions. Apart from the common law voluntariness doctrine, the American law of confessions can be summarized in four propositions.

(a) The *McNabb-Mallory* rule requires federal courts to exclude even voluntary confessions if they were made during a period of illegal detention.[29] The majority of state courts have not adopted this rule.

(b) Confessions obtained in consequence of a search and seizure which infringes the Fourth Amendment to the Constitution may be excluded.[30]

(c) The Fifth and Fourteenth Amendments guaranteeing due process of law may be infringed by such practices as the use of physical torture or drugs, and the oppression of ignorant or weak prisoners.[31]

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[25] 11th Report, *Evidence (General)* (*Cmnd.* 4991, 1972), paras. 48-52.

[26] *Criminal Investigation* (1975), paras. 156-59.

[27] E.g. Criminal Law Revision Committee 11th Report: *Evidence (General)* (*Cmnd.* 4991. 1972) para. 47; N.S.W. Law Reform Commission Working Paper, *The Rule Against Hearsay* (1976) para. 3.180.

[28] M. Scaparone, "Police Interrogation in Italy" [1974] *Crim. L.R.* 581.

[29] *McNabb* v. *United States* 318 U.S. 332 (1943); *Mallory* v. *United States* 354 U.S. 449 (1957).

[30] *Wong Sun* v. *United States* 371 U.S. 471 (1963).

[31] *Brown* v. *Mississippi* 297 U.S. 278 (1936); *Stein* v. *New York* 346 U.S. 156 at 184-85 (1953); *Dugan* v. *Commonwealth* 333 S.W. 2d 755 (1960).

(d) The Fifth and Sixth Amendments have been held, under the *Escobedo-Miranda* doctrine, to require the exclusion of confessions by an accused person who has not been warned of his right to silence and his right to counsel (at public expense if necessary).[32] In our law, (a) and (b) have a parallel in the doctrine of illegally obtained evidence and in the Australian equivalents to the Judges' Rules. Our law as to involuntariness and oppression is similar to (c). The system of compulsory warnings in (d) exists in our equivalents to the Judges' Rules, which are much less strongly enforced than the American rules. But the *Escobedo-Miranda* doctrine may be thought unsuitable in Australia. It leads to the exclusion of confessions made by the accused virtually spontaneously the moment the police meet him as well as those produced by hours of questioning.[33] It is anomalous as applied in the United States, for confessions rendered inadmissible in chief may be used in cross-examination to impeach the defendant's credibility.[34] It seems that the warnings are often not understood, and sometimes suggest to their recipients that the police must have complete evidence of guilt. Certainly the doctrine has unsettled and complicated the law, as may be seen in the tentative rivulet of text which meanders uncertainly through the massive footnotes made necessary in Chadbourn's revision of the relevant parts of Wigmore's *Treatise*.[35] However, the American law has had some influence here, principally in the Australian Law Reform Commission Report on *Criminal Investigation,* which proposes a quite elaborate system of mandatory rules on such matters as permissible periods during which a suspect may be interviewed; warnings of a right to silence; statements of reasons for restraining or arresting a suspect; access to lawyers, relatives and friends; medical treatment; interviewing aboriginals, non-English speakers, and children; the recording and verification of interviews; fingerprinting and photographing; identification parades; medical examinations; search and seizure; and entrapment. Evidence obtained in breach of these provisions may be excluded in the discretion of the court, unless it is in the public interest that it be admitted. Some discussion of the issues this raises will take place below.[36]

Corroboration

In this area there are three trends. One involves extending the definition of accomplice and increasing the scope of warnings analogous to the accomplice warning. The second seeks the complete or partial abolition of the rule against mutual corroboration. The third questions the merit of some or all requirements for corroboration or for corroboration warnings.

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[32] *Gideon* v. *Wainwright* 372 U.S. 335 (1963); *Escobedo* v. *Illinois* 378 U.S. 478 (1964); *Miranda* v. *Arizona* 384 U.S. 436 (1966).

[33] E.g., *Orozco* v. *Texas* 394 U.S. 324 (1969).

[34] *Harris* v. *New York* 401 U.S. 222 (1971).

[35] Wigmore, *Evidence* (Chadbourn rev. 1970) Vol. 3 especially paras. 821-826a which occupy 134 pages.

[36] At 324-28; see also 319-324.

(a) *Accomplices.* According to *Davies* v. *Director of Public Prosecutions,*[37] accomplices are witnesses for the prosecution who fall into one of three classes:

(a) *participes criminis* in respect of the actual crime charged (including principals, accessories before or after the fact, and other secondary parties);

(b) receivers at the trial of the thief;

(c) parties to acts admissible against the accused person as similar fact evidence.

Australian courts find this definition unsatisfactory. First, the inclusion of accessories after the fact has been rejected.[38] This seems sound, because while an accomplice's interest is in blaming another to reduce his own responsibility, the interest of an accessory after the fact is in establishing the principal offender's innocence, not his guilt. Secondly, the view that a party giving evidence on his own behalf against a co-accused is not an accomplice has been rejected,[39] and this too seems sound. The dangers of self-exculpatory evidence may be even stronger when a witness is testifying in his own defence than when he is a prosecution witness. An accomplice who has already been convicted and sentenced before he testifies for the prosecution has less incentive to lie than one still on trial with a co-accused. Further, the accused is less capable of defending himself against a co-accused: "the accused has warning in advance of what the Crown witnesses are going to say, but no such warning of what his co-accused is going to say".[40] Thirdly, the requirement of technical identity between the crime the accused is charged with and the crime the accomplice may have committed is disliked.[41] It ignores the involvement of the witness in a series of events which the police view seriously and which, for all he knows, may make him liable to criminal punishment. Thus wider definitions are sought. In South Africa "a person is an accomplice if he is liable to prosecution in connection with the commission of the same offence as the principal offender".[42] Tests of this kind, or at least the considerations underlying them, have been relied on in some jurisdictions to make thieves the accomplices of receivers,[43] receivers the accomplices of thieves,[44] and a bribe-taker the accomplice of a bribe-giver.[45] A further justification for this tendency is that under Lord Simonds, L.C.'s test in *Davies* v. *Director of Public Prosecutions*[46]

[37] [1954] A.C. 378 at 400 *per* Lord Simonds, L.C.
[38] *McNee* v. *Kay* [1953] V.L.R. 520; *Khan* v. *R.* [1971] W.A.R. 44.
[39] E.g. *R.* v. *Allen* [1973] Qd. R. 395; *R.* v. *Rigney* (1975) 12 S.A.S.R. 30 at 38-39.
[40] *R.* v. *Rigney* (1975) 12 S.A.S.R. 30 at 38 *per* Bray, C.J.
[41] See *McNee* v. *Kay* [1953] V.L.R. 520 at 529-530; *R.* v. *Rigney* (1975) 12 S.A.S.R. 30 at 37 and 53-54.
[42] *S.* v. *Kellner* 1963 (2) S.A. 435 at 446 *per* Steyn, C.J.
[43] *R. v. Sneesby* [1951] Qd. R. 26 at 29.
[44] *Davies* v. *Director of Public Prosecutions* [1954] A.C. 378.
[45] *S.* v. *Ingham* 1958 (2) S.A. 37.
[46] [1954] A.C. 378 at 400.

the need for a corroboration warning varies capriciously with the crime charged. If, in a homicide case, the witness's only knowledge of the accused's state of mind was of intent to assault in furtherance of robbery rather than to kill, a corroboration warning would be needed if the accused were charged with manslaughter, but not if the more serious charge of murder were brought.[47] And if the accused were convicted of a crime different from that actually charged on the uncorroborated evidence of a witness, and no corroboration warning were given, on Lord Simonds, L.C.'s test the conviction would stand, even though the witness were party to the crime of which the accused was convicted, though not if the accused were convicted of the crime charged and the witness were party to that crime.[48]

One response to the inadequacy of Lord Simonds, L.C.'s definition is the growth in what may be called *"Prater* warnings". The court, it has been held, has a discretion to warn against the danger of acting on uncorroborated evidence "in cases where a person may be regarded as having some purpose of his own to serve".[49] The doctrine is quite old, but has enjoyed a recent revival.[50] Such a doctrine enables an adequate warning to be given in respect of persons who clearly fall outside the definition of accomplice, and also those who have been held not to be accomplices on less clear grounds, such as *agents provocateurs.*

(b) *Rule against mutual corroboration.* The House of Lords has held that an unsworn child may corroborate a sworn child, and vice versa,[51] and that a witness to one incident whose evidence is admissible under the similar fact rule may corroborate a witness to the incident alleged against the accused.[52] But it has been assumed in the House that the legislation permitting unsworn children to testify is so worded as to preclude one unsworn child corroborating another.[53]

Though the rule against one accomplice corroborating another has not yet been overturned in Anglo-Australian law, there are signs of its impending demise. It does not exist in South Africa.[54] It has been restricted in England in that accomplices of Lord Simonds, L.C.'s third class[55] may now corroborate each other.[56] It has been doubted by Lord Reid.[57] And the English Criminal Law Revision Committee has recom-

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[47] *Khan* v. *R.* [1971] W.A.R. 44 at 49 *per* Virtue, S.P.J.
[48] *Id.* at 51 *per* Nevile, J.
[49] *R.* v. *Prater* [1960] 2 Q.B. 464 at 466 *per* Edmund Davies, J.
[50] E.g., *R.* v. *Anthony* [1962] V.R. 440 at 447; *Khan* v. *R.* [1971] W.A.R. 44 at 49-50; *R.* v. *Rigney* (1975) 12 S.A.S.R. 30 at 53-54.
[51] *Director of Public Prosecutions* v. *Hester* [1973] A.C. 296, reversing *R.* v. *Manser* (1934) 25 Cr. App. Rep. 18 and *R.* v. *E.* [1964] 1 W.L.R. 671.
[52] *Director of Public Prosecutions* v. *Kilbourne* [1973] A.C. 729.
[53] *Director of Public Prosecutions* v. *Hester* [1973] A.C. 296 at 311, 318, 320, 326 and 330 *per* Lord Morris of Borth-y-Gest, Viscount Dilhorne, and Lords Pearson, Diplock and Cross.
[54] E.g., *S.* v. *Avon Bottle Store (Pty.) Ltd.* 1963 (2) S.A. 389.
[55] *Davies* v. *Director of Public Prosecutions* [1954] A.C. 378 at 400.
[56] *Director of Public Prosecutions* v. *Kilbourne* [1973] A.C. 729.
[57] *Id.* at 751.

mended its abolition.[58]

The rule against the mutual corroboration of accomplices may well be based on a misunderstanding of Littledale, J.'s jury direction in *R.* v. *Noakes*.[59] He may have been urging the jury to look for confirmation of two accomplices as they would of one, but only as a matter of caution, so that he was not excluding the possibility of each corroborating the other. But in any event the rule may have had a historical justification in the early nineteenth century, as Lord Diplock has pointed out.

> The accused himself was not a competent witness and so was debarred from giving evidence to contradict that of any accomplices as to matters which might well be known only to him and them. Furthermore, had they too been charged in the same indictment . . . they too would have been incompetent to give evidence. Common fairness, with which the judges sought to mitigate the rigour of the law which debarred the accused from giving evidence in his own defence, may well have influenced [them] . . . to limit the advantage which the prosecution could obtain by choosing not to arraign accomplices in the same indictment as the accused.[60]

Since an accused person, and hence any accomplice whether charged in the indictment or not, may now testify, this justification has lost its basis.

Further, if the wife of an accomplice can corroborate him, it is hard to see why another accomplice cannot;[61] in many cases a wife will have an equal or greater incentive to lie. The argument for the present law, that accomplices have "every reason . . . to concert together to tell the same false story",[62] has force in some circumstances. But it is strange that if two accomplices apparently acting independently tell the same story, particularly if they submit to cross-examination and are unshaken by it, they cannot corroborate each other.[63] If a court may convict on A's evidence standing alone, why is it not sufficient to corroborate the evidence of A's accomplice B to the same effect?[64]

The case of unsworn children is more difficult, since arguably the statutes permitting them to testify require that they cannot corroborate each other. So far as the House of Lords' assumption to this effect is based on an exploration of earlier legislation,[65] it must be noted that

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[58] 11th Report, *Evidence (General)* (*Cmnd.* 4991, 1972) para. 194.

[59] (1832) 5 C. & P. 326; 172 E.R. 996.

[60] *Director of Public Prosecutions* v. *Hester* [1973] A.C. 296 at 326.

[61] *Tripodi* v. *R.* (1961) 104 C.L.R. 1.

[62] *Director of Public Prosecutions* v. *Hester* [1973] A.C. 296 at 326 *per* Lord Diplock.

[63] Lord Hailsham, L.C. said in *Director of Public Prosecutions* v. *Kilbourne* [1973] A.C. 729 at 747-48 that the accomplices' "joint evidence is not 'independent' in the sense required by *R.* v. *Baskerville* [1916] 2 K.B. 658 at 667". The word "joint" appears to have had a mischievous result. If accomplices provide joint evidence in the sense of a jointly signed statement or statements made pursuant to a conspiracy, doubtless independence may be lacking. But if two accomplices testify separately and without collusion to the same effect, are they not independent?

[64] R. Cross, *Evidence* (4th ed. 1974) p. 180.

[65] See *Director of Public Prosecutions* v. *Hester* [1973] A.C. 296 at 317, 320-21 and 322-23 *per* Viscount Dilhorne and Lords Pearson and Diplock.

the earlier legislation was very differently worded. If the rule exists, it is unique among corroboration rules (other than those for accomplices) in requiring independence not merely of source, but of class of source. It might have unfortunate results in that the attacker of small children in private has the more impunity the younger the objects of his attacks. Further, there is very little difference between a child who understands the nature of an oath and gives sworn evidence and one who does not, so that mutual corroboration is possible as between them.[66] And similarly there is no real difference between, on the one hand, the weight of the evidence of two unsworn children and, on the other hand, the weight of the evidence of a sworn and an unsworn child, so that no rule against mutual corroboration should apply in either case. It seems strange that if ten children give unsworn evidence to the same effect, and there is no real risk of conspiracy or mistake, the facts to which they testify cannot be found to exist. The coincidence of detail in their stories may only be explicable by the fact that they are telling the truth. It is confusing to a jury, and indeed wrong in principle,[67] to distinguish between admissible evidence which though it is admissible cannot be corroborative, and evidence which is both admissible and capable of being corroborative.

One argument of construction is this. The statutes under consideration are usually worded in this form:

> No person shall be convicted of the offence charged, unless the [child's unsworn evidence] is corroborated by some other material evidence in support thereof implicating the accused.

The view that "other . . . evidence" means evidence of another kind, not merely from another source, might be supported by the reflection that "other" must be doing some work not done by "corroborated", and hence must not mean just "extra" but "of a different kind". But, if this approach is right, what can "material evidence in support thereof implicating the accused" add to the common law meaning of corroboration? The inclusion of these words suggests that all the words after "corroboration" are inserted *ex abundanti cautela,* so that "some other material evidence" simply means "some other admissible evidence, whether sworn or unsworn".[68]

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[66] *Id.* at 304 *per* Stroyan, Q.C. *arguendo.*

[67] *Kilbourne* v. *Director of Public Prosecutions* [1973] A.C. 729 at 751-52 attacking *dicta* in *R.* v. *Sims* [1946] K.B. 531 at 544; *R.* v. *Campbell* [1956] 2 K.B. 432 at 438-39.

[68] One may compare the construction given to the South African Criminal Procedure Act 1955, s. 257, and the Swaziland Criminal Procedure and Evidence Proclamation 1938, s. 231. The latter, for example, provided that an accused person may be convicted "on the single evidence of any accomplice: provided that the offence has, by competent evidence, other than the single and unconfirmed evidence of the accomplice, been proved . . . to have been actually committed". In *Nkambule* v. *R.* [1950] A.C. 379, the Privy Council held that "the single evidence of any accomplice" meant "the evidence of any one accomplice" rather than "accomplice evidence", and that the evidence of any other accomplice was "competent evidence" for the purpose of the proviso. See also *R.* v. *Thielke* 1918 A.D. 373; *R.* v. *John* 1943 T.P.D. 295.

It seems there is a clear trend, both among judges and in other quarters, to seek the abolition of the rule against mutual corroboration in all or most of its forms.

(c) *Complete abolition of corroboration rules.* One other trend in the law of corroboration is towards the abolition of all requirements of corroboration and all compulsory corroboration warnings. The Law Reform Commission of Canada has recommended this.[69] To justify total abolition would require much argument of a kind, both as to general principle and as to the considerations peculiarly relevant to each particular case, which that Commission did not provide. But there are indications that some movement towards that destination is widely felt to be desirable. Thus the High Court has refused to follow English and other courts in holding that the corroboration warning in sexual cases is compulsory.[70] The English Criminal Law Revision Committee recommended the abolition of any requirements for actual corroboration respecting treason, personation at elections, and certain offences of procuring or facilitating sexual intercourse;[71] and also the abolition of the compulsory warning for accomplices.[72] These developments are understandable; for the arguments in favour of a general requirement of corroboration are weak, and though there are well-known arguments (which cannot be examined here) in favour of corroboration rules in particular instances, there are strong arguments the other way which make such rules difficult to justify. Thus any corroboration requirement tends to produce a system of counting witnesses, rather than weighing what they say. Modern juries generally will understand that unsupported evidence will often be less weighty than supported evidence, and that special dangers may exist with particular categories, such as accomplice evidence, children's evidence, evidence in sexual cases, evidence supporting claims against deceased estates, identification evidence, and so on. In cases where they may not understand the danger, counsel can explain it to them, or expose it in cross-examination. The judge can remedy any defect in the performance of counsel's duty in his direction to the jury. A corroboration requirement tends to cause the acquittal of the guilty or the failure of a just cause of action; it therefore causes a court which wishes to avoid this result to construe the requirement narrowly[73] or define "corroboration" very broadly.[74] Then there are the problems of technicality in deciding what corroboration is, whether it is needed, and whether any evidence meets

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[69] *Report on Evidence* (1975), Draft Evidence Code, s. 88(b); see also R. Cross, *Evidence* (4th ed. 1974) p.194.

[70] *Kelleher* v. *R.* (1974) 131 C.L.R. 534, criticizing the contrary view of the New South Wales Court of Criminal Appeal in that case: [1974] 1 N.S.W.L.R. 517. See also *R.* v. *Turnsek* [1967] V.R. 610; *R.* v. *Jansen* [1970] S.A.S.R. 531 at 536.

[71] 11th Report, *Evidence (General)* (*Cmnd.* 4991, 1972) paras. 188 and 195.

[72] *Id.* paras. 183-85. *Cf.* the Criminal Law and Penal Methods Reform Committee of South Australia, 3rd Report on *Court Procedure and Evidence* (1975), ch. 8 para. 12.3.

[73] E.g., the definition of accomplice.

[74] E.g., the decisions in affiliation proceedings.

the need; problems which become much greater if a jury must receive a direction as to them, and which are fruitful soil for an excess of unmeritorious appeals.[75]

Further, there are special drawbacks so far as a corroboration rule applies, as it does under our law, only with respect to particular categories of evidence. One "is to suggest that corroboration is always of little or no importance in the case of other kinds of evidence when in fact it may often be more so in some cases".[76] And within each category much evidence may be perfectly worth acting on without corroboration; in order to overcome the problems of a few lying or mistaken witnesses, the law interferes with a perhaps much more numerous class of witnesses in respect of whom these contingencies do not exist. The consequence of corroboration rules is to make facts harder to prove, and there may be facts occurring secretly which can normally be proved only by the evidence of one witness.

It is true that the above drawbacks are more acute where corroboration is required than where merely a corroboration warning is mandatory; but both kinds of rule have like tendencies which will probably lead to their withering away.

Identification Evidence

Many courts have long been wary of identification evidence and have, as a matter of regular practice if not of universal duty, warned against its dangers, particularly where the identifying witness has not known the person identified before.[77] But despite this, such miscarriages of justice as occurred in the cases of Adolph Beck and Oscar Slater have been repeated in our own time less spectacularly, but with disquieting frequency.

The problems of identification evidence were formerly obscure, but, in consequence of this history and of scientific experiment, they are coming to be better understood. First, accuracy may be affected by the time for observation, the identifying witness's familiarity with the person identified, the conditions of light and weather, and the distances involved. Secondly, one recognizes and distinguishes outsiders less well than members of one's own race, or age, or class, or dress. Thirdly, a glance at another person often arouses a conventional categorization of him, and then the ascription to him of the qualities normally associated with that category. This creates great difficulties in remembering faces. Fourthly, identification seems to be a matter in which personal pride is bound up, and on which witnesses become dogmatically and stubbornly confident even when their

[75] See Lord Diplock's lengthy account of the problem in *Director of Public Prosecutions* v. *Hester* [1973] A.C. 296 at 327-28, and also the Criminal Law Revision Committee's 11th Report, *Evidence (General)* (*Cmnd.* 4991, 1972), para. 180.

[76] English Criminal Law Revision Committee 11th Report, *Evidence (General)* (*Cmnd.* 4991, 1972) para. 179.

[77] E.g., *Davies and Cody* v. *R.* (1937) 57 C.L.R. 170.

grounds are slight. Fifthly, those with criminal records are peculiarly at risk of being wrongly identified because the police, in showing photographs of suspects to witnesses, will necessarily tend to use to a large extent photographs of persons thought from their records to be likely parties to the crime. An accused person will in practice be deterred from attacking the reliability of such identification by the fear that the jury may infer that the police have his picture because he has criminal convictions, even if this is not so.[78] Sixthly, photographic identification has more general dangers, for there is, in Ferguson, J.'s classical words, "the risk that a witness may unconsciously substitute the clear impression gained by looking at a photograph for the perhaps hazy recollection of the face he is trying to recall, and his subsequent identification of the accused may be really the result of a mental comparison with the photograph instead of with the living person".[79] Similar problems may arise from the perusal of identikit pictures, staged confrontations with the suspect, the reading of descriptions of the suspect, and listening to a police officer's leading questions as to the features of the criminal. Seventhly, the identification parade is an overrated safeguard. In many parades either no-one is picked out, or an innocent man is.[80] The problem is that since the witness expects to find the guilty man, he will tend to pick out whoever resembles him most closely; but resemblance may not be identity. Eighthly, the value of identification evidence "is exceptionally difficult to assess. The weapon of cross-examination is blunted. A witness says that he recognizes the man, and that is that or almost that. There is no story to be dissected, just a simple assertion to be accepted or rejected."[81] Ninthly, the evidence available to the Devlin Committee suggested that a second eye-witness was not necessarily a useful independent safeguard: "there seems to be a tendency . . . , when there is a mistake, to make the same mistake".[82] Finally, a man may be over-ready to identify from motives of revenge or to find a scape-goat; a crime has occurred, and someone must be punished. And such a man may also be prepared to support an identification made by another on the basis that though he might not press his identification if it stood alone, any doubts he has are resolved by the other's confidence.

The most extreme judicial response to these problems has taken place in Eire and England. In *People (Attorney-General)* v. *Casey (No. 2)*,[83] Kingsmill Moore, J. said:

> [I]t is desirable that in all cases, where the verdict depends substantially on the correctness of an identification, [the jury's] attention should

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[78] *R.* v. *Goode* [1970] S.A.S.R. 69 at 80.

[79] *R.* v. *Fannon* (1922) 22 S.R. (N.S.W.) 427 at 430.

[80] The Devlin Report on *Evidence of Identification in Criminal Cases* (1976, H.C.P. 338), Table 1, shows that in the 2116 identification parades in England and Wales in 1973, in 944 the suspect was picked out, in 984 no-one was, and in 188 someone other than the suspect was.

[81] *Id.* para. 1.24.

[82] *Id.* para. 4.31.

[83] [1963] I.R. 33 at 39; *R.* v. *Turnbull* [1976] 3 W.L.R. 445.

> be called in general terms to the fact that in a number of instances such identification has proved erroneous, to the possibilities of mistake in the case before them and to the necessity of caution. Nor do we think that such warning should be confined to cases where the identification is that of only one witness. Experience has shown that mistakes can occur where two or more witnesses have made positive identifications.

This warning is compulsory in all cases, whether or not the witness had prior acquaintance with the person identified and whether or not there is corroboration.[84] However, it seems clear that such a warning is not universally required in Australia,[85] Canada,[86] and New Zealand.[87] England has recently moved towards the Eire position.[88]

The response of law reform committees has been similar to that of the courts of Eire. The English Criminal Law Revision Committee proposed a compulsory "warning of the special need for caution before convicting in reliance on the correctness of one or more identifications of the accused where the case depends wholly or substantially on this".[89] The Devlin Committee Report on *Evidence of Identification in Criminal Cases* proposed that a detailed warning should be given of the risks of errors in identification evidence which made it unsafe to convict "unless the circumstances of the identification are exceptional or the identification is supported by substantial evidence of another sort".[90] Failure to warn would be a ground of appeal if the conditions imposed by the quoted words were absent.

These proposals have been widely welcomed and indeed most of them have been adopted by the English Court of Appeal,[91] but their merits are said to be that such warnings avoid the technicality of any warning couched in the language of corroboration, and that identification evidence

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[84] *People* v. *Michael and Thomas O'Driscoll* (1972, unrep.): see Devlin Report cited *supra* n. 80. Appendix L, para. 11.

[85] E.g., *Davies and Cody* v. *R.* (1937) 57 C.L.R. 170; *R.* v. *Preston* [1961] V.R. 761; *R. v. Goode* [1970] S.A.S.R.; 69; *R.* v. *Harris* (1971) 1 S.A.S.R. 447; *Kelleher* v. *R.* (1974) 131 C.L.R. 534 at 551; *R.* v. *Harm* (1975) 13 S.A.S.R. 84.

[86] E.g.. *R.* v. *Olbey* (1971) 4 C.C.C. (2d) 103.

[87] *R.* v. *Fox* [1953] N.Z.L.R. 555; *R.* v. *Collings* [1976] 2 N.Z.L.R. 104.

[88] *R.* v. *Turnbull* [1976] 3 W.L.R. 445. The main earlier authorities were *R.* v. *Williams* [1956] *Crim. L.R.* 833; *Arthurs* v. *Attorney-General (Northern Ireland)* (1970) 55 Cr. App. Rep. 161 at 168-170. The House of Lords in the latter case left the question open, and though in *Director of Public Prosecutions* v. *Kilbourne* [1973] A.C. 729 at 740, Lord Hailsham, L.C. said that it "may still be open", the house has since refused leave to appeal in a case which would have tested the issue: *R.* v. *Long* (1973) 57 Cr. App. Rep. 871.

[89] 11th Report, *Evidence (General)* (*Cmnd.* 4991, 1972) para. 199; Australian Law Reform Commission Report No. 2 *Criminal Investigation* (1975) para. 119; Criminal Law and Penal Methods Reform Committee of South Australia; 3rd Report (1975) *Court Procedure and Evidence*, Ch. 8, para. 12.6.

[90] (1976, H.C.P. 338) para. 4.83.

[91] *R.* v. *Turnbull* [1976] 3 W.L.R. 445 (a slightly less strict rule). See Glanville Williams, "Evidence of Identification: The Devlin Report" [1976] *Crim. L.R.* 407.

should be scrutinized warily even if it is corroborated.[92] But what the *Casey* warning and its brethren gain in reduced technicality they perhaps lose in increased uncertainty. Jurymen are presently said to be confused by being told that despite the danger of convicting without corroboration they may convict.[93] They may be just as confused by being told that despite the special need for caution, they may convict. More fundamentally, such rules would distinguish with unrealistic sharpness between identification evidence and some other evidence based on observation. The deep scepticism about identification evidence underlying these rules and proposals ought, in consistency, to require compulsory warnings for much other evidence based on the narrated observation of events rather than the perusal of documents or things in court; for the weaknesses of identification evidence exist just as clearly in all evidence which depends on the observation of isolated or sudden events which are not related to any chain or network of past or future events which could otherwise confirm or discredit the observation. The common examples of such errors include mistakes as to the numbers of, relative positions of, and distances between, persons; to the order of, or lapse of time between, events, which may be vital in relation to such pleas as provocation or self-defence; and to the literal accuracy, or even the sense, of words reported. The attribution of events occurring on one occasion to another is also quite likely.[94] Further, the proposals seek to avoid the laxity that may come from a discretionary warning. Thus the Devlin Committee remarked "Some judges are disposed to put a higher value than others on visual identification with the result that a man's prospects of acquittal vary unnecessarily according to the views of the presiding judge".[95] In practice, the warnings devised by modern appellate courts are very similar to those given by the Irish courts and contemplated as desirable by the Devlin Committee.[96] And one must ask how the rigidity of any truly compulsory rule, which leads to the disadvantage of having to use a warning in inappropriate circumstances, will be overcome. The Criminal Law Revision Committee states that where a witness who knows the suspect "had a good opportunity [to observe him] the direction would naturally be less strong".[97] It might be thought better in safe cases to have a discretionary warning which need not be given, and therefore would not mislead, than to have a compulsory warning given in watered-down form. The Devlin Committee sought to avoid rigidity without invoking discretion by proposing that their warning should

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[92] One reason given by the English Criminal Law Revision Committee was "public disquiet" (11th Report, *Evidence (General)* (*Cmnd.* 4991, 1972) para. 199), but should public disquiet be a reason for changing the law unless it is justified?

[93] See the Report cited in the previous footnote, para. 181.

[94] See, e.g., Glanville Williams, *The Proof of Guilt* (3rd ed. 1963) pp. 87-91; A. Trankell, *Reliability of Evidence* (Stockholm, 1972).

[95] See the Report cited *supra* n. 80 para. 4.79.

[96] See *R.* v. *Preston* [1961] V.R. 761; *R.* v. *Wright* (*No.* 2) [1968] V.R. 174 at 178-79; *R.* v. *Maarroui* (1970) 92 W.N. (N.S.W.) 757; *R.* v. *Long* (1973) 57 Cr. App. Rep. 871 at 877-78.

[97] 11th Report, *Evidence* (*General*) (*Cmnd.* 4991, 1972) para. 199.

not be given if "exceptional circumstances" were present.[98] These examples were given — familiarity between witness and accused, admissions by the accused of presence while denying the *actus reus,* the accused's failure to testify in answer to credible identification evidence, opportunities for repeated or prolonged observation by the witness.[99] Though in a formal sense a court would not be exercizing a discretion in acting on these circumstances, in substance the processes of recognizing them and judging whether they were "exceptional" would have just those qualities of flexibility, uncertainty and vagueness which are characteristic of discretions; and judges are just as likely to differ about them as they presently do about the need to give an identification warning. A further difficulty with the Devlin Report is this. It is contemplated that a warning need not be given, and that it would be safe to convict on identification evidence, if "additional supporting evidencc" other than identification evidence exists. Does this not tend to have the vices of an actual corroboration requirement rightly condemned earlier in the Devlin Report?[100] It means that a man could not be convicted on the evidence of a hundred eyewitnesses (if the circustances were not exceptional), but he could be convicted on "a fleeting glimpse plus a triffle from a forensic laboratory".[101] It might also be asked how "substantial additional evidence" is to be distinguished from "corroboration in the old technical sense". The latter, it is mysteriously said,[102] "may not have survived *Director of Public Prosecutions* v. *Hester",*[103] and the remainder of the discussion is no more illuminating.[104] Corroboration may or may not lead to problems of technicality, but it is a well understood expression, while "substantial evidence", as explained in the Devlin Report, is not.

In sum, then, one reaction to the rules proposed by the Devlin Committee and others like them is that we cannot have it both ways. Either there are enough miscarriages of justice to require a radical change in the practical operation of the present law, or there are not. If the former view is intended, such outlets as "exceptional circumstances" and "additional evidence" must be very narrowly applied. The more narrowly they are applied, the closer the law approaches a mandatory corroboration requirement with all its drawbacks. The more widely "exceptional circumstances" and "additional evidence" are defined, the less change is made to the present law.

Several proposals have been made for avoiding misidentification which are outside our present concern. These include regulation of the

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98 See the Report cited *supra* n. 80, para. 4.79.
99 *Id.* paras. 4.61-4.65.
100 *Id.* paras. 4.36-4.42.
101 *Id.* para. 4.38.
102 *Id.* para. 4.67, n.1.
103 [1973] A.C. 296.
104 See the Report cited *supra* n. 80 paras. 4.66-4.70.

practice of dock identification[105] and the improvement of procedures for out-of-court identifications such as identification parades, photographic and identikit identifications, and arranged confrontations.[106]

Improperly Obtained Evidence

(a) *Our law.* Since *Kuruma* v. *R.*[107] the rule has been clear, at least in England and Australia,[108] that relevant evidence is admissible, even though it was obtained by illegal or other improper means, but that the court has a discretion to exclude it if its admission would operate unfairly against the accused. No distinction is drawn between breaches of common law rules, statutory rules, or constitutional provisions.[109] But what is unfairness? Examples given include "false representations, . . . a trick, . . . threats, . . . bribes, anything of that sort";[110] but it seems such conduct must be "oppressive" before it leads to exclusion.[111] Certainly the discretion is rarely acted on. In two English cases the results of a medical examination, to which the accused consented after being told its results would not be tendered against him, were excluded.[112] Australian courts have held that evidence of an unauthorized medical examination and a photograph which the accused was wrongly told he would have to have taken should have been excluded.[113] A Canadian court has excluded evidence obtained by reason of a policeman disguising himself as a magistrate.[114] And English courts have excluded evidence obtained by the entrapment of an accused person, though the outcome of this line of cases is unresolved.[115]

Apart from its weaknesses in practice, the *Kuruma* doctrine has certain other noteworthy features. It is vague: what is "unfairness", or "oppressive unfairness"? It is strange that evidence obtained by a trick without illegality is apparently more likely to be excluded than evidence obtained in breach of a positive rule of law. The Privy Council relied on

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[105] *Id.* paras. 4.89-4.109; English Criminal Law Revision Committee's 11th Report, *Evidence (General)* (*Cmnd.* 4991, 1972) para. 201; Thomson Committee's 2nd Report on *Criminal Procedure in Scotland* (*Cmnd.* 6218, 1975) Ch. 46; Devlin Committee Report cited *supra* n. 80 paras. 4.89-4.109.

[106] See Criminal Law Revision Committee 11th Report, *Evidence (General)* (*Cmnd.* 4991, 1972) para. 200; Australian Law Reform Commission Report No. 2, *Criminal Investigation* (1975), paras. 117-129; Thomson Committee's 2nd Report on *Criminal Procedure in Scotland* (*Cmnd.* 6218, 1975), Ch. 12; Devlin Committee Report (1976) cited *supra* n. 80, paras. 5.29-5.82.

[107] [1955] A.C. 197.

[108] Despite Sir Owen Dixon's reservations: *Wendo* v. *R.* (1963) 109 C.L.R. 559 at 562.

[109] *King* v. *R.* [1969] 1 A.C. 304.

[110] *Callis* v. *Gunn* [1964] 1 Q.B. 495 at 502 *per* Lord Parker, C.J.

[111] *R.* v. *Murphy* [1965] N.I. 138 at 147-49 *per* Lord MacDermott, C.J.

[112] *R.* v. *Court* [1962] *Crim. L.R.* 697; *R.* v. *Payne* [1963] 1 All E.R. 848.

[113] *R.* v. *Ireland* (*No.* 1) [1970] S.A.S.R. 416; 126 C.L.R. 321.

[114] *R.* v. *Pettipiece* (1972) 7 C.C.C. (2d) 133.

[115] *R.* v. *Foulder* [1973] *Crim. L.R.* 45; *R.* v. *Burnett* [1973] *Crim. L.R.* 748; *R. v. O'Shannessy* (1973, N.Z.C.A., unrep.: see [1975] N.Z.L.R. at 414, and N.L.A. Barlow, "Recent Developments in New Zealand in the Law Relating to Entrapment" [1976] *N.Z.L.J.* 304 at 305, 309 and 328); *R.* v. *Capner* [1975] 1 N.Z.L.R. 411; *cf.* *R.* v. *McEvilly* [1974] *Crim. L.R.* 239; *R.* v. *Mealy* [1974] *Crim. L.R.* 710; *R.* v. *Willis* [1976] *Crim. L.R.* 127. See also *R.* v. *Demicoli* [1971] Qd. R. 358.

Scots law to support its conclusion, but though the verbal formulation of the Scots rule is similar, in practice the Scots rule is applied with much greater precision and sophistication, and with a more exclusionary effect.[116] The Privy Council also said that the stricter United States rule of exclusion was necessitated by the Constitution. But the Fourth Amendment simply proscribes unreasonable searches and seizures; it says nothing of the exclusion or admission of evidence obtained in breach of it. In all jurisdictions there is the same question: is it desirable to admit evidence obtained in breach of a law which does not expressly provide for its exclusion? Further, Lord Goddard's advice failed to discuss *Wolf* v. *Colorado,*[117] holding that the States were bound by the Fourth Amendment; this was an important step towards *Mapp* v. *Ohio,*[118] holding that evidence obtained in breach of the Fourth Amendment should be excluded in state courts as well as federal. Lord Goddard also misrepresented the American law in mentioning *Olmstead* v. *United States,*[119] holding wiretap evidence admissible, but not its reversal.[120] Further, Lord Goddard relied on civil cases denying a party's claim of privilege when a copy of a privileged document comes into the hands of his opponent.[121] Even if such cases are right,[122] a denial of privilege in a civil case is different from admitting illegally obtained evidence in criminal cases; for in a civil case the wrong is more likely to be remedied by separate proceedings in court than if the victim is in prison and the wrongdoer a policeman.

Other jurisdictions have chosen something different from this very weak exclusionary rule. At one extreme, the Supreme Court of Canada has adopted an even less exclusionary rule. At the other extreme, the United States Supreme Court excludes automatically evidence obtained by certain kinds of illegality, though not all. The courts of Scotland and Eire occupy middle ground in applying an exclusionary rule which, though discretionary, is substantially stronger than that applied in our law; the Australian Law Reform Commission has recommended legislative adoption of a like test.

(b) *Canada.* In *R.* v. *Wray* a majority of the Supreme Court of Canada said that even if there was a discretion to exclude illegally obtained evidence operating unfairly, the meaning of unfairness had to be limited. "The allowance of admissible evidence relevant to the issue before the Court and of substantial probative value may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and

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[116] See below at 327.
[117] 338 U.S. 25 (1949).
[118] 367 U.S. 643 (1961).
[119] 277 U.S. 438 (1928).
[120] Federal Communications Act, 1934, s. 605, *Nardone* v. *United States* (*No.* 1) 302 U.S. 379 (1937).
[121] E.g., *Calcraft* v. *Guest* [1898] 1 Q.B. 759.
[122] *Cf. Ashburton* v. *Pape* [1913] 2 Ch. 469; C. Tapper, "Privilege and Confidence" (1972) 35 *M.L.R.* 83.

whose probative force in relation to the main issue before the Court is trifling, which can be said to operate unfairly."[123] This narrow view has the merit of avoiding the unsatisfactory vagueness of language normally used in discussing the *Kuruma* doctrine. But it has two drawbacks. First, it depends on the view that the evidence admitted is reliable, but this does not always seem to be so. Thus in *Kuruma* v. *R.*, which was approved in *R.* v. *Wray,* whether the accused in fact had in his possession the ammunition he was said to have had was very doubtful, for reasons which were pointed out in the argument of his counsel, and which caused the Privy Council to call the Secretary of State's attention to them.[124] Secondly, in many cases to admit illegally obtained evidence is to place the court's view of when it is safe to act above Parliament's, for Parliament may have indicated a particular procedure as necessary because it regards any less stringent procedure as dangerous. Thus requirements that searches for ammunition be carried out only by senior police officers[125] or that searches for drugs be carried out in the presence of a magistrate[126] were probably imposed because only such persons can be trusted not to plant evidence.

(c) *The United States.* The American courts have held that the Fourth Amendment right to be secure from unreasonable searches and seizures can only be enforced by the sanction of excluding evidence obtained in breach of it both in state and federal courts.[127] The exclusion extends to the "fruit of the poisonous tree", i.e., evidence obtained in consequence of the evidence gained from the illegality;[128] to oral evidence as well as real, e.g., statements overheard through a microphone driven into the wall of a house,[129] or statements made to police during an unlawful search.[130] A more spectacular recent extension, which does some violence to the constitutional words, is that wiretapping and eavesdropping fall within "searches and seizures".[131] But the American rule has limits, some quite old, others more recent. An accused person cannot invoke the rule if the evidence was obtained in breach of *another's* right.[132] This rule does not apply to breaches by a private individual rather than a state official,[133] nor to evidence put to

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[123] (1970) 11 D.L.R. (3d) at 689-690 *per* Martland, J.; see also *People* v. *McGrath* (1965) 99 I.L.T.R. 59 at 74; *R.* v. *Li Wai-leung* [1969] H.K.L.R. 642 at 666-67.

[124] [1955] A.C. 197 at 199, 201 and 205.

[125] *Kuruma* v. *R.* [1955] A.C. 197.

[126] *King* v. *R.* [1969] 1 A.C. 304.

[127] *Weeks* v. *United States* 232 U.S. 383 (1914); *Wolf* v. *Colorado* 338 U.S. 25 (1949); *Mapp* v. *Ohio* 367 U.S. 643 (1961).

[128] *Silverthorne Lumber Co.* v. *United States* 251 U.S. 385 (1920).

[129] *Silverman* v. *United States* 365 U.S. 505 (1961).

[130] *Wong Sun* v. *United States* 371 U.S. 471 (1963).

[131] *Katz* v. *United States* 389 U.S. 347 (1967); *United States* v. *White* 401 U.S. 745 (1971).

[132] *Alderman* v. *United States* 394 U.S. 165 (1969); *cf. People* v. *Martin* 290 P. 2d 855 (1955).

[133] *Burdeau* v. *McDowell* 256 U.S. 465 (1921).

a federal grand jury,[134] nor where the evidence is admitted only on some issue collateral to guilt such as the accused's credibility as a witness.[135] This narrow distinction between evidence proving guilt and evidence tending to prove that an accused who says he is not guilty is not to be believed, which exists in other areas, is difficult to apply.[136] The requirements of the Fifth and Fourteenth Amendments that the federal or a state government shall not "deprive any person of life, liberty of property, without due process of law" may lead to the exclusion of evidence obtained by methods which shock the conscience, e.g., the forcible stomach pumping of the accused to reveal his having swallowed drugs.[137]

(d) *Scotland and Ireland.* Here, though the verbal formulation of of the rule is similar to the *Kuruma* doctrine, its effect is very different in excluding evidence more often. The courts have made explicit a number of different factors relevant to the exercise of the discretion. Was the irregularity an important part of a deliberate attempt to get the evidence illegally, or was it accidental? Was the illegality serious or trivial? Were there circumstances of urgency or emergency making illegality necessary to preserve the evidence? Were the responsible parties police or public officials subject to control by superiors, by traditional codes and norms, by elected politicians and public opinion, or were they entirely irresponsible private persons who can only be disciplined by an exclusionary rule? Did the breach infringe a carefully devised statutory procedure which Parliament for good reasons intended to be followed in detail? How easy would it have been to obey the law? How serious was the offence being investigated? How necessary are underhand methods in its investigation?

(e) *Australian Law Reform Commission.* The *Kuruma* rule has the advantage of increasing the admissibility of evidence, much of which is weighty. But it can have scarcely any effect in discouraging illegality, and it tends to make the substantive law as to warrants, powers of arrest and search a dead letter. On the other hand, the American rule attempts to achieve its purposes perhaps too well. If police misconduct is to be deterred or punished, it must be sufficiently serious to be worth deterring or punishing, and it can scarcely be deterred if it is not intended or at least negligent conduct. Trivial illegalities which cause evidence of serious crime to be collected are laudable or at least excusable. A man who thinks he is not breaking the law will not be influenced by the reflection that if he were, the evidence he collects will be excluded. Too strict a rule encourages police perjury. For these and other reasons, the Australian Law Reform Commission recommended the statutory adoption of something like the Scots-Irish position.[138] Section 71 of the Commission's proposed

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[134] *United States* v. *Calandra* 414 U.S. 338 (1974).
[135] *Walder* v. *United States* 347 U.S. 62 (1954); *Harris* v. *New York* 410 U.S. 222 (1971).
[136] See below at 330.
[137] *Rochin* v. *California* 342 U.S. 165 (1952).
[138] See Report No. 2 *Criminal Investigation* (1975) paras. 288-298.

draft Bill provides that evidence obtained in breach of, or in consequence of a breach of, any statutory or common law rule is inadmissible in criminal proceedings, unless the party seeking to have it admitted satisfies the court that admission would "specifically and substantially benefit the public interest without unduly prejudicing the rights and freedoms of any person". Among the matters which the court may consider are:

(a) the seriousness of the offence in the course of the investigation of which the [rule] was contravened, . . . the urgency and difficulty of detecting the offender and the urgency or the need to preserve evidence of the fact;

(b) the nature and seriousness of the contravention . . .; and

(c) the extent to which the evidence that was obtained in contravention of . . . [the rule] might have been lawfully obtained.

Though this does not extend to improprieties other than illegalities, it should be remembered that the Commission proposed many new statutory rules of procedure,[139] and if these were enacted there would be little scope for any wider doctrine of impropriety.

On the other hand, the Criminal Law and Penal Methods Reform Committee of South Australia recommended adoption of a modified version of American law by which illegally obtained evidence should be excluded automatically except where it was obtained by urgent entry or where the illegality is not directed against and does not relate to the person against whom the evidence is tendered.[140] In the view of that Committee, "An accidental breach may betoken an inadequate system of instruction or supervision of the person responsible for the breach, and its repetition should be deterred".[141] The Australian Law Reform Commission proposal has been included in the Criminal Investigation Bill 1977 (Cth.). It will be interesting to see how it works in practice, if enacted.

The Accused's Bad Character

Of the two rules which govern the admission of the accused's bad character, or previous record, little change has occurred or is likely in the first, while the second is much more in flux. The first is the similar fact rule. The usual rather sterile school disputes continue about its formulation, and about whether some of the many reported cases applying it are

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[139] See above at 313.

[140] 2nd Report, *Criminal Investigation* (1974) Ch. 7, para. 3.3.

[141] Ch. 7, para. 3.2.2. See also the Law Reform Commission of Canada's draft Evidence Code, s. 15: "(1) Evidence shall be excluded if it was obtained under such circumstances that its use in the proceedings would tend to bring the adminstration of justice into disrepute.

(2) In determining whether evidence should be excluded under this section, all the circumstances surrounding the proceedings and the manner in which the evidence was obtained shall be considered, including the extent to which human dignity and social values were breached in obtaining the evidence, the seriousness of the case, the importance of the evidence, whether any harm to an accused or others was inflicted wilfully or not, and whether there were circumstances justifying the action, such as a situation of urgency requiring action to prevent the destruction or loss of evidence".

correct on the facts. The only significant recent developments include a House of Lords decision which may stretch the pre-existing limits of admissibility by reducing the requirement of similarity,[142] and an attempt to codify and modify the common law.[143] The modification was that previous offences of the same kind as that charged should be admissible, even if dissimilar, where the accused admitted the *actus reus* but denied some mental element of the crime. The majority considered, but opposed, proposals to expand admissibility substantially, either by weakening the similarity requirement in all cases, or by having the accused's record read out as a matter of course at the start of the trial.

The second rule regulating admission of the accused's record is that in general, if he testifies, he may not be cross-examined as to his record, unless it is admissible under the similar fact rule. In this respect the accused is better off than ordinary witnesses. But he may lose this "shield" in various circumstances, usually where evidence is given of his good character, or where he attacks the prosecutor, a prosecution witness, or a co-accused person. The complicated law that surrounds these statutes is often thought to have two main defects. One is that there are some charges to which it is impossible to raise certain defences without attacking the prosecution, e.g., consent to sexual crimes, and self-defence to assault. (This defect is tempered by the rule that the shield is not lost by the raising of consent as a defence to rape, and by the court's discretion to prevent cross-examination on the record if this is necessary to ensure a fair trial.)[144] The second defect is that the accused's character seems to be indivisible; that is, if on an assault charge he says he is a man of peace, he can be cross-examined about offences of incest, even though as a matter of commonsense his incest record is irrelevant both to any disposition he has to be violent and to his credibility.

In New South Wales these two defects were partially met in 1974 by inserting ss. 413A and 413B into the Crimes Act, 1900. An accused only loses his shield in consequence of attacking a witness for the prosecution or for a co-accused if the main purpose of his attack was to impugn the witness's credibility rather than to establish some fact relevant to a defence being advanced. And if he does lose his shield in this way, his record becomes divisible in the sense that only the part of it which is relevant to credibility is admissible.[145] (However, if he raises his own good character, the record remains indivisible.) These reforms had been recommended by the English Criminal Law Revision Committee.[146] That Committee considered and rejected two further more

[142] *Boardman* v. *Director of Public Prosecutions* [1974] 3 All E.R. 887; C. Tapper, "Similar Facts: Peculiarity and Credibility" (1975) 38 *M.L.R.* 206.

[143] English Criminal Law Revision Committee, 11th Report, *Evidence (General)* (*Cmnd.* 4991, 1972) para. 92.

[144] *Selvey* v. *Director of Public Prosecutions* [1970] A.C. 304.

[145] There is much to be said for the view that in cross-examining all witnesses, not merely the accused, only those convictions which are relevant to credibility should be used to attack it.

[146] 11th Report *Evidence (General)* (*Cmnd.* 4991, 1972) paras. 114-136.

extreme proposals, each of which attracted some support. One was to allow the accused to be treated as an ordinary witness, so that the normal cross-examination as to credibility could occur. The other was to grant the assused complete immunity from cross-examination as to his character.

What are the arguments for treating the accused as an ordinary witness, as he is in Canada and to some extent in the United States?[147] It would simplify the choices for defence counsel, who must at present balance the advantages of attacking the prosecution against the risk of the accused losing his shield if he testifies. It would increase the relevant material before the court, since the accused's record is often highly relevant to the question of his guilt. Such arguments did not prevail. The majority considered that the proposal would tend to deter the accused from testifying, thus in fact reducing the amount of evidence before the court. The distinction between evidence going to the credibility of a witness and that going to the guilt of the accused becomes fine indeed when the witness is the accused and trial is by jury. As Cross says, it would require a direction "in something like the following terms: 'You must not infer from the fact that the accused has numerous convictions that he is guilty because he is the kind of man who would commit this crime but, when considering the weight to be attached to his testimony to the effect that he did not commit this crime, you must remember that it is rendered less trustworthy than would otherwise be the case by the fact that he has numerous convictions' ".[148]

The arguments for the view that the accused should have complete immunity from cross-examination are perhaps stronger.[149] Once the law has determined, by reference to the similar fact rule, what prior misconduct should be admissible in the prosecution's evidence in chief, why should the decision be changed simply because of the defence tactics? Any sanction against accused persons making quite unfounded attacks on prosecution witnesses ought not to be one which renders an innocent man more likely to be convicted. Even true imputations on the prosecution cause loss of the shield; the jury should not be left with the impression that prosecution witnesses are reliable when their records show they are not. The accused should have greater freedom to prove the record of a prosecution witness than the prosecution to prove the accused's. The credibility of a prosecution witness is far more crucial; the accused's credibility is inevitably suspect because the circumstances he finds himself in create a great temptation for even a naturally honest man to lie. On the other hand, the majority of the Committee preferred the view that

[147] See C. T. McCormick, *Handbook of the Law of Evidence* (1st ed., 1954) paras. 42-43 and 157; American Federal Rules, r. 608.

[148] *An Attempt to Update the Law of Evidence* (Magnes Press, Jerusalem, 1974) pp. 21-22.

[149] The accused has such immunity in Israel except where he puts his good character in issue: Israeli Criminal Procedure Law, 1965, s. 146; see also the American Model Code, r. 106(3), and Uniform Rules, r. 21.

the jury, in deciding whom to believe, should know not only the prosecution witness's record but also the accused's. The present law was thought the only practicable sanction against unjustified attacks by the accused which might deter witnesses coming forward to help the police: the fear of prosecution for perjury can have little effect on a man already on trial for another and perhaps more serious crime.

This debate reveals that the law on these points is not entirely settled, and that perhaps there might, apart from the New South Wales reforms, be at least one further change: permitting the accused to prove with impunity those parts of a prosecution witness's record which seriously undermine his credibility, e.g., convictions for perjury.

Other Trends

Much has been omitted. The great debate about whether the jury should be given directions as to the inferences properly to be drawn from a man's out-of-court silence and his failure to testify has died down since the early attacks on the English Criminal Law Revision Committee's 11th Report, but will doubtless revive again. In New South Wales the unsworn statement was almost abolished in 1974; but despite the general view of lawyers that it is an anomalous survival from days when the accused could not testify, and that it has no merits of policy or principle, it may yet continue to be tenacious of life. There are perhaps signs in the High Court that the doctrine of judicial notice is about to undergo a great expansion, perhaps beyond its proper limits, for in *National Investments Pty. Ltd.* v. *Gilles,*[150] Barwick, C.J. said that in determining the quantum of damages payable to an injured law student, the trial judge "had no need . . . to know or to have evidence of the specific earnings of a solicitor in private practice, or for that matter as to the precise level of those earnings". There will probably continue to be debate as to the restriction of existing privileges and the creation of others. In practice there is a tendency to admit opinion evidence much more freely than the strict rules suggest it should be, and some think this tendency should be recognized explicitly and extended. The English Criminal Law Revision Committee's proposal[151] that in general the accused should never bear a persuasive burden of proof, but at most an evidential burden, accords with the feelings of most lawyers, but not with the provisions of many modern statutes. Though most of the agitation for reform of rape trials concerns non-evidential questions, it seems certain that the practice by which questions as to the complainant's acts of intercourse with persons other than the accused are permitted as being relevant to credibility will be abolished

[150] (1975) A.L.J.R. 349 at 350. This view has been followed, but with reluctance: "Judges . . . ought to resist having thrust upon them the amorphous trappings of soothsayers": *Davies* v. *Lumsden* (New South Wales Court of Appeal, May 15, 1976, unrep.) *per* Samuels, J.A. See also *Hayman* v. *Forbes* (1975) 13 S.A.S.R. 225 at 235 *per* Zelling, J.: "The acceptance without evidence, of a specific sum as the likely future earnings of a professional man is beyond the limit of judicial notice permitted to a Judge".

[151] 11th Report, *Evidence (General)* (*Cmnd.* 4991, 1972) paras. 137-142.

or modified.[152] And apart from these areas where clear trends are in fact developing, I have said nothing of those where there ought to be a trend towards reform or at least simplification, such as the rules as to examination and cross-examination and the procedures for proving documents.[153]

Whether the above developments turn out in truth to be trends or only false starts and anomalies instead, it seems likely that the future of the law of evidence will depend on the outcome of a struggle taking place in almost every section of the subject. One side believes that the sole purpose of the law of evidence should be to bring as much reliable evidence as possible before the court with as little dislocation of the trial or inconvenience to parties, their advisers, and the court as possible. The other side believes that that aim should give way to the achievement of other goals — the disciplining of errant police officers, the protection of privacy and other human rights, the serving of the special interests of spouses, priests, doctors, journalists and so on. It may or may not be in the public interest for the latter side to win some victories, but the more it wins, the less principled and easy to apply will the law be, and the less likely to lead to adjudications based on sound views of the facts.

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[152] E.g., Report of the Victorian Law Reform Commissioner on *Rape Prosecutions (Court Procedures and Rules of Evidence)* (Melbourne, 1976), paras. 64 and 68.

[153] See the doubts and obscurities revealed by Moffit, P., and by Rath and Reynolds, JJ., in their papers in H. H. Glass (ed.) *Seminars on Evidence* (1970).