MURPHY ON EVIDENCE

Fourteenth Edition

RICHARD GLOVER

Solicitor
Senior Lecturer, School of Law
University of Wolverhampton

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

Eleventh Edition 2009
Twelfth Edition 2011
Thirteenth Edition 2013

Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2015933304

ISBN 978–0–19–873333–1

Printed in Great Britain by
Ashford Colour Press Ltd, Gosport, Hampshire

1

INTRODUCTION TO THE LAW OF EVIDENCE

Summary of Main Points

- The law of evidence is not the same as the science or philosophy of evidence.
- The characteristics of judicial trials demand a particular legal approach to the presentation and use of evidence.
- In most legal systems all relevant evidence is admitted and weighed, and conclusions drawn from it; this is the only known method of scientifically reconstructing past events.
- Unlike other legal systems, the common law has developed a law of evidence, i.e. detailed exclusionary rules of evidence, whereby relevant evidence may be excluded for various reasons.
- Among the factors which influenced the development of these rules are the adversarial system of trial (including the use of juries); the accused's procedural disadvantages during the formative periods; and the common law's terror of perjury and fabrication.
- Today the law of evidence is significantly influenced by the fair trial and other provisions of the European Convention on Human Rights.

1.1 WHAT EVIDENCE IS

Most lawyers and students think of evidence as a collection of rules governing what facts may be proved in court, what materials may be placed before the court to prove those facts, and the form in which those materials should be placed before the court. What they have in mind is the law of evidence, but not evidence itself. One of the curiosities of the common law is the emergence of rules of evidence whose purpose is not to enable a party

to bring before the court evidence which might help his case, but to prohibit a party from bringing some kinds of evidence if his opponent objects, or even if the court itself refuses to permit it. Because of the demands made by the realities of practice, it is only natural that familiarity with the rules should be emphasized. What is taught and examined in the field of evidence is the law of evidence. Yet there is a whole field of inquiry which relates to evidence itself, rather than the law of evidence. The field is a fascinating mixture of logic, epistemology, sociology, psychology, and the forensic sciences, and is, therefore, wide enough to encompass a vast library of its own. Its concern is the use of evidence as material in the reconstruction of past events.

It is a field which has attracted a distinguished, but relatively small number of investigators, at least as far as lawyers are concerned, and some of its main contributors have been philosophers and psychologists. Some of these contributors, for example Jeremy Bentham, while deeply interested in the science of evidence, actually disapproved of the whole concept of a law of evidence. Bentham perceived rules of evidence to be nothing more than an artificial restriction on the science of evidence, invented by lawyers for less than honourable purposes.[1] John Henry Wigmore, the dean of American evidence writers, required his students to master the science of evidence before turning to the law (a luxury now foreclosed by the tyranny of practice-based syllabi and examinations) and developed a thorough, though cumbersome system for the methodical analysis of evidence to be presented in court.[2]

Evidence may be defined in general terms as any material which has the potential to change the state of a fact-finder's belief with respect to any factual proposition which is to be decided and which is in dispute. In more formal terms, Achinstein defines evidence as follows: evidence E is potential evidence on hypothesis H if and only if (1) E is true; (2) E does not make H necessary; (3) the probability of H on E is substantial; and (4) the probability of an explanatory connection between H and E is substantial.[3] Although, as we shall see, lawyers do not treat evidence in the courtroom with very much deference to the neat compartmentalization of Achinstein's definition—for example, the question of whether E is true is decided after, rather than before, E is legally accepted as evidence (2.8)—the definition does make clear the logical role of evidence in proving a hypothesis. It is, of course, a logical rather than a legal definition, appropriate to scientific inquiries of any kind. But lawyers have superimposed on it the particular requirements of their own interest in the uses of evidence.

[1] Namely increasing their potential for earning fees, and making it impossible for lay people to penetrate the complexities of the law. Bentham saw the attitudes of lawyers as the most dangerous obstacle to reform. His excoriation of the judiciary and the profession in his monumental treatise on evidence, *The Rationale of Judicial Evidence* (London: Allen & Clarke, 1827) was, however, weakened by its intemperance. There are rules of public policy which support some rules of evidence.

[2] *The Principles of Judicial Proof* (Littleton, Colorado: F.B. Rothman, 1913). Despite efforts to portray Wigmore's method as a viable practical tool on the part of Twining (*Theories of Evidence, Bentham and Wigmore* (London: Weidenfeld & Nicolson, 1985), Anderson, Schum, and Twining, *The Analysis of Evidence* (2nd edn, Cambridge: Cambridge University Press, 2005)), the pure Wigmorean method involves an unnecessary and impracticable expenditure of time from the point of view of the practitioner. However, it remains of value in showing scientifically how pieces of evidence relate to issues and each other in terms of relevance, and how their weight is affected by various factors. Many of the important primary and secondary sources dealing with the philosophical and scientific aspects of evidence and proof are collected in P. Murphy, *Evidence Proof and Facts: A Book of Sources* (Oxford: Oxford University Press, 2003).

[3] P. Achinstein, *The Nature of Explanation* (New York: Oxford University Press, 1983).

1.2 THE NATURE OF THE JUDICIAL TRIAL

For legal purposes, the nature of evidence can best be understood by reference to the nature of the judicial trial. A trial is an inquiry into past events, the main purpose of which is to establish to an acceptable degree of probability those past events which it is claimed entitle the court to grant or deny some relief in accordance with law. From a scientific viewpoint, evidence may be defined as any material which would aid the court in establishing the probability of past events into which it must inquire.[4] Historians, journalists, and others also seek to establish the probability of past events, but their inquiries are carried out under quite different circumstances from those under which a court works. The principal characteristics of a judicial trial, which distinguish that process from historical and other inquiries, are as follows:

(a) The parties define for the court what the issues to be inquired into are. Legal proceedings are commenced by a party. The court has no power to bring matters before itself, and must wait to be seised of a case by a party. The parties then further define the issues which the court is to resolve, and once the issues are defined, both the court and the parties must confine their investigation to them.[5] Procedurally, the issues are reflected in the statements of case or indictment. They are narrow and precisely defined, and may exclude much material which a historian would feel bound to consider in exploring the entire history of an event.

(b) Legal disputes must be resolved within a reasonable time and at reasonable expense. The outcome of a judicial trial determines the rights and obligations of the parties, and may result in loss of life or liberty, loss of financial resources, of parental rights over children, or of reputation. There is no possibility of a detached, academic inquiry. Time limits are an integral part of the trial process, and the parties' preparation of the case must be accomplished within the time limits established.

(c) Trials are not objective inquiries into past events, but adversarial contests, in which parties, who have a vital interest in the outcome, not only decide what evidence they wish to present and prevent from being presented, but also present the evidence in as persuasive a manner as possible, a manner calculated to win them the sympathy and support of the court. Each party also seeks to persuade the court, by means of partisan persuasive argument, to interpret the evidence in a light favourable to his case.

(d) A judicial trial is not a search to ascertain the ultimate truth of the past events inquired into, but to establish that a version of what occurred has an acceptable probability of being correct.[6] It is in the nature of human experience that it is impossible to ascertain the truth of past events with absolute certainty. Nonetheless, a historian or a journalist is entitled to set his own standard of probability, which may correspond to truth as closely as he wishes. A court accepts predetermined standards of probability, which depend not on the facts of the individual case, but

[4] This is, of course, quite different from the legal viewpoint, which considers also whether certain kinds of evidence should be excluded, notwithstanding their potential in helping to reconstruct the facts.

[5] Though since the coming into force of the Civil Procedure Rules 1998, the courts have begun to take a more proactive role in defining what issues it is necessary to decide. The Rules require a civil court to undertake the overall management of cases brought before it.

[6] Notwithstanding statements sometimes found to the contrary, e.g. that contained in American Federal Rule of Evidence 102, which states that the purposes of the Rules of Evidence are that: '… the truth shall be ascertained and proceedings justly determined'. The second of these goals is worthy, if imprecise; the first is worthy, but ultimately unattainable.

on the type of case under consideration. The highest standard of proof demanded by a common law court in any circumstances is proof beyond reasonable doubt. This is a high standard (4.12) but falls well short of absolute certainty. This standard is demanded only of the prosecution on the issue of guilt in a criminal case; in all other cases, the standard is that of the balance of probability, i.e. that the event is more likely than not to have occurred as alleged. In relation to many secondary issues, an even lower standard is employed, namely, that there is some evidence capable of supporting the proponent's version of the event (a *prima facie* case).

(e) To the extent that juries are employed as triers of fact, the above considerations are compounded. Juries consist of laymen and women who have no training in the evaluation of evidence, and who are more likely to be swayed by partisan persuasive argument than those with professional experience of evidence.

1.3 DEVELOPMENT OF RULES OF EVIDENCE

One school of thought is that all rules of evidence are artificial restrictions on the ability of the court to reach a correct decision through judicial reasoning. Jeremy Bentham, probably the most celebrated proponent of this view, ascribed the rules to the tendency of lawyers and judges to promote technicality so as to make themselves indispensable, and to the evils of sentimental liberalism (for example, his elaborated analogy of a criminal trial to a fox hunt—the fox must be given 'fair play'). He believed that the proper approach was the utilitarian one of allowing all rationally helpful evidence to be considered by the tribunal of fact, subject to guidance as to its weight. Correctness of decision was all-important. In his monumental *Rationale of Judicial Evidence*, Bentham developed these themes at great length, and it must be conceded that even today (his writings were influential in producing some reforms) the law is technical in many respects. It must also be borne in mind that exclusionary rules of evidence are primarily associated with common law jurisdictions. In the continental civil law or Romano-Germanic systems prevalent in Europe and other parts of the world, there are relatively few legal rules of evidence. In these systems, the principle is one of 'free proof', meaning that any apparently relevant evidence tends to be admitted, and that factors which in the common law world would lead to the exclusion of some evidence are considered as bearing only on the weight of that evidence. The totality of the available relevant evidence is admitted and considered in an undifferentiated way in evaluating the case as a whole. In this sense, the civil law model is closer to Bentham's utilitarian ideal. But it must be noted that pre-trial and trial procedure in civil law systems is very different from that in common law systems. The procedure is inquisitorial rather than adversarial, with the court taking a proactive lead in supervising the investigation of the case as well as the evaluation of the evidence, and the parties having a more passive role. The trial is conducted by one or more professional judges sitting without a jury as the finders of fact as well as the judges of the law. In this context, exclusionary rules of evidence in the common law sense are generally considered to be unnecessary.[7]

However, most writers have conceded the need for some artificial restrictions on the evidence to be admitted in judicial trials in the common law context. While correctness

[7] Though not entirely so. Rules upholding transcendental legal principles, e.g. the basic rights of the accused necessary to ensure a fair trial enshrined in the European Convention on Human Rights, and the protection of privileged communications, are recognized. For an alternative view: P. Murphy (2008) 12 *E & P* 1.

of decision is the main goal of a judicial trial, there are also other legitimate concurrent goals. These include the upholding of transcendent rules which guarantee the fairness of the trial, the exclusion of kinds of evidence known by experience to be inherently suspect or unreliable, and the exclusion of kinds of evidence which are known to produce an unacceptable degree of prejudice on the part of the trier of fact. Policy-based exclusionary rules of evidence result from these concurrent goals, not from the goal of correct decision.

The formulation of the common law rules of evidence began to come into its own in the eighteenth century, although some rules predate this period by some time. The theory most favoured in the eighteenth century was the 'best evidence rule', i.e. the rule that a party must produce the best evidence that the nature of the case would allow. In *Omychund* v *Barker* (1745) 1 Atk 21, 49, Lord Hardwicke LC said that this was the only general rule of evidence. Gilbert's major treatise also contributed to the popularity of this view. But it proved to be inadequate as a general basis for a system of evidence law. Today, it remains only in vestigial form in the rule that, where a document is adduced as substantive evidence of its contents, the original document (as opposed to a copy or other 'secondary' evidence of its contents) is required. The modern working of this rule as regards documents is considered in Chapter 19. The wider implications of the rule are still sometimes canvassed. In *Teper* v *R* [1952] AC 480, 486, Lord Normand suggested that hearsay was objectionable because it was not the best evidence.[8]

In *Quinn* [1962] 2 QB 245, the accused were charged with keeping a disorderly house. The Court of Criminal Appeal rejected an argument that the trial judge ought to have permitted the showing to the jury of a film depicting striptease acts. The film had been prepared by the defence as a deliberate reconstruction of the acts which the defence contended had taken place in the premises concerned, and which was supported by some evidence indicating its accuracy as such. The easiest way to dispose of the appeal might have been to treat the question as one of relevance, because the film was a deliberate reconstruction, but the Court chose to decide the issue using the best evidence rule. Ashworth J said:

> Indeed, in this case, it was admitted that some of the movements in the film (for instance, that of a snake used in one scene) could not be said with any certainty to be the same movements as were made at the material time. In our judgment, this objection goes not only to weight, as was argued, but to admissibility; it is not the best evidence.

The best evidence theory was superseded by the concept of relevance, which, despite criticisms, remains the basis of our system of judicial reasoning. (For definitions of relevance: 2.8.) The concept of relevance was developed in the nineteenth century, and refined principally by Sir James Fitzjames Stephen. To make the concept work in relation to policy-based rules of evidence, Stephen was obliged to distinguish logical relevance (the rational, inferential relationship of a piece of evidence to a fact to be proved) from legal relevance (the study of what evidence should be admissible). Stephen's language is still to be seen in the Indian Evidence Act 1872, which he drafted and which is still in effect. But in England, the concept of relevance (a strictly logical analysis of probative value) plus admissibility (a policy decision as to what relevant evidence may be admitted) is now preferred.

[8] And see J. Spencer [1996] *Crim LR* 29. It has always been recognized that a failure to produce the best available evidence may affect the weight of the evidence in fact produced: e.g. *Francis* (1874) LR 2 CCR 128, per Lord Coleridge CJ.

The development of specific rules of evidence in England can also be traced to certain definite historical circumstances. Those which had the greatest effect are as follows.

1.3.1 The prevalence of trial by jury

Commenting on the rule against hearsay, Morgan observed that: 'while distrust of the jury had nothing to do with the origin of the hearsay rule, it has exerted a strong influence in preventing or delaying its liberalisation'.[9] The common law was closely bound up with the peculiar exigencies of jury trial, and because any evidence admitted had to be considered by a body of laymen, the law looked with disfavour on evidence which might expose the jury to evidence that judges considered unreliable, or which might impose on them the need for unreasonable analytical skills. Thus, it was feared that to require juries to weigh up the value of hearsay evidence, or evidence of character, would be to impose too great a burden, and a burden which, if not faithfully borne, might result in an irretrievable prejudice to a party against whom such evidence was tendered. There is, of course, a risk that a jury may, despite careful direction, act upon the wrong principles and it is no doubt necessary to regulate to some extent the material placed before juries. But whether the rules which have developed to keep certain types of evidence from them really operate to prevent them acting misguidedly is open to question. It will become apparent, from the rules discussed later in this book, that juries are habitually called upon to perform considerable feats of analysis, not to say of mental gymnastics. Nonetheless, no major rule of evidence has developed without unmistakable signs of tailoring to the supposed needs of juries, and without doubt it is the comparative rarity of jury trial in civil cases, in modern practice, which prompted reform and the willingness to experiment with the inclusionary approach in such cases.[10] The Civil Evidence Acts 1968, 1972, and 1995 effectively abolished the rule against hearsay.

The development of the law of evidence in criminal cases has been much more hesitant, and only in recent legislation, the Police and Criminal Evidence Act 1984 and the Criminal Justice Acts 1988 and 2003, has Parliament indicated that juries may now be regarded as capable of evaluating responsibly some significant kinds of hearsay evidence. It is of some interest to note that despite the entrenched constitutional right to jury trial in American Federal courts, and despite the fact that hearsay is always suspect in relation to the conditionally guaranteed right of confrontation, those courts have shown a far greater willingness to admit hearsay than have English courts.

1.3.2 The dread of manufactured evidence

The common law lived in constant fear of perjury, fabrication, and attempts to abuse or pervert the course of justice. The fear had far-reaching consequences, not only in the rejection of specific kinds of evidence which were thought to be particularly prone to abuse (hearsay, again, was a principal offender), but also in the wholesale rejection as witnesses of interested parties and their spouses. The rule that the parties and their spouses were incompetent to give evidence began to be relaxed in civil cases as late as 1851, and it was not until the Criminal Evidence Act 1898 that the accused in a criminal case became

[9] J.P. Morgan, *Some Problems of Proof under the Anglo American System of Litigation* (New York: Columbia University Press, 1956), p. 117.

[10] It may be more accurate to say that the system of adversarial trial, rather than the particular mode of trial by jury *per se*, was the most important factor in the emergence of rules of admissibility as a feature of the common law, but the two are closely identified, and jury trial has certainly influenced many rules of evidence in highly specific ways: J. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2002), p. 178.

competent to give evidence in his own defence. As a result, provision had often to be made for the proof of facts without recourse to the evidence of those best able to testify about them. Closely bound up with the fear of fabrication is the rule requiring sworn testimony. The solemnity and sanctity of sworn evidence, and the rule that at common law, evidence might not be given except on oath, has invested the law of competence (including the process of being sworn, which was eventually updated by the Oaths Act 1978) with a number of curious features, in particular with respect to the evidence of children of tender years (Chapter 15).

1.3.3 The harshness of the criminal law in the late eighteenth and nineteenth centuries

Most of the major common law rules of evidence owe much of their force to judicial attempts, during the formative years of the modern law of evidence, to mitigate some of the harshness of criminal law and procedure towards the accused. Faced with a system in which death was the sentence prescribed for many (at some periods all) felonies, but which denied to the accused the right of representation by counsel in such cases until 1836,[11] and the right to give evidence in his defence until 1898, the judges took seriously their role as the protectors of the accused, and developed many exclusionary rules with a view to redressing the balance. The general exclusion of character evidence, the stringent conditions of admissibility of confessions, the accused's right (until recently) to remain silent without risk of an adverse inference being drawn against him, and the burden and standard of proof in criminal cases, all owe much to this period of legal development. Indeed, they have in most respects remained virtually unchanged, despite the radical changes in the criminal process which have since taken place.

1.4 IMPACT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

More recently, decisions in which provisions of the European Convention on Human Rights[12] have been considered have had a considerable impact on the law of evidence. Indeed, it may not be an exaggeration to say that there is an on-going 'human rights revolution' in the law of evidence since enactment of the Human Rights Act 1998.[13] Courts are obliged to take into account (but not necessarily follow) the jurisprudence of the European Court of Human Rights whenever it is relevant in domestic proceedings. Several provisions of the Convention have affected the law, but most notably Article 6,

[11] The accused was allowed counsel in cases of treason as early as 1695, and appears to have enjoyed the right in the case of misdemeanours from early times. Blackstone, *Commentaries*, vol. IV, ch. 27, 349; 2 Hawk PC 400. Though Blackstone indicates that it was not uncommon for the accused to receive informal assistance from counsel, and the rule was not entirely clear in practice: A.N. May, *The Bar and the Old Bailey (1750–1850)* (Chapel Hill, NC: North Carolina University Press, 2003), chs 4 and 7.

[12] The Convention for the Protection of Human Rights and Fundamental Freedoms, signed in 1950 by the members of the Council of Europe, of which the UK was one, came into effect in 1953. With the coming into effect of the Human Rights Act 1998, the Convention was in effect incorporated into English domestic law: *Sharpe* [1997] Crim LR 848; *Ovey* [1998] Crim LR 4; *Arden* [1999] Crim LR 439. The majority of the Act's provisions came into effect on 2 October 2000. In accordance with accepted principles of statutory application, decisions which pre-date the coming into effect of the Act cannot be impugned on the ground that they do not comport with Convention rights: *Lambert* [2002] 2 AC 545; *Wilson* v *First County Trust (No. 2)* [2002] QB 74, 89 per Sir Andrew Morritt V-C.

[13] P. Roberts and J. Hunter (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Oxford: Hart Publishing, 2012), p. 1.

which guarantees the right to a fair trial. This is wide enough to include almost any issues of fairness or unfairness arising from the nature or operation of domestic rules of evidence, including the burden of proof (Chapter 4), the court's powers to exclude evidence under s. 78 of the Police and Criminal Evidence Act 1984 (3.7) and the admission of hearsay evidence against the accused (Chapter 8, Part B), to name some prominent examples. Article 3, which guarantees freedom from torture and inhuman and degrading treatment, is also relevant to the possible exclusion of a confession based on the circumstances in which it is alleged to have been made (9.5, 9.7). Article 8, which guarantees the right to respect for private and family life, is relevant to the possible exclusion of evidence obtained by means of trespass, the interception of communications, or other violations of privacy (3.10, 3.11). Article 10, which guarantees the right to freedom of expression, inspired the statutory privilege against disclosure of journalistic sources, and is relevant when balancing the public interests in protecting the confidentiality of communications to journalists, on the one hand, and in allowing parties access to evidence which is needed to protect their own interests, on the other (14.18).

1.4.1 Impact before coming into effect of the Act

The Human Rights Act 1998 effectively incorporates the Convention into English law, and requires a court to take account of the provisions of the Convention, and any judgment, decision, declaration, or advisory opinion of the European Court of Human Rights which may affect the issue with which the court is concerned. It also requires the courts, as far as possible, to construe statutory provisions in accordance with the Convention rights. Even before the Act came into effect, the relevant provisions of the Convention had been considered by English courts, and had proved relevant to statutory interpretation, because of the rule of construction that Parliament should not be taken, in the absence of clear indications, to have legislated in a manner contrary to the treaty obligations of the UK (*Derbyshire County Council* v *Times Newspapers Ltd* [1992] QB 770; *Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696). But at this stage the Convention failed to make a decisive difference in the outcome of an English case, because the courts held, not surprisingly, that English law provides safeguards at least equal to those of the Convention (e.g. the hearsay cases, Chapter 8, Part B), with the result that the cases were resolved simply on the basis of English law. This makes it difficult to assess how much influence the Convention then had on judicial attitudes.

1.4.2 Impact after coming into effect of the Act

In the light of these cases, it was, to say the least, doubtful whether the coming into effect of the Human Rights Act 1998 would result in a greater impact on the domestic evidence law of England. In fact, the courts have on the whole responded admirably to the challenge. The Convention has been considered and applied in a number of cases, some of which have produced far-reaching effects on the law. These cases are dealt with in their proper places in this book, but as an illustration, it is appropriate here to mention the decision of the House of Lords in *Lambert* [2002] 2 AC 545. In *Lambert*, the House was faced with the issue (a vexed one even under common law principles) of how far a statute which purports to require the accused to bear the legal burden of proof of an affirmative defence may be construed as doing so in the light of the presumption of innocence. At common law, it seemed to have been established that Parliament had the power to require the accused to bear a legal burden of proof of an affirmative defence (though not a burden of disproving an element of the offence). Whether the statute in question had this effect expressly or by necessary implication was to be judged by its language and was essentially a matter of statutory construction. But in *Lambert*, the House held that, subject

to a principle of proportionality between the importance of maintaining the presumption of innocence and the social necessity of dealing effectively with offences such as that charged, the Convention may require reading such a statutory provision as if it imposed on the accused no more than an evidential burden of adducing some evidence in support of the defence. Given the number and importance of the statutory provisions which have the same apparent effect as that under consideration in *Lambert*, the ripple effect of the decision will continue for a considerable time to come. Despite some degree of retreat in subsequent cases (4.9), it has already had a major impact on the law relating to the burden of proof. It will involve the reconsideration of the principles underlying some cases decided before the coming into effect of the Act, and will necessitate some re-formulation of parliamentary intent in the drafting of criminal statutes.[14] The law in this area and the decision in *Lambert* are considered in more detail at 4.9.

As anticipated in previous editions of this book, the impact of the European Convention has been hugely significant since the enactment of the Human Rights Act 1998 in October 2000. However, there are some important limits on the potential impact of Strasbourg jurisprudence on domestic law. The corresponding provisions of the Fifth and Sixth Amendments to the United States Constitution, which provide basic guarantees of fairness to defendants in criminal cases, have affected almost every area of the law of evidence. But these Amendments operate more directly than the Convention, because the latter cannot directly dictate the content of the domestic law of the States which are party to it, and confines itself to the broad ground of procedural fairness. In *Kostovski* v *Netherlands*,[15] the European Court of Human Rights observed:

> It has to be recalled at the outset that admissibility of evidence is primarily a matter for regulation by national law … Again, as a general rule it is for the national courts to assess the evidence before them … In the light of these principles the court sees its task in the present case as not being to express a view as to whether the statements in question were correctly admitted and assessed, but rather to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair.

It is apparent from recent caselaw that, at least in theory, this principle remains intact: *Bykov* v *Russia* [2009] App. No. 4378/02, Grand Chamber (10 March 2009, unreported). However, there have been occasions when the Court has appeared willing to rule on points of evidence: e.g. *Teixera de Castro* v *Portugal* (1998) 28 EHRR 101 (entrapment); *Condron* v *United Kingdom* (2001) 31 EHRR 1 (the right to silence); *Jalloh* v *Germany* (2007) 44 EHRR 32 (privilege against self-incrimination), and *Al-Khawaja & Tahery* v *United Kingdom* (2012) 54 EHRR 23. Nevertheless, unlike the United States Supreme Court, the European Court of Human Rights has no power to affect directly the outcome of a case in the domestic courts of a Council of Europe State. The Court will consider whether the framework and basic rules governing the law of evidence is fair, and comports with the standards of fairness required by the Convention. But, in general, it will avoid dictating to a Council State what its detailed rules of evidence should be.

[14] Thus, the Convention has played an important role in the thinking of the Law Commission in its proposed recommendations for reform of the law of mental disorder defences. The burden of proof as to the present defences of insanity and diminished responsibility may well need to be re-considered, as may proposals for future statutory provisions such as those adopted by the Commission in its report, *Draft Criminal Code: Criminal Liability and Mental Disorder*, 28 August 2002 (4.8.1).

[15] (1989) 12 EHRR 434, [39]; *Saidi* v *France* (1993) 17 EHRR 251, [43] and *Twomey* v *United Kingdom* (2013) 57 EHRR SE15, [31].

1.4.2.1 Stare decisis*: precedential value of decisions of European Court of Human Rights*

In *Kay & Others* v *Lambeth London Borough Council* [2006] 2 AC 465, the House of Lords clarified the precedential value of decisions of the European Court of Human Rights. The House held that while the European Court of Human Rights is authoritative on matters of interpretation of the Convention, and while English courts must give practical recognition to its decisions, they are not strictly bound by those decisions. Consequently, an English court must continue to follow binding decisions of a higher English court in accordance with the usual domestic rules of precedent. The House was prepared to allow a 'partial' exception to this rule in a case in which it is clear that a decision of a higher court rendered before the coming into effect of the Human Rights Act 1998 simply cannot stand in the light of that Act. But such an exception can apply only in an 'extreme' case, where there is no room for doubt: see the opinion of Lord Bingham of Cornhill [40]–[45].[16] The strength of this principle was underlined recently in relation to the fairness of trials where the defendant has been convicted on the basis of 'sole and decisive' hearsay evidence. The Court of Appeal stated clearly in *Riat & Others* [2013] 1 Cr App R 2 that:

> … if there be any difference, on close analysis, between the judgment of the Supreme Court in *Horncastle* [2010] 2 AC 373 and that of the ECtHR in *Al-Khawaja & Tahery* (2012) 54 EHRR 23, the obligation of a domestic court is to follow the former.[17]

1.4.3 Relevant Convention provisions

The following articles of the Convention are the most likely to be involved in issues of the admissibility of evidence and the judicial power to exclude evidence as a matter of discretion:

> *Article 3 (prohibition of torture)*
> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
>
> *Article 6 (right to a fair trial)*
> (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …
> (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
> (3) Everyone charged with a criminal offence has the following minimum rights:
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> (b) to have adequate time and facilities for the preparation of his defence;
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

[16] Lord Bingham provides an example of such an extreme case, involving the decision of the House of Lords in *X (Minors)* v *Bedfordshire County Council* [1995] 2 AC 683, which could not survive the 1998 Act. See the decision of Evans-Lombe J in *C plc* v *P* [2006] Ch 549 applying the exception in a case involving the privilege against self-incrimination; though this was criticized on appeal by the majority of the Court of Appeal, affirming the result of the case but on much simplified grounds, [2008] Ch 1; 14.8.

[17] Also see *Ibrahim* [2012] EWCA Crim 837.

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 8 (right to respect for private and family life)
(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder and crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 10 (freedom of expression)
(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. …
(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The Human Rights Act 1998 provides, *inter alia*, with respect to Convention rights:[18]

2—(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—
(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights [(b), (c), and (d) add opinions or decisions of the Commission and decisions of the Committee of Ministers.]
3—(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
(2) This section—…
(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation. …
4—(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility …
(6) A declaration under this section ('a declaration of incompatibility')—
(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
(b) is not binding on the parties to the proceedings in which it is made. …

[18] The term 'Convention rights' is defined by s. 1 of the Act as referring to the rights and freedoms contained in arts 2 to 12 and 14 of the Convention, together with arts 1 to 3 of the First Protocol, and arts 1 and 2 of the Sixth Protocol, as read with arts 16 and 18 of the Convention, subject to any derogation or reservation adopted by the UK. Only articles having a probable impact on the law of evidence are reproduced in the text.

> **6**—(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if—
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
>
> (3) In this section, 'public authority' includes—
>
> (a) a court or tribunal, and
>
> (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament, or a person exercising functions in connection with proceedings in Parliament.[19]

These provisions will be referred to further in this book at the appropriate places dealing with issues which have arisen under the Convention.

RECOMMENDED FURTHER READING

Allen, R.J., Friedman, R.D., and Stein, A. et al., 'Bayesianism and juridical proof' (1997) special issue of *International Journal of Evidence and Proof*.

Ashworth, A., 'A decade of human rights in criminal justice' [2014] *Criminal Law Review* 325

Campbell, T., Ewing, K., and Tomkins, A., *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press: Oxford, 2011).

Ho, H.L., *A Philosophy of Law: Justice in the Search for Truth* (Oxford: Oxford University Press, 2008).

Laudan, L., *Truth, Error and Criminal Law* (Cambridge: Cambridge University Press, 2008).

Lippke, R.L., 'Justifying the proof structure of criminal trials' (2013) 17(4) *International Journal of Evidence and Proof* 323.

Murphy, P., 'Excluding justice or facilitating justice? International criminal law would benefit from rules of evidence' (2008) 12(1) *International Journal of Evidence and Proof* 1.

Redmayne, M., 'Analysing Evidence Case Law' in Roberts, P. and Redmayne, M., *Innovations in Evidence and Proof* (Oxford: Hart Publishing, 2007), pp. 119–39.

Roberts, P. and Hunter, J., (eds.), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Oxford: Hart Publishing, 2012).

Stein, A., *Foundations of Evidence Law* (Oxford: Oxford University Press, 2005).

Tapper, C., 'The law of evidence and the rule of law' [2009] 68(1) *Cambridge Law Journal* 67.

Twining, W., *Rethinking Evidence: Exploratory Essays* (2nd edn, Cambridge: Cambridge University Press, 2006).

Waldron, J., *Law and Disagreement* (Oxford: Oxford University Press, 1999).

[19] A jury is not a 'public authority' for the purposes of s. 6(3) and it is, therefore, unnecessary for the jury to satisfy itself of the admissibility of evidence independently of the judge: *Mushtaq* [2005] 1 WLR 1513 (3.2).

Questions

1. Does the term 'contest' accurately describe the nature of a trial in England?
2. If a trial is not a search to ascertain the ultimate truth of past events, what is it?
3. Judicial reasoning may be described as a combination of which three kinds of logical process?
4. Is it possible (or desirable) to decide legal cases on the basis of mathematical probability?
5. Why do courts exclude evidence?
6. What is meant by the expression 'free proof'? Is this preferable to an exclusionary approach to evidence?
7. What is the 'best evidence rule' and in what form does it apply today?
8. Are decisions of the European Court of Human Rights binding on UK courts?
9. Does the European Court of Human Rights rule on a member State's rules on the admissibility of evidence?

online resource centre

This text is accompanied by an **Online Resource Centre** where you will find the following resources to aid your study,

- **Multiple-choice questions** for each chapter.
- **Legal updates** since the publication of the text.
- Useful **web links**.
- **Case materials** for the fictitious cases, *R* v *COKE; LITTLETON* and *BLACKSTONE* v *COKE*.

Visit **www.oxfordtextbooks.co.uk/orc/glover14e/**