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Evidence

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Introduction

'…as has been authoritatively stated, facts are obstinate.'

(Primo Levi, 'The Magic Paint' in *A Tranquil Star*, 2007, London)

The noted American writer on evidence, Wigmore, once wrote 'at the trial of Warren Hastings in 1794, Edmund Burke is reported to have said that he knew a parrot who could learn the rules of evidence in a half-hour and repeat them in five minutes' (*A Treatise on the Anglo-American System of Evidence*, 1923, Boston, MA, 2nd edn, I.237). Twenty-first-century students will be disheartened to learn that this golden age, if ever it existed, is long past. The law of evidence, it should be said from the outset, is complex—sometimes, unnecessarily so. Modern scholars have variously suggested that the rules of evidence are 'arcane' (Brian W Simpson in John H Langbein, *The Origins of Adversary Criminal Trial*, 2003, Oxford, p v) or 'even more bizarre and complex than the game of cricket' (W Twining, *Rethinking Evidence*, 1994, Evanston, Il, p 178). The law of evidence, it could be added, is also rapidly evolving. All the same, since it determines the critical issue of which items of proof parties are actually permitted to produce before a court in support of their contentions, it would be difficult to exaggerate the importance of the subject. Certainly, practising lawyers worth their salt cannot afford to ignore the law of evidence.

Despite the title of this book, it is to an extent misleading today to speak of the 'law of evidence' as though the subject enjoyed a strong intellectual unity. While there remain some areas in which civil and criminal proceedings do share broadly common principles, the two domains have grown apart. Some of today's best-known rules of evidence only ever did apply in criminal cases: for instance, the admissibility of confessions, now governed by the Police and Criminal Evidence Act 1984 (PACE), s 76 (**Chapter 10**). Others, such as the rules affecting the admissibility of evidence of a defendant's other misconduct, now regulated in criminal cases by Pt 11 of the Criminal Justice Act 2003, always possessed far greater importance in the criminal context and follow principles quite distinct from those that obtain in civil cases when 'similar fact evidence' is adduced before the court (**Chapter 7**). Another great exclusionary rule, the hearsay rule, which once applied in criminal and civil proceedings alike with almost equal vigour, has for some while had little role to play in civil cases: successive Civil Evidence Acts, passed in 1968, 1972, and 1995, buttressed by provisions in the Civil Procedure Rules which were first introduced in 1998, have virtually rendered the hearsay rule devoid of significance in civil cases. The hearsay rule in criminal cases is regulated by its own separate legislation—the Criminal Justice Act 2003, ss 114–136—which, it is true, does now share some features with the legislation affecting civil evidence (**Chapter 9**). To paint the picture with an impressionistic brushstroke, the empire of civil evidence has been progressively shrinking; in contrast, whilst many of the principles of criminal evidence seem to be in retreat, the subject itself, if anything, is in expansion.

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This transformation is obvious if one only pauses to examine the sources of the law of evidence. Until comparatively recently, it was largely a case law subject. Today, not only does statute play the leading role in delineating the rules of evidence, but in recent years legislation has also altered those rules at a remorseless pace. Within the last couple of decades, major legislation that has transformed key areas of criminal evidence includes such bagatelles as the Criminal Justice and Public Order Act 1994 (which introduced radical changes to the right of silence—**Chapter 11**), the Youth Justice and Criminal Evidence Act 1999 (which introduced detailed rules designed to protect vulnerable and intimidated witnesses, as well as modifying existing rules relating to the evidence of children and spouses, and to computer evidence—**Chapters 3** and **4**), the Coroners and Justice Act 2009 (which has renewed earlier legislation regulating the admission of the testimony of witnesses whose identities are concealed and has created a further regime of 'investigation anonymity orders' designed to protect the identities of those who assist the police or the Serious Organised Crime Agency in certain types of homicide enquiry), and a Brobdingnagian Criminal Justice Act 2003 (which has comprehensively rejigged the rules governing both the admission of evidence of bad character and that perennial thorn in the lawyer's side, the hearsay rule). The fact is that criminal evidence in particular is in a state of almost perpetual transition.

Outside the common law world, legal systems tend not to have developed laws of evidence (but see Damaška, 'Of Hearsay and its Analogues' (1992) 76 Minn L Rev 425). Although some decisions of the European Court of Human Rights (ECtHR) in Strasbourg have arguably induced Continental systems to adopt what almost begin to resemble common law rules of evidence, such as a semblance of a hearsay rule, European jurisdictions do not in truth possess meaningful counterparts to the great exclusionary rules of the English law of evidence. The law of evidence, then, is a distinctive feature of common law systems.

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Origins of a 'law of evidence'

There is disagreement over the origins of many of the English rules of evidence. A substantial body of legal historians believes that the emergence of a number of the major exclusionary rules of criminal evidence coincided with, and was in fact prompted by, the advent of meaningful legal representation of accused persons in criminal trials in what became increasingly adversarial proceedings during the course of the eighteenth century (for example, Langbein's 'The Criminal Trial before the Lawyers' (1978) 45 U Chi L R 263, 'Shaping the Eighteenth-Century Trial: A View from the Ryder Sources' (1983) 50 U Chi L R 86, and *The Origins of Adversary Criminal Trial*, 2003, Oxford). Indeed, the 'crucial impulse' for—if not the very origins of—many of these exclusionary rules may be traceable to historical developments that took place in the English criminal courts (Gallanis, 'The Rise of Modern Evidence Law' (1999) 84 Iowa L Rev 499). Other scholars would portray much of the law of evidence as having evolved as a means of buttressing humanistic policies and, more particularly, of protecting the individual's rights rather than simply ensuring factual accuracy (such as Friedman, 'Anchors and Flotsam: Is Evidence Law "Adrift"?' (1998) 107 Yale LJ 1921).

Another breed of writer has endeavoured to explain the law of evidence in pronouncedly theoretical terms. Whereas John Leubsdorf has argued that evidence can be viewed as a complex system of incentives and disincentives affecting people's behaviour in anticipating, conducting,

litigating, and settling future disputes ('Evidence Law as a System of Incentives' (2010) 95 Iowa L Rev 1621), in his study *Foundations of Evidence Law* (2005, Oxford), Alex Stein works with a cocktail of insights derived from probability theory, economic analysis, epistemology, and moral philosophy. Stein argues that, in examining the probabilistic deductions to which the tribunal of fact must inevitably resort in reaching its decisions and in resolving the sometimes paradoxical conclusions to which probabilistic deduction can lead, it is necessary to distinguish between 'probability' and 'weight'. Although it may in turn be overridden by notions of 'social utility', Stein contends that fact-finders cannot make a finding against a person when the evidence they employ is not susceptible to individualised testing—what he terms 'the principle of maximum individualisation'. The concern of the law of evidence, Stein contends, is the allocation of risk of error. Moreover, this process of risk-allocation operates via three vehicles: a principle of cost-efficiency, which requires the tribunal to minimise the total cost of errors as well as the total cost of error-avoidance; (in civil cases) a principle of equality, according to which both claimant and defendant share equally in the cost of apportioning risk; and, finally, (in criminal cases) an 'equal best' principle, which requires the state both to exert itself to protect the defendant against the risk of wrongful conviction and to ensure that others are not afforded greater protection. These three principles, which together conduce to allocating the risk of error within the justice system, are said to explain many of the leading rules of the law of evidence.

Other writers, again, incline to the more conventional view that many of the law of evidence's exclusionary rules represent an attempt by the judges to control the activities of autonomous juries, the members of which, if uncontrolled, might otherwise be tempted to pay undue regard to irrelevant or prejudicial material. In the words of the great American scholar, James Bradley Thayer, the law of evidence can in this sense be viewed as 'the child of the jury system' (*A Preliminary Treatise on Evidence at Common Law*, 1898, Boston, MA, p 296).

This last outlook, which would link a law of evidence with the presence of a jury, endures. Because laypersons lack the expertise of the professional lawyer, jurors need to be protected from evidence that might prejudice or inflame them (see, for example, *R v South Worcestershire Magistrates, ex p Lilley* [1996] 1 Cr App R 420 *per* Rose LJ). The criminal justice system is therefore concerned to filter carefully what evidence is admitted—to control how it is used and to ensure that triers of fact do not employ sources of evidence extraneous to the trial. As the Court of Appeal stated in *A-G v Fraill* [2011] 2 Cr App R 271, 28:

> *In every case the defendant and… the prosecution is entitled as a matter of elementary justice not to be subject to a verdict reached on the basis of material or information known to the jury but which was not in evidence at the trial.*

Subsequently, in *A-G v Dallas* [2012] 1 WLR 991, [41], a Greek lady, who had defied the court by researching a defendant's criminal record on the Internet, was jailed for contempt. Lord Judge CJ declared, 'in the long run any system which allows itself to be treated with contempt faces extinction… a possibility we cannot countenance'.

True, the courts may now be becoming less mistrustful. In *Mirza* [2004] 1 AC 1118, a case concerned with the extent to which juror misconduct can properly be investigated by the courts, Lord Rodger of Earlsferry strongly defended the lay presence in criminal trials:

> *The risk that those chosen as jurors may be prejudiced in various ways is, and always has been, inherent in trial by jury. Indeed, only the most foolish would deny that judges*

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> *too may be prejudiced, whether, for example, in favour of a pretty woman or a handsome man, or against one whose dress, general demeanour or lifestyle offends. The legal system does not ignore these risks: indeed it constantly guards against them. It works, however, on the basis that, in general, the training of professional judges and the judicial oath that they take mean that they can and do set their prejudices on one side when judging a case. Similarly, the law supposes that, when called upon to exercise judgment in the special circumstances of a trial, in general, jurors can and do set their prejudices aside and act impartially. The recognised starting point is, therefore, that all the individual members of a jury are presumed to be impartial until there is proof to the contrary.*
>
> (*Mirza* [2004] 1 AC 1118, [52])

More generally, it is now noticeable that appellate judges often articulate the view that the whole criminal justice system is 'premised on the basis that juries will be loyal to and will understand the judge's directions when difficult matters . . . arise as they frequently do in the course of trials' (*Isichei* (2006) 1790 JP 753, [50] *per* Auld LJ). Nevertheless, one encounters suggestions in some quarters that jurors are less qualified than judges to adjudicate certain matters and that the law of evidence should take account of this when determining which evidence is actually placed before the tribunal. One possible corollary is that exclusionary rules might be operated more loosely, even disregarded, if no jury is present. The degree to which such suggestions are justified is open to question (see Munday, 'Case Management, Similar Fact Evidence in Civil Cases, and a Divided Law of Evidence' (2006) 10 E & P 81, and Schauer, 'On the Supposed Jury-Dependence of Evidence Law' (2006) 155 U Pa L Rev 165).

Regardless of where the truth lies, the student will discover that the law of evidence, as elaborated over the decades largely by the judiciary, has a strong negative quality. Lord Phillips of Worth Matravers MR referred critically to this characteristic as though it were become a thing of the past:

> *For a long time our criminal procedure has been encumbered, and we use that word advisedly, with a mass of jurisprudence and legislation dealing with what can and cannot be put before the jury and what should be said to the jury about the evidence put before them. Much of this is designed to assist the jury in drawing conclusions from the evidence which are essentially matters of common sense. Sometimes the relevant rules are, or were, designed to prevent the jury from seeing relevant material, or drawing logical conclusions from such material, because they could not be trusted to accord to the material no more weight than it deserved.*
>
> (*Lambert, McGrath and Brown* [2006] 2 Cr App R (S) 105, [55])

Taking up Lord Phillips' point, the hearsay rule, for instance, forbids parties from adducing evidence of a statement not made in oral evidence in the proceedings as proof of any matter stated: in the round, witness A may not testify to the facts in place of witness B. It could be said that this rule prevents unschooled jurors from being misled by unreliable tittle-tattle and gossip. The rules that restrict the introduction of evidence of an accused's bad character, again, could be portrayed as having been designed to keep from the jury evidence that, although it may be relevant and hence probative, could simply prejudice them against the accused, preventing them from judging the case solely on the evidence. It is also certain that even if the

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rules of evidence did not originate in judicial distrust of juries, such distrust has unquestionably played a role in English law's retention of these rules. Their purpose in criminal cases was to ensure that defendants received a fair trial. (In civil cases, too, until the last century, jury trial was the order of the day.) However, as Lieck pointed out:

> *The English law of evidence can sometimes, by its very attempt at fairness, succeed more effectually in suppressing the truth.… Our law of evidence has been built up by generations of judges distrustful of the capacity of juries, and it has ended by holding the judges themselves in fetters.*
>
> (*Trial of Benjamin Knowles*, 1933, Notable British Trials, pp 22–3)

Properties of the law of evidence

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Whatever their origins, the rules of the law of evidence developed several unfortunate properties:

First, they became highly complex. For some, the common law's gradual and serendipitous accretion of judicial decisions contrasts unfavourably with the temptingly sleek lines of legislation. Indeed, for thinkers like Jeremy Bentham, an obsessive devotee of codification, not only was the subject a jumble, but the rules of evidence also turned the lawyer into a keeper of the mysteries, being 'at once the engines of a [lawyer's] power, and the foundation of his claim to the reputation of superior wisdom, and recondite science' (*Rationale of Judicial Evidence*, 1827, London, II.48). In fact, great tracts of the law of evidence have been overhauled in recent years by legislation—most notably, by the Criminal Justice Act 2003. Legislation has done little to reduce the complexity of the law of evidence. On the contrary, if Rose LJ's *cri de coeur* in *Bradley* [2005] 1 Cr App R 24 is representative, the very opposite would appear to be the case:

> *It is more than a decade since the late Lord Taylor of Gosforth CJ called for a reduction in the torrent of legislation affecting criminal justice. Regrettably, that call has gone unheeded by successive governments. Indeed, the quantity of such legislation has increased and its quality has, if anything, diminished. The 2003 Act has 339 sections and 38 schedules and runs to 453 pages. It is, in pre-metric terms, an inch thick. The provisions which we have considered have been brought into force prematurely, before appropriate training could be given by the Judicial Studies Board or otherwise to approximately 2,000 Crown Court and Supreme Court judges and 30,000 magistrates. In the meantime, the judiciary and, no doubt, the many criminal justice agencies for which this Court cannot speak, must, in the phrase familiar during the Second World War 'make do and mend'. That is what we have been obliged to do in the present appeal and it has been an unsatisfactory activity, wasteful of scarce resources in public money and judicial time.*
>
> (Bradley [2005] 1 Cr App R 24, [39])

Nor has the entry into force of this legislation always been managed especially stylishly (see, for example, *R (CPS) v City of London Magistrates' Court* [2006] EWHC 1153 (Admin), [13] and [32] *per* Maurice Kay LJ).

Following the enactment of the Criminal Justice Act 2003, one might have assumed that the Benthamite school's appetite for legislation had been temporarily sated. However, in March 2005, the Law Commission gave codification of the law of criminal evidence pride of place in its Ninth Programme of Law Reform. The Commissioners informed us that 'the law of criminal evidence consists of a jumble of statutes and common law rules, lacking clarity and coherence. This project would seek to clarify and improve the law'. The projected codification was to be led by the Home Office at a date to be appointed. It is little short of outlandish that no recognised evidence scholar's name appears in the long list of persons consulted by those responsible for assembling the Ninth Programme. Nor was the project mentioned in Sir Roger Toulson's otherwise comprehensive lecture in May 2006 on 'Law Reform in the Twenty-First Century' (2006) 26 LS 321. One is left to wonder just how this project found its way into the programme, not least because one Law Commissioner with whom this author conversed seemed decidedly unclear on its genesis. Subsequently, the codification project was described, hesitantly, in an undated consultation document, as a project 'not started that will be considered for priority alongside potential new projects' for the Tenth Programme, which commenced almost seven years ago in April 2008. It has not been mentioned since in either the Tenth, Eleventh (2011) or Twelfth (2014) Law Commission Programmes for Law Reform.

One consequence of the law of evidence's growing complexity is that the Judicial Studies Board (JSB), the body responsible for training the judiciary of England and Wales, published a *Crown Court Bench Book* that carried specimen directions intended to assist judges to tailor suitable directions on the law to juries. The specimen directions were subject to several important failings (see Munday, '*Exemplum habemus*: Reflections on the Judicial Studies Board's Specimen Directions' [2006] J Crim Law 27). As Lord Judge CJ acknowledged in the Foreword to the March 2010 edition, the specimen directions could sometimes be 'incanted mechanistically and without any sufficient link with the case being tried' (p v). The new edition, entitled *Crown Court Bench Book: Directing the Jury*, brings the materials up to date and, it is claimed, moves away from the perceived rigidity of specimen directions towards a fresh emphasis on the responsibility of the individual judge, in an individual case, to craft directions appropriate to that case. It now provides:

> *thorough exposition of the summary of the relevant law, bullet-pointed ingredients for directions, some essential, most calling for a judgment as to relevance, and illustrative examples. It guides the judge in the crafting of directions, and should be a useful starting point of reference on the Bench.*
>
> (Judicial Studies Board, *Crown Court Bench Book*, 2010, Foreword)

Although they will no longer be updated, Lord Judge recognised that it would be 'unrealistic to attempt an instant crossover from specimen directions to self-crafted directions'. The directions were not therefore being 'withdrawn'. Although this author was a declared foe of the specimen directions, in this book reference will occasionally be made to them when it is thought useful. The student will have to consult pre-March 2010 editions of the *Bench Book* for the relevant texts.

Secondly, in the past it was possible to say that the rules of evidence had a tendency to become too rigid, often serving to exclude evidence contrary to the plain dictates of common sense. In recent years, thanks to numerous legislative and judicial interventions, the significance of this failing has diminished. Judges do sometimes refer to the phenomenon, but more often than not in order to stress how, in modern times, our outlook has altered for the better, the criminal

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process no longer being 'an obstacle course for the prosecution' in which the accused is but 'a bystander at the spectacle' (*R (Cox) v DPP* [2005] EWHC 2694 (Admin), [10] *per* Newman J).

Interestingly, a similar sea change is visible in the courts' approach to rules of criminal procedure. In *Ashton* [2006] 2 Cr App R 15, an important decision, Fulford J noted:

> *The prevailing approach to litigation is to avoid determining cases on technicalities (when they do not result in real prejudice and injustice) but instead to ensure that they are decided fairly on their merits. This approach is reflected in the Criminal Procedure Rules and, in particular, the overriding objective.…[A]bsent a clear indication that Parliament intended jurisdiction automatically to be removed following procedural failure, the decision of the court should be based on a wide assessment of the interests of justice, with particular focus on whether there was a real possibility that the prosecution or the defendant may suffer prejudice. If that risk is present, the court should then decide whether it is just to permit the proceedings to continue…*
>
> (*Ashton* [2006] 2 Cr App R 15, [9])

Thirdly, although in practice the jury has dramatically declined in importance, a curious feature of the law of evidence is that rules of evidence which evolved in the particular context of jury trial mostly apply with equal vigour in magistrates' courts, where there is no jury—and, increasingly, no lay magistrates either. The jury is now virtually extinct in civil cases, and attempts are regularly made to restrict its use even in criminal cases by governments anxious to be seen to be cutting costs or getting tough on crime. Yet, as Damaška has pointed out:

> *…[T]he relative marginalization of jury trials has so far failed to bite deeply into the common law orthodoxy and produce shifts in mainstream thinking about evidence; jury trials continue to be employed both as the institutional background for reflection on evidence and as a benchmark for shaping evidentiary rules.*
>
> (*Evidence Law Adrift*, 1997, New Haven, p 128)

Fourthly, in criminal cases the rules of evidence have often come to be seen as tilting too far in favour of accused persons. The *bien pensants* frequently argue that the balance needs to be redressed. This critique looks less convincing today. In particular, following enactment of the Criminal Justice Act 2003, it is not so easy to argue that the system is heavily tilted in favour of those accused of crime. Under the 2003 Act: the situations in which the prosecution may adduce evidence of a defendant's bad character have been considerably expanded and the defendant's opportunities to attack the prosecution's witnesses have considerably diminished; the constitution of the jury has been transformed—even to the extent of recruiting as jurors members of the judiciary, police officers, and prison wardens, a policy fraught with difficulty (*Hanif and Khan v UK* (2012) 55 EHRR 16); and the range of cases triable without a jury has been extended to include certain fraud trials, cases in which there is a danger of jury tampering, and rare cases in which:

> *…the complexity of the trial or the length of the trial (or both) is likely to make the trial so burdensome to the members of a jury hearing the trial that the interests of justice require that serious consideration should be given to the question of whether the trial should be conducted without a jury.*
>
> (Criminal Justice Act 2003, s 43: See, for example, *Twomey et al* [2010] 1 WLR 630)

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In addition, the exceptions to a now rewritten hearsay rule are extremely wide-ranging, and acquitted defendants may be retried in a variety of circumstances.

Fifthly, the law of evidence was for a long time assumed by many to be largely impervious to thoroughgoing reform. Writing in the press in 1992, a former Lord Chancellor, Lord Hailsham, bewailed the English law of evidence's robust resistance to fundamental remodelling:

> *[L]et nobody suppose that a serious attempt to introduce into our law of evidence a general rule in favour of common sense would be either popular or acceptable to either House of Parliament. … There are more sacred cows in our law of criminal evidence and procedure than would fill Smithfield market in a decade.*
>
> (*The Sunday Times*, 19 January 1992)

The distinguished criminal lawyer, judge, and architect of that enduring codification, the Indian Evidence Act of 1872, James Fitzjames Stephen, writing in the previous century, had similarly commented morosely on the English law of evidence's imperviousness to change that '[i]t would be as impossible to get in Parliament a really satisfactory discussion of a Bill codifying the law of Evidence as to get a Committee of the whole House to paint a picture' (*A Digest of the Law of Evidence*, 1874, London). The welter of recent legislative reforms in the field demonstrates that such fears were misplaced.

In keeping with diminishing confidence in the merits of the English system, which is evident in other contexts, and as a response to the criticisms to which the law of evidence has been subjected, a small but vociferous group of lawyers, comprising both academics and practitioners, has sought sanctuary in the belief that, in place of an adversarial procedure in which responsibility for adducing proof in the case rests predominantly with the parties, English law ought to adopt a putatively more efficient, inquisitorial model, with the court taking a more prominent role in proceedings. This line of attack has led other writers to put forward some interesting defences of common law adversarial procedure. One of the most ambitious has been Richard A Posner's attempt to apply cost-efficiency analysis to the law of evidence ('An Economic Approach to the Law of Evidence' (1999) 51 Stan L Rev 1477). His analysis of American evidence law, which makes extensive use of Bayes' theorem (see paras 8.52–8.54), acknowledges that 'superficially' inquisitorial systems can appear more economically efficient than adversarial systems, particularly if one restricts one's attention to the process of evidence-gathering, in which inquisitorial systems do indeed facilitate the amassing of an optimum amount of evidence. Other desiderata, however, must be taken into consideration when assessing the respective overall efficiencies of common law and civil law systems of trial in relation not only to evidence-gathering, but also to the presentation and evaluation of evidence. Notably, Posner argues, when one takes into account the greater public visibility and widespread use of plea bargaining in American law, the superior efficiency of inquisitorial systems begins to look less self-evident. Posner concludes that American adversarial procedure does not simply sacrifice efficiency to a number of non-economic values, but is actually quite efficient in itself and conceivably superior to Continental, inquisitorial systems in that respect. Although these findings, some of them debatable, cannot necessarily be transposed unadjusted into an English setting, Posner's writings serve as a warning that those who decry adversarial method may be assuming too readily the correctness of the beguiling claims sometimes made on behalf of inquisitorial modes of trial—claims that are all too often made by their more uncritical exponents. (See also Hodgson, 'The Future of Adversarial Justice in 21st Century Britain' (2010) 35 NCJ Int'l & Com Reg 319.)

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Recent years have witnessed a transformation in the law of evidence. In criminal cases, legislation has unquestionably tipped the scales more in favour of the prosecution. Alongside the examples already mentioned, legislation has restricted the right of silence under the controversial provisions of the Criminal Justice and Public Order Act 1994, just as it has dramatically altered the legal system's attitude towards classes of vulnerable witness, such as child victims (see the Criminal Justice Act 1988, as amended) and vulnerable or intimidated witnesses (under the Youth Justice and Criminal Evidence Act 1999 and Criminal Justice Act 2003). The courts, too, have relaxed some of the exclusionary rules in favour of the prosecution. Indeed, one occasionally detects a fresh spirit in the courts' judgments, with judges calling for the abandonment of 'ancient rules' and their replacement by a more pragmatic approach (for example, Lord Steyn in *Mills v R* [1995] 1 WLR 511). The Law Commission's reports on the hearsay rule (*Evidence in Criminal Proceedings: Hearsay and Related Topics*, 1997, Law Com no 245) and on bad character evidence (*Evidence of Bad Character in Criminal Proceedings* in 2001, Law Com no 273), and Sir Robin Auld's *Review of the Criminal Courts* (2001, Cm 5563), all played a part in stimulating the government to bring forward proposals for the reconstruction of some of criminal evidence's central topics. The reforming process within the law of evidence is often portrayed as the law's lowering the barriers to truth. Many have long believed that the law of evidence is in need of this variety of 'rationalisation'.

Sixthly, little more than a passing familiarity with the law of evidence will alert us to the fact that this is an area in which the Human Rights Act 1998 exerts considerable influence. The effects of the Act are visible in very many criminal cases. The 1998 Act has led judges and lawyers to alter their discourse fundamentally. To the extent that all lawyers have had to adjust to a new intellectual framework, it is difficult to imagine the occurrence of any greater change to the system.

Even before the Act was brought into force, decisions of the ECtHR had caused English law to modify the rules governing the permissible inferences that might now be drawn from a suspect's exercise of the right of silence (see Youth Justice and Criminal Evidence Act 1999, s 58). The European Convention on Human Rights—and especially the presumption of innocence enshrined in Art 6—must have been a factor in the government's decision in the Terrorism Act 2000 (s 118(2)) and in the Regulation of Investigatory Powers Act 2000 (s 53(3)) to impose only an evidential, rather than a legal, burden of proof on defendants charged with certain offences under those statutes (see **Chapter 2**). Prior to the enactment of Pt 11 of the Criminal Justice Act 2003, there had also been broad acknowledgement that the hearsay rule—and indeed some of its exceptions—were unlikely to pass muster under the Convention. As Lord Hope of Craighead pointed out in *R v DPP, ex p Kebilene* [2000] 2 AC 326, 374–5, prior to the Act's entry into force: 'It is now plain that the incorporation of the European Convention on Human Rights into our domestic law will subject the entire legal system to a fundamental process of review and, where necessary, reform by the judiciary.'

Subsequently, in *Lambert* [2002] 2 AC 545, [6], Lord Slynn put us on notice that under the Act 'well-entrenched ideas may have to be put aside, sacred cows culled'. Later, in a brief dissenting speech in *Harrow LBC v Qazi* [2004] 1 AC 983, [27] and [32], Lord Steyn twice referred to 'the new landscape' created by the Human Rights Act 1998. The law of evidence affords a commanding vantage point from which to survey this process.

How, then, is the Convention to be applied? Lord Woolf CJ declared, in *Lambert, Ali and Jordan* [2002] QB 1112, that the Convention was to be given 'a broad and purposive approach', so as to safeguard the fundamental rights of individuals as well as society as a whole.

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In a number of evidence cases, such as *Lambert* [2002] 2 AC 545 and *A (No 2)* [2002] 1 AC 45 (see paras 2.42–2.53 and 4.87–4.94), the House of Lords delivered sharp reminders that the Human Rights Act allowed courts to give domestic legislation very ample constructions simply in order to maintain the legislation's compatibility with European human rights law. Section 3, which requires that 'so far as it is possible to do so, primary legislation . . . must be read and given effect in a way which is compatible with the Convention rights', has led courts sometimes to adopt 'an interpretation which linguistically may appear strained' that may 'require the court to subordinate the niceties of the language of the (impugned Act) . . . to broader considerations'. As Kentridge JA warned, speaking in the South African Constitutional Court in *State v Zuma* (1995) 4 BCLR 401, 412, 'If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination'. The English higher judiciary has begun to take this admonition to heart. Lord Steyn, in *HM Advocate v R* [2003] 1 WLR 317, [18], observed, significantly: 'The moral authority of human rights in the eyes of the public must not be undermined by allowing them to run riot in our justice systems.'

Of late, the courts have even begun to contest the authority of what they consider aberrant rulings of the ECtHR. In *Horncastle* [2010] 2 WLR 47, the Supreme Court, along with the Court of Appeal, openly challenged a statement in *Al-Khawaja and Tahery v UK* (Applications nos 26766/05 and 22228/06) suggesting that Art 6 of the Convention was violated whenever hearsay evidence relied upon by the prosecution was the sole or decisive evidence in the case. The Grand Chamber eventually handed down a conciliatory judgment in December 2011. The Supreme Court expressed similar concerns in *SOCA v Gale* [2011] 1 WLR 2761, in which a seven-man Court was concerned with whether a civil recovery order made in the UK in respect of monies allegedly acquired through drug trafficking, money laundering, and tax evasion by G, who had previously been acquitted of drug trafficking in Portugal, infringed European human rights law. Having reviewed the relevant Strasbourg jurisprudence, Lord Phillips of Worth Matravers PSC observed that he found the ECtHR's attempts to distinguish between claims for compensation by an acquitted defendant and claims for compensation by a third party against an acquitted defendant 'unconvincing', hazarding that the Court may have taken 'a wrong turn' and suggesting that 'this confusing area of Strasbourg law would benefit from consideration by the Grand Chamber' (at [32]). Five further members of the Court associated themselves with Lord Phillips' remarks (see [60], [112]–[114], and [117]). Only Lord Dyson adopted a 'less critical' stance (at [131]). Once again, decisions of the ECtHR have been openly called into question—in this instance, a whole tranche of its jurisprudence.

Finally, mention needs to be made of the advent of active case management, and more precisely of the fundamental procedural changes wrought by both the Civil Procedure Rules and the Criminal Procedure Rules. Rules have been introduced in recent years, in both civil and criminal procedure, which can have the effect of restricting the volume of evidence admitted at trial. The Civil Procedure Rules, which came into force first, formally introduced the concept that every trial judge is responsible for the efficient husbanding of court resources via 'active case management'. When, in 2005, the Criminal Procedure Rules (Crim PR) were brought into force, they too adopted this concept. Like their civil counterparts, the Criminal Procedure Rules (now Crim PR 2014, which are buttressed by the *Criminal Practice Directions* [2013] 1 WLR 3164) exert significant impact on the evidence admitted in criminal trials, both

in terms of quantity and even in terms of substance, through this medium of 'active case management'.

Lord Woolf CJ's original Foreword to the Criminal Procedure Rules shows that they were intended to precipitate a sea change in criminal practice. Today, it is accepted that the 'explicit powers and responsibilities' to manage cases actively and to reduce the numbers of ineffective hearings are 'of the first importance' (*R (Kelly) v Warley Magistrates' Court* [2008] 1 WLR 2001, [4] *per* Laws LJ).

The overriding objective of criminal procedure, as stated in the Rules, includes the court's 'dealing with the case efficiently and expeditiously' (Pt 1.1(2)(e)) and 'in ways that take into account … the complexity of what is in issue' (Pt 1.1(2)(g)(ii)). The overriding objective applies with equal force to the conduct of trials before the Crown Court, magistrates' courts, and appellate courts. All parties who are involved in any way with a criminal case must now 'conduct the case in accordance with the overriding objective' (Pt 1.2(1)). Moreover, 'the court must further the overriding objective in particular when … interpreting any rule' (Pt 1.3(c)). Part 3 of the Criminal Procedure Rules requires that 'the court must further the overriding objective by actively managing the case' and, after the manner of its civil counterpart, 'active case management' includes such things as:

> *… ensuring that evidence, whether disputed or not, is presented in the shortest and clearest way; discouraging delay, dealing with as many aspects of the case as possible on the same occasion, and avoiding unnecessary hearings; [and] encouraging the participants to co-operate in the progression of the case. … Each party must actively assist the court in fulfilling its duty.*
>
> (Criminal Procedure Rules, Pts 3.2(2)(e), (f), and (g) and 3.3)

These Rules could quite readily be construed to confer on criminal trial judges and case management judges the power to deliver directions that restrict the volume of admissible evidence, even according to the type of tribunal before which the case is ultimately to be tried (see further Munday, 'Case Management, Similar Fact Evidence in Civil Cases, and a Divided Law of Evidence' (2006) 10 E & P 31). They certainly foster a degree of openness—parties must be 'prepared to put their cards face up' (*Hayes* [2008] EWCA Crim 1998, [13] *per* Toulson LJ)—which previously had been largely alien to English criminal procedure.

The notion that the trial judge must retain control over the conduct of proceedings is by no means new. Its formal integration into the Rules, however, lends this judicial responsibility added force. The judge's role is now very much to ensure that attention is intently focused on what really counts; iterative and tangential evidence is to be avoided. As Pill LJ observed:

> *The danger about letting in peripheral and collateral matters is in one thing leading to another, as happened in this case. … If justice is to be done, trials must be kept within reasonable bounds. The central issue must not so be overlaid with consideration of peripheral matters that the judge and the jury are likely to lose sight of the central issue.*
>
> (*Sylvester* [2005] EWCA Crim 1794, [44])

Tuckey LJ made similar points in *Caley-Knowles* [2006] 1 WLR 3181, [29], noting that 'robust but reasonable use of this power is the way to ensure that a trial is not side-tracked into consideration of matters which are not as a matter of law relevant to the issues which the jury has to decide'.

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Unmindful of the caution that case management powers are to be exercised robustly, but reasonably, judges occasionally exercise them overenthusiastically. In *FB* [2011] 1 WLR 844, the Court of Appeal had to check a judge who, wishing to spare the public purse, made it his practice to quash indictments in cases that he did not believe ought to have been brought before the Crown Court. As Leveson LJ pointed out:

> *[T]he Rules do not either expressly or by necessary implication include a power to alter the established constitutional position. … It is not … for judges to short circuit or ignore well established principles of law in the name of efficiency.*
>
> (*FB* [2011] 1 WLR 844, [29] and [34])

As Sir Igor Judge P pointed out in *K et al* [2006] EWCA Crim 835, [6], a judge nevertheless enjoys considerable discretion in such matters: 'We are not prescribing any particular method of approach. Case management decisions are case specific.' They may even lead to the exclusion of otherwise admissible defence evidence. *Musone* [2007] 1 WLR 2467 represents a particularly powerful application of the Criminal Procedure Rules insofar as they prevented an accused from adducing evidence in his defence. M had failed to comply with rules of court that require notice to be given whenever a defendant intends to introduce evidence of his co-accused's bad character. As a tactical ploy, M had deliberately chosen to seek to adduce evidence of a co-accused's confession very late in the day. The Court of Appeal declared that the requirements of fair trial, enshrined in Art 6 of the European Convention, were met by the proper application of the Criminal Procedure Rules: by failing to give notice, as required, M had deliberately manipulated the trial process in order to ambush his co-defendant and to deprive the latter of an opportunity to deal properly with the allegation. All of this led Moses LJ to conclude, in upholding the trial court's decision to exclude the evidence altogether, that:

> *It is not possible to see how the overriding objective can be achieved if a court has no power to prevent a deliberate manipulation of the rules by refusing to admit evidence which it is sought to adduce in deliberate breach of those rules.*
>
> (*Musone* [2007] 1 WLR 2467, [59])

Case management often takes pride of place in JSB judicial training sessions. Its consecration in the Criminal Procedure Rules 2014 means that the notion of what is relevant, the central tenet of a law of evidence (see Chapter 1), as well as what is fair, needs to be clearly delineated, will be at the forefront of all parties' minds, and in future will be strictly enforced in criminal as well as civil cases. (See further HHJ Roderick Denyer QC, *Case Management in the Crown Court*, 2008, Oxford.)

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Envoi

If one elects to write a textbook on a subject in which legal rules rapidly develop and mutate, contents are bound to have a restricted shelf life. As on previous occasions, this latest edition has involved substantial rewriting. Some small part of this relates to common law rules of evidence; by far the greater part, however, is necessitated by case law that seeks to gloss recent legislation. There is a persistent fantasy amongst law reformers that legislation simplifies the law. The short, and selfish, point that this author would make is that if one sets out to write on

the law of evidence, then one finds oneself shooting at a swift moving target. In his 'prudently chaotic' but wholly ungeographic work, *Atlas*, Jorge Luis Borges wrote about his friend, the Argentine mystic and painter, 'Xul-Solar', who:

> *had…invented…a kind of complex duodecimal chess which took place on a board boasting one hundred and forty-four squares. Every time [Xul] explained it to me he would decide it was too elementary, and would proceed to enrich it with new ramifications, with the result that I never learned it.*
>
> (Jorge Luis Borges, *Atlas*, 1984, New York, p 80)

Borges could almost have been referring to the relationship between long-suffering students of the law of evidence and successive governments, which have simply not been able to let well alone. It might be agreeable to imagine that, following enactment and progressive implementation of the Criminal Justice Act 2003, the law of evidence would have been allowed to enjoy brief respite from the process of reform and granted time to consolidate—but that has not entirely been the case. All the same, despite the panoply of new rules with which the subject is persistently enriched, this author expresses the hope that, by means of his book, the reader may be able to learn something of the laws of the game.

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