BOOK REVIEW
"LAW OF EVIDENCE IN IRELAND"
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An author in mapping a route of approach to the topic of Evidence can view the subject as a free standing mountain where every step leads to a summit or else as an array of independent foothills of varying shapes which a traveller must negotiate. By the former approach, one describes a Law of Evidence where all the rules are underpinned by a purpose against which the merit of each rule can be judged. The other path, involves the empirical description of the rules (or laws) of Evidence, born of many disparate forbears, whose sole function is the ordering of trial. When faced with this choice, the Scottish Law Commission in a Report on Hearsay Evidence in Criminal Proceedings (Scot Law Com No 149, 1995) were content with "a simple answer" and took as their own purpose; simplification. The function of the rules - which could be classed indiscriminately as evidential or procedural - were to provide intelligible and acceptable rules indicating what evidence may be received in the elucidation of truth. The commission was to simplify them so they could be understood.

This neutral empirical route is travelled by two of the three recent textbooks on Evidence in Ireland. The remaining work, the 2nd Edition of the *Law of Evidence in Ireland* by Caroline Fennell aims for a summit in seeking to identify a unifying principle against which each rule of evidence should be measured. It is an ambitious approach and attractive for that. There is a nuance of surrender in any assertion that the facts of the rules are more important than their purpose. The justice of consistency is bought at the cost of the call of justice, implying an acceptance that since the trial system can give no guarantee that it will attain the right verdict, it proffers an assurance of impartiality flowing from pre-ordained rules.

Except of course they are not – the rules of evidence did not arrive on a tablet from a mount. They are misshapen creatures of

the common law, created piecemeal in response to the demands of equity in individual cases, and are not of easy application. Legislation has not provided codification and, on Fennell's arguments, will not. It is then the function of the academic to assert the underlying principles which do, or should, exist to give coherency. Rules may then be predicted, not through being fixed but because the end to which they work is known.

The difficulty – most pronounced with evidence – is that a plethora of possible purposes present. These might include; facilitating the prosecution of the guilty, promoting equality between litigants of varying strengths and economic resources, searching out the truth, ensuring that no unreliable or manufactured information enters the process, providing trial judges with mechanisms for shortening trials where the result is obvious, promoting economic efficiency in society by allowing for a speedy resolution of disputes, limiting information to that which can be managed and presented within a reasonable period of court time, maintaining social order within society, promoting settlement of civil action and pleas to criminal prosecutions, encouraging and protecting witnesses who make information available to the trial process. Common law rules are responses to particular purposes whose demands clambered above the others in the melee of a unique case. Compromised rules result from a multiplicity of purposes and the law of evidence in serving so many masters serves none.

The Law of Evidence in Ireland by Fennell identifies the dominant master in championing the cause of civil liberties. This is done in a section of the textbook, added since the first edition, which discusses the influence of the Constitution. The guarantee of fair procedures is the arbiter of evidence and by such the Law of Evidence is obliged to provide a bulwark of civil liberties. This analysis seems to have grown out of the author's 1993 work, *Crime and Crisis in Ireland, Justice by Illusions*[1] - a work concerned primarily with society's response to a perceived crisis of rising levels of crime. The author challenged this perception but identified two noteworthy elements in the response of government; a tendency of the legislature to respond by way of populist reaction to particular events solely from the perspective of achieving a conviction and the

tendency, over time, to adopt emergency provisions as a standard response.

Validation for these views can be found in the evidential provisions of Criminal Justice Bill 2004, some 11 years later. The proposed Section 8 (indirectly an evidential provision) appears to be an increment in the process by which emergency powers of detention have become of general application. Part 3 of the Bill appears to be a direct response to the Liam Keane murder trial. Characterising this as a knee-jerk reaction may be an over-harsh criticism of the Department of Justice. There is a real problem to be dealt with and other jurisdictions have reached similar endpoints. Nonetheless, the conviction of an accused person beyond all reasonable doubt, based solely upon an unsworn statement, which is denied on oath by the maker, raises civil liberties considerations. More pointedly, the Law Reform Commission produced a Report on the Rule Against Hearsay which is now 16 year old. Notwithstanding Part II of the Criminal Evidence Act, 1992 Act, this report has not provoked significant legislative response. A vivid photograph on the front page of a tabloid has.

The author's identification of the primacy of civil liberties considerations has its origins extrinsic to the traditional rules of evidence but this linking of the right to fair procedures to civil liberties is essential for a forceful work. To simply state that rules of evidence will be judged against a requirement of fair procedures affords no more guidance than saying that rules should be just. A civil liberties or rights based approach marks the point on the compass towards which the law will work.

This analysis may explain why evidential rules can be seen as restricting the prosecution more than the defence in criminal proceedings. This actuality is open to contentious debate. Yet, if there is truth to perception, it sits uneasily with a model of neutral truth-seeking rules. Constitutional imperatives can explain why in the United States, admissions in respect of a crime by an absent third party were deemed admissible in *Chambers v. Mississippi*[2] but an admission by an available but unwilling third party was not admitted in England in *R. v. Blastland*.[3] The facts of the two cases differed significantly but each accused tied his defence onto the third

party admission and it was the Constitution in the United States which prompted the finding "*(t)hat testimony was also critical to Chambers' defence. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice*".

This is to re-cast evidential law as a subset of Constitutional law. In Ireland, in considering the protection afforded to litigants by legal professional privilege, the Irish Courts recognised the obligation to find Constitutional justification for a common law doctrine that long pre-dated 1937. There is merit to arguing that rules of evidence can and should play a role in upholding Constitutional rights rather than being one standard by which due process is judged. It is a trite observation that under any system, some accused persons who are innocent will be convicted and some accused persons who are guilty will be acquitted. Rules can be modified to allow more "guilty" persons go free so that fewer innocent are convicted or alternatively, might serve to lower the bar for convictions, so that fewer of the guilty escape. The question of whether such decisions are a matter of policy or principle is a philosophical one but short of Tolstoyian rejection of any legal system, an acceptance of a margin of error is implicit the act of rendering justice. Such errors as they surface may be remedied but some errors will never out. In this context, the acclamation of evidence as a safeguard of personal rights has its attractions.

It may also be timely. The adoption into Irish domestic law of the European Convention of Human Rights, may directly - or indirectly through the deliberations of the English Courts - result in a wholesale review of the rules of evidence against a standard of justice. One possible weakness of the analysis in the textbook may be that insufficient attention is paid to European norms established under the Convention. The Criminal Law Review of October, 2004 reported three decisions of the European Court of Human Rights as cases relevant to the practice of criminal trials in England and Wales and other cases were reported in which evidential issues were decided by the British courts under the terms of the Human Rights Act, 1998.

There is a suspicion though that rules for the conduct of trials don't provide a sufficiently broad platform to carry considerations of this sweep. Evidence traditionally either allowed, precluded or qualified certain forms of information at trial but this was the end of its role. If the effects of these rules are to be considered on a rights basis - the dog that doesn't bark also begs consideration. The Irish Courts, along with other jurisdictions, have been developing jurisprudence, outside the traditional ambit of evidence, to deal with absent information whether of the nature of lost islands of fact, scrapped vehicles or unviewed video tapes. The basis for ordering prohibition in such cases is the overriding requirement of a fair trial. Rules of evidence could be used to respond to this. The Court of Criminal Appeal recently quashed the conviction of George Redmond, because bank records which were thought destroyed, were discovered and proved inconsistent with testimony offered by the prosecution.[4] This begs the question would the conviction have been safe if the records had in fact been destroyed? Does this call for a rule of evidence precluding reliance on evidence which is incapable of verification?

Without going to such Scottish extremes, does it follow that prohibition should be ordered or acquittals directed precisely because a piece of information had been denied by the operation of rights based rules of evidence? A notable foreign example (now over-ruled) was the decision by the United States Federal Courts in the prosecution of Zacarias Moussaoui on terrorist charges that the non-disclosure of potentially useful witness statements by reason of national security precluded the State, not from proceeding to trial, but from seeking the death penalty. An Irish example of the Court removing an issue from trial pursuant to an inherent jurisdiction to do justice following the exclusion of evidence by reason of public interest immunity is found in *Burke v. Central Independent Television*.[5] In civil cases, the direction in which such jurisdiction will be exercised might be varied, governed largely by the onus of proof but in criminal trials, on a civil liberties approach, this would most likely work against the prosecution.

Yet, although they have a role, evidential rules can not deal with the totality of a fair trial. Any doctrine would have to transmute into

a Constitutional law doctrine of wider application. There may be no logical need for a back draft which would alter the rules of evidence that are left behind. There is also no overt call in this textbook for such an all encompassing doctrine and even if this is what is entailed by logic, law inclines more to balances than to logical conclusions.

This discussion might be accused of only describing the tail of the elephant. The textbook does assert that civil liberties should influence the law of evidence but by far the greater part of the textbook sets out the description of rules of evidence as they currently exist in Ireland. The textbook deals with leading issues in the Irish law of evidence. The significance of the decision in *People (D.P.P.) v. McGrail* in differentiating the approaches of the Irish and English courts to s.1(f) which governs the cross-examination of an accused is highlighted,[6] a differentiation clearly mandated in Ireland by the requirement of fair procedures. The textbook identifies the as yet unresolved challenge posed for the Irish Courts by *P. v. D.P.P.*,[7] although the ubiquitous topic heading of similar fact evidence is preserved. Academics should really be working to eradicate this misleading shorthand. In civil law, the work highlights the tension amongst the legal professional privilege decisions as to whether the privilege should promote confidence of confidentiality or whether a practice of judicial inspection and of exceptions meeting the call of equity in specific cases can be allowed to undermine this.

Some of the approaches taken are open to debate. The rules applying to visual identification are described as corroboration rules, albeit corroboration rules of "separate and different extent." It is arguable that the most interesting feature of these rules is that when confronted by this issue in the *People (Att.Gen.) v. Casey (No.2)* by, Kingsmill-Moore J., a master of evidence, did not apply the corroboration rules but rather established a similar but better test.[8] In fairness, this work differs from another Irish textbook, by stressing the influential role played by the Irish Courts in relation to visual identification rules rather than implying that *Casey (No.2)* did little more than follow the English example.

The analytical approach of viewing Evidence as part of a seamless guard for civil liberties prompts other debates of classification. The treatment of the rules governing the admission of

statements made in police custody is described as an exception to the rule against hearsay. Without doubt, the exception of admissions is a pre-condition for the admissibility of such statements but it is a strain to conclude that the additional rules form part of that exception. The voluntariness requirement was a creation of the common law but the Privy Council in *Ibrahim v. R* didn't speak in terms of hearsay.[9] In confirming a death sentence on an Afghan solider for a murder in Canton, the Privy Council described the application of "a positive rule of the English criminal law … as old as Lord Hale" and stated it was a rule of policy. The Judge's Rule and the O'Brien test are even more removed from hearsay considerations. To subsume these rules into the rule against hearsay reverses the natural subjugation of Evidence to the Constitution.

The emphasis on civil liberties adds force to the justifiable bias in favour of the rules of evidence as they apply in criminal trials. This bias is so widespread as to be dogma. Criminal trials where guilt or innocence is at issue before a jury, dominate the textbooks. Yet they must constitute only a few percent of the total number of cases dealt with by the Courts. Aside from the civil liberties considerations, a prejudice in favour of effectiveness explains this. The greater burden of the criminal onus of proof and the presence of jury mean that evidential points are more likely to succeed and to be of effect in criminal trials. Anecdotally, the exclusion of prosecution evidence is the most common means of obtaining an acquittal. In contrast, trial judges hearing civil cases are loath to deny themselves information and, being lawyers, who control the process by which information is admitted, are generally able to secure its admission.

Yet for all that, if it is accepted that rules governing the flow of information are necessary, some law of evidence must operate in the great remainder of hearings. The textbook doesn't ignore the civil law, but understandably, in light of its approach, the treatment is less complete. The selection of civil topics bears out the favouring of determinative effect. Privilege, a concept of unquestioned effect, is given detailed treatment and discovery, arguably a procedural rule, if that distinction has any meaning, receives treatment both in conjunction with privilege and separately.

In the treatment of presumptions, leaving aside that of Innocence

which is sui generis, res ipsa loquitur dominates. This is justified by the gauge of effectiveness. The balance of the presumptions is little more than confirmatory of inferences that would be drawn in any event. Yet, res ipsa loquitur is primarily a creature of the law of negligence. The textbook deals with the Supreme Court decision of *Mullen v. Quinnsworth*, but it is the first decision when, in reviewing the removal of the issue of negligence from a jury rather than making a more directly evidential decision, the verdict of the retrial was quashed as the trial judge sitting alone had ignored the rule against hearsay.[10] The determinative doctrine of res ipsa loquitur receives more attention than the hapless civil rule against hearsay. This difficulty of disentangling evidential rules of general application from doctrines of the substantive law only arises if there is an attempt at a unified Law of Evidence. There are difficulties. Evidence draws its authorities from cases that are always essentially about something else, and defining the scope of Evidence involves, the waging of, what was described in the preface to the 13th edition of Phipson as, the "guerrilla war against the infiltrators from the substantive law".[11] Almost by definition, rules of substantive law are more determinative than rules of evidence and a prejudice in favour of effectiveness favours the infiltrators. This influence and the author's attention to larger goals than those of defining the academic topic of Evidence explain this pragmatic approach to that lesser part of Evidence, the civil law rules. The thrust of this work, the promotion of civil liberties is far more concerned with the criminal trial and its relationship with society.

Generally, judged by dichotomy that existed before the 1st Edition of this work, when there were no Irish textbooks on evidence and when Cross on Evidence[12] was the book for discussion of academic principle and Phipson the book for the trial practitioner, this books falls into the Cross tradition. It does constitute a practical source for the evidential rules that are decisive in the workings of the Irish Courts, but is greatest force is polemical. Its task is not merely to describe the law of evidence but to change it. The approach taken is the fixing of the compass point of civil liberties as the lodestone for any traverse across the Law of Evidence. There can be arguments about the route taken and the nature of the mountain being climbed

but argument is the point of the work and the ascent is an admirable achievement.