Evidence, Proof and Justice

Legal Philosophy and the Provable in English Courts

Solomon E. Salako

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Evidence, Proof and Justice: Legal Philosophy and the Provable in English Courts
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Preface

A lot has happened in the last decade on rationalising the congeries of rules of evidence applied in English courts. Scientific evidence is gradually replacing evidence based on the principle of orality or spontaneity. And yet, judges are not scientifically trained. There is a convergence of the English adversarial system, especially in criminal proceedings, with the Continental inquisitorial system; and, what is more, the proliferation of statutes on the law of evidence and the wide discretionary powers vested in judges to admit all types of evidence raise serious issues of justice and 'open impartiality' as distinct from 'close impartiality'.

It is the object of this book to use legal philosophy to analyse the transformation of the rules of evidence in English courts with a view to teasing out the benefits and portents of the transformation and proffering suggestions for reform.

I seize this opportunity to thank Ms Karin Hamilton Jakobsen and the editorial staff of Ventus Publishing, Denmark, for their cooperation. Many thanks to Ms Sue Wiseman for using her immense word-processing skills to type the manuscript within a short space of time.

The book is dedicated to Diane.

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Liverpool,
United Kingdom.
July 2010.

1 Introduction

1.1 Demosthenes, Cicero and the rationalist tradition

The intellectual history of the law of evidence, according to Professor W. Twining, "reaches back to classical rhetoric and has fascinating ramifications for the philosophy of knowledge, debates about proof of the existence of God, the emergence of theories of probability and the development of modern psychology, forensic science and several other fields".[1] This reflection on the entelechy or constituent atoms of the law of evidence – i.e. rhetoric, legal philosophy, epistemology, religion, mathematics, psychology and legal ideology – must be appraised in any critical study of the adversarial system of justice in English courts. Such an appraisal must not only evaluate how the "oughts" of today have been conditioned in the past but also highlight the gap between the law in books and the living law, the role of legal ideology in the transformation of the English law of evidence and discuss the theories of adjudication.

Historically, the Anglo-American rationalist tradition of evidence scholarship is traceable to rhetoric – the theory and practice of persuasion – which, according to prosographical sources[2], was initiated in the fifth century BC. Views differed as to who the founder of rhetoric was. The view that Empedocles was the founder has been ascribed to Aristotle while Cicero in **De oratore**[3] regarded Corax and Tisias as the inventors and founders of the art. Who the real founder was need not detain us here. What is important is the legal importance of rhetoric: the fact that both civil and criminal trials in English courts are dominated by it.

As for classification, technical handbooks on rhetoric are divided into three main genres: (i) forensic (i.e. speeches of defence or accusation before law courts); (ii) deliberative (political advice to legislative or executive body); and (iii) demonstrative or epideictic (speeches in praise or blame)[4]. Of these three genres, forensic rhetoric is the most important to the English adversarial system of justice even though the deliberative and epideictic genres are often pressed into service.

Forensic rhetoric, as it is practised in English courts today, was initiated by Demosthenes (384–322 BC) a vigorous opponent of Philip of Macedonia – eulogized by Cicero as "the most famous of the Greek orators."[5] But to Cicero we owe the development of the forensic skills of advocacy. Cicero's main thesis in **De oratore** is that the orator needs philosophical knowledge and that the earliest system devised by the Sophists in the fifth century BC prescribed the division of a speech into five parts: (i) prologue – attracting the attention of the audience, making the audience well-disposed, attentive and receptive; (ii) narration – an account of what (allegedly) happened in a nutshell; (iii) division or an announcement of the themes or points one intends to address; (iv) argumentation or the proof of one's points and the refutation of the points of one's adversary; and (v) the epilogue – the summing-up and the arousal of the emotions of the jury or audience[6]. (For Cicero, the adumbrated parts of speech became the traditional focus of judicial rhetoric.)

Of this quintuplet, argumentation or the lawyer's story – whether as an advocate trying to persuade a tribunal to decide in favour of his client or the judge as an orator grappling with the principles of law applicable in the instant case – bristles with jurisprudential problems. The argumentation of an advocate is often presented in narrative form: a story presenting the disputed facts as he (the advocate) finds them and supporting a particular theory which he wants the judge or jury to accept.

The argumentation, and not the law, determines the case as illustrated by Cicero's exploits as a young advocate in 80 BC. In his defence of Roscius from Ameria (**Pro Roscio Amerina**)[7], Cicero delivered a speech soundly based on meticulous research but its dramatic effect derived from its structure and not from evidence. Roscius was accused of having murdered his father. Parricide at this period carried a death penalty under Roman law. Cicero knew that the father and son had been on poor terms and that Roscius was framed for parricide. In the course of his research, Cicero found that Roscius's father, a well-to-do farmer in Ameria, a hill town north of Rome (now Amelia) had paid a visit to Rome during the previous summer or autumn. He found that a long-standing feud existed between Roscius's father and two fellow Amerians and the former was set upon and killed near some public baths on his way back from a dinner. According to Cicero, one of the pair of fellow-Amerians happened to be in Rome and immediately sent a message to the other with the news of Roscius's death. Cicero also found that this was a trumped up charge to prevent Roscius from reclaiming his father's estate (valued at 6,000,000 sestertia) which had been confiscated retrospectively under the Proscription and auctioned for a trifling 2,000 sestertia.

Cicero opened his defence with a refutation of parricide and went on to destroy the character of the two Amerians and pin the murder on them. He also launched a frontal assault on the Dictator of Rome's favourite, Chrysogonus, highlighting the un-Roman excesses of his life-style and describing him as the real villain. The court burst into loud applause and Roscius was acquitted.

Again, in his defence of Cluentius (**Pro Cluentio**)[8], who was accused of poisoning his step-father, Oppianicus in 66 BC, Cicero concentrated on a series of trials eight years earlier when the defendant had successfully prosecuted Oppianicus for attempting to murder him. Public opinion was on Oppianicus's side but Cicero took the jury through Oppianicus's bizarre career: how he had systematically killed members of his own family or other families into which he had married. Cicero took no interest in simplifying the narrative and conceded that in the interest of his client he had "wrapped the jury in darkness".

That judicial rhetoric determines the outcome of cases, now as then, is chronicled by Professor W. Twining. In his review of the extensive literature on **R v Bywaters and Thompson**[9], Twining found that the decision in the murder trial depended on "competing [four] general hypotheses or theories within which all relevant evidence can be organized and weighed" which the trier of fact was prepared to accept in an adversarial system of criminal justice. And yet, rhetoric has been ignored in Anglo-American theories of evidence. To these theories we now turn.

1.2 Theories of evidence

The first treatise on the law of evidence was William Nelson's **The Law of Evidence** (1720)[10] which consisted of numbered propositions founded on statutes and an analysis of over fifty series of legal reports compiled [and] published before 1700. No attempt was made to extract the underlying principles or to propound a theory of evidence. The book, however, inspired Geoffrey Gilbert's and Thomas Peake's classic works published in 1754 and 1801 respectively.

For Gilbert the whole corpus of the law of evidence can be subsumed under the Best Evidence rule: "that a man must have the utmost evidence, the nature of the fact is capable of; for the design of the law is to come to rigid demonstration in matters of right, and there can be no demonstration of a fact without the Best Evidence that the nature of the thing is capable of…"[11]. Peake, Gilbert's successor, observed that the "extension of commerce, and the various concerns of mankind…rendered very large additions necessary"[12] and stated the seven rules of evidence adopted by the common law of England. First, he who asserts must prove; he who denies need not prove. Second, the character of either party, unless put in issue by the very proceeding itself, cannot be called into question. Third, the best evidence the nature of the case will offer must be produced. Fourth, the law requires the testimony of a witness to be given on oath so that he may be examined and cross-examined. Fifth, hearsay statements are admissible as exception to the general rule where the facts, by their very nature, are incapable of positive and direct proof such as reputation, pedigree, prescription, custom and dying declaration. Sixth, admissions of a party are admissible as evidence against him. Seventh, the confession of an accused, voluntarily made, is evidence against him at his trial[13].Gilbert's other successors such as Greenleaf[14], Taylor[15] and Best[16] accepted the Best Evidence rule as fundamental but Thayer[17] reduced it to a counsel of prudence.

Writing in 1875, James Fitzjames Stephen based his theory on the doctrine of relevancy. Stephen opined:

> "Evidence may be given in any proceeding of any fact in issue,
> and of any fact relevant to any fact in issue unless it is hereinafter declared to be relevant,
> and of any fact hereinafter declared to be deemed relevant to the issue:
>
> Provided that the judge may exclude evidence of facts, which, though relevant or deemed to be relevant to the issue, appear to him too remote to be material under all the circumstances of the case."[18]

This doctrine of legal relevancy was transmogrified by Thayer into legal admissibility in this instructive passage:

> "Admissibility is determined, first, by relevancy, – an affair of logic and experience, and not at all of law; second but only indirectly, by the law of evidence which determines whether any given matter which is logically probative is excluded."[19]

But that is not all. Thayer, like Best[20], expatiated on the nexus between the theories of evidence and legal philosophy. For Thayer, legal reasoning is "an element common to all rational systems of proof"[21] and is required for the ascertainment of facts, the promotion of justice, maintaining established rights and existing governmental order[22]. The ascertainment of facts, alluded to, depends not only on mathematical proof but also on "the ordinary rules of human thought and human experience…sought in the ordinary sources, and not in the law books"[23]. Legal philosophy, that part of legal theory which is concerned with general and abstract questions about law, is a rich tool box for deconstructing and reconstructing the adversarial system of justice; and to this we now turn.

1.3 Legal philosophy and the rationalist tradition

Although Bentham in his anti-nomian thesis on evidence advocated the abolition of formal rules of evidence and their replacement by a natural system of free proof based on common sense and experience[24], he consistently held the view that a theory of evidence and judicial proof implied a theory of adjudication[25]. This view was kept alive by writers such as Best and Thayer.

For Best, judicial evidence "is a species of the genus "evidence", and is for the most part nothing more than natural evidence, restrained or modified by rules of positive law"[26] and also "a handmaid of jurisprudence"[27]. Thayer, in his **Preliminary Treatise On Evidence**[28], analyses the scope and limits of legal reasoning in judicial proof. For Thayer, the purpose of legal theorising in judicial proof is not about the ideal truth as in mathematical facts and reasoning but the ascertainment of what is just as between the adversaries; and in this quest, "maxims, principles, and rules, growing out of the personal relation of the parties to each other and to the court"[29] are applied.

The rules and principles instantiated above are not limited to the law books; they are "in the ordinary rules of human thought and human experience"[30] to be distilled from juristic writings, philosophical speculations and from physical and natural sciences – especially mathematics, psychology and genetic engineering biotechnology[31].

Theories of Adjudication and their Positivist Pedigree

Theories of evidence imply theories of adjudication. The law of evidence which developed in the period 1770 to 1830[32] consisted of two elements: first the collation and classification of an avalanche of cases; and, second, a comparatively small number of Acts of Parliament. The systematisation of these cases and the Acts of Parliament which have since proliferated have resulted in congeries of rules, doctrines, principles and exceptions to exceptions. For instance, to the general rule that all relevant evidence is admissible, there are, at least, four exceptions, viz. (i) the rule that hearsay statements are generally inadmissible which, in turn, is subject to, three statutory exceptions[33] in criminal proceedings; (ii) the rule against opinion; (iii) evidence of character, though relevant, is generally inadmissible but is rendered admissible by the Criminal Evidence Act 1898 (as amended)[34]; and (iv) the similar fact rule which is both an inclusionary and exclusionary rule[35]

Various theories of evidence such as free-proof (Bentham), the Best Evidence rule (Gilbert, Peake and Best), logical relevancy (Stephen) and legal admissibility (Thayer, Wigmore and Cross) discussed earlier are grown on legal positivism and its variants.

The purpose of this excursus is to show that neither legal positivism nor the watered-down versions by Kelsen, Dworkin and MacCormick embody and sustain a coherent scheme for the analysis of the congeries of rules and exceptions invoked in the Anglo-American rationalist tradition of evidence scholarship.

Legal Positivism and Its Watered-Down Versions

Legal positivism, from Bentham (through Austin) to Hart and Kelsen, is the analysis of law as a self-contained system of rules and norms "without reference to any content, usage or history of the rules that comprised the system."[36]

The law, according to the positivists, is deducible from a coherent legal order. For Bentham, the lawmaking authority is to be located in the legislature. Laws promulgated are to be expressed in the form of a comprehensive code or a set of codes and it is the duty of the judge to resolve all disputes arising in the jurisdiction[37]. According to Bentham, judicial lawmaking is permissible but subject to constitutionally defined emendation process which gives the legislature formal veto over any interpretation of the code.

In a similar vein, Hans Kelsen insofar as his analysis of law separates law that 'is' from law as it 'ought' to be, proffered a positivist theory of law. For Kelsen, the analysis of law must be separated from deleterious elements such as psychology, sociology, ethics and political theory. In other words the juristic analysis of law must be pure. Law, for Kelsen, is a system of norms which derives its efficacy from a basic norm or Grundnorm – a presupposition beyond which we need not inquire lest we lapse into an infinite regress.[38]

Kelsen postulates what he deems an internally coherent legal order in this instructive passage:

"The law is an order, and therefore all legal problems must be set and solved as problems of order. In this way legal theory becomes an exact structural analysis of positive law, free of all ethical-political value judgments."[39]

The exclusion of elements of subjectivity is Kelsen's way of dealing with conceptions of historical and political practice which have crept into legal theory through historical and reductionist theories in the nineteenth century and early twentieth century.

H.L.A. Hart (1907–1992), in an attempt to rescue earlier positivists from their mistakes, proffered a semi-sociological description of law as the union of primary rules and secondary rules of recognition, change and adjudication[40]: primary rules are found in substantive laws and secondary rules in adjective laws, that is, evidence and procedure.

In his restatement of the positivist position, Hart concedes that law influences morals and vice versa but insists that in the absence of legal or constitutional prohibition a law does not cease to be valid because it does not conform to a moral precept and conversely a moral precept is not law simply because it is a moral precept[41]. Hart, a positivist, recommends the incorporation of a minimum content of natural law into positive law based on the five truisms.[42] (For this stance, Hart is described as a 'soft positivist'.)

Hart also recognises the indeterminacy of rules: that rules are open-textured, that is, they have core of determinate meanings and a penumbra or fringe areas of indeterminate meanings. Hart's test of validity is found in his master rule – the rule of recognition – which in the United Kingdom is: The Queen in Parliament enacts laws.

The problem with Hart's semi-sociological description of law, as noted by Professors R. Dworkin and N. MacCormick, is that law is more than a system of rules and that the Hartian thesis lacks a theory of adjudication. Professor MacCormick, in his inaugural lecture[43], contends that courts may rely on certain principles to validate or enforce some contracts which are not in conformity with statutory requirements as to form. Dworkin maintains a sustained attack on positivism – especially positivism of the Hartian variety – in a series of polemical essays[44]. He claims that positivism is a model of and for a system of rules. In **Taking Rights Seriously**, Dworkin argues that when lawyers are confronted with 'hard cases', that is, cases in which the law appears indeterminate because of vagueness, conflicting rules, and the like, they may use standards that do not function as rules but operate differently as principles, policies and other standards. But these principles, policies and other standards may be referred to generically as 'principles'.

A policy, according to Dworkin, is that kind of standard that sets out a goal to be reached whether economic, political or social such as in **Heningsen v Bloomfield Motors Inc**.[45] A principle is a standard to be observed not because it will secure an economic, political or social situation deemed desirable but because it is a requirement of justice. For example, the principle that a person cannot benefit from his own wrong in **Riggs v Palmer**.[46]

Dworkin argues that there is no law beyond Law: even in hard cases, there will always be right answers. Discretion, according to Hart, is the power to choose between two courses of action which is thought to be permissible.[47] For Dworkin, judicial discretion in the strong sense does not exist. Dworkin attacks the theory of judicial discretion on two grounds. First, the democratic imperative ordains that a community should be governed by elected officials answerable to the electorate. Judges are not elected; they are delegates of Parliament. Second is the objection to judicial originality that if a judge makes a new law and applies it retrospectively, the losing party is penalised. By concentrating on rules to the exclusion of principles, Dworkin claims, positivism ignores the impact of principles on the decision even of cases in which the rules are clear and cases where the rules are not clear.

In "Hard Cases" (1975) Dworkin introduced a fictitious super-judge, Hercules J., described as "a lawyer of superhuman skill, learning, patience, and acumen" who accepts law as integrity and is able to weigh correctly the "gravitational force" of each individual legal principle which may have a bearing on the issue and render the legal judgment accordingly.

Dworkin's theory of adjudication, in spite of theoretical and empirical objections to it, has important uses when grappling with rules which are vague or indeterminate or when wrestling with principles and counterprinciples pulling at different directions as in the cases culminating in **R v Forbes**[48] where the issue was whether an identification parade was mandatory where the suspect requested it.

Another theory of adjudication is Professor N. MacCormick's arguments of coherence and consistency[49] from which the echoes of forensic or judicial rhetoric perfected by Cicero reverberate. While the doctrine of consistency requires adherence to the legislative purposes of existing rules, the doctrine of coherence imposes limits on the lawyer's formulation of his case. First, he must avoid conflict with existing rules when 'explaining' and 'distinguishing' unfavourable precedents and when 'literally' or 'liberally' interpreting statutes must rely an analogies from existing cases. For a judge as an orator, the formulation of the general principle justifying a new development in the relevant field calls for creative imagination. But there are problems with the watered-down versions of positivism. As Professor Twining observes:

"They [Hart and Dworkin[50]] come from a shared philosophical tradition, but from somewhat different legal cultures. Neither has drawn much inspiration from anthropology, sociology or history."[51]

Towards a New Evidence Scholarship

The conventional wisdom is that the English system of justice is accusatorial or adversarial. This is based on the ruling illusion that the trial is an altercation between parties where the judge remains an umpire.

In a reactive state where the state provides the judicial framework and adopts few policies, this is true. But in the last thirty years or so, the reality is that an activist state which provides comprehensive policies of social life and statisizes social policies and welfare problems by transforming them into state problems and state policies[52] has been in place. This new realism compels us to see the adversary system as if applicable to the civil rather than criminal justice.

In criminal justice, the rules of evidence which protect the innocent from convictions, the accused from prejudice, and the machinery of justice from contamination are being eroded to vanishing point leading to serious miscarriages of justice. Theories of adjudication whether positivist (Bentham, Kelsen and Hart) or its watered-down versions (Dworkin and MacCormick) are inadequate for rationalising the congeries of rules of evidence and their exceptions pressed into service in the adversarial system.

To stem the miscarriages of justice we need a conception of justice that is concerned with setting up just institutions and incorporating the device of "open impartiality". To the formulation of this conception of justice we now turn.

Towards a conception of justice underpinning the legal regulation of adjudicative fact-finding.

Three conceptions of justice deserve consideration but not acceptance in their present rendition, viz. (i) justice as respecting freedom of choice, (ii) justice as concerned with utility and securing general welfare, and (iii) justice as concerned with civic virtue and the common good.[53] Sceptics reject the second (maximising welfare) and the third (promoting virtue) because neither respects human freedom. And yet, a fair and just society cannot be achieved simply by securing human freedom. A theory of justice must not only give an important place to human freedoms but also to the role of institutions that advance justice and reduce injustice and not institutions themselves as manifestations of justice.[54] Of the transcendental theories of justice based on the quest for just institutions, John Rawls's theory of 'justice as fairness' arrived at behind the 'veil of ignorance' yields a set of principles of justice that are concerned with setting up just institutions:

a) "Each person has an equal right to a fully adequate scheme of liberties which is compatible with a similar scheme of liberties for all.
b) Social and economic inequalities are to satisfy two conditions: First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged member of society."[55]

The formulation of the demands of justice in terms of two principles that are concerned with 'just institutions' ignores the fact that just institutions as manifestations of justice are not enough. Justice as fairness as posited by Rawls is about 'closed impartiality': "the need to remove the influence of vested interests and personal slants of diverse individuals within the focal group"[56] behind the 'veil of ignorance', according to Sen, ignores the device of 'open impartiality' – the analysis of the impartial spectator – as developed by Adam Smith in **The Theory of Moral Sentiments**[57]. Sen contends that a theory of justice must have "a systematic procedure for correcting the influence of parochial values which any society may be vulnerable when detached from the rest of the world"[58], and, since decisions, especially those raising human rights issues, have adverse effect on people beyond the borders of each country, it is necessary to hear the voice of affected people elsewhere. In other words, it is mandatory to use other common law jurisdictions (Australia, Canada, New Zealand and the USA) either as paradigms or interrogatory sources and take cognizance of European Convention jurisprudence.

1.4 Guide to readers

My purpose is to show that the analysis of the law of evidence cannot be accomplished within the confines of one discipline – law. Other disciplines must be interrogated.

The rules of evidence which were formulated in an agricultural society and based on facts perceived by witnesses or documents compiled by persons acting under a duty such as parsons, vicars and clergymen have to compete with an ever-increasing number of facts established by technical instruments. The traditional methods of fact-finding are on the wane while the new technical methods of fact-finding are ever-increasing with a devastating effect on the congeries of rules of evidence established in the last five or six centuries.

The legal readers will find in this chapter and others that follow a contextual study of the law of evidence and may be eclectic in their selection of chapters for perusal. Social scientists will find Chapters 3 and 5 to 7 stimulating in that philosophy, psychology, forensic science and mathematics are used as tools of legal philosophy. Those who are interested in the transformation of the English law of evidence must peruse the whole text. In Chapter 8 (Epilogue), I tackle the question: What is wrong with the English adversarial system of justice? The suggestions proffered are based on 2,500 years of accumulated wisdom.

In my contextual analysis of the English law of evidence, I have taken readers to unfamiliar territories. I hope they find this a rewarding experience.

2 The presumption of innocence and adverse inferences from silence

2.1 Introduction

In his reflections on the rights people have to procedure in court, Professor R. Dworkin posed the following questions:

> "(1) Is it consistent, with the proposition that people have a right not to be convicted of a crime if innocent, to deny people any rights, in the strong sense, to procedures to test their innocence? (2) If not, does consistency require that people have a right to the most accurate procedures possible? (3) If not, is there some defensible middle ground, according to which people have some procedural rights, but not to the most accurate procedures possible? How might such rights be stated? (4) Do our conclusions hold for civil as well as the criminal law? (5) Are the decisions that courts make about procedure, in the course of a trial, decisions of policy or principle? Which should they be? (6) Do people have procedural rights with respect to political decision of policy?"[59]

Answers to these questions must be sought in order to reconcile the cases decided under two rules of evidence: the presumption of innocence, that is, the principle that the accused is presumed innocent until proved guilty (the **Woolmington** principle) which is protected by Article 6(2) of the Convention for the Protection of Human Rights and Freedoms 1950 (the Convention) and the right to remain silent which is protected by Article 6(1) of the Convention.

In the United Kingdom, unlike Canada, these rights are not entrenched in the Constitution. British judges only have power to make a declaration of incompatibility pursuant to section 4 of the Human Rights Act 1988 (HRA 1988) where primary or secondary legislation violates Convention rights. The incompatible legislation is not vitiated but is amendable pursuant to section 10 of the HRA 1998. Where the decisions of municipal courts were declared incompatible with Convention rights by the European Court of Human Rights at Strasbourg, British judges have refused to follow such rulings by relying on the traditional theory of parliamentary sovereignty. The modern theory is passed over in silence.

We shall return to the theories of sovereignty later in this Chapter but, first, Professor Dworkin's questions must be recouched (to facilitate exposition) as follows: Is the accused entitled to the procedural right to speak or not to speak and to choose who he speaks to? Should judges' decisions on procedural rights be based on principle, and not policy? To answer these questions, the marcescent **Woolmington** principle and adverse inferences from silence will be discussed in a lexical order.

2.2 The presumption of innocence: the marcescent Woolmington principle

The principle governing the phrase "the burden of proof" has been traced to Paulus[60], a Roman jurist, whilst in the second century A.D. it was also attributed to Akiba, a rabbinical teacher, and expressed by the Latin maxim "ei qui affirmat non ei qui negat incumbit probatio": he who asserts a matter must prove it[61]. For Thayer, the phrase "the burden of proof" has two meanings: (i) the risk of not persuading the jury and (ii) the duty of going forward with the evidence to satisfy the judge. The latter meaning is frequently called the "presumption of innocence", a presumption recognised as a cornerstone of English criminal law in the oft-quoted passage in **Woolmington v DPP62** where Viscount Sankey LC said:

> "Where intent is an ingredient of a crime there is no onus on the defendant to prove that the act alleged was accidental. Throughout the web of the English Criminal Law one *golden thread* is always to be seen, that it is the duty of the prosecution to prove the person's guilt subject to what I have already said as to the defence of insanity and subject to any statutory exception."[63]

Although two exceptions to the "golden thread" or the so-called Woolmington principle were instantiated by Viscount Sankey LC in 1935, namely, insanity and express statutory exception (i.e. where a statute places the burden of proof on the defendant), a third exception has been added. The third or implied statutory exception applies where the burden of proof of a statutory defence is not expressly stated. In that case, the courts must look to the mischief at which the Act is aimed and the ease or difficulty that respective parties would encounter in discharging the burden.[64]

In the past seventy-five years since Woolmington the proliferation of express statutory exceptions have reached an alarming proportion. In the year 2000, at least twenty-nine statutory exceptions to the **Woolmington** principle were in force[65]. Furthermore, in a recent survey, it was found "that no fewer than forty per cent of offences triable in the Crown Courts appear to violate the presumption [of innocence]."[66] Indeed, there is some scepticism about the aptness of referring to the English criminal justice system as adversarial for several reasons. First, placing the burden on the defence reverses the burden of proof and renders the accused "a presumptive criminal".[67] Second, breaches of the principle of orality or spontaneity[68] and adverse inferences from silence, which we shall discuss later, whittle down further the **Woolmington** principle, the evanescence of which lends credence to Professor Twining's assertion that

> "English criminal procedure, for example, can be interpreted mainly in terms of the model of 'inquest' with a few 'adversarial' glosses especially at the stage of a disputed trial – an event which occurs in only a small minority of cases."[69]

Or perhaps there is a convergence of the adversarial system with the inquisitorial system[70] or, more likely, a gradual disintegration of the adversarial system. The better view is that

> "Although some of the procedures in English criminal justice blur the line between the two, there is little doubt that the overall orientation is towards an adversarial model."[71]

It is in the light of this overall orientation towards the adversarial model that we must consider the impact of the HRA 1998 on the Terrorism Acts taking cognisance of the fact that the line between the inquisitorial system (the implementation of state policy to solve a "law and order" problem) and the adversarial system (a contest between identifiable parties) is blurred.

In the run up to the coming into force of the HRA 1988, the Director of Public Prosecution's (DPP) decision to prosecute under sections 16A and 16B of the Prevention of Terrorism (Temporary Provisions) Act 1989 as inserted by section 82 of the Criminal Justice and Public Order Act 1994 was challenged as incompatible with the presumption of innocence guaranteed by Article 6(2) of the Convention in **R v DPP, ex parte Kebilene; R v DPP, ex parte Rechachi**[72]. In that case, Mr. Kebilene and others were charged with an offence of possessing articles, in themselves innocent, for terrorist purposes contrary to section 16A of the 1989 Act. Section 16A (1) provides:

> "(1) a person is guilty of an offence if he has any article in his possession in circumstances giving rise to a reasonable suspicion that the article is in his possession for a purpose connected with the commission, preparation and instigation of acts of terrorism…"

This subsection allows the prosecution to establish the terrorist purpose by showing something short of proof because the reverse burden is placed on the defendant by section 16A (3) which provides:

> "(3) It is a defence for a person charged…under this section to prove that at the time of the alleged offence the article in question was in his possession for such a purpose as mentioned in (1) above."

Mr. Rechachi was charged under Section 16A (as above) and Mr. Kebilene under section 16B (1) of the 1989 Act. Section 16B (1) makes it an offence for any person, without lawful authority or reasonable cause (the proof of which lies on him) to collect or record any information of such a nature as is likely useful to a terrorist in planning or carrying out an act of terrorism or to have in his possession any such record or document.

Pursuant to section 3 (1) of the HRA 1998 which makes it mandatory for courts to adopt, insofar as is practicable, a new interpretative approach not yet in force that provisions of domestic legislation must be construed in the light of Convention jurisprudence and issue a declaration of incompatibility (section 4) if there is a violation of Convention rights, the defendants challenged the DPP's decision to consent to the prosecution which palpably infringed Article 6(2) of the Convention (the presumption of innocence).

The defendants' position was based on two grounds. The first is their legitimate expectation that the DPP would exercise his prosecutorial discretion in accordance with the Convention following the enactment of the HRA 1988 and in particular section 22(4) of the Act[73] and from public statements made by ministers since the passing of the Act. The second is that the Prevention of Terrorism (Temporary Provisions) Act 1989 undermined the presumption of innocence and violated Article 6(2) of the Convention because of the reverse burden placed on the defendants by sections 16A (3) and 16B (1) of the 1989 Act.

The judges in the Divisional Court (Lord Bingham CJ, Lord Justice Laws and Mr. Justice Sullivan) were adamant that sections 16A and 16B were incompatible with Article 6(2) of the Convention. There are two countervailing considerations: (i) the exercise by the individual of the right guaranteed to him or her under the Convention as incorporated into the UK law by the HRA 1998; and (ii) the right of the State to take effective measures for the prevention of terrorist crimes. How are these considerations to be reconciled?

Hitherto, cases on terrorism before the European Court of Human Rights were argued under Article 5 (the right to liberty and security), Article 6(1) (the right to fair hearing) and Article 8 (the right to privacy) of the Convention. Those cases were decided on policy grounds. For instance, in **John Murray v United Kingdom**[74], the applicant complained that the denial of legal advice for 48 hours and the fact that inferences of guilt were drawn from his silence when questioned had resulted in him not having a fair hearing under Article 6(1) of the Convention which provides: "In the determination of any criminal charge against him, everyone is entitled to fair…hearing…by a…tribunal." The European Court admitted that although the right was not specifically mentioned in the Convention, the right to remain silent under police questioning and privilege against self-incrimination were generally recognised international standards. The Court noted, however, that the immunities conferred by these standards contributed to avoiding miscarriage of justice. The Court also observed that on the one hand improper compulsion to give evidence was incompatible with the immunities but, on the other hand, those immunities could not prevent the accused's silence in situations which clearly called for an explanation and which could be taken into account in assessing the persuasiveness of the evidence advanced by the prosecution. We shall return to this case later but suffice it to say that the Court regarded the right to silence and the privilege against self-incrimination as relative rights.

Again, in **Margaret Murray v United Kingdom**[75] the domestic court held that Mrs. Murray was genuinely and honestly suspected by the commission of a terrorist linked crime. The European Court found on the evidence before it that the suspicion could be regarded as reasonable for the purposes of sub-paragraph (c), Article 5(1) of the Convention (i.e. the lawful arrest or detention of a person affected).

The last two cases must be contrasted with **Barberà, Messegué and Jabardo v Spain**[76] where the European Court relied on a principle of justice, and not on policy. In that case, the applicants, allegedly members of the Catalan separatist organisation convicted of murder, complained of violation of Article 6(1) and (2) of the Convention. It was held that there could be a violation of Article 6(1) where there is evidence that the *principle* of adversarial proceedings and equality of arms had not been followed and Article 6(2) because members of the Court had started with the preconceived idea that the accused had committed the offence charged.

Let us now turn to the UK courts on **Kebiline and Rechachi**. Lord Bingham CJ looked at the countervailing considerations in the continuum by interrogating the Canadian model and ruled that statements by ministers concerning the future conduct of themselves and their officials could found no legitimate expectation concerning the future decision of the DPP. He also held that both sections 16A and 16B undermined in a blatant and obvious way the presumption of innocence. He relied on the rule propounded by Dickson CJC in **R v Whyte**[77] that

> "The exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. **If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of considerable doubt in the mind of the trier of fact as to the guilt of the accused**."[78]

The rationale is that the Canadian Charter of Rights and Freedom 1982, a constitutional document, is fundamentally different from a statute and any statute, for that matter, must conform to it.

The other Law Lords (except Lord Cooke of Thorndon) disagreed with Lord Bingham. In spite of the disfavour with which reverse legal burden has been regarded in the Commonwealth[79,] the majority erroneously drew considerable strength from **Salabiaku v France**[80]. In that case, the European Court was concerned with an article in the Customs Code which provides that where possession of prohibited goods was established, the person in possession is deemed liable for smuggling. The Court held that there was no failure to comply with Article 6(2) of the Convention. Their Lordships also took into consideration what was at stake in Ex parte Kebilene, namely, terrorism and maintaining the procedural rights of the defence. It was erroneously believed that in interpreting statutes pursuant to section 3 of the HRA 1998 an element of discretion resides in the court to find an acceptable means of dealing with an otherwise incompatible provision either in the public interest or because it is necessary in a democratic society. This may entail "reading down" a piece of legislation, that is, where statutory language bears two meanings such as legal and evidential burdens of proof, the narrow meaning (i.e. evidential burden) is applied in order to ensure that the legislation is valid. Accordingly Lord Hope of Craighead opined:

> "Statutory presumptions which placed an "evidential" burden on the accused, requiring the accused to do no more than raise a reasonable doubt on the matter with which they deal, do not breach the presumption of innocence. They are not incompatible with Article 6(2) of the Convention."[81]

The question is: do judges have a discretion to read down "legal burden" to "evidential burden"? The simple answer, **à la** Dworkin (see Chapter 1), is that they do not have this discretion, even in the strong sense. But Lord Hope's position is problematic for two reasons. First, we are reminded by Lord Cooke that Professor Glanville Williams's suggestion on which **Ex parte Kebilene** is based that statutes should be "read down" in order to uphold their validity was rejected in New Zealand[82]. The second is that **Salabiaku v France**[83] is not the leading case and that in European Convention jurisprudence where the doctrine of stare decisis does not apply as we understand it in the United Kingdom, the European Court at Strasbourg "regards its previous decisions as a starting-point rather than as binding precedents."[84] Recently, in **Telfner v Austria**[85]; the guiding principle on reverse burden was enunciated as follows:

> "[I]t is for the national courts to assess the evidence before them, while it is for the Court [at Strasbourg] to ascertain that the proceedings considered as a whole were fair, which in the case of criminal proceedings includes the observance of the presumption of innocence. Article 6(2) requires, inter alia, that when carrying out their idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. Thus the presumption of innocence will be infringed where the burden of proof is shifted from the prosecution to the defence."[86]

In that case, the applicant was convicted of causing injury by negligence in a car accident. The applicant's mother, the owner of the car, was not driving the car. His mother and sister had exercised their right not to testify. The domestic court relied on allegations made in the police report according to which the car in issue was mainly used by the applicant. The European Court found that this was arbitrary and violated the presumption of innocence in that it wrongly placed the burden of proof on the defence. In **Janosevic v Sweden**[87] the court reiterated that the presumption of innocence enshrined in Article 6 (2) was one of the elements of fair trial that is required in Article 6 (1) and affirmed the principle in **Barberà, Messegué and Jabardo v Spain** which was followed in **Telfner v Austria** above, but recent British cases have followed noncritically the ruling in **Ex p. Kebilene**.[88]

More recently, in **Sheldrake v DPP, Attorney General's Reference (No. 4 of 2002)**[89] the House of Lords held that statutory defences available to an accused person imposed a reverse burden and did not violate Article 6 (1) and (2) of the Convention. What is significant about this decision is the passing reference made to **Barberà, Messegué and Jabardo v Spain** and **Janosevic v Sweden** without considering **Telfner v Austria** and the legal reasoning of the judges at Strasbourg. In view of two recent decisions[90] holding that reverse burden violates Article 6 (2) of the Convention, it is safe to assert that the issue of reverse burden and its compatibility with Article 6 (2) will not go away in a hurry and this brings into focus the need for the reconceptualisation of the **Woolmington** principle.

2.3 Adverse inferences from silence

Clearly linked to the presumption of innocence (discussed above) are two concepts: the privilege against self-incrimination and the right to remain silent which, according to Wigmore[91], are two distinct and parallel lines of development.

The privilege against self-incrimination developed in opposition to the use of the *ex officio* or inquisitorial oath of the ecclesiastical and common law courts. The oath was compulsorily administered so that a person might be examined and himself provide the accusation to be made against him. In **Lilburn's case**,[92] Lilburn did not refuse absolutely to answer any incriminating question: he answered a good many of them but at last refused to go further He merely claimed a proper proceeding of presentment or accusation. Lilburn was sentenced by the Court of Star Chamber to stand in the pillory. In May 1641, the House of Commons declared the sentence illegal, against the liberty of the subject, barbarous and tyrannical.

The right to remain silent is an off-shoot of the privilege against self-incrimination. Although the Court of Star Chamber and other conciliar courts – the Councils of North, Wales and the Marches – were abolished in 1641, the two concepts subsist and will be referred to compendiously as "the right to silence". In evidentiary terms, three rules emerge from this right, viz. (i) that the accused (and in certain cases the accused's spouse[93]) is an incompetent witness for the prosecution and for the defence; (ii) that the accused has the right to remain silent before and at the trial; and (iii) that the accused and witnesses have the right to refuse to answer questions or produce documents which may be self-incriminating[94]. The rationale for these rules is that it is repellent to public opinion to compel the accused or witnesses to give answers exposing them to criminal punishment and that people might not testify freely in the absence of some kind of privilege against incrimination.

At common law, the defendant was under no obligation to testify when charged but a strong comment might be appropriate when the defence case involved alleged facts which were at variance with the prosecution evidence or exculpatory and, if true, had to be within the knowledge of the defendant[95]. As regards corroboration, there were two conflicting authorities: one suggesting that silence when charged constituted corroboration[96]; the other that it did not[97]. But there was a sea change in 1994 when the Criminal Justice and Public Order Act 1994, sections 34 to 37 (as amended), whilst preserving the common law position, allowed the court or jury to draw adverse inferences from silence in four specified cases. These radical changes effectuated the recommendation of the minority of the 1981 Royal Commission on Criminal Procedure in flagrant violation of the democratic imperative.

Section 34 (as amended[98]) states that the court or jury may draw adverse inferences from the accused's failure or refusal to mention facts when questioned provided he has been allowed an opportunity to consult a solicitor. Section 35 which remains unchanged states that the court or jury may draw adverse inferences from the accused's silence at the trial as appear proper. Section 36 (as amended[99]) allows inferences to be drawn from the accused's failure or refusal to account for objects, substances or marks on his person or clothing or footwear or in his possession whilst section 37 (as amended[100]) allows inferences to be drawn from the accused's failure or refusal to account for his presence at a place provided in both sets of circumstance he has been allowed to consult a solicitor.

From the outset, it must be stated that the recent amendment to make adverse inferences Convention compatible addressed part of the objection raised by the majority of the 1981 Royal Commission that "the suspect was to be provided with full knowledge of his rights"[101]. There are profound constitutional, and jurisprudential and evidentiary issues not addressed in the cases decided under sections 34 and 35 before and after the recent amendment and to this we now turn.

In **R v Cowan, Gayle and Ricciardi102** the Court of Appeal held that the specimen discretion suggested by the Judicial Services Board must be adhered to but it might be necessary to adapt or add to it in particular cases[103]. Pursuant to that direction, it should be made clear to the jury:

i) "that the burden of proof remained upon the prosecution throughout and what the required standard was;
ii) that the defendant was entitled to remain silent;
iii) that before drawing an adverse inference from the defendant's silence they had to be satisfied that there was a case to answer on the prosecution evidence;
iv) that an inference from failure to give evidence could not itself prove guilt;
v) that no adverse inference could be drawn unless the only sensible explanation for the defendant's silence was that he had no answer to the case against him or none that could have stood up to cross-examination."[104]

These guidelines were applied and the appeals of Cowan and Gayle were allowed because guidelines (iv) and (v) above were not adhered to by the judges of first instance and Ricciardi's appeal was dismissed because the five guidelines were adhered to.

The first and second guidelines affirmed the right to silence protected by Article 6(1) of the Convention and the Woolmington principle protected by Article 6(2) of the Convention. But the court or jury, pursuant to section 34(1)(a), can draw an adverse inference where the accused on being questioned by the police fails to mention any "fact" which he later relies upon in his defence. This inference could be drawn even if the accused did not give evidence.[105] The pertinent question is: what is the nature of the "fact" which the defendant later relies on in his defence? The answer to this question is stated in four legal propositions.

First, the "fact" must be a new fact. In **R v McGarry**[106], D, at the trial, stuck to his written statement that he struck the complainant in self-defence. The trial judge said that he would not invite the jury to draw an adverse inference under section 34 because D had not relied on a new fact but said that he would not direct them not to if that was what they wanted to do on their own. D was convicted and the appeal was allowed.

Second, the "fact" must relate to a matter which impinged on the accused's mind at the time he was questioned as in **R v B (MT)**[107] where the accused was charged with raping his 14-year-old quasi-stepdaughter (S) and unlawful sexual intercourse with a girl (B) under 16. During the police interrogation, the defendant was unable to put forward any motive for the two girls to make up allegations against him. S provided a motive during her evidence at the trial: that she did not like the defendant living with her mother. As a result the trial judge gave the jury direction under section 34 to draw adverse inferences if they were sure that he could reasonably have put forward the jealousy motive at the time of the trial. He appealed. The appeal was allowed and the conviction quashed. Again, in **R v N**[108] it was not known at the time the accused was interviewed about the alleged indecent assault on his stepdaughter that there was a semen stain on her nightdress. The accused could not be expected, therefore, to explain its presence.

Third, the fact must be independent of the central issue in the case as in **R v Gill**[109] where it was held that the jury should not have been invited to consider an adverse inference from failure to mention a relevant fact during police interview since the fact was the central issue in that case. This must be contrasted with **R v Daly**[110] where the court found the reasoning in **Gill** difficult to understand and held that inference could be drawn where the "fact" is not independent of the central issue in the case.

Fourth, a "fact" arising from the nature of advice given by the solicitor may be the subject of adverse inferences if the accused decides to waive legal professional privilege. Where the accused has declined to give evidence after consulting a solicitor as in **R v Milford**[111] it is inappropriate to draw an adverse inference without first ensuring that a prima facie case has been made against the accused. However, in **R v Howell**[112] D told his solicitor he was unsure as to whether V would pursue his complaint. His solicitor advised: "Until we had full disclosure from the [police] officers we would give a no comment interview." It was held that an adverse inference could be drawn.

The problem raised by the cases discussed above under the four categories is how the judge and the triers of fact should manage the uncertain facts presented in court[113]. The guidelines promulgated by the Judicial Studies Board constitute a juridical method for managing factual uncertainty but implicit in the guidelines is the constitutional problem raised by the first and second guidelines – Article 6(1) (right to silence) and Article 6(2) (presumption of innocence) to which we must now turn.

2.4 European Convention Jurisprudence and Commonwealth Paradigms Re-Examined

The decision in **Murray**, as highlighted above, is a policy decision. The evanescence of the substratum on which the policy is based by the cessation of the hostilities in N. Ireland deprives the policy of any rational basis. Moreover, the preponderance of Convention jurisprudence and the new light thrown on the right to silence in a constitutional setting by Australian and Canadian authorities corrode the principled basis on which statutory provisions on adverse inferences from silence rest.

Let us discuss Convention jurisprudence first as we are considering the impact of the HRA 1998 on key evidentiary issues – the presumption of innocence and the right to silence. In **Funke v France**[114], the applicant was fined by the Strasbourg police court for failing to provide the customs authorities with the statements of his bank account after a search of his house and seizure which did not result in any criminal proceedings. It was held that the criminal conviction violated Article 6(1) and (2) and the search and seizure effected at his home violated Article 8. In **Crimieux v France**[115] the applicant complained that the searches and seizure made by custom officers at his home and other addresses of his in France violated, inter alia, Articles 6(3) and 8. It was held that there had been a breach of Article 8 but it was not necessary to consider Article 6(3).

Again, in **Condron v United Kingdom**[116] the defendants had remained silent when interviewed at the police station on the advice of their solicitors, who contrary to the opinion of the police doctors, considered them unfit to be interviewed. They were convicted of supplying and possessing heroin after the trial judge had directed the jury that it was a matter for them to decide whether any adverse inferences should be drawn against the defendants from their failure to mention certain facts at their interview. Their appeal to the Court of Appeal was dismissed. On appeal to the European Court, it was unanimously held that the trial judge had not properly directed the jury on the applicant's silence.

Saunders v United Kingdom[117] is a land mark decision in that the European Court held that the appellant was denied a fair hearing in breach of Article 6(1) of the Convention because of the use at his trial of statements obtained from him by the DTI Inspectors in exercise of their powers of compulsion. It must be noted, however, that the UK courts have consistently refused to follow this decision[118] on a version of parliamentary sovereignty, namely, that no Act of Parliament could be invalid in the eyes of the court – the traditional theory of sovereignty of Parliament[119]. The new theory of Parliamentary Sovereignty propounded by Hart states that Parliament can alter its manner and form without detracting from its sovereignty provided this alteration is consonant with the rule of recognition.[120] As Lord Cooke of Thorndon rightly observed:

> "The Human Rights Act [1998] alone not merely departs from the British legal tradition in its whole approach: once in force, it will also make a change to the relations between Parliament and the Executive and on the one hand, and the courts on the other. Our old friend Parliamentary Sovereignty will never be the same again."[121]

In **Averill v United Kingdom**[122] the appellant was detained under section 14 (1) (b) of the Prevention of Terrorism (Temporary Provisions) Act 1989 in connection with double murder. Access to a solicitor was deferred during the first 24 hours and he did not respond to police questioning about his movements at the time of the murder nor about fibres found on his hair and clothing which matched those found on the balaclava and gloves discovered in a burnt-out car used by the gunmen. The judge stated that he had been persuaded by the cogency of the forensic evidence linking the appellant to killings and drew strong adverse inferences from the applicant's silence in the face of police questioning. On appeal to the European Court, it was held that while denial of access to a lawyer violated Article 6 (1), (2) and (3) (c) of the Convention, the right to silence and the privilege against self-incrimination implied into Article 6 (1) by decisions such as **Murray v United Kingdom** and **Saunders v United Kingdom** (cited above) were not breached in this case. In other words, the right to silence is not an absolute right. The issues whether or not the right to silence is violated must now be determined in the light of the circumstances of the case; and in **Averill** the forensic evidence was overwhelming. However, in **Heaney and McGuiness v Ireland**[123] the applicants were arrested in connection with an explosion at a British Army/RUC checkpoint in Co. Derry. The trial judge drew adverse inferences from their refusal to account for their movement during a certain period pursuant to section 52 of the Offences Against the State Act 1939. The European Court unanimously held that that violated Article 6 (1) and (2) of the Convention.

In **Beckles v United Kingdom** where D refused to answer questions during police interview, on the advice of a solicitor, and was convicted, the European Court held that there had been a violation of Article 6 (1) of the Convention. The Court concluded:

> "…whether the drawing of adverse inference from an accused's silence infringes Article 6 is a matter to be determined in the light of the circumstances of the case, having regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation. Of particular relevance are the terms of the trial judge's direction to the jury on the issues of adverse inference".[124]

In **R v Beckles**[125], Lord Woolf, affirming the Strasbourg decision, held that trial judges must make it plain to the jury that they should not draw an adverse inference from silence if they considered that the defendant genuinely and reasonably relied on the advice of his solicitor to remain silent. D's conviction was declared unsafe, his appeal was allowed and a re-trial ordered. Recently, in **Shannon v United Kingdom**[126], the applicant's claim that his conviction and fine for failing to reply to questions about specific offences from financial investigators was unanimously held to violate Article 6 (1) of the Convention.

It must be noted, however, that principles of fundamental justice such as the right to remain silent and the privilege against self-incrimination when expressed in a constitutional document as the Canadian Charter of Rights and Freedoms 1982 are broader and more general than the particular rules which exemplify them. This was highlighted by the Supreme Court of Canada in **Hebert v R**[127]. In that case, the Crown relied on statements made by the accused after he had consulted with counsel and had indicated that he did not wish to make a statement. He was then placed in a cell with an undercover police officer to whom he made statements implicating himself in the robbery with which he was charged. The Supreme Court of Canada unanimously held that the statement should be excluded.

Again, in **R v Broyles**[128] the accused was charged with murder. The evidence against him was circumstantial but included a statement made to a friend after his arrest and after he had been cautioned. The friend who wore a recording device visited the accused in prison at the request of the police. The friend questioned the accused about the killing of the deceased. The statements made to the friend which implicated the accused were excluded pursuant to a provision of the Charter.

It is also interesting to note that prior to the enactment of the Evidence Act 1995 (Commonwealth of Australia) and the identical Act in New South Wales, the common law rights to silence when charged[129] and the right to refuse to produce documents which might be self-incriminating[130] were similar to those asserted in the United Kingdom. In **Swaffield and Pavic v R**[131] a case decided by the High Court of Australia under Section 90 of both Acts, the right to speak or not to speak and to choose who one speaks to was applied in Australia following **Hebert** and **Broyles** – the two Canadian cases cited above.

(4) Summary and Conclusion

The statutory provisions placing the reverse burden on the accused and those allowing adverse inferences to be drawn from the accused's silence must be assessed in their juridico-political context.

In theory, the English system of criminal justice is adversarial (i.e. a criminal proceeding is a contest between the parties before a passive judge and impartial jury). In practice, this is a ruling illusion. There is a convergence of the English adversarial system of justice with the Continental inquisitorial system, or in the continuum, a gradual disintegration of the adversarial system. Social policies and practices are statisized by an activist state.

In the last thirty years or so, we witnessed the re-emergence of victim's interest as a legitimate concern of criminal justice (see Chapter 3) and the introduction of Codes of Practice promulgated by the Home Secretary pursuant to section 66 of the Police and Criminal Evidence Act 1984 which regulate the gathering of evidence for the purpose of prosecution.[132] The police have been vested with enormous powers of surveillance and information gathering by the Police Act 1997, the Terrorism Act 2000, the Regulation of Investigatory Powers Act 2000 and the Criminal Justice and Police Act 2001; and the radical reorganisation of the police by the Police Reform Act 2002 means that the subordination of the police to democratic control is weakening.

We are witnessing the passing away of the minimal (reactive) state: the nightwatchman state of classical liberal theory is being replaced by an activist state, a policy-implementing and conflict-solving state. The fact remains, however, that a clearly hierarchical or pyramidal structure of policing, prosecution, judging, sentencing and penal administration found under the inquisitorial system is not in place in the United Kingdom because the British *Volkgeist* ("the common feeling of inner certainty"[133]) distrusts state institutions and values the direct participation of people in truth-finding through the jury and the establishment of one's version of the truth through one's 'hired gun', that is, through counsel who, according to Langbein, "shape[s] the course of the litigation to partisan advantage".[134]

The British judges also lack the real power of legislative review available to their American counterparts because of different legal cultures and the fact that British jurisprudence and, *a fortiori*, the traditional theory of Parliamentary sovereignty are both Austinian. This position is anachronistic in the twenty-first century when Parliament is amending itself pursuant to Hart's new theory of sovereignty by reforming its organs. The abolition of the Lord Chancellorship, the reform of the House of Lords and the establishment of a Supreme Court (which replaced the House of Lords) are all antithetical to the traditional theory of sovereignty.

3 Protecting vulnerable witnesses: summum ius summa iniuria

3.1 Introduction

The incremental development of the evidential rules relating to vulnerable witnesses took cognisance of two categories of witnesses: the "automatic" category and the "discretionary" category.[135] Whilst the former category includes witnesses suffering from mental handicap or illness, the latter category includes victims of rape or serious sexual offences and those who are unable to give evidence through fear or because they are kept out of the way.[136] The last-mentioned fraction of the latter category has been discussed elsewhere and need not detain us here.[137]

The evidential rules relating to the automatic category of vulnerable witnesses which are mainly judge-made evolved in the exercise of the **parens patriae** jurisdiction of the courts, the origin of which, we are told, "is lost in the mists of antiquity."[138] The spate of legislative activity on the evidential rules relating to the discretionary category was inspired by four Reports.[139]

The enquiry which led to the first of the four Reports, the Heilbron Report, originated as a result of the widespread concern of the public regarding the decision of the House of Lords in **Morgan**.[140] Much of the criticism of the decision in Morgan was directed not much against the substantive law of rape but the evidential rules relating to cross-examination as to the sexual behaviours or sexual histories of the rape victims resulting, according to the Report, "in unnecessary and hurtful revelations of their private life."[141] The Report recommended that the trial judge's discretion to admit such evidence should be guided by, and based on, principles set out in legislation.[142] The legislation was section 1 of the Sexual Offences (Amendment) Act 1976 discussed later in this chapter.

The Roskill Report recommended, **inter alia**, the use of the live television link effectuated by section 32 of the Criminal Justice Act 1988 (hereafter cited as 'The CJA 1988') which rendered admissible evidence through television link in fraud[143] and child abuse[144] cases. The Pigot Committee felt that section 32 of the CJA 1988 did not go far enough and therefore recommended that "video-recorded interviews with children under the age of 14 conducted by police officers, social workers or those whose duties include the investigation of crime or the protection of the welfare of children should be admissible as evidence."[145] This recommendation was effectuated by section 32A of the CJA 1988.[146] One of the major recommendations of the Pigot Committee, albeit ignored, was that defendants charged with sexual offences and of cruelty to children should not be allowed to cross-examine the alleged victim.[147] This ignored recommendation was adopted by the Interdepartmental Working Group on the treatment of vulnerable or intimidated witnesses[148] and enacted in sections 34, 35 and 41 of the Youth Justice and Criminal Evidence Act 1999 (the YJCEA 1999).

It is the object of this chapter to assess critically the evidential rules relating to the protection of vulnerable witnesses under the YJCEA 1999 with a view to determining whether they are compatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the Convention). To this end, the following themes are considered, viz. (i) the principle of orality, video-recorded evidence and aids to communication; (ii) the false-memory syndrome and miscarriages of justice; (iii) sexual history evidence; and (iv) special measures and the judicial discretion under s.32 of the YJCEA 1999.

3.2 The principle of orality

Prior to the enactment of the CJA 1988, four obstacles stood in the way of the prosecution in child abuse cases, viz. (i) the rules of competency and compellability, (ii) the rules of corroboration, (iii) the hearsay rule, and (iv) the rule against opinion.

The first two obstacles were surmounted by the CJA 1988 as amended by the Criminal Justice Act 1991 and the Criminal Justice and Public Order Act 1994. The law was first amended to allow the unsworn evidence of a child to be corroborated by both sworn and unsworn evidence[149] and then the mandatory requirement for corroboration in sexual offence cases was abrogated[150] but judges still have a discretion to give corroboration warning in certain circumstances.[151] The caselaw as to the threshold of competency of children of "tender years" was inconclusive.[152] Section 33A(2A) of the CJA 1988 clarified the competency of children by stating that "a child's evidence shall be received unless it appears that the child is incapable of giving intelligible testimony."[153]

i) The two major obstacles which have not been surmounted entirely are the rules against hearsay and opinion; and these obstacles are due to the principle of orality or spontaneity.[154] The origin of this principle which imposes a general ban on absent witnesses has been traced to a much older version of the hearsay rule that a witness must speak in open court **de visu et auditu** (i.e. from his personal knowledge).[155] Three sets of statutory provisions are considered with a view to showing that breaches of the principle of orality may be incompatible with Article 6(1) and 6(3)(d) of the Convention, viz. (i) section 32A of the CJA 1988 and section 32 of the 1988 Act as replicated in section 24 of the YJCEA 1999 (live television link and video-taped interviews); (ii) sections 27 and 28 of the 1999 Act (video-taped evidence-in-chief, cross-examination and re-examination; and (iii) section 30 of the 1999 Act (aids to communication). Live television link and video-taped interviews

Two important statutory provisions were enacted to effectuate the recommendation of the Roskill Committee that treaties and legislation should allow live television links to enable evidence to be taken from a witness in any other country. Live television link was rendered admissible in fraud cases by virtue of section 32(1)(a) of the CJA 1988 and in child abuse cases by section 32(1)(b) of the same Act.

The provisions of section 32 of the CJA 1988 were replicated in section 24(1) of the YJCEA 1999 and extended by defining "a live link" as "a television link or other arrangement whereby a witness, while absent… is able to see and hear a person there and to be seen by persons specified in s.23(2)(a) to (c) [of the CJA 1988]."[156] This amendment brings within the ambit of "live link" other arrangements such as the use of video conferencing in criminal as well as civil proceedings.[157]

The impact of motion pictures on courts, Wigmore reminds us, "should never be overlooked. It is one of the few forms of evidence which retains almost all of its original dramatic effect, brought out again with full force in appellate chambers."[158] In **Speaking Up For Justice**, the Working Group claims that there are two advantages for using the television link: (i) the vulnerable witness avoids the trauma of sitting in the court room facing the defendant; and (ii) the defendant's right to see the witness's demeanour and to test evidence by cross-examination is not infringed.[159] The two advantages proffered are questionable for two reasons. First, the reduction of trauma might be at the expense of the quality and truthfulness of the evidence. Is the evidence obtained "the best evidence" that the nature of the case will allow?[160] If in civil proceedings the currency of the Best Evidence rule is recognised;[161] **a fortiori**, in criminal proceedings, it must be recognised because, on the one hand, children benefit from the live link but, on the other hand, it made them likely to lie. Second, there is much resistance to live link in Scotland because it is evidence admitted in breach of the principle of orality.[162] The use of screens whilst not an acceptable alternative for a vulnerable adult witness,[163] should be available in case of juvenile witnesses.[164]

Video-taped interviews were also rendered admissible by section 32A of the CJA 1988 which was inserted by section 54 of the Criminal Justice Act 1991 to implement the recommendation of the Pigot Committee. Although the supporters of the Bill felt that the video-taped interviews would be admitted free of the restrictive rules of evidence,[165] their hope was not fully realised due to the prompting of Mr David Mellor, the then Minister of State at the Home Office, who insisted on safeguarding the principle of orality by introducing, at Committee stage of the Bill in the House of Commons, a discretionary power to exclude video-taped interviews in the interests of justice vested in judges by section 32A(3)(c) of the CJA 1988 for infringing the rules against hearsay and opinion.[166]

It must be noted that diagnostic video-taped interview has been admitted by itself[167] or in conjunction with live television link to determine the competency of a child witness.[168] However, there are worrying signs that in spite of the Practice Directions[169] and the Memorandum of Good Practice issued as guidance by the Home Office and the Department of Health, videotaped evidence may include leading and facilitating questions posed by psychiatrists, psychological social workers and police officers who have emotional or professional investment in the outcome of the criminal proceedings. Three cases neatly highlight this foreboding. In **Re N (Minors) (Child Abuse: Evidence)**,[170] it was alleged that a girl was sexually abused by the mother's cohabitee. Although a physical examination did not reveal any evidence of sexual interference, the child was subsequently interviewed by a psychological social worker who asked leading questions and used sexually explicit dolls. The court was given a report by the social worker together with a video recording and a transcript. They were found seriously flawed because two psychiatrists had serious misgivings about them and that both before and after the interview the social worker had general conversation about the matter with various parties and came to a firm conclusion that the cohabitee had sexually assaulted the girl in some five different ways and that the mother had condoned them. The allegations of sexual abuse were dismissed.

Again, in **Re E (A Minor) (Child Abuse: Evidence)**[171] the only evidence available was that of a four year-old boy, E, together with three other boys of the same age who alleged that they had been subjected to sexual abuse by the boy's parents and the father's brother. Two social workers involved in this case had been completely concerned from an early stage that all the children said was true. The President of the Family Division gave leave for E to be interviewed by a child psychiatrist who concluded that E was a normally healthy boy and there were no clinical signs of sexual abuse. Scott Baker J. held that the evidential value of what the children were reported as saying was limited because they were factually inaccurate and some accounts were undoubtedly fiction. More recently, in **Re M (Sexual Abuse Allegations: Interviewing Techniques)**,[172] Sir Stephen Brown P. concluded that the videotaped interviews tendered as evidence were seriously flawed and there had been a serious disregard of the guidelines.

The problem with videotaped evidence is that in view of the fact that it is difficult to separate fact from fiction and bring all the makers of the statements on which the compiler of the video relied to give evidence, inadmissible hearsay is transmogrified into real evidence by some sort of legal alchemy. What is more, the principle of orality is breached and Article 6(3)(d) of the Convention is violated because the defendant is denied the opportunity of cross-examining all those who provided evidence against him.[173] This is the predicament of some of the care workers whose cases were trawled back to the 1970s and 1980s which will be discussed later.

ii) Video-recorded evidence-in-chief, cross-examination and re-examination

Video-recorded evidence in the form of evidence-in-chief rendered admissible by section 32A of the CJA 1988 was justified by the Pigot Committee on two grounds: (i) that the proceedings in which a child witness is involved should be concluded with alacrity in a manner consonant with the interests of justice; and (ii) that children should give evidence in surroundings or circumstances which do not intimidate them.[174] Much has been discussed on the latter above. Whilst disposing of a case with alacrity in the interests of justice is a strong overwhelming interest, there is a stronger overwhelming interest that

> "the…most important thing for the administration of criminal law is that it should appear that the prisoner is having a fair trial, and that he should not be left with any sense of injustice on the ground that his case has not been fairly put before the jury."[175]

The need to protect the defendant's right to fair hearing guaranteed by Article 6(1) and 6(3)(d) becomes pressing in view of the extension of the provisions in section 32A of the CJA 1988 by the YJCEA 1999. Section 27(1) of the 1999 Act renders admissible video-taped evidence-in-chief and section 28(1) of the same Act renders admissible video-taped cross-examination and re-examination subject to the safeguards incorporated into the Act.[176]

The problem with video-taped examination-in-chief was noted in 1995 in **R v C (R.E.)**.[177] In that case, the appellant was convicted of indecent assault. The complainant's evidence-in-chief took the form of playing to the jury a video-tape of her interview by the police as permitted by section 32A of the CJA 1988 and the trial judge permitted a typed transcript of the tape to be given to the jury. Pill L.J. in the Court of Appeal held that it was not generally appropriate for the jury to be supplied with the transcript of the video evidence of a complainant having regard to the disproportionate weight attached to the evidence-in-chief as against the rest of the evidence including the cross-examination and the defence evidence.

Pill L.J.'s prescient foreboding is a foretaste of what is likely to happen with the course of evidence wholly or partly conducted out of court. As I have argued elsewhere

> "Unless stringent rules of practice are introduced, trial in court may be replaced by trial by documents (as defined[178]) and the principle of orality which ordains that witnesses shall be examined-in-chief, cross-examined and re-examined in open court – the cornerstone of our adversarial system of criminal justice – may atrophy."[179]

iii) Facilitated Communication

The realisation that even whilst adhering to the principle of orality witnesses might have difficulties affecting their communication skills, response to perceived aggression, memory and comprehension prompted the enactment of sections 29 and 30 of the YJCEA 1999.[180]

Section 29 of the 1999 Act placed on statutory footing the Circular of the Home Office issued sequel to the decision in **R v Atard**.[181] In that case, a Maltese was interrogated and the police officer who took notes of the answers was not permitted to give evidence of those notes because the interpreter was not called to give evidence. It was held that the notes were inadmissible hearsay. As a result of this decision, the Home Office issued a Circular suggesting that interpreters make notes of their interpretation and be prepared to give evidence. Section 29 allows the examination of a witness through an interpreter or intermediary subject to a special measures direction[182] and rules of court.

Section 30 of the 1999 Act allows the use of aids to communication necessary to overcome an impairment of a witness who is eligible under section 16 of the Act. Whilst competence and compellability of persons of unsound mind[183] and deaf and dumb persons[184] are regulated by common law, facilitated communication – a technique whereby an adult supports the arm of an autistic person while using a keyboard or typing device – poses a thorny evidential issue.

Recently, in **Re D (Evidence: Facilitated Communication)**,[185] the admissibility of facilitated communication was tested in wardship proceedings in the Family Division of the High Court. In that case, a young man of seventeen, suffering from severe autism and epilepsy with a cognitive age of not more than two years, purportedly alleged that he had been the victim of sexual abuse by his father. Although the young man could not speak, he was assisted by facilitated communication. Dame Butler-Sloss P. discharged the wardship for two reasons. First, the use of facilitated communication is not reliable because responses produced by the technique were under the control of the facilitator and not the complainant.[186] Second, as Butler-Sloss P. rightly observed, "facilitated communication is a highly controversial method of communication and one that should be viewed with the greatest possible caution unless or until further evidence is provided."[187] And one might add, facilitated communication is not only in breach of the principle of orality but also a violation of Article 6(2) of the Convention for it could not be said that the prosecution case has been proved beyond reasonable doubt.

3.3 False-memory

It has been recognised recently that one of the reasons for miscarriages of justice in the trials of sex offenders is the "false-memory" syndrome.

Repressed-memory, recovered-memory and false-memory are often used interchangeably. They are but different phases of reproduction. Whilst the concept of "repressed-memory" is the notion that personal histories of the most awful childhood can be hidden from consciousness for decades, "recovered-memory" denotes the recovery episodes when repressed feelings are released by unlocking the repressed memory cage.[188] Allegations of sexual abuse based on recovered memory are treated by the criminal justice system as delayed reports and there is no time limit for prosecuting the alleged sexual abuse. False-memory, a riposte to an alleged "repressed-memory syndrome", has been defined as "the recollection of an event which did not occur but in which the individual strongly believes."[189]

Historically, the widespread use of memory recovery techniques was triggered by a self-help book co-authored by Bass and Davis in the United States of America in 1988,[190] recovered memory narratives, television documentaries, films and chat shows. In the United Kingdom, the widespread use of recovered-memory technique began in 1990 and the British False Memory Association was formed in 1993 following reports that well-educated adult daughters in their late thirties were making serious allegations of childhood sexual abuse after undergoing therapy.[191]

Matters came to a head recently in the prosecutions for child abuse allegedly committed by care workers in the 1970s and 1980s after a full scale investigation in 34 of the 44 police forces in England, Wales and Northern Ireland.[192] Most of the investigations are continuing but some have been completed amid a mounting concern about flawed prosecutions and possible miscarriages of justice. In some cases, in the absence of witness evidence and forensic materials, trawling produced what was colloquially (but inaccurately) described by the media as "'corroboration' by volume."[193]

Whilst some retrospective allegations of sexual abuse are proved beyond reasonable doubt, evidence of recovered-memory are problematic for three reasons. First, scientific evidence pointing to the unreliability of recovery techniques used by therapists is overwhelming: disturbing number of cases are not investigated and the fact that the cases are based on such technique is either concealed or emerges when the accused is committed for trial. Dangerously suggestive techniques can lead to arguments for exclusion under section 32A(3)(c) of the CJA 1988 or sections 78 and 82(3) of the Police and Criminal Evidence Act 1984 as exemplified by relatively recent cases. In **R v H**,[194] a brother and sister undergoing psychiatric treatment began to attribute their illness to sexual abuse within the family during the period of introspection and by means of "flashbacks" and "new memories" to others outside the family circle. Fortunately, a psychiatrist quickly recognised this as false-memory syndrome. Again, in **G v DPP**,[195] a recovery technique called Thematic Emergence of Anomaly was held inadmissible but in **R v Clarke**[196] facial mapping by video superimposition was held admissible. There is also the real danger that therapists, agencies and complainants espousing recovery memory beliefs will be sued successfully for negligence as is the case in the USA. In **State of New Hampshire v Joel Hungerford**[197] (1997) the Supreme Court of New Hampshire ruled that the recovered memory thesis did not satisfy the standard of evidential reliability sufficient to form a delayed discovery presentation. Even under English law where time does not run against the Crown, it is a moot point whether the evidence satisfies the standard of proof and is compatible with Article 6(2) of the Convention.

The second reason for regarding recovered-memory as being problematic is that there is no provision in the YJCEA 1999 making it mandatory to video-tape interviews of adults making retrospective allegations of sexual abuse as in the case of children.

3.4 Sexual History Evidence or the slagging-off of the complainant in rape cases

Perhaps the most controversial provisions of the YJCEA 1999 are those dealing with sexual offences. Disputants on the admissibility of sexual history evidence often ignore the unique body of evidential caselaw surrounding sexual offences such as the doctrine of recent complaints, the evidence that the complainant raised a "hue and cry" after an assault and corroboration rules. Added to these are statutory provisions on proof of previous inconsistent statements, viz. Sections 4 and 5 of the Criminal Procedure Act 1865.

Evidence of recent complaint is an exception to the rule against narrative or self-corroboration: the rule that a witness may not be asked in examination-in-chief whether she has formerly made a statement consistent with her present testimony because of the danger of manufactured evidence. The two reasons adduced for this exception are that it is admissible as evidence of inconsistency of the complainant's statement with her testimony and to negative consent where consent is in issue. The only safeguard is that at common law such evidence of recent complaint is admissible only when the complainant is called to give evidence.[198] It may, however, be rendered admissible under section 23(2) of the CJA 1988 subject, of course, to the requirement that the section must now be interpreted in a manner compatible with Convention rights.[199] But the doctrine of recent complaint described by Holmes J. in **Commonwealth v Cleary**[200] as "a perverted survival of the ancient requirement that she should make **hue and cry** as a preliminary to bringing her appeal"[201] has never been corroborative evidence since it does not come from a source independent of the complainant.[202] The only evidential value is that it is relevant and, as the Judicial Studies Board put it, that it "may possibly help the jury to decide whether she [the complainant] has told the truth."[203]

What is important in this discourse is the relevance of the evidence tendered and relevance depends on the issue to be resolved and not the crime charged. The Heilbron Committee recommended the banning of questions on the past history of the complainant except where the line of questioning leads to evidence relating to a behaviour on the part of the complainant which was strikingly similar to her alleged behaviour on the occasion of the alleged offence or where the defendant had had sex with the woman or where it would be unfair to the defendant to allow it.[204] The Committee also added a rider: that the prosecution may adduce sexual history evidence to show that the complainant is a happily married woman or a virgin and that if such evidence were to be challenged the judge should have a discretion to allow cross-examination and the calling of evidence in rebuttal.[205] All the above recommendations except the "striking similarity" clause were enacted in section 2 of the Sexual Offences (Amendment) Act 1976. Section 2(4) of the 1976 Act, however, provides: "Nothing in this section authorises evidence to be adduced or asked apart from this section." This means that the section did not replace the common law restrictions discussed above but only complemented them. To its supporters, the section protects the right of the accused to fair hearing which is now guaranteed by Art. 6(1) and 6(3)(d) of the Convention; to its critics, there are three objections. The first is that it is a defendant-oriented legislation and sexist. The second is that the discretion to allow cross-examination should not be left in the hands of judges because "many judges, at both crown court and court of appeal level… use their discretion to perpetuate the sexism rather than implement the reforms of the Sexual Offences (Amendment) Act 1976."[206] The third is that lacking from the discourse in **Viola**[207] and later cases is any discussion of the degree of relevance needed to qualify matters relating to sexual history for admissibility.[208] We shall discuss these objections in reverse order and in the light of sections 34, 35 and 41 of the YJCEA 1999.

The prohibition of cross-examination of complainants in proceedings for sexual offences by section 34 of the 1999 Act and child complainants and others by section 35 of the same Act is problematic. In **Seaboyer**[209] where the Supreme Court of Canada upheld that a rape-shield legislation was compatible with the Canadian Charter of Rights and Freedoms 1982, McLachlin J. whilst concurring presciently noted that the legislation had the potential of excluding relevant material evidence. He considered the example proffered by Tanford and Bocchino[210] where a woman alleges that she was raped and the man claims she is a prostitute who agreed to sexual relations for a fee and afterwards threatened to accuse him of rape because he refuses to pay an additional fee. At the trial for rape, the defendant will not be allowed to cross-examine the woman on her sexual history. However, in the trial of the woman for extortion, the man will be entitled to cross-examine her. In other words, relevance depends on the crime charged and not the issue. The issue in both cases is whether the woman is a prostitute. And relevance, whatever the degree of relevance, is not equal to admissibility.

Professor Temkin's argument that **Viola**[211] and other cases did not specify the degree of relevance needed to qualify matters relating to sexual history for admissibility conflates cogency and admissibility and therefore obscures the distinction between relevance and admissibility. Temkin cited with approval Thayer's position on relevance:

> "[Evidence] must not merely be remotely relevant but proximately so. Again it must not necessarily complicate the case, or too much tend to confuse, mislead or tire…the jury, or withdraw their attention too much from the real issues of the case."[212]

In an illuminating passage on admissibility, Thayer opined:

> "Admissibility is determined, first, by relevancy, – an affair of logic and experience, and not at all of law; second, but only indirectly by the law of evidence, which declares whether any given matter which is logically probative is excluded."[213]

Thayer's position on admissibility was revised by Wigmore as follows:

> "Admissibility signifies that the particular fact is relevant, and something more – that it has also satisfied all the auxiliary tests and extrinsic policies."[214]

Cross eventually reformulated Thayer's position in a statement explicable in a quasi-mathematical form:

> Relevance ≠ Admissibility
> Admissibility = Relevance + Satisfaction of Auxiliary Tests
> and Extrinsic Policies

The relevance of evidence of sexual history is therefore a question of logic and experience; its admissibility depends on relevance and the satisfaction of auxiliary tests and extrinsic policies which include compatibility with Convention rights pursuant to section 3 of the Human Rights Act 1998.

It is therefore submitted that the prohibition of cross-examination in section 34 and 35 of the YJCEA 1999 violates Article 6(1), (2) and (3)(d) of the Convention as the only plank on which the defendant can establish his defence has been removed. True, there is a lee-way for the defendant in section 41 which provides that no evidence may be allowed or questions asked about any sexual behaviour except with leave of court. Whilst the caselaw[215] on section 2 of the Sexual Offences (Amendment) Act 1976 which is superseded[216] does not fall into desuetude, the evidential principles in the pre-existing law are purportedly whittled down by the exclusion of materials the main purpose of which is to impugn the credibility of the complainant as a witness and by limiting questions to specific instances of sexual behaviour; thus creating a blurred line of demarcation – a potential ground of appeal – between "sexual behaviour" and "sexual experience".[217]

Fortunately, in deciding two recent cases, British judges adopted a purposive interpretation of liberty rights as their counterparts in Canada[218] and New Zealand[219] by which there is a reconciliation between the individual and the community and their respective rights. In **R v Y (Sexual Offence: Complainant's sexual history)**,[220] it was held that where the defence was the defendant's belief in the complainant's consent, the defendant was not precluded from adducing evidence that he and the complainant had taken part in consensual sexual activity but that it was not admissible on the issue of consent and alleged recent consensual activity with the defendant's friend. This decision was quickly reversed in **R v A (No. 2)**[221] where the House of Lords held that a prior consensual sexual intercourse between the complainant and the defendant might in some circumstances be relevant to the issue of consent and that the absence of evidential material relevant to it might violate Article 6 of the Convention. The balance was quickly restored by the House but the empirical objection of sexism – that the discretion must not be left in the hands of judges who are predominantly male – must now be considered.

3.5 Special Measures and Judicial Discretion

Special measures are available to witnesses who qualify under section 16 of the YJCEA 1999 (i.e. witnesses under the age of 17 and those who are mentally handicapped or suffering from physical disability or disorder) or under section 17 of the Act (i.e. witnesses eligible on the ground of fear or distress about testifying). The Act makes provisions on special directions to allow vulnerable witnesses to be screened from the defendant,[222] to give evidence by live link[223] or in private,[224] to use the video recordings of their interviews as evidence-in-chief[225] and for cross-examination and re-examination[226] to be recorded, for evidence to be given through an intermediary,[227] for aids to communication to be provided[228] and for wearing of wigs and gowns to be dispensed with.[229]

These special measures, whilst redressing the balance in favour of vulnerable witnesses, raise perplexing questions about the fundamental rights of the defendants as outlined in the preceding sections. It is true that judges are vested with wide powers to determine whether the measures are likely to enhance the quality of evidence given by witnesses.[230] Judges must also consider all the circumstances in which the evidence was obtained including the views expressed by witnesses and whether the measure "might tend to inhibit such evidence being effectively tested by a party to the proceedings."[231] These provisions taken superficially suggest that judges have the right to determine whether the proffered evidence is the best evidence. While in a similar situation in civil proceedings judges have the discretion to exclude relevant evidence,[232] the YJCEA 1999 lacks an express or implied provision to this effect. Instead, judges are vested with the power to comment on the weight (if any) to be attached to the evidence[233] and to give appropriate warning to the jury.[234] This position highlights the undue deference of the Working Group on vulnerable witnesses to the powerful lobby which advocated the removal of judicial discretion in the trial of sexual offenders.

It is submitted that in view of the wide powers vested in judges by section 3 of the HRA 1988 to interpret primary legislation and secondary legislation in a manner compatible with Convention rights and the discretionary powers vested in them under sections 78 and 82(3) of the Police and Criminal Evidence Act 1984 (PACE) to exclude relevant evidence, judges are in a position to strike the right balance between vulnerable witnesses and vulnerable defendants. After all, the discretionary power to exclude under sections 78 and 82(3) of PACE has been invoked not only to exclude illegally obtained evidence and confessions[235] but also inadmissible similar fact evidence[236] and the plea of guilty.[237]

3.6 Summary and Conclusion

The Youth Justice and Criminal Evidence Act 1999 was hastily enacted to give effect to the recommendations of the Interdepartmental Working Group on the treatment of vulnerable witnesses. The deliberations of the Working Group and its recommendations as summarised in its Report entitled **Speaking Up For Justice** leave much to be desired. The Report lacks foresight and critical analysis. Evidential rules are not critically assessed and the proliferation of electronically recorded evidence (documents as defined[238]) means that trial by production of direct oral evidence is being replaced by documents compiled outside the court. The breaches of the principle of orality instantiated above not only undermine the English adversarial system of criminal justice but also violate, in most cases, the defendant's right to fair trial protected by Article 6 of the Convention.

It is also worth noting that the supporters of the 1999 Act are averse to discretionary powers being vested in judges in rape cases. And yet, the oblique consequence of the victim-oriented 1999 Act is the creation of vulnerable defendants whose rights can only be safeguarded, if capable of being safeguarded under the Act, by judges.

The prognosis is that judges can rescue the Act from its imperfections and fill the hiatuses by purposive interpretation of its provisions. The decisions of the Court of Appeal in **R v Y**[239] and **R v T, R v H**[240] and the House of Lords in **R v A (No. 2)**[241] confirm this prognosis. Cicero's trite proverbial statement 'summum ius summa iniuria' ('the strictest application of the law is the greatest injustice)[242] remains as valid today as it was in the days of the great rhetorician and lawyer; and, what is more, there are limits to what judges can do or achieve by purposive interpretation.

4 Double jeopardy and similar fact evidence

4.1 Introduction

The **fons et origo** of the principle of double jeopardy – that no man ought to be punished twice for the same offence – has been traced to Demosthenes, the Greek rhetorician, in 355 BC.[243] The modern version of the principle, however, derived from the **Non Bis in Idem** principle of the continental law which, in turn, stemmed from the Justinian's **Corpus Juris Civilis** was incorporated into English law in the twelve century AD and eventually adopted in the Fifth Amendment of the United States Constitution which provides, inter alia, that no person be "subject for the same offence to be twice put in jeopardy of life and limb".[244]

The rationale of this principle is that it prevents the unwarranted harassment of the accused, protects the innocent, and ensures that the legal system "commands the respect of the public"[245] but at the same time, it may occasionally allow the guilty person to escape punishment.[246]

There are two double jeopardy problems. The first involves the question whether a prosecutor can charge an accused who has been previously convicted with a further offence based on the same facts. In answering this question, the doctrine of estoppel has played a major, though uncertain, role in the development of the special pleas of **autrefois acquit** (that the accused has been previously acquitted) and **autrefois convict** (that the accused has been previously convicted). The second problem is the similar fact evidence problem: whether a defendant acquitted in case A could have evidence of the case called against him in case B to show what was his intent in case B. We shall discuss these problems taking cognisance of the changes effectuated by the Criminal Justice Act 2003 (CJA 2003).

4.2 The extent to which double jeopardy protects an accused from further proceedings based on same factual situation

i) Early Decisions and the Tests

In the early cases[247], the courts adopted the literal interpretation of **autrefois acquit** and **autrefois convict**. Erle CJ in **R v Winsor** said:

> "The only pleas known to the law founded upon a former trial are pleas of a former conviction or a former acquittal for the same offence; but if the former trial has been abortive without a verdict, there has been neither a conviction nor an acquittal, and the plea could not be proved…"[248]

In this case, it was held that even where the jury were improperly discharged the accused could be reindicted. It has also been held that in cases where a **nolle prosequi** was entered by the Attorney General[249], a case was terminated by the withdrawal of information[250], and there was an accidental acquittal as where the foreman of the jury says 'not guilty'[251] or gives a verdict which does not express the true verdict of the jury[252], there were no acquittals for the purpose of **autrefois acquit**. The pertinent question is: What is deemed to be the "same offence" for the purpose of **autrefois acquit** and **convict**? Four tests have been proffered, viz (a) the "in peril" test, (b) the **Vandercomb** test, (c) the **Elrington** test, and (d) the **Blockburger** or **Gavieres** test.

a) The 'In Peril' Test

The 'in peril' test as enunciated by Lord Reading CJ in **R v Barron**[253] and **Bannister and Clarke**[254] bars a second prosecution if the accused has already been in peril of conviction on the former trial. The test applies "not only to the offence actually charged in the first indictment, but to any offence of which he could have been properly convicted on the trial of the first indictment".[255] In **Barron**[256], the accused was charged with sodomy and committing an act of gross indecency. He was tried for sodomy and convicted but was not tried upon the other indictment which remained on the file. On appeal to the Court of Criminal Appeal, the conviction for sodomy was quashed and a verdict of acquittal entered pursuant to section 4(2) of the Criminal Appeal Act 1907. The accused was later tried for committing an act of gross indecency and pleaded **autrefois acquit**. The appeal was dismissed. According to Lord Reading, penetration was an essential element of the charge of sodomy but not an essential element of the offence of gross indecency; so the offence at the second trial was "not the same or substantially the same as that charged against [the accused] at the first trial".[257]

In **Bannister v Clarke**[258] the accused at the first trial was charged with the offence of using a house for the purpose of betting with persons resorting thereto under the Betting Act 1853 and acquitted. On the second, at the second trial, other informations were laid against him under the Licensing (Consolidation) Act 1910 for that he, being the holder of a licence for the sale of intoxicating liquor by retail suffered the licensed premises to be used by certain persons for the purpose of betting with persons resorting thereto. His plea of **autrefois acquit** was rejected and he was convicted. Again, Lord Reading said:

> "…that the offence under…the Licensing (Consolidation) Act 1910, is not identical with the offence under the Betting Act 1853, nor is it substantially the same offence. The one can only be committed at licensed premises by the holder of the licence; the other can be committed at any premises, whether licensed or not, by a person who is not a licence-holder at all. The conclusion on this point is that the plea of autrefois acquit fails."[259]

b) The Vandercomb Test

The so-called **Vandercomb** test which was derived from **R v Vandercomb and Abbott**[260] was not a test **stricto sensu** but two rules enunciated by Buller J stating when two offences are **not** the same. The two rules are as follows:

Rule 1

> "…and if crimes are so distinct that evidence of the one will not support the other, it is as inconsistent with reason, as it is repugnant to the rule of law, to say that they are so far the same that an acquittal of the one shall be a bar to the prosecution for the other."[261]

Rule 2

> "[U]nless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second."[262]

In **Vandercomb and Abbott** it was held that the offence of breaking and entering a dwelling-house in the night time and stealing goods therein was not the same offence as entering a dwelling-house in the night time with the intent to commit a felony. Buller J explained:

> "that evidence of one of them will not support an indictment for the other … In the present case, therefore, evidence of breaking and entering with intent to steal, was rightly held not to be sufficient to support the indictment, charging the prisoner with having broken and entered the house, and stolen the goods stated in the first indictment."[263]

It is unclear whether this is "the same evidence" test or "the same factual situation" test: whether one looks to the facts contained in the second indictment or the evidence to support the second indictment. And yet, the Vandercomb test has been applied in the USA[264] and in the United Kingdom[265]. In **Connolly**[266], Lord Morris of Borth-y-Gest suggested that it was "the same evidence" test in this passage:

"The test is, therefore, whether such proof as is necessary to convict of the second offence would establish guilt of the first offence or of an offence for which on the first charge there could be a conviction."[267]

But in another passage endorsing "the factual situation" test, he opined:

> "In **Bird's case** it was a question of fact (for the jury) whether the assault which was the subject of the second indictment was the same as one of the assaults forming the basis of murder charge, but it was a question of construction and, therefore, of law for the judge whether on the indictment of murder there could have been a verdict of assault. There does not seem to have been any suggestion that the second indictment could not be preferred or could not result in conviction merely because it related to facts which had already been examined or because it required the repetition of evidence previously given."[268]

In the cause célèbre **Sambasivan v Public Prosecutor, Federation of Malaya**[269] the plea of **autrefois acquit** was considered. In that case, the appellant at his first trial was charged with two offences, carrying a firearm and being in possession of ammunition. He was acquitted of the second charge and a new trial was ordered on the first. At the new trial, the prosecution relied on an admission to the effect that he was both carrying a firearm and in possession of ammunition. His conviction on the charge of carrying a firearm was quashed because the triers of fact had not been told that part of the statement dealing with ammunition was untrue. Lord MacDermott explained:

> "The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trail is not completely stated by saying that the person cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication … That is was not conclusive of his innocence on the firearm charge is plain but it undoubtedly reduced to some degree the weight of the case against him, for at the first trial the facts proved in support of one charge was relevant to the other."[270]

c) The Elrington Test

The **Elrington** test or the ascending scale principle was enunciated by Cockburn CJ in **R v Elrington**[271] where he stated:

> "…we must bear in mind the well established principle of our criminal law that a series of charges shall not be preferred, and, whether a party accused of a minor offence is acquitted or convicted he shall not be charged again on the same charge in a more aggravated form."[272]

In **Elrington** the accused was indicted on three counts: (i) assault causing grievous bodily harm, (ii) assault (the same assault) causing actual bodily harm, and (iii) common assault (the same assault). The accused's plea was than in respect of the same assault an information and complaint against him has been heard and dismissed by justices. Cockburn CJ held that the express wording of section 28 of a statute which provided that in such circumstances a person should be "released from all further or other proceedings, civil or criminal, for the same cause" enabled the accused to plead **autrefois acquit**.

The **Elrington** test was applied in **R v Beedie**[273] where the defendant, the landlord of a property where a young woman died of carbon monoxide poison by use of a defective gas fire, was prosecuted by the Health and Safety Executive, pleaded guilty and was fined. The defendant was later charged with manslaughter. His application to stay the indictment on the ground of **autrefois acquit** was rejected by the trial judge. The defendant was convicted and appealed. The Court of Appeal, allowing the appeal, held that a stay should have been ordered since manslaughter was based on the same facts as the earlier summary proceedings. It must be noted, however, that courts have departed from the ruling in **Beedie** where there are sequential trials and special circumstances as in **R v South Hampshire Magistrates' Court, ex p Crown Prosecution Service**[274]. In that case, the defendant was tried in December 1995 and acquitted. In January 1996 he was re-arrested and charged with a series of connected but different offences. He argued that failure of the prosecution to consolidate all the charges was an abuse of process. At the committal, the magistrates agreed but the Divisional Court, on a judicial review application brought by the Director of Public Prosecutions, disagreed. The Divisional Court held that a second trial brought on the same or similar facts was not oppressive because there were special circumstances such as lack of significant evidential overlap between the two proceedings which made it just and convenient to hold two trials.

d) The American Blockburger or Gravieres Test

The test emerging from **Blockburger v United States**[275] and **Gravieres v United States**[276] is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the principle to be applied to determine whether there are two offences or only one is whether each provision requires proof of an additional fact which the other does not. In **Blockburger**, it was held that although a second sale of narcotic drug was made to the same purchaser, with no substantial interval of time between the delivery of the drug in the first transaction and the payment for the second quantity sold, the two sales were not a single continuing offence but separate violations of the Harrison Narcotic Act.

In **Gravieres**, it was held that the offences of behaving in an indecent manner in a public place and of insulting a public officer by deed or word in his presence were not identical and the conviction of the first would not bar a prosecution for the other, even though the acts and words of the accused set forth in both charges were the same.

4.3 The impact of the CJA 2003 on the Principle of Double Jeopardy and Similar Fact Rule

The Law Commission Consultation Paper No. 156, **Double Jeopardy**, provisionally concluded that **Sambasivan** (discussed above) "was ill-conceived and superfluous, and ripe for abolition".[277] The Law Commission identified four rationales for the principle of double jeopardy, viz. (i) the risk of wrongful conviction; (ii) the distress of the trial process; (iii) the importance of finality in litigation (**res judicata**); and (iv) the promotion of efficient investigation and prosecution.[278]

In **R v Z**[279] the House of Lords held that the principle of double jeopardy did not render inadmissible evidence of previous acquittals as similar fact evidence but that the question of fairness must be addressed and judges must exercise their discretion under sections 78 (1) and 82 (3) of PACE to exclude the evidence if admission would be adverse to the fairness of the proceedings. In **Z** it was held that evidence involving incidents resulting in three prior acquittals of the defendant on charges of rape could be adduced as similar fact by the Crown in the charge for which the defendant was standing trial. Sambasivan was not expressly disavowed in **Z** and Lord Hutton (with whom Lords Hope, Browne-Wilkinson and Millett agreed) even said Sambasivan was right on its own facts. This is an abolitionist trend: the replacement of rigid rules of evidence by free evaluation of evidence or free proof. While free proof, à la Bentham, is noble, it ignores a perplexing issue of justice: that evidence of previous acquittals may cause the fact-finder to proceed with a pre-conceived idea of the defendant's guilt in violation of not only the requirement of equality of arms but also the presumption of innocence (Article 6 (1) and (2) of the European Convention on Human Rights [the Convention] which are part of the broad concept of fair trial (Article 6 (3) (d) of Convention).[280]

R v Z is now placed on statutory footing by section 98 (b) of the CJA 2003 which defines evidence of "bad character" as including, inter alia, the "evidence of conduct in connection with investigation or prosecution of that offence". In other words, a previous charge which resulted in an acquittal (**Maxwell v DPP**[281], **R v Cokar**[282] and **R v Z**[283]) and an allegation that did not result in a charge (**Stirland v DPP**[284]) which were excluded under the Criminal Evidence Act 1898 as amended[285] are evidence of bad character pursuant to section 98 (b) of the CJA 2003. While the principle in **R v Z** applies in New Zealand[286], it does not apply in Australia[287] and Canada[288] where the principle of double jeopardy is strictly adhered to.

Section 101 (1) (d) of the CJA 2003, one of the safety valves created for the admissibility of bad character, places the **R v P** test of similar fact evidence on statutory footing. (The **R v P** test is that similar fact evidence is admissible if the probative force of the evidence is sufficiently great to make it just to admit the evidence notwithstanding its prejudicial value and that such probative force could be derived from striking similarity or the former "categories", now regarded as examples.[289])

The conventional wisdom is that the R v P test will continue for the forseeable future.[290] The reality is that we might be witnessing the slow and painful demise of the R v P test which, in spite of its imperfections and limitation[291], struck the right balance between the State's interest in the administration of justice and the defendant's right to fair hearing protected by Article 6 of the European Convention on Human Rights. The reason for this gloomy foreboding is **R v Somanathan**[292] where the Court of Appeal held that evidence of bad character which satisfied the requirement of section 101 (1) (d) of the CJA 2003 was admissible in a criminal trial notwithstanding that it might not have satisfied the pre-existing **R v P** test for the admissibility of similar fact evidence provided the question of fairness was dealt with under section 101 (3) and (4) of the CJA 2003.

One final issue must be broached and that is the reopening of final acquittals.

4.4 Double Jeopardy and Reopening of Final Acquittals

Both the Law Commission[293] and the Home Affairs Committee of the House of Commons[294] recommended a limited power to reopen an acquittal if new evidence emerged. The Government in its White Paper **Justice For All** stated:

> "The double jeopardy rule means that a person cannot be tried more than once for the same offence…. The Stephen Lawrence Inquiry Report recognised that the rule is capable of causing grave injustice to victims and the community in certain cases where compelling fresh evidence has come to light after an acquittal. It called for a change in the law to be considered, and we have accepted that such change is appropriate. *The European Convention on Human Rights (Article 4 (2) of Protocol 7)* explicitly recognises the importance of being able to re-open cases, where new evidence comes to light."[295]

Article 4 of Protocol 7 of the Convention states:

1) "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted[296] in accordance with the law and penal procedure of that State.
2) The provision of the preceding paragraph shall not prevent the re-opening of the case in accordance with the law and penal procedure of the state concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
3) No derogation from this Article shall be made under Article 15 of the Convention."
Article 4 (1) of Protocol 7 prohibits the bringing of proceedings only where the defendant has been "finally acquitted or convicted" of the offence now charged. In other words, a decision is to be regarded as "final" for the purposes of Article 4 (1) if

"it has acquired the force of res judicata. This is the case when no further ordinary remedies are available or when parties have exhausted such remedies or have permitted the time limit to expire without availing themselves of them."[297]

Article 4 (2) of Protocol 7 must be distinguished from an appeal by the prosecution. The prosecution may appeal *before* the decision becomes res judicata. Reopening is an extraordinary procedure which may be invoked *after* the decision is res judicata. Article 4 (2) permits a different way of challenging an acquittal, namely, persuading a higher court to "reopen" the original proceedings.

The other relevant international human rights provision is Article 14 (7) of the International Covenant on Civil and Political Rights 1966 (ICCPR 1966) which states:

> "7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

This provision applies both to the reopening of a conviction and an acquittal. The treaty body charged with implementing the ICCPR expressed the view that reopening of criminal proceedings in "exceptional circumstances" did not infringe the principle of double jeopardy.

Mindful of the above human rights provisions, the Government in its White Paper **Justice for All** made the following proposals:

- "Should fresh evidence emerge that could not reasonably have been available for the first trial and that strongly suggest that a previously acquitted defendant was in fact guilty, the Director of Public Prosecutions (DPP) will need to give his personal consent for the defendant to be re-investigated…
- Before submitting an application to the Court of Appeal to quash an acquittal, the DPP will need to be satisfied that there is a new and compelling evidence and that an application is in public interest and a re-trial fully justified.
- The Court of Appeal will have the power to quash the acquittal where:
  - there is compelling evidence of guilt; and
  - the Court is satisfied that it is right in all circumstances of the case to be a re-trial.
- There will be scope for only one re-trial under these procedures.
- The power [to reopen a final acquittal] will be retrospective, that is, it will apply to acquittals which take place before the law is changed, as well as those that happen after."[298]

The above recommendations were effectuated by sections 75 to 81 of the CJA 2003. Section 75 (1) of the CJA 2003 provides that an acquittal may be retried if the acquittal relates to proceedings for a "qualifying offence" in England and Wales or "elsewhere in the United Kingdom" if the commission of the offence would have amounted to, or included, the commission in the United Kingdom of a qualifying offence and, for this purpose, acquittals in Scotland is not to be regarded as proceedings in a foreign jurisdiction. The qualifying offences are murder, criminal damage offences, war crimes and terrorism and conspiracy.[299] Section 75 (6) of the CJA 2003 provides that the power to retry an acquittal is retrospective and prospective. Section 78 (1) of the CJA 2003 provides:

1) "the requirements of this section are met if there is a new and compelling evidence against the acquitted person in relation to the qualifying offence."

   Evidence is "new" if it has not been adduced in the proceedings the person was acquitted and "compelling" if it is reliable, substantial, and in the context of "outstanding issues" it appears highly probative of the case against the accused person.[300]

A confession to the murder of H made by the defendant while serving prison sentence for an unrelated matter was held to be new and compelling evidence warranting the reopening of the acquittal in **R v Dunlop**[301]. It must be noted, however, that in **R v Miell**[302] the Court of Appeal refused to quash the conviction and order a retrial since there were grounds to doubt the veracity of the confession which the defendant retracted. According to Lord Phillips, **Miell** differs from **Dunlop** in that "Dunlop had never gainsaid the truth of his confession that resulted in his conviction for perjury".[303] Lord Judge CJ's obiter in **R v A**[304] that the stark question in reopening final acquittals "is not the form or type or nature said to be new and compelling, but whether it is indeed new and compelling and highly probative of the qualifying offence"[305] overlooked the interest of justice requirement in section 79 of the CJA 2003. It is also worthy of note that the retrospective aspect of the procedure and considerations of the interests of justice might engage and violate Article 6 (1) (the right to fair trial) and Article 7 (the prohibition of retrospective allegations of criminal law) of the European Convention on Human Rights.

4.5 Summary and Conclusion

The rationale for treating an acquittal as final was eloquently and succinctly stated by Lord MacDermont in **Sambasivan**[306] above. Since the enunciation of the principle of double jeopardy in the nineteenth century, judges have sought, with varying degrees of success as exemplified by the 'in peril', the Vandercomb, the Elrington, and the Blockburger or Gravieres tests, to delimit the extent to which the principle protects an accused from further proceedings on same factual situations. This judicial enterprise is compounded by the parallel development of the similar fact rule which states that past crimes and discreditable conduct are admissible to prove that the accused is guilty of the offence with which he is charged.

It is true that the interests of justice require the reopening of a final acquittal to prevent a guilty person from escaping justice but it is trite jurisprudence to explain the rationales of admitting evidence of previous acquittals as the allocation of risks of errors[307] of by the felicific calculus of Bentham's 'free proof' or free evaluation of evidence. The apportionment of the risk of errors adopts a welfarist approach to justice. As we are reminded by Kant, the conception of justice as maximizing welfare leaves rights vulnerable[308] and, what is more, admitting acquittal evidence as evidence of guilt "no matter how conscientiously the jury attempts to make allowance for its distorting effect…introduces another incalculable into the nebula that is similar fact evidence."[309] Convictions based on previous acquittals or remarks and innuendos – **à la R v Z** – now placed on statutory footing by section 98 of the CJA 2003 – are not only incompatible with the European Convention on Human Rights but are also indefensible on any coherent principle of justice that serves as a basis for practical reasoning.

5 Identification evidence: old problems, new solutions

5.1 Introduction

The problem of misidentification has been a recurrent theme in the dispensation of criminal justice. Adolph Beck was wrongly convicted twice and pardoned twice.[310] The mistaken identification of Beck led to the setting up of a Committee of Inquiry, the report of which in 1905 led to the establishment of the Court of Criminal Appeal. The Departmental Committee on Evidence of Identification in Criminal Cases under the chairmanship of Lord Devlin was specifically required to enquire into the law relating to identification in the light of the cases of Dougherty and Virag who were wrongly identified as criminals and other relevant cases. In a Report[311] published on 26 April 1976, the Committee made several recommendations on the various means of identification. The recommendations were followed by the Court of Appeal in enunciating the **Turnbull** guidelines[312] on evidence of visual identification or recognition.

Before the advent of scientific evidence, the various means of identifying a suspect include confrontation, visual identification or recognition, identification parade and identification in court. The problem of identification, we are reminded, is that "a complex variety of mental and human emotions are involved: seeing, hearing; acquiring, storing, interpreting, and retrieving information; recognizing; believing; asserting, communicating, describing, persuading, deciding; and so on."[313] In this context, the statement A identified B is a paradigm of ambiguity. The statement A identified B can mean A recognized B or A believed B was the same person as C. This often leads to miscarriages of justice.[314]

The traditional means of identification based on sensory perception is withering away in the wake of scientization of fact gathering by use of scientific or empirical information presented by experts such as DNA profiling[315], psychological profile[316], psychological autopsy [317], face-mapping[318], empirical research[319], ear-print[320] and voice identification.[321]

The admissibility of scientific evidence in English courts is based on the rule in **R v Turner**[322] which states:

> "An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and the knowledge of a judge or jury… The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think he does."[323]

In Turner the accused unsuccessfully pleaded provocation in answer to a charge of murder and was not allowed to call a psychiatrist to testify that the deep relationship which subsisted with his deceased girlfriend was likely to cause an explosive outburst of rage at her confession of infidelity. This type of evidence is excluded because it impinged on the ultimate issue which is the responsibility of the triers of fact, the jury, to decide.

Added to the **Turner** rule are the responsibilities of expert witnesses, including the duty to give independent and unbiased evidence, enunciated by Cresswell J in **National Justice Compania Naviera SA v Prudential Insurance Company Ltd (Ikarian Reefer)**[324] as follows:

1. "Expert evidence presented to the courts should be and should be seen to be, the independent product of the expert uninfluenced as to form or context by the exigencies of litigation…
2. Independent assistance should be provided to the court by way of objective unbiased opinion regarding the expertise of the expert witness… An expert witness in the High Court should never assume the role of advocate.
3. Facts or assumptions upon which the opinion was based should be stated together with material facts which could detract from the concluded opinion.
4. An expert witness should make it clear when a question or issue fell outside his expertise.
5. If the opinion was not properly researched because it was considered that insufficient data was available then that had to be stated with an indication that the opinion was provisional. If the witness could not assert that the report contained the truth, the whole truth and nothing but the truth then that qualification should be stated on the report.
6. If, after exchange of reports, an expert witness changed his mind on a material matter then the change of view should be communicated to the other side through legal representatives without delay and, when appropriate, to the court.
7. Photographs, plans, survey reports and other documents referred to in the expert evidence had to be provided to the other side at the same time as the exchange of reports."[325]

More recently, expert reports are admissible in criminal trials whether the expert is called or not[326] and experts are allowed to rely on the opinions of other experts.[327] Since expert evidence is based on scientific and/or technical knowledge, the present regime of admissibility of scientific evidence outlined above has the potential for miscarriages of justice for two reasons: (i) the **Turner** rule and the guideline in the **Ikarian Reefer** are incongruent with the present state of scientific or technical knowledge and (ii) failure of courts in England and Wales, unlike the US Supreme Court, to prescribe rigorous rules for scrutinizing scientific evidence.

5.2 Causes Célèbres and the **Turner** rule

Although in **R v Weightman**[328] and **R v Stagg**[329] psychological and psychiatric evidence were rejected, no criteria for rigorous scrutiny of the evidence were enunciated by the judges. In the former, the Court of Appeal held that the evidence of a psychiatrist was inadmissible when its purpose was to tell a jury how a person not suffering from mental illness was likely to react to stresses and strains of life while in the latter, Ognall J, excluding psychological profile, stated: "The notion that a psychological profile is in any circumstances admissible in proof of identity is to my mind redolent with considerable danger."[330]

Recently, two types of scientific evidence were considered in **R v Clark (Sally)**[331] and **R v Gilfoyle**[332] without criteria for rigorous scrutiny. In the former Sally Clark was convicted for the murder of her two infant sons. Although the forensic pathologist failed to disclose that in the case of one of the infants a form of potentially lethal bacteria could not be excluded as a possible cause of death and the conviction was quashed on appeal, the damage to Ms Clark was irreparable. Ms Clark, a solicitor, was heart-broken and died a few years after acquittal. In the latter, the accused's conviction for murder was based on an allegation that he killed his wife and made it appear as suicide. He had asked his wife to write out some examples of suicide notes saying that he was doing a suicide project at work as part of his coursework for a course he was attending in counselling. He was then an auxiliary nurse. His wife was later found hanging in her home. One of the items of evidence the prosecution wished to call was an eminent professor of psychology to give evidence, according to his report to the prosecution, that pregnant women rarely committed suicide. The trial judge rightly ruled the evidence inadmissible. The judge's ruling was corroborated by the fact that new research showed that suicide was the main cause of maternal death in pregnancy and after childbirth and that hanging was the method chosen.

In the first appeal to the Court of Appeal, the Court affirmed the decision of the trial judge. In the second appeal, the Court was asked to admit psychological autopsy but the Court refused. The Court's rationale and the failure of courts to provide rigorous rules for scrutinizing scientific evidence are discussed in the next section

5.3 Failure of courts to prescribe rigorous rules for scrutinizing scientific opinion evidence

The categories of expert scientific opinion are not closed: they include DNA profiling, psychological autopsy, fingerprints, lip-reading, voice identification, ear-prints and expert opinion on diminished responsibility, to mention a few. It is true that expert psychiatric testimony is legally necessary and admissible to assist the jury in its assessment of pleas of insanity, diminished responsibility and automatism (whether of the sane or insane variety). Neither in the **Turner** rule and **Stagg** nor in **The Ikarian Reefer** were rules enunciated for the rigorous scrutiny of scientific opinion. Voice identification, whether based on auditory or acoustic analysis, was rejected in **R v Johnson**[333] but admitted when based on the comparison of the suspect's voice with a recording of the perpetrator's voice by an expert[334] or non-expert[335] witness, even though the Court of Appeal doubted the visual identification safeguards.[336] Again, the novel technique of ear-prints has formed the basis of expert opinion in **R v Dallagher**[337] and **R v Kempster**[338] without any special scrutiny. Voice identification is problematic because – whether auditory or acoustic – the analysis is beyond the ken of an ordinary juror and then, of course, the question of reliability.

In a multicentre research, the Forensic Ear Identification project conducted in the period 2002-2005 in Italy, the Netherlands and the UK, two fundamental issues resulting from matching earprints were identified:

1. "Repeatability: Are earprints from the same ear, taken repeatedly under the same circumstances by the same operator sufficiently similar?
2. Reproducibility: Are earprints from the same ear, taken repeatedly under different circumstances by different operators sufficiently similar?"[339]

In this research, donors were instructed to listen for a sound supplied behind a glass plate on a flat surface based on the notion that in practice perpetrators listen for the presence or absence of sound and hence use a stable "functional force." Earprints were then recovered from the right and left ears of 1229 donors. Their findings were as follows:

- Different donors have largely differing behaviour of comparison scores for matching prints: one person may leave consistent "better" earprints than another.
- That smaller "error rates" are achieved when identical operators annotate matching earprints than when different operators do this.
- *The country effect*. In country 2, experienced police officers handled the acquisition of prints, and in countries 1 and 3 experts in biology and anthropology who received only a short training in print acquisition. Hence, the country effect is probably connected to experience of operators.
- In the current setting of earprint comparison, with respect to questions about *repeatability* and *reproducibility*, we find definite country, run, and donor effects."[340]

The researchers concluded: "From a valid point of view (**Daubert**, **Frye**) it is important that thorough investigation takes place before performance results are relied upon in judicial practice."[341] Counsel of prudence, succinctly put!

The only attempt to use the US decisions as paradigms or interrogatory source was in the second Gilfoyle appeal to the Court of Appeal. In **R v Gilfoyle**[342] (the second appeal), Rose LJ rejected fresh evidence by an eminent psychologist adduced to cast doubts on the deceased's state of mind and reverse the judgment in the first trial where Mr. Gilfoyle was alleged to have killed his wife and made it appear as suicide.

Rose LJ, in refusing to admit psychological autopsy to cast doubt on the deceased's state of mind, erroneously relied on the guiding principle in **Frye v United States**[343] which states that evidence based on a developing new brand of science or medicine is not admissible until accepted by the scientific community, the so-called "general acceptance" test. This test is an ineffective test because it misconceives the nature of the scientific enterprise: that there is definiteness in science and precision takes the form of widely held beliefs. On the contrary, scientific claims remain provisional and continue to be challenged until incentives for investigating the problem disappears. And, what is more, the "general acceptance" test has not survived the US Federal Rules of Evidence. The alternative test was enunciated in **United States v Downing**[344], the **Downing** or "reliability" test. The problem with this test is that a judge in ruling on the admissibility of scientific evidence should evaluate the content of the evidence. The implication is that an unscientifically trained judge will be able to evaluate the true state of scientific evidence.

The two aforementioned tests have been replaced by the criteria of admissibility of scientific evidence enunciated in the **Daubert** Trilogy – **Daubert**[345], **Joiner**[346], and **Kumho Tire**[347] – which are as follows:

- falsifiability or refutability or testability[348]
- publication in an academic or professional journal
- indication of the error rate
- expert theory or methodology attains general acceptance in the relevant scientific community
- examination by the court of the expert's inference from theory or methodology to detect the analytical gap (serious analytical gap is a compelling reason for the exclusion of expert scientific evidence.

5.4 Conclusion

The categories of expert scientific evidence are not closed but the risk of miscarriages of justice due to misidentification is a recurrent theme in the dispensation of criminal justice.

Judges are expected to discharge the **Daubert** "gate-keeping" obligation of scrutinizing scientific or technical knowledge and yet judges are not scientifically trained. The **Daubert** criteria, instantiated above, do not constitute a definitive list but are factors that might prove helpful in determining the reliability of scientific or technical knowledge.

It has been suggested that a rigorous scrutiny of scientific evidence is required[349] but the question is: how is this to be effectuated? It is submitted that the next step forward is the promulgation of a Code of Practice based on an eclectic rendition of the **Daubert** trilogy which will serve as guiding principles for judges on the admissibility of scientific and technical knowledge and the use of assessors sitting, not as adjudicators but as facilitators, with judges. The role of these assessors is to demystify the scientific and technical or specialised knowledge and help judges in assessing the reliability of novel techniques. The practice of using assessors now confined to the Admiralty jurisdiction and General Medical Council disciplinary proceedings should be extended to all proceedings where scientific evidence, whether based on old or novel techniques, is considered[350]; and, what is more, the use of assessors in judicial and quasi-judicial tribunals is compatible with the European Convention on Human Rights if the requirement of equality of arms and the principle of adversarial proceedings are strictly adhered to.

6 Public interest immunity, privilege and liberty rights: Hohfeld's analysis re-examined

6.1 Introduction

The nexus between evidence and jurisprudence is a persistent theme in the writings of evidence scholars and legal philosophers such as Wigmore[351], Cross[352], Dworkin[353], Twining[354] and MacCormick[355] who focused their attention on juridical concepts critically analysed by Wesley Newcomb Hohfeld (1879–1918).

For Hohfeld, there are eight juridical concepts (ideas and thoughts) found in ordinary and legal parlance which are vitally important in legal relations of men and in any judicial or government systems. Hohfeld in his magnum opus[356] arranged the eight juridical concepts in the four pairs of "opposites" (contradictions) and correlatives:

Jural Opposites	right	privilege	power	immunity
	no-right	duty	disability	liability
Jural Correlatives	right	privilege	power	immunity
	duty	no-right	liability	disability

In the Hohfeldian scheme, "right" means control over another's conduct which involves the imposition of "duties" on others and the granting of "privileges" to some which necessitates the extinguishment of the "rights" of others. In other words, a successful claim of privilege deprives another of an existing right. The word "power" in elementary physics means the ability to change the position of matter in space. In legal parlance "power" means the ability to change the legal relationship of persons. The word "immunity", in its legal and constitutional sense, is the exemption from legal power.

Several trenchant criticisms have been made against the Hohfeldian scheme notable amongst which are (i) that Hohfeld analysis was incorrect and incomplete in places and (ii) that cases which accorded with Hohfeld's analysis were decided without taking cognizance of the scheme.[357] The answer to the first criticism is that Hohfeld, if he had lived long, would have revised the scheme. The answer to the second critique is that an understanding of Hohfeld analysis helps to clarify the issues when one is asserting a right or fighting for the evidence of a privilege or an immunity. For Corbin, Hohfeld's analysis "solves no problem of social or juristic policy, but it does much to define and clarify the issue that is in dispute and thus enables the mind to concentrate on the interests and policies that are involved, and increases the probability of an informed and sound conclusion."[358]

English law has recognised the principle of unimpeded access to evidence from an early time subject, of course, to restriction on policy grounds. In civil proceedings, *inter partes* discovery is mandatory for disposing fairly the cause or matter[359]. In criminal trials, all parties to the litigation have unimpeded access to all relevant evidence. The right of the State to withhold relevant evidence on the ground of public interest immunity covers matters in civil and criminal proceedings in which the safety or well-being of the state is directly affected such as national security[360], police matters[361] local government and analogous records[362], confidential matters[363] and proceedings in Parliament.[364] This elastic band of rights (public interest immunity) must be distinguished from privilege which covers matters which directly affect only the particular litigant or witness, for example, legal professional privilege. In the former class, the exclusion cannot be waived no secondary evidence of the excluded matter is allowed. In the latter class, the person entitled to privilege may waive it.

Where public interest immunity is claimed on the grounds of national security, police matters, local government and analogous records, confidentiality, and in respect of proceedings in Parliament, judges, as social engineers, must balance the public interest of the State in non-disclosure against the public interest in the defendant having a fair trial. How is this social engineering effectuated? Mustill LJ in **R v Agar**[365] provided the needed help for judges on how to conduct the balancing exercise in the following dictum:

> "There was a strong and, absent to the contrary indication, overwhelming public interest in keeping secret the source of information; but as the authorities show, there was even stronger overwhelming public interest in allowing a defendant to put forward a tenable case in the best light."[366]

In the above dictum, there are two juridical concepts in the Hohfeldian sense: the "immunity" claimed by the State for non-disclosure of relevant evidence which started its chequered history as Crown "privilege"[367] and the right of the defendant to fair trial which is now protected in English law by Article 6 of the European Convention on Human Rights. As we are reminded by Hohfeld, "the term 'rights' tends to be used indiscriminately to cover what in a given case may be privilege, a power, or an immunity, rather than right in the strictest sense…"[368] He then added that "in law the word 'right' is often used to designate *power*, *prerogative*, and *privilege*,…"[369] What emerges from the Hohfeldian analysis of the so-called public interest immunity is that both in its original formulation as Crown privilege and its present rendition as immunity the words 'privilege' and 'immunity' have been used to denote a particular right asserted by the State in the interest of the public safety and national security and underpinned by public policy. The question is: what is the real anatomy of this right?

6.2 Theories of unimpeded access to justice

Zuckerman in a seminal article opined:

> "While the individual cannot be said to have a right against the state to the provisions of trial procedure guaranteeing a certain level of accuracy, the state must nevertheless, aim at high standards of procedural fairness and accuracy."[370]

Zuckerman then referred to types of protected interests and the existence of residual discretion in courts such as in **D v NSPCC**[371] and **Marks v Beyfus**[372]. In the former, the plaintiff claimed damages for injuries to her health caused by false allegation that she maltreated her child. The NSPCC sought an order excusing it from disclosing the identity of the informer. Lord Edmund-Davies held that where a confidential relationship exists other than that of lawyer and client and disclosure would be in breach of some ethical or social value involving public interest, the court has a discretion to uphold a refusal to disclose relevant document. In **Marks v Beyfus** the rationale for not disclosing the name of the informer was that the source of information would dry up.

A quick look at cases decided since **Duncan v Cammell Laird & Co Ltd**[373] cast serious doubts on the assumption that "the individuals cannot be said to have a right against the state to the provisions of trial procedure guaranteeing a certain level of accuracy." **R v Agar**[374] and **R v Langford**[375] are authorities for the proposition that where the prosecution fail to name the informer so that he could be cross-examined, the conviction will be quashed. Again, the public interest immunity claimed in respect of local government[376] and analogous records[377] are no longer absolute. **R v Brushett**[378] is authority for the proposition (i) that the immunity that attaches to social service documents about children is not absolute and (ii) that documents that might prove innocence or avoid miscarriage of justice such as false allegations by a complainant must be disclosed but not documents that would enable endless cross-examination as to credit on very peripheral matter to take place.

We noticed a sea-change in the judical attitude to public interest immunity in police matters in **Metropolitan Police Commissioner v Locker**[379] where Knox J held that public interest immunity did not attach to statements made during the course of Metropolitan Police grievance procedure initiated by a police officer alleging either racial or sex discrimination because such statements were distinguishable from statements made in complaints and disciplinary procedures. In the cause célèbre **R v Chief Constable of West Midland Police, ex p Wiley; R v Chief Constable of Nottinghamshire Police, ex p Sunderland**[380] the House of Lords held that there was no general public immunity in respect of documents coming into existence during an investigation into a complaint against the police under Part IX of the Police and Criminal Evidence Act 1984. Lord Woolf said that whilst he agreed with Lord Hailsham's dictum in **D v NSPCC** that "the categories of public interest are not closed and must alter from time to time as conditions and social legislation develop"[381] no sufficient case had been made to justify public interest immunity. Finally, in **R v Shayler**[382] it was held that the ban on disclosure of information or documents relating to security or intelligence imposed by the Official Secrets Act 1989 on a member of the security service was not absolute.

The question is: what is the nature of the right emerging from the cases sequel to **Duncan v Cammell Laird**[383] instantiated above? In answering this question, Dworkin poses a rhetorical question:

> "Does it follow, from the fact that each citizen has a right not to be convicted if innocent, that he has the right to the most accurate procedures possible to test his guilt or innocence, no matter how expensive these procedures might be to the community as a whole?"[384]

Dworkin argues that there are two extremes: one extreme is that people accused of crime are not entitled to accuracy at all; and the other is choosing trial procedures and rules of evidence entirely on the basis of cost-benefit calculations about the best interests of society. The latter extreme balances the interests of the accused against the interests of those who would gain from public savings in a utilitarian fashion. Dworkin chooses a middle ground by arguing that in civil cases judges adjudicate by applying principles rather than policies, even in hard cases. He argues that even in a cost-efficient society there is an absolute right not to be convicted of a crime if innocent and people have procedural rights with respect to decisions of policy and that the violation of such a right constitutes a special kind of moral harm.

6.3 Conclusion

The ascription of the terms "privilege" and "immunity" to claims by the State for non-disclosure of relevant evidence on the ground of public policy reveals a deficiency in the philosophical analysis of the rights of the State and the plaintiff/defendant in civil or criminal proceedings.

In Hohfeldian terms, "privilege" deprives another of an existing right while "immunity" is the exemption from legal power. But Hohfeld reminds us that the term "rights" tends to be used indiscriminately to cover a "privilege" or an "immunity". The issue is whether there is a right not to be convicted if innocent and whether parties have procedural rights with respect to decisions of policy. Hohfeld proffers no solution to problems of social policy but clarifies the issues raised by "public interest immunity" or (Crown) privilege. If "immunity" or "privilege" is a right asserted by the State for non-disclosure of relevant evidence on ground of public policy based on utilitarian consideration or allocation of the risk of errors[385], then the principle emerging from cases such as **Agar**, **Brushett**, **ex p Wiley** and **Shayler**, to mention a few, is that there is a right not to be convicted if innocent and people have procedural rights, à la Dworkin, with respect to decisions of policy and this right is congruent with Article 6 of the Convention. "Public interest immunity" based on a conception of justice as maximizing welfare, we are reminded by Kant, ignored individual freedom and, therefore, should be reconceptualized. Dworkin's analysis of rights, instantiated above, is a paradigm.

7 Expert evidence and mathematical proof

7.1 Introduction

The rules of evidence formulated in an agricultural society where the emphasis was on human senses for factual enquiries are being replaced by scientific proof based on sophisticated technical instruments, descriptive and inferential statistics, and other forms of mathematical proof such as Bayes's theorem.

In the last two decades, the demand for psychologists as expert witnesses has been on the increase. And yet, miscarriages of justice abound as a result of highly questionable expert evidence highlighting the fact that scientific proof which is based on an hypothesis (i.e., a possible explanation for an observation), which is either supported or rejected by alternative hypotheses, operates differently from legal proof as succinctly put by Lévy-Bruhl:

> "What is acceptable as legal proof is, however, different from scientific proof… A decision must be handed down on the basis of the facts available. The judge cannot, like the scientist, continually make provisional judgements, ready to reopen the matter when a new data comes to light. So legal proof can never equal scientific proof."[386]

In ordinary parlance, the word "probability" means "provable" or "capable of being tested".[387] For the mathematician or statistician, probability refers to the frequency of an occurrence: the objective concept or the statistical theory of probability. The subjective theory attempts to determine the credibility of an hypothesis by expressing the degree of confidence or doubt is made and then translate it into mathematical terms, for example, the Bayes's theorem, discussed later.

Three categories of mathematical proof are used in the law of evidence: viz. (i) those in which such proof is directed to proving the occurrence or nonoccurrence of an event, (ii) where proof is directed to the identity of an individual responsible for an act or series of acts, and (iii) those in which such proof is directed to some mental element such as an intention or recklessness or partial defence such as provocation.[388]

The concept of probability, we are told, "has been analyzed, theorized, formalized, and sterilized through a series of permutations, combinations, and formulations that fill volumes".[389] The major schools of probability are as follows:

1) "The Pascal/Bayes School of Probability and Uncertainty,
2) The Bacon/Mill/Cohen School of Inductive Probability,
3) The Schafer/Dempster School of Non-additive Beliefs,
4) The Zadeh School of Fuzzy Probability and Inference, and
5) The Scandinavian School of Evidentiary Value."[390]

7.2 The Pascal/Bayes School of Probability and Uncertainty

The Pascal/Bayes system was initiated in the seventeenth century by the French mathematician Blaise Pascal in his games theory. Probabilities are numbered between zero and one. If two events cannot happen simultaneously, the probability of one or the other happening is the product of their separate probabilities. If the two events can both occur, the probability of their joint occurrence is determined by multiplying the probability of the two events. The multiplication rule for mathematical probability is inconsistent with the standard of proof in civil cases since the mathematical rule allows the plaintiff to lose his case on a balance of probability. Assuming the probability of each element is greater than 0.5, to satisfy the balance or preponderance of probabilities, the product of numbers less than one sooner drops below 0.5.

Since Pascal's time many individuals have revised mathematical probability for studying random processes, notably among these mathematicians, is Reverend Thomas Bayes (1702–1761). Two versions of Bayes's theorem for computation of conditional probability are considered.

Version I

The theorem states[391]:

$$P(A/B) = \frac{P(B/A) \times P(A)}{P(B)}$$

These symbols may be read as follows:

P(A/B) reads: the probability of A, given B

P(B/A) reads: the probability of B, given A

P(A) reads: the probability of A

P(B) reads: the probability of B

In another form, the theorem states[392]:

$$O(A/B) = \frac{P(B/A) \times O(A)}{P(B/\text{not} - A)}$$

Version II

This version of the theorem is read thus:

O(A/B) = odds of A, given B

P(B/A) = probability of B, given A

P(B/not – A) = probability of B, given not – A

(O/A) = odds of A

To convert probability to odds, the following formula is used:

$$\frac{P(G/E)}{P(nG/E)} = \frac{P(G)}{P(nG)} \times \frac{P(E/G)}{P(E/nG)}$$

POSTERIOR ODDS = PRIOR ODDS × LIKELIHOOD RATIO

While the expert provides the likelihood ratio (the match probability) to the court, it is the task of the triers of fact (the jury) to multiply the likelihood ratio by the prior odds in order to arrive at the posterior odds: the probability that the defendant is guilty given the DNA evidence and any other evidence adduced at the trial.

The question is whether the statistics of DNA evidence should be presented in frequentist terms or Bayesian terms. Finkelstein and Fairley argue that statistically-based identification evidence should be presented in the Bayesian format.[393] In the United Kingdom, the procedure to be adopted in relation to DNA evidence was stated in **R v Doheny**, **R v Adams**[394] as follows:

1. The scientist should adduce the evidence of the DNA comparison between the crime stain and the defendant's sample together with his calculations of the random occurrence ratio.
2. Whenever DNA evidence is to be adduced the Crown should serve on the defence details as to how the calculations have been carried out which are sufficient to enable the defence to scrutinise the basis of calculations.
3. The Forensic Science Service should make available to the defence expert, if requested, the databases upon which the calculations have been based.

4. Any issue of expert evidence should be identified and, if possible, resolved before trial. This area should be explored by the court in the pre-trial review.
5. In giving evidence the expert will explain to the jury the nature of the matching DNA characteristics between the DNA in the crime stain and the DNA in the defendant's sample.
6. The expert will, on the basis of empirical statistical data, give the jury the random occurrence ratio – the frequency with which the matching DNA characteristics are likely to be found in the population at large.
7. Provided that the expert has the necessary data, it may then be appropriate for him to indicate how many people with the matching characteristics are likely to be found in the United Kingdom or a more limited relevant sub-group, for instance, the caucasian, sexually active males in Manchester area.
8. It is then for the jury to decide, having regard to all the relevant evidence, whether they are sure that it was the defendant who left the crime stain, or whether it was possible that it was left by someone else with the same matching DNA characteristics.
9. The expert should not be asked his opinion on the likelihood that it was the defendant who left the stain, nor when giving evidence should he use terminology which may lead the jury to believe that he is expressing such an opinion.
10. It is inappropriate for an expert to expound statistical approach to evaluating the likelihood that the defendant left the crime stain, since unnecessary theory and complexity deflect the jury from their proper task.

11. In the summing-up careful directions are required in respect of expert evidence and guidance should be given to avoid confusion caused by areas of expertise evidence where no real issue exists.
12. The judge should explain to the jury the relevance of the random occurrence ratio in arriving at their verdict and draw attention to the extraneous evidence which provides the context which gives the ratio its significance, and to that which conflicts with the conclusion that the defendant was responsible for the crime stain.
13. In relation to the random occurrence ratio, a direction along the following lines may be appropriate, tailored to the facts of the particular case:

    "Members of the jury, if you accept the scientific evidence called by the Crown this indicates that there are probably only four or five white males in the United Kingdom from whom the semen stain could have come. The defendant is one of them. If that is the position, the decision you have to reach, on all the evidence, is whether you are sure that it was the defendant who left the stain or whether it is possible that it was one of that other small group of men who share the same DNA characteristics."[395]

Failure to comply with this procedure may lead to a conviction on DNA evidence being quashed as in **R v Adams**.[396] In that case, the defendant was charged with rape and convicted. The appeal was allowed because the judge failed to sum up properly the expert's exposition of Bayes's theorem. Rose LJ in the Court of Appeal stated:

> "[T]he translation of cogency into a percentage probability of guilt is entirely a matter of judgment and the conferring of a percentage probability of guilt upon one item of evidence taken in isolation is an essentially artificial operation, different jurors might well with to select different numerical figures even they were broadly agreed on the weight of evidence… Quite apart from these general objections, as the present case graphically demonstrates, to introduce Bayes's Theorem, or any similar method, into a criminal trial plunges the jury into inappropriate and unnecessary realms of theory and complexity deflecting them from their proper task."[397]

7.3 The Bacon/Mill/Cohen School of Inductive Probability

The ideas known as inductive probability (P_I) is different from the Pascal/Bayes system of mathematical probability (P_M) discussed above. The School of Inductive Probability will be associated to posterity with Sir Francis Bacon, John Stuart Mill and Jonathan Cohen.

Bacon in his treatise **Novum Organum** [*The New Organon*] (1620)[398] first justified inductive procedures for natural science. For Bacon, a proposition could not be validated by enumerating evidential instances but could be invalidated by a single unfavourable instance. He therefore proposed a method of induction by elimination. To this end, Bacon recommended inductive inference which entailed the use of presence, absence, or covariation of effects in order to eliminate various hypotheses until one hypothesis is left and the one that survives being accepted as the valid cause.

John Stuart Mill in his **System of Logic**[399] proposed a collection of scientific methods for induction presently used in behavioural, biological and physical sciences. According to Cohen, inductive probabilities (P_I) do not behave like mathematical probabilities (P_M): they cannot be added, subtracted, multiplied or divided.[400] Cohen argues that various prescriptions and standards in Anglo-American jurisprudence are not meant to satisfy philosophers and mathematicians; they are meant to guide the reasoning of factfinders who have to grade the inferential soundness of inferring A from B, thus, grading the probability of A given the knowledge that B occurred. Although there are points of contact between P_I and P_M, P_I is not derivable from P_M.

7.4 The Shafer/Dempster School of Non-additive Beliefs

The School's probability theory is a theory expressing our beliefs or credal states in the light of evidence. According to Shafer, the School propounds a mathematical theory which is "at once a theory of evidence and a theory of probable reasoning".[401] As it is familiar with probability theories, the theory begins by using a number between zero and one to indicate the degree of support a body of evidence provides for a proposition. This may vary from "belief" to "disbelief" to "disproved". The way to combine beliefs based on distinct bodies of evidence is called the "Dempster" rule. (Hence, the School is referred to as the Shafer/Dempster School.) Under this rule, a new aggregate belief function called "an orthogonal sum" can be determined from the distinct bodies of evidence.

The rule of the Shafer/Dempster zero is different from the Pascal/Bayes School discussed above. In the former system, zero means "lack of support" or "lack of belief" and our lack of belief in A can be revised in the light of new and compelling evidence to various graduations of belief in A.

In the latter (Pascal/Bayes system), a possibility once assigned zero probability cannot be resuscitated in the light of new evidence as zero means "disbelief", "disproved" or "impossible".

While all probability systems describe the way people combine and draw conclusions and inferences from evidence, the Shafer/Dempster system captures various credal states.

7.5 The Zadeh School of Fuzzy Probability and Inference

Zadeh argues that in evidentiary discourse we employ what he calls "linguistic variables": (i) "short", "not short", "tall", "very tall"; (ii) "young", "very young", "old", "very old". Zadeh adds that fuzzy probabilities are used by lawyers in structuring generalizations at particular stages of legal reasoning in an attempt to prove facts in issue. For example, the assertion: "People who purchase guns subsequently use them in committing offences" is a fuzzy statement capable of meaning (i) *almost always* members of a criminal gang, (ii) *usually* are in a criminal gang, and (iii) *rarely* are members of a criminal gang. The words "almost always", "usually" and "rarely" are fuzzy quantifiers and we might say that each of these conditional probability is a fuzzy number between zero and one and forensic standards of proof – beyond reasonable doubt and preponderance or balance of probabilities – can be construed as fuzzy statements.

7.6 The Scandinavian School of Evidentiary Value

The evidentiary value model attributed to a collection of Scandinavian evidence scholars is that instead of determining the probability of an hypothesis conditional on evidence, we should determine the probability that the evidence proves the hypothesis. In this view, the focus is on the value of the evidence rather than on the probability of hypotheses.[402]

7.7 Conclusion

The conjunction of mathematics and the trial process raises serious issues of justice: how to enhance justice and reduce injustice. The five theories of probabilities instantiated above instruct us on how to use language and numbers as instrumental aids to the process of legal reasoning. But theories of mathematical probability, whether directed to the occurrence or nonoccurrence of an event or the identity of an individual responsible for certain acts or directed to ultimate issues such as intention, provocation and capacity to corrupt and deprave young people, are based on subjective judgments of individuals allocated numerical values from zero to one.

Expert evidence based on mathematical probabilities cannot be ignored in courts. There is no doubt that the Bayesian presentation is directed to the issue the jury must resolve, say in DNA evidence, and that it is reasonable for the jury to perceive a moderate prior possibility of guild (prior odds) in order to integrate prior odds with the probative force of the DNA (the likelihood ratio). But it is crystal clear that statistical or mathematical evidence, whether presented in frequentist or Bayesian term, is beyond the ken of reasonable jurors. We are reminded by one commentator that: "It would be ludicrous to ignore science in the court room, but at the same time there are no safeguards in place for science convicting the innocent."[403] This counsel of prudence, *a fortiori*, applies to mathematical proof.

8 Epilogue: the future

8.1 What is wrong with the English adversarial system of justice?

The English adversarial system of justice which in its full flowering was an expression of laissez-faire philosophy is now in need of a new philosophy. The minimal state, the paradigm of the classical liberal theory, on which this system is posited has been supplanted by an active state which requires not only a philosophy of rights but how those rights are to be secured with little friction.

Any reform of the English law of evidence must take cognisance of the following considerations:

- The assessment of credibility and the ethics of forensic or judicial rhetoric
- Scientific evidence and the provable in English courts
- Philosophy of the State and Adjudication

(a) The assessment of credibility and the ethics of forensic or judicial rhetoric

One of the claims made for the English adversarial system of justice is that it is the most efficient method devised for ascertaining the truth of disputed facts. Another claim, championed by Thayer, is that evidence "does not, like mathematical reasoning, have to do merely with ideal truth"[404]. Thayer explains:

> "[The law of evidence] must shape itself to various other exigencies of a practical kind, such as the time that it is possible to allow any particular case, the reasonable limitation of the number of witnesses, the opportunities for reply, and the chance to correct errors. It must adjust its processes to the general code, so as generally to promote justice, and to discourage evil, to maintain long-established rights, and the existing governmental order."[405]

We are here dealing with epistemological pragmatism: the idea that truth is the same as usefulness. The sporting analogy is apt to mislead. Under the adversarial system it is more a contest between the advocates than parties. True, advocates can unmask an unmitigated liar or an incorrigible rogue but by brilliant cross-examination, a witness we believe to be honest can be made to lack the reputation for veracity because he is not allowed to tell his own story which may throw some light on uncertain facts but be confined to specific questions (brilliantly skewed towards an end) to which specific answers are required.

Rules of practice or professional codes of ethics are inadequate for tackling this problem. Judges need to have the power to intervene, as in some jurisdictions in the United States of America[406], to correct a serious error of law, even when the jury have returned their verdict and prevent a miscarriage of justice.

(b) Scientific Evidence and the Provable in English Courts

The reception of scientific evidence in English courts has been traced to 1554[407] but it was in 1782[408] that Lord Mansfield CJ formulated an exception to the general rule against opinion when he stated:

> "On certain matters, such as those of science and art, upon which the court itself cannot form an opinion, special study, skill or experience being required for the purpose, "expert" witnesses may give evidence."[409]

Since then, the opinions of experts have been admitted "to furnish the court with scientific information which is likely to be outside the experience of a judge and jury"[410] on a variety of subjects such as handwriting[411], graphs[412], medical negligence[413], voice identification[414], ear print[415], DNA evidence[416] and recovered memory[417] (to mention a few) provided they do not impinge on ultimate issues.[418] It is not clear whether lip reading is expert evidence[419] but opinions of experts on psychological profiles[420] and psychological autopsies[421] are inadmissible.

The items of evidence adumbrated above are assessed in Chapter 5. The problem, however, is how to bridge the gap between reality as perceived by our five senses and reality as revealed by the prosthetic devices used in collating expert evidence.

One suggestion is to educate lawyers and judges on how to appraise mathematical (Bayes's theorem and statistics) and scientific evidence presented in the form of DNA profile.[422] Even where judges are guided by experts on the latter, they have been known to commit some blunders in their summings-up resulting in convictions being quashed[423]. The other suggestion, equally problematic, is the use of assessors. The use of assessors in the United Kingdom is primarily but not necessarily confined to Admiralty courts and the law relating to assessors is governed by section 71 of the Supreme Court Act 1981 and section 63 of the County Court Act 1984[424]. The evidence of an assessor is not given under oath and not disclosable for cross-examination, a flagrant violation of the principle of orality and Article 6 of the Convention.[425]

If the assessor system is to be applied in civil and criminal proceedings where scientific evidence is tendered, a conceptual framework is required to turn what looks like an inquisitorial system to a Convention-friendly feature of the adversarial system of justice. We must now turn to the philosophy of the State and adjudication.

(c) Philosophy of the State and Adjudication

Despite its difficult gestation,[426] the Human Rights Act 1998 (HRA 1998) has come to stay. Its pervasiveness is felt in every department of English jurisprudence, and, more so, in the English law of criminal evidence.

The incorporation of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the Convention) into the United Kingdom laws raises a number of evidential, jurisprudential and constitutional problems which must be addressed in an evidentiary discourse. These include (i) the interpretation of Convention rights by British judges and the impact of their interpretation on rules of evidence both civil and criminal; and (ii) whether the United Kingdom should have an 'interpretative Act' or an entrenched Bill of Rights.

The catalogue of rights and freedoms incorporated into the United Kingdom laws by section 1 of the HRA 1998 is essentially liberal and defines a zone of autonomy for individuals which the State is precluded from interfering. But the term "liberty" – the central theme of liberalism – is a vigorously contested one. Berlin describes two concepts of liberty, viz. (i) "negative freedom" or *freedom from* obstructions or interferences and (ii) "positive freedom" or *freedom to* act insofar as I am included in the political units managing my environment[427]. Both concepts are flawed as freedom in the negative sense promotes hands-off government policies callous to the poor and minorities; and positive freedom, that individuals can have any regular imprint on the course of events, is justified by an empirical fallacy. Even though we belong to the electorate, none of us sees our beliefs and desires reflected in what goes on politically.

A third concept of liberty is the freedom of a *communal* or *collective* will which posits that our different ends should be constrained by a set of values and that the State has a legitimate interest in encouraging those values[428]. This freedom of communal will is the underpinning philosophy of the purposive method of interpretation of liberty rights in Canada[429] and New Zealand[430] by which there is a reconciliation between individual and community and their respective rights. This approach has been adopted in recent cases on Convention rights before the UK courts[431]. There are, however, some worrying signals: that judges exercising their power to declare a primary or subordinate legislation incompatible with Convention rights may not be able to nip in the bud the proliferation of statutes placing reverse burden on defendants in criminal proceedings[432] or those that threaten the pillars of the English law of criminal evidence such as the principle of orality, the privilege against self-incrimination and the right to silence.

It is true that pursuant to section 3 of the HRA 1998, judges must interpret and apply primary and secondary legislation, insofar as it is practicable, in a manner compatible with Convention rights and make declaration of incompatibility pursuant to section 4 of the Act. The fact remains that section 10 of the Act only directs a Minister of the Crown or Her Majesty in Council (depending on the nature of the legislation) to amend the legislation in response to a national judicial declaration of incompatibility or a finding of the European Court of Human Rights.

It must be stressed, however, that section 6(6) of the HRA 1998 excludes failure to legislate from the purview of judicial control. This creates categories of complaints about lack of legislation or statutory provisions purported to be Convention compatible which may not be so such as sections 23, 24, 26 and 30 of the Criminal Justice Act 1988 – (now replaced by sections 114 to 118 of the Criminal Justice Act 2003) – (statutory exceptions to the hearsay rule in criminal proceedings)[433], sections 34 to 37 of the Criminal Justice and Public Order Act 1994 as amended by section 58(2), (3) and (4) of the Youth Justice and Criminal Evidence Act 1999[434] (adverse inferences from silence) and the furore on covert policing which refuses to abate[435]. These categories of complaints always end up in the European Court of Human Rights.

Lack of legislation or failure to legislate after a declaration of incompatibility poses some perplexing problems to judges when the same or similar matter is (re)litigated. Despite the objection to the Bill of Rights on the grounds of Parliamentary sovereignty[436], the next step forward is to grasp the nettle and adopt an entrenched Bill of Rights as Canada did in 1982 by replacing the Bill of Rights Act 1960 with the Canadian Charter of Rights and Freedoms[437]. This will ensure that an incompatible statutory provision is quickly jettisoned. After all, a former President of the New Zealand Court of Appeal has hinted in a lecture on the Human Rights Act 1998 that "our old friend Parliamentary sovereignty will never be the same again."[438] The recently established Supreme Court, which replaced the House of Lords and the Privy Council, is a step in the right direction but a step which has not gone far enough. The Supreme Court must be vested with the power of judicial review: the power to declare any statute which is incompatible with fundamental rights null and void.

8.2 Free proof and the adversarial system of justice: the final words

The proliferation of statutes on the law of evidence and the policy of free proof, **à la** Bentham, bring into focus one final question: Can the rule of law be upheld by an activist state[439] in the face of dangers arising from terrorism and concerns of public safety? The answer to this question is to be found not in a theory of evidence or a theory of legal argumentation but in a theory of justice which incorporates procedural devices for enhancing justice and reducing injustice. Theories of evidence are isolated responses to particular problems by different scholars at different times. Wherever there is legal argumentation, there is rhetoric and rhetorical arguments are supported by some accepted *topois* or commonplaces such as "a person is to be presumed innocent until proven guilty" or "later law derogates from an earlier one" or "probative evidence ought on the whole to be admissible". Some of these *topois* are driven by good and bad arguments and the study of rhetoric enables an advocate to persuade gullible fact-finders into accepting a conclusion that is not based on a defensible conception of justice.

It is submitted that the rules of evidence need to be tightened rather than scaled down. A programme of free proof or freedom of evaluation from legal constraints pursued assiduously under the CJA 2003 is prone to miscarriages of justice and tyranny. The English adversarial system of justice remains the most efficient system of discovering the truth and protecting the procedural rights of the accused but the policy of free proof remains indefensible under the conception of justice based on practical reasoning outlined in Chapter 1. As Cicero reminded us: *Summum ius summa iniuria* (the strictest application of the law is the greatest injustice).

List of Abbreviations

AC	Appeal Cases (UK 1891–date)
AD	Appellate Division Reports (South Africa: 1910–46)
Ad&E	Adolphus & Ellis' Reports (KB 1834–40)
All ER	All England Reports (1936–date)
All ER Rep	All England Reports (Reprint)
App Cas	Appeal Cases (UK 1876–90)
Arch News	Archbold News
Beav	Beavan's Reports (Rolls 1836–66)
Bentham, **Works**	**The Works of Jeremy Bentham**, published under the superintendence of John Bowring (Edinburgh, 1838–43)
Best, **Evidence**	W.M. Best, **The Principles of the Law of Evidence** (12th edn., 1922)
Bing	Bingham's Reports (CP 1822–34)
B&S	Best & Smith's Reports (KB 1861–5)
Bro CC	Brown's Chancery Reports (1778–1794)
BWCC	Butterworth's Workmen's Compensation Cases (1908–1946)
Cas KB t Hard	Kelyne (W) Ch. (1730–1734)
CLJ	Cambridge Law Journal (1921–date)
Camp	Campbell's Reports (NP 1808–16)
CAR	Criminal Appeal Reports (CCA 1909–date)
Cr App R	Criminal Appeal Reports (1908–date)
CB	Common Bench Reports (CP 1845–66)
CCR	Reports of Cases determined by the Court of Crown Cases Reserved
Ch	Chancery Reports (Eng. 1891–date)
Ch D	Chancery Division Reports (1876–90)
C&K	Carrington & Kirwan's Reports (NP 1843–50)
CL & F	Clarke & Finelly (1831–1846)
CLP	Current Legal Problems (London: 1948–date)
CLR	Commonwealth Law Reports (Australia: 1903–date)
C&M	Carrington & Marshman's Reports (NP 1840–2)
Cox CC	Cox's Criminal Cases (1843–1940)
CP	Common Pleas Reports (1866–75)
C&P	Carrington and Payne (NP 1823–41)
CPD	Common Pleas Division
Crim LR	Criminal Law Review (England)
Cro Car	Croke's Reports (KB 1625–41)

Cro Jac	Croke's Reports (KB 1603–25)
Dears & B	Dearsley & Bell's Reports (Crown 1852–6)
De G, M&G	De Gex, M^{c}Naghten & Garden's Reports (Ch. 1851–7)
DLR	Dominion Law Reports (Canada: 1912–date)
Doug	Douglas (1774–1785)
East	East's Reports (KB 1801–12)
E&B	Ellis & Blackburn (1851–1858)
EHRLR	European Human Rights Law Review
EHRR	European Human Rights Reports
Eq	Reports of Equity Cases (England 1866–75)
E&P	International Journal of Evidence and Proof
ER	The English Reports
Ex	Exchequer Reports (1866–75)
Ex Div	Exchequer Division Reports (1875–80)
F&F	Foster & Findson's Reports (NP 1858–67)
FLR	Family Law Reports
Gilbert, **Evidence**	Sir Geoffrey Gilbert, **The Law of Evidence** (New York and London: Garland Publishing, Inc., 1979) [a reprint of the 1754 ed. printed for Sarah Cotter, Dublin]
Harv LR	Harvard Law Review (1887–date)
H&C	Hurlstone & Coltman's Reports (Ex. 1862–6)
HL	House of Lords Reports
HLC	House of Lords Cases (HL 1847–66)
Holdsworth, **HEL**	Sir William Holdsworth, **A History of English Law** (1922–66) 16 vols.)
HR	Human Rights (Jordans, Bristol)
ICR	Industrial Cases Reportss
ILTR	Irish Law Times Reports (1867–date)
Ir R or IR	Irish Reports
IYLCT	International Yearbook of Law, Computer and Technology
JC	Justiciary Cases (Scotland) (1916–date)
J Crim L	Journal of Criminal Law
J Fr Sc	Journal of Forensic Science
JPR	Justice of the Peace Reports (England)
JPN	Justice of the Peace (Notes)
KB	King's Bench Reports (England)
Langbein, **Origins**	John H. Langbein, **The Origins of Adversary Criminal Trial** (Oxford: Oxford University Press, 2003)
Leach	Leach CC (1730–1815)
Lew	Lewin CC (1822–1838)
LJ	Law Journal Reports (1831–1949)

Ll R	Lloyd's Reports (1968–date)
Ll RM	Lloyd's Medical Reports
LQR	Law Quarterly Review (England: 1885–date)
LRCP	Common Pleas Cases (1865–1875)
LRQB	Queen's Bench (1865–1875)
LS	Legal Studies
LT	Law Times Reports (England: 1859–1948)
M&G	Manning & Grainger's Reports (CP 1840–4)
MLR	Modern Law Review (England: 1937–date)
Moo PC	Moore's Reports, Privy Council (PC 1836–62)
Moo &R	Moody & Robinson's Reports (NP 1831–44)
M&S	Maule & Selwyn's Reports (KB 1813–17)
M&W	Meeson & Welsby's Reports (Ex. 1836–47)
NLJ	New Law Journal (England: 1966–date)
NI	Northern Ireland Reports
NILQ	Northern Ireland Legal Quarterly (1936–date)
NP	Nisi Prius
NZLR	New Zealand Law Reports (1883–date)
OJLS	Oxford Journal of Legal Studies (1981–date)
P	Probate, Divorce and Admiralty Division Reports (1891–date)

PACE	Police and Criminal Evidence Act 1984
PD	Probate, Divorce and Admiralty Division Reports (1876–90)
Peake	Peake's Reports (NP 1790–1812)
Peake, **Compendium**	Thomas Peake, **A Compendium of the Law of Evidence** (New York and London: Garland Publishing, Inc., 1979 [a reprint of the 1801 ed. printed for E. & R. Brooke and J. Rider, London]
QB	Queen's Bench Reports (1891–1901, 1952–date)
QBD	Queens Bench Division Reports (1876–90)
Radzinowicz, **History**	Leon Radzinowicz, **A History of English Criminal Law and Its Administration from 1750** (1948–1968) (4 vols.)
RTR	Road Traffic Reports
Ry & M	Ryan & Moody (1823–1826)
Salk	Salked KB (1689–1712)
SASR	South Australian State Reports (1921–date)
SC	Session Cases (Scotland)
SCR	Supreme Court Reports (Canada: 1970–date)
Sim & St	Simons & Stuart (1822–1826)
SJ	Solicitor's Journal (1857–date)
SLT	Scottish Law Times Reports (1893–date)
Stark	Starkie's Reports (NP 1815–22)
Stephen, **Evidence**	James Fitzjames Stephen, **A Digest of the Law of Evidence** (London: Macmillan, 1948)
Stephen, **History**	James Fitzjames Stephen, **A History of the Criminal Law of England** (London 1883) (3 vols.)
Str	Strange's Reports (KB 1716–49)
St Tr	Howell's State Trials (London, 1828)
Syd LR	Sydney Law Review
Taylor, **Evidence**	John Pitt Taylor, **A Treatise On the Law of Evidence** (12th edn., 1931) (2 vols.)
Thayer, **Evidence**	James Bradley Thayer, **A Preliminary Treatise On Evidence at the Common Law** (1898)
TLR	Times Law Reports (England: 1884–1952)
TR	Term Reports (1785–1800)
TuLR	Tulane Law Review
Twining, **Evidence**	William Twining, **Rethinking Evidence: Exploratory Evidence** (Illinois: Northwestern University Press, 1994)
Twining, **TEBW**	William Twining, **Theories of Evidence: Bentham and Wigmore** (London: Weidenfeld & Wigmore, 1985)
UKHRR	United Kingdom Human Rights Reports
UNSWLJ	University of New South Wales Law Journal

U Pa LR	University of Pennsylvania Law Review (1852–date)
US	United States Supreme Court Reports (1754–date)
VR	Victoria Reports (1957–date)
Wigmore, **Evidence**	John H. Wigmore, **A Treatise on the Anglo-American System of Evidence in Trials at Common Law** (P. Tillers rev., 1983) (10 vols.)
Wigmore, **Principles**	John H. Wigmore, **The Principles of Judicial Proof** (Boston: Little, Brown, 1913)
Willes	Willes' Reports (CP 1737–60)
WLR	Weekly Law Reports (England: 1953–date)

Endnotes

1. Twining, **TEBW**, 1.
2. See A. Everritt, **Cicero: A Turbulent Life** (London: Murray, 2001), Cicero, **De oratore** [*On the Ideal Orator*], trans. by J.M. May and J. Wisse (Oxford: Oxford University Press, 2001) and Robert Wardy, **The Birth of Rhetoric** (London: Routledge, 1996), 2.
3. Cicero, **De oratore** 1. 91.
4. See Aristotle, **Treatise on Rhetoric and Poetic** (**with Hobbes' Analysis**), ed. Theodore Buckley (London: Bell and Daldy, 1872), Book 1, ch. 3, 24.
5. Cicero, **De oratore**, 1. 260.
6. Cicero, **On the Ideal Orator**, trans. by J.M. May and J. Wisse (Oxford: Oxford University press, 2001), 29.
7. See Anthony Everritt, **Cicero: A Turbulent Life** (London: Murray, 2001), 54–57.
8. Ibid, 78. See also J.M. Kelly, **A Short History of Western Legal Theory** (Oxford: Clarendon Press, 1992), 54.
9. See Twining, **Evidence**, Ch. 8.
10. The second edition was published in 1735 by R. Nutt and R. Gosling.
11. Gilbert, **Evidence**, 3–4.
12. Peake, **Evidence**, v.
13. Ibid., 2–12.
14. S. Greenleaf, **A Treatise on the Law of Evidence** (Boston: Little, Brown, 1842).
15. Taylor, **Evidence**, Vol. 1, 272–3 and 361–4.
16. Best, **Evidence**, 415–17.
17. Thayer, **Evidence**, 487–8.
18. Stephen, **Evidence**, 6.
19. Thayer, **Evidence**, 269.
20. Best, **Evidence**, 24.
21. Thayer, **Evidence**, 270.
22. Ibid., 274.
23. Ibid., 275.
24. J. Bentham, **Rationale of Judicial Evidence** in **Works**, Vol. VI, 86–119.
25. J. Bentham, **Of Laws in General**, H.L.A. Hart ed. (London: The Athlone Press, 1970), 183.
26. Best, **Evidence**, 23.
27. Ibid., 24.
28. Thayer, **Evidence**, 270–276.
29. Ibid., 275.
30. See Wigmore, **Principles**, 1913 for the application of science to judicial proof.

31. Genetic engineering biotechnology includes the technique for isolating, modifying, multiplying and recombining genes from different organisms, genetic testing, DNA profiling and cloning whether reproductive or therapeutic. See Mae-Wan Ho, **Genetic Engineering: Dream on Nightmare** (Bath: Gateway Books, 1998), Ch. 2.
32. See W. Twining, **Rethinking Evidence: Exploratory Essays** (Illinois: Northwestern University Press, 1994), 185.
33. In criminal proceedings, see sections 116-118 of the Criminal Justice Act 2003. In civil proceedings, s.1(1) of the Civil Evidence Act 1995 renders hearsay statements admissible but may still be excluded due to consideration of weight (s.4(2)) or because it is inadmissible on other grounds (s.14(1)).
34. By the Criminal Evidence Act 1979, s.1, by the Criminal Justice and Public Order Act 1994, s.31 by the Youth Justice and Criminal Evidence Act 1999, Sch. 4, paras. 1(4) and (5) and by ss. 98 and 101 of the CTA 2003.
35. **Makin v Attorney General for New South Wales** [1894] AC 57 discussed in Chapter 4.
36. P. Goodrich, **Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis** (London: Macmillan, 1987), 36. See also W. Twining, "General and Particular Jurisprudence – Three Chapters in a Story" in S. Guest (ed.), **Positivism Today** (Aldershot: Dartmouth, 1996), Ch. 8.
37. J. Bentham, **Of Laws in General**, supra n. 25, 46–52, 64, 158–9 and 239–40 and G.J. Postema, **Bentham and the Common Law Tradition** (Oxford: Clarendon Press, 1986), 405–6.
38. H. Kelsen, **The Pure Theory of Law**, trans. by Max Knight (Berkeley: University of California, 1967), 4–15.
39. Ibid., 192. See also H. Kelsen, **General Theory of Law and the State**, trans. by Anders Wedberg (New York: Russell & Russell, 1961) at 13: "The system of norms we call a legal order is a system of the dynamic kind."
40. H.L.A. Hart, **The Concept of Law**, 2nd edn. (Oxford: Clarendon Press, 1994).
41. H.L.A. Hart, "Positivism and the Separation of Law and Morals" (1957–58) 71 Harv L R 593; also in H.L.A. Hart, **Essays in Philosophy and Jurisprudence** (Oxford: Clarendon Press, 1983), Essay 2.
42. The five truisms are human vulnerability, proximate equality, limited altruism, limited resources and limited understanding and strength of will (see H.L.A. Hart, **The Concept of Law**, supra n.40, 193–200).
43. N. MacCormick, "Law as Institutional Fact" (1973) Edinburgh University Inaugural Lecture No 52; also (1974) 90 LQR 102.
44. "The Model of Rules I–II" (1967/72) and "Hard Cases" (1975) collected in R. Dworkin, **Taking Rights Seriously** (London: Duckworth, 1977); "Law as Interpretation" (1982) reproduced in R. Dworkin, **A Matter of Principle** (Oxford: Clarendon Press, 1985); and R. Dworkin, **Law's Empire** (London: Fontana, 1986).

45. 32 N.J. 358, 161 A 2d 69 (1960). In that case, the question was whether an automobile manufacturer may limit his liability in case the automobile is defective. Heningsen had bought a car, and signed a contract which said that the manufacturer's liability for defects was limited to "making good" defective parts – "this warranty being expressly in lieu of all warranties, obligations or liabilities. Heningsen argued that, at least in the circumstances of this case, the manufacturer ought not to be protected by this limitation, and ought to be liable for the medical and other expenses of persons injured in a crash. The court agreed with Heningsen. At various points the court made appeals to standards.
46. 115 NY 506, 22 NE 188 (1889). In that case, the New York Court had to decide whether an heir named in the will of his grandfather could inherit under the will even though he had murdered his grandfather to do so. The murderer did not receive his inheritance. See also **Tennessee Valley Authority v Hill**, 437 US 153 (1978) discussed in **Law's Empire**, n. 44, 20–23.
47. See H.L.A. Hart, supra n. 40, at 273 where he said: "[T]here will be points where the existing law fails to dictate any decision as the correct one, and to decide cases where this is so the judge must exercise his law-making powers."
48. [2001] 1 All ER 686, [2001] Crim LR 649, H.L. (discussed in Ch. 5).
49. Sir Neil MacCormick, **Legal Reasoning and Legal Theory** (Oxford: Oxford University Press, 1978), 120-128.
50. One might add MacCormick.
51. See W. Twining, supra n. 37, 137.
52. For an overview of "reactive" and "active" states, see M. Damaska, **The Faces of Justice and State Authority** (New Haven: Yale University Press, 1986), 72–80.
53. See Michael J. Sandel, **Justice: What's the right thing to do?** (London: Penguin, 2010), 105–106.
54. Amartya Sen, **The Idea of Justice** (London: Allen Lane, 2009), ix and 82.
55. John Rawls, **A Theory of Justice** (Oxford: Oxford University Press, 1999, revised edition).
56. Amaryta Sen, op cit, 124.
57. Adam Smith, **The Theory of Moral Sentiments** (London: T. Cadell, extended version, 1790; republished, Oxford: Clarendon Press, 1976), III, i, 2.
58. Amaryta Sen, op cit, 90.
59. R. Dworkin, "Principle, policy, procedure" in C.F.H. Tapper (ed.), **Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross** (London: Butterworths, 1981), 200–201.
60. C.A. Morrison, "Some Features of the Roman and the English Law of Evidence" (1956) 33 Tul LR 577.
61. G.D. Nokes, **An Introduction to Evidence** (London: Sweet and Maxwell, 1967), 16.
62. [1935] AC 462. In that case, D was convicted of murder. His defence was accident. Swift J in his summing-up said that once it was shown that V had died through the act of D, that was presumed to be murder unless D could satisfy the jury that it was accidental or justified or something less such as manslaughter. D successfully appealed to the House of Lords.
63. Ibid., 481 (emphasis added).

64. See **Nimmo v Alexander Cowan & Sons Ltd.** [1968] AC 107, **R v Edwards** [1975] QB27, **R v Hunt** [1987] 1 All ER 1, **R v Alath Construction Ltd.; R v Brightman** [1990] Crim LR 516 and **R (on the application of Grundy & Co. Excavations Ltd. and Another) v Halton Division Magistrates' Court** (2003) JPR 7.
65. P. Lewis, "The Human Rights Act 1998: Shifting the Burden" [2000] Crim LR 667.
66. A. Ashworth and M. Blake, "The Presumption of Innocence in English Criminal Law" [1996] Crim LR 306 at 314.
67. See Paul Roberts [1995] Crim LR 783.
68. The principle, a much older version of the hearsay rule, states that a witness must speak in court "de visu et auditu" (i.e. from his personal knowledge). This principle imposes a general ban on absent witnesses and on inferences. See Holdsworth, **History**, Vol. IX, 214.
69. Twining, **Evidence**, 181.
70. See Nico Jörg, **et al.** "Are Inquisitorial and Adversarial Systems Converging?" in P. Fennell, C. Harding, N. Jörg and B. Stuart, **Criminal Justice in Europe: A Comparative Study** (Oxford: Clarendon Press, 1995), and M. Damaska, **The Faces of Justice and State Authority: A Comparative Approach to the Legal Process** (New Haven: Yale University Press, 1986).
71. A. Ashworth, **The Criminal Process: an evaluative study** (Oxford: Oxford University Press, 1998), 69.
72. [2001] 1 Cr App R 275, HL.

73. The HRA 1998, s.22(4) provides:
"(4) Paragraph 6 of subsection (1) of section 7 applies to proceedings brought by or at the instigation of a public authority whether the act in question took place; **but otherwise that section does not apply to an act taking** place before the coming into force of that section." (emphasis added)
Section 7(1) of the HRA 1998 provides:
"(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful…may –
(a) bring proceedings against the authority under this Act [HRA 1989] in the appropriate court or tribunal, or
(b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act."
74. (1996) 22 EHRR 29.
75. (1994) 19 EHRR 193.
76. (1989) 11 EHRR 360.
77. (1988) 51 DLR (4th) 481 (Supreme Court of Canada).
78. Ibid., 493 (emphasis added)
79. See **Attorney-General of Hong Kong v Lee Kwon-kwut** [1993] AC 951, **R v Oakes** (1986) 26 DLR (4th) 2000, *per* Dickson CJC at 223, **R v Whyte**, supra n.19 and **State v Mbatha** [1996] 2 LRC 208 (South African Constitutional Court).
80. (1988) 13 EHRR 379
81. [2000] 1 Cr App R 275 at 324.
82. See **R v Phillips** [1991] 3 NZLR 175.
83. Supra n.22.
84. D. Feldman, **Civil Liberties and Human Rights in England and Wales** (Oxford: Oxford University Press, 2002), 51.
85. (2002) 34 EHRR 7.
86. Ibid., at [15].
87. (2004) 38 EHRR 22.
88. **R v Gibson** (2000) 2 March; **R v Lambert** [2001] UKHRR 1074, HL; **HM Advocate v McIntosh** [2001] HRLR 20, PC; **R v Benjafield** [2002] 1 All ER 815; and **R v Kansal (No. 2)** [2002] 1 All ER 257, HL.
89. [2002] 2 ALL ER 517, HL.
90. **R v Keogh** [2007] 3 All ER 789, CA and **DPP v Wright** [2009] EWHC 105 (Admin), (2009) The Times, 17 February, QBD.
91. Wigmore, **Evidence**, Vol. VIII, 269.
92. 2 Corbett, Paul. Hist., 722, 762 and 853; 3 St Tr 1315–1368 excerpted in Stephen, **History**, Vol. 1, 343.

93. See the Police and Criminal Evidence Act 1984,section 80 (as amended by the Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999), s.54(3)) and 80A.
94. See A. Ligertwood, **Australian Evidence** (Sydney: Butterworths, 1993), 239.
95. **R v Martinez-Tobon** [1994] 2 All ER 90.
96. **R v Mitchell** (1892) 17 Cox CC 503, **R v Christie** [1914] AC 545, **R v Chandler** (1976) 63 Cr App R 1, **Parkes v R** (1976) 64 Cr App R 25 and **R v Horne** [1990] Crim LR 188.
97. **R v Tate** [1908] 2 KB 68 and **R v Whithead** [1929] 1 KB 99.
98. By s.58(2) of the YJCEA 1999.
99. By s.58(3) of the YJCEA 1999.
100. By s.58(4) of the YJCEA 1999.
101. RCCP Report, para. 4.52.
102. (1996) 160 JPR 165. See also **R v Friend** [1997] 1 WLR 1433 and **R v Birchall** (1998) The Times, 10 February.
103. See **R v Betts and Hall** [2001] 2 Cr App R 257 CA. In this case, the appellants were convicted of causing grievous bodily harm with intent. The appellants denied involvement in the attack and did not answer questions by the police on the advice of their solicitors. Allowing the appeal, it was held that the direction should include, inter alia, that taking into consideration Betts' age and the extent of Hall's speech impediment as you find it to be, in deciding whether each defendant could reasonably be expected to mention matters upon which he subsequently relied.
104. (1996) 160 JPR 165 at 165–166.
105. **R v Bowers** (1999) 163 JPR 33, CA.
106. [1999] 1 Cr App R 377.
107. [2000] Crim LR 181, CA.
108. (1998) The Times, 13 February, CA.
109. [2001] 1 Cr. App. R 160, CA. See also **R v Mountford** [1999] Crim LR 575.
110. [2002] 1 Arch News 2.
111. [2001] Crim LR 330, CA.
112. [2003] Crim LR 405 discussed in Choo and Jennings (2003) TE&P 185. *Cf.* **R v Knight** (2003) The Times, 20 August where it was held that an adverse inference could not be drawn where the defence in a pre-prepared statement was consistent with the defence at trial.
113. See R.J. Allen and C.R. Callen, "The juridical management of factual uncertainty" (2003) 7 E&P 1.
114. (1993) EHRR 297.
115. (1993) 16 EHRR 357.
116. [2000] Crim LR 679.
117. (1997) 23 EHRR 313.
118. See **R v Staines and Morrisey** [1997] 2 Cr. App R 426, **R v Secretary of State for Trade and Industry, ex parte McCormick** (1998) The Times, 10 February and **R v Lyons** [2002] 4 All ER 1028.

119. See R. Clayton and H. Tomlinson, **The Law of Human Rights** (Oxford: Oxford University Press, 2000), Vol. 1, paras. 1–66 to 1–85.
120. H.L.A. Hart, **The Concept of Law** (Oxford: Clarendon Press, 1994), 71–78.
121. Lord Cooke of Thorndon, "The British Embracement of Human Rights" [1999] EHRLR 243 at 244.
122. [2000] Crim LR 682.
123. (2001) 33 EHRR 12.
124. (2003) 36 EHRR 13 at [59].
125. [2004] ECWA Crim 2766.
126. (2006) 42 EHRR 31.
127. [1990] 2 SCR 151.
128. [1991] 3 SCR 595.
129. See **Petty v R** (1991) 173 CLR 95 and **Weissensteiner v R** (1993) 178 CLR 217.
130. In Australia, see **Pynboard Pty. Ltd. v Trade Practices Commission** (1983) 152 CLR 328 and **Environment Protection Authority v Caltex Refining Co. Pty. Ltd.** (1993) 178 CLR 477. In the UK, see **Blunt v Park Lane Hotel Ltd.** [1942] 2 KB 253 at 257.
131. [1998] HCA 1 (20 January 1998): available on the Internet at http://www.austlii.edu.au/do/displ./
132. See Ed Cape, "The Revised PACE Codes of Practice: A Further Step Towards Inquisitorialism" [2003] Crim. LR 355.

133. J. Stone describing Savigny's *Volkgeist* (the spirit of the people) in J. Stone, **Social Dimensions of Law and Society** (London: Stevens, 1966), 94. See also Ch. 1 of this book.
134. Langbein, **Origins**, 8.
135. See I. Dennis, **The Law of Evidence** (Sweet and Maxwell: London, 1999), p. 463.
136. See the Criminal Justice Act 1988, s.23(3)(b) superseded by s.116 (2) (e) of the Criminal Justice Act 2003.
137. See S. E. Salako, "Hearsay in English Criminal Trials: A violation of the Convention?" [2001] HR 232 at 236–237.
138. H. Theobald, **The Law Relating to Lunacy** (1924), p. 1 quoted by La Forest J. in **Re Eve** [1986] 2 S.C.R. 388 at 4007 (Supreme Court of Canada).
139. The four Reports are as follows: (i) **The Report of the Advisory Group on the Law of Rape** (the Heilbron Report), Home Office, London, December 19975; (ii) **The Report of the Committee on Frauds Trial** (the Roskill Report), H.M.S.O., London 1986; **The Report of the Advisory Group on Video Evidence** (the Pigot Report), Home Office, London, December 1989; and (iv) **Speaking Up For Justice**, the Report of the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System, Home Office, London, June 1998.
140. **DPP v Morgan** (1975) 61 Cr. App. R. 136.
141. The Heilbron Report, paras. 85 and 86.
142. Ibid., para. 137.
143. See the CJA 1988, s.32(1)(a).
144. Ibid., s.32(1)(b).
145. The Pigot Report, paras. 2.25 and 2.36–37.
146. Substituted by s.54 of the Criminal Justice Act 1991.
147. The Pigot Report, para. 2.30.
148. See **Speaking Up For Justice**, paras. 9.37 and 9.38.
149. See the CJA 1988, s.34(3).
150. See the Criminal Justice and Public Order Act 1994, s.32(1)(b).
151. See **R v Makanjuola; R v Easton** [1995] 3 All E.R. 730 at 732–733 (Per Lord Taylor C.J.); **R v Whitehouse** [1996] Crim. L.R. 50 and **R v Islam** (1998) 162 J.P.R. 391.
152. Note that whilst Lord Goddard C.J. in **Wallwork** (1958) 42 Cr. App. R. 153 at 160 opined that it was undesirable that a child as young as five should give evidence, a London stipendiary magistrate received the evidence of a child of two [see J.R. Spencer and R. Flin, **Evidence of Children: The Law and the Psychology** (Blackstone : London, 1993), p. 53]. See also **R v B** [1990] Crim. L.R. 510 where the Court of Appeal upheld the trial judge's decision to allow a six year-old child to give evidence against her father on a charge of incest.
153. Section 33A(2A) of the CJA 1988 was substituted by section 168(1) of and Schedule 9, para. 33 to the Criminal Justice and Public Order Act 1994.

154. For illuminating discussions of this principle, see R. Eggleston, **Evidence, Proof and Probability** (Butterworths: London, 1997), p.50; R. Munday, "Hostile Witnesses and the Admission of Witness Statements under section 23 of the Criminal Justice Act 1988 [1991] Crim. L.R. 348 at 350–351; J.R. Spencer, "Orality and the Evidence of Absent Witnesses" [1994] Crim. L.R. 628; and Twining, **Evidence**, 183.
155. See Holdsworth, **History**, Vol. IX, 214.
156. See the YJCEA 1999, s.24(8).
157. See the Civil Procedure Rules 1998, r. 32.3.
158. Wigmore, **Evidence**, Vol. 3, 263.
159. See para. 8.4.
160. For the Best Evidence rule, see **Ford v Hopkins** (1700) 1 Salk. 283; **Althram v Anglessa** (1709) 11 Mod. 210; and **Omichund v Barker** (1744) Willes Rep. 550 where Lord Hardwicke said: "The judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will allow."
161. See **Ventouris v Mountain (No. 2) The Italian Express** [1992] 3 All E.R. 414 at 426 where Balcombe L.J. said: "[T]he modern tendency in civil proceedings is to admit all relevant evidence and the judge should be trusted to give only proper weight to evidence which is not the best evidence." See also s.4(2)(a) to (f) of the Civil Evidence Act 1995.
162. See **H.M. Advocate v Birkett** (1992) The Times, 29 October where children aged between four and six were to give evidence regarding the use of a knife, and a child aged eight who had a close relationship with the accused was to give evidence. It was held that there were insufficient grounds to order that their evidence be taken by a television link.
163. See **R v Cooper and Shaub** [1994] 'Crim. L.R. 531 where the Court of Appeal held that the use of screens was prejudicial to the defendant and that adult witnesses should be afforded the use of screens only in exceptional circumstances.
164. See **R v X; R v Y; R v Z** [1990] Crim. L.R. 515. Note that in **Smelie** (1919) 14 Cr. App. R. 128, a child witness was kept out of sight of the defendant by sitting on the stairs by the side of the dock.
165. See G. Williams, "Children's Evidence By Video" (1987) 151 J.P.N. 339;p E. Goldstein, "Photographic and Videotape Evidence in the Criminal Courts of England and Canada" [1987] Crim. L.R. 384;p and J. Temkin, "Child Sexual Abuse and Criminal Justice" (1990) 140 N.L.J. 352, 355 and 410–411.
166. See, for example, **R v B (An Accused)** [1987] 1 N.Z.L.R. 362 (a New Zealand case) where the evidence of a child psychologist who had interviewed a sexually abused twelve year-old girl was declared inadmissible because it infringed the hearsay rule and the rule against opinion.
167. See **Rawlings and Broadbent** [1995] 1 All E.R. 580; **Welstead** [1996] Crim. L.R. 48; and **McAndrew-Bingham** (1999) 2 Cr. App. R. 293.
168. See **Hampshire** [1995] 2 Cr. Ap. R. 319; **DPP v M** [1997] 2 Cr. App. R. 80; and **G v DPP** [1997] 2 Cr. App. R. 78.

169. See Practice Direction (Crown Courts: TV Links) [1992] 1 W.L.R. 838 and Practice Direction (Crime: Child's Video Evidence) [1992] 1 W.L.R. 839.
170. [1987] 1 F.L.R. 280.
171. [1991] 1 F.L.R. 420.
172. [1999] 2 F.L.R. 92.
173. See **Republic of Ireland v UK** (1979-80) 2 E.H.R.R. 25; **Barberà, Messegué and Jabardo v Spain** (1989) 11 E.H.R.R. 360; **Kostovski v Netherlands** (1990) 12 E.H.R.R. 360; and **Unterpertinger v Austria** (1991) 13 E.H.R.R. 175.
174. See the Pigot Report, paras, 2.18 and 2.22; and **Speaking Up For Justice**, paras 8.33 and 8.36.
175. **R v Clewer** (1953) 37 Cr. App. R. 37 at 40 (Per Goddard C.J.).
176. See the YJCEA 1999, ss. 19–22.
177. (1995) 159 J.P.R. 521.
178. See s.72(1) of the Police and Criminal Evidence Act 1984 as amended by s.15(1) of and Sched. 1, para. 9(1) to the Civil Evidence Act 1995.
179. S. E. Salako, op. cit., 237.
180. **Speaking Up For Justice**, para. 5.16.
181. (1958) 43 Cr. App. R. 90.
182. See note 42 above.
183. See **R v Hill** (1851) 2 Den. 254, **R v Dunning** [1965] Crim. L.R. 372, **R v Bellamy** (1985) 82 Cr. App. R. 222 and **R v Stretton** (1986) 86 Cr. App. R. 7.

184. See **R v Ruston** (1786) 1 L Ca. L. 403.
185. [2001] 1 F.L.R. 148.
186. Ibid., p. 150.
187. Ibid., p. 151.
188. For an overview, see R. Scotford, "False memories – a peripheral issue?" in C. Feltham (ed.), **Controversies in Psychotherapy and Counselling** (Sage: London, 1999), p. 48.
189. I. Glen, "True lies and false memories", [1999] 3 Arch News, 5.
190. See E. Bass and L. Davis, **The Courage to Heal** (Harper & Row: New York, 1988).
191. For the history of repressed-memory, recovered memory and false-memory, see M. Jervis, **Submission to the Lord Nolan Review on Child Protection in the Catholic Church in England and Wales**, British False Memory Society, Bradford-on-Avon, January 2001.
192. See J. Bennetto, "Child sex abuse inquiries 'will top 100'" (2001) The Independent, 8 January.
193. See S. O'Neil, "Police face major overhaul of child abuse inquiries" (2000) **The Daily Telegraph**, 19 December.
194. Unreported, December 1998 (Bristol Crown Court) discussed in I. Glen, op. cit., p. 5.
195. [1997] 2 All E. R. 755.
196. [1995] 2 Cr. App. R. 45.
197. See http://www.state.nh.us/court/supreme.htm
198. See **R v Lillyman** [1896] 2 Q.B. 167 followed in **R v Osborne** [1905] 1 K.B. 551 and **R v Camellari** [1922] 2 K.B. 122. See also P.J. Richardson **et al.**, **Archbold's Criminal Pleading, Evidence and Practice** (Sweet & Maxwell: London, 2001), para. 8–106.
199. See section 3 of the Human Rights Act 1998 and S. E. Salako, op. cit., pp. 237–238.
200. 172 Mass. 175 (1898).
201. Ibid. (emphasis added).
202. See **Whitehead** [1929] 1 K.B. 99, **Redpath** (1962) 46 Cr. App. R. 319 and **Islam** (1998) 162 J.P.R. 391.
203. The Heibron Report, para. 137(a).
204. Ibid., para 137(b).
205. Ibid., para. 138.
206. See S. Lees, **Carnal Knowledge : Rape On Trial** (Penguin : London, 1997), p.130.
207. (1982) 75 Cr. App. R. 125, C.A.
208. See J. Temkin, "Sexual History Evidence – the Ravishment of Section 2" [1993] Crim. L.R. 3 at 5–6.
209. **R v Seaboyer; R v Gayme** (1991) 83 D.L.R. (4th) 193.
210. Ibid., p. 267. See J.A. Tanford and A.J. Bocchino, "Rape Victim Shield Laws and the Sixth Amendment" (1980) 128 U Pa LR 544 at 588.
211. J. Temkin [1993] Crim LR 3.
212. Thayer, **Evidence**, 516 quoted by J. Temkin, note 78 above.
213. Thayer, op. cit., 269.

214. Wigmore, **Evidence**, Vol. 1, 689. This passage was adopted in C. Tapper (ed.), **Cross and Tapper On Evidence** (Butterworths: London, 1999), p. 66.
215. See **Lawrence** [1977] Crim. L.R. 492, **Brown** (1989) 89 Cr. App. R. 97, **Funderbunk** [1990] 2 All E.R. 482, **Said** [1992] Crim. L.R. 433 and **R v C** [1996] Crim. L.R. 37.
216. See the YJCEA 1999, s.41(4).
217. See, for example, **Said** [1993] Crim LR 433, where the complainant, a 14 year-old girl alleged that S raped her. Medical examination revealed that her hymen was not intact but the doctor was unable to say whether that was due to wearing tampons or to previous sexual behaviour. For a scintillating discussion, see D. Birch and R. Leng, **Blackstone's Guide to the Youth Justice and Criminal Evidence Act 1999** (Blackstone: London, 2000), pp. 95–96. See also J. Temkin, "Sexual History Evidence: Beware the Backlash" [2003] Crim LR 217 and D. Birch, "Untangling Sexual History Evidence. A Rejoinder to Professor Temkin" [2003] Crim LR 370.
218. See **Law Society of Upper Canada v Skapinker** (1984) 9 D.L.R. (4th) 161 and **R v Big M Drug Mart Ltd.** (1985) 18 D.L.R. 321 at 359–360 (Per Dickson J.).
219. See **Palmer v Superintendent of Auckland Maximum Security Prison** [1991] 3 N.Z.L. R. 315 at 321 (Per Wylie J.) and **Ministry of Transport v Noart** [1992] 3 N.Z.L. R. 260 (Court of Appeal).
220. (2001) The Times, 13 February.
221. [2001] 2 WLR 1546, HL.
222. See the YJCEA 1999, s.23.
223. Ibid., s.24.
224. Ibid., s.25.
225. Ibid., s.27.
226. Ibid., s.28.
227. Ibid., s.29.
228. Ibid., s.30.
229. Ibid., s.26.
230. Ibid., s.19(2)(a) and (b).
231. Ibid., s.19(3)(b).
232. See the Civil Evidence Act 1995, s.4(2) and the Civil Procedure Rules, r.32.1 and 32.1.2.
233. See the YJCEA 1999, s.31.
234. Ibid., s.32.
235. See **Jit Singh Matto v DPP** [1987] Crim. L.R. 641, **R v H** [1987] Crim. L.R. 47. **Mason** (1988) 86 Cr. App. R. 349 and **Stagg**, [1994] 9 Arch News, 4 to mention a few.
236. See **Johnson** [1995] Crim. L.R. 53.

237. See **O'Connor** (1987) 85 Cr. App. R. 298, **Kempster** (1989) 90 Cr. App. R. 14 and **Dixon (Sarah Louise)** [2001] Crim. L.R. 126 where the pleas of guilty rendered admissible by s.74 of PACE were excluded. Cf. **Robertson and Golder** (1987) 85 Cr. App. R. 304, **Chapman** [1991] Crim. L.R. 44 and **Boyson** [1991] Crim. L.R. 274 where the pleas of guilty were held admissible because the guidelines enunciated in **Robertson and Golder** (above) by Lord Lane C.J. at pp. 311–312 were adhered to.
238. See note 44 above.
239. (2001) The Times, 13 February.
240. [2002] 1 All ER 683, where the Court of Appeal held that the questions or evidence about false statement in the past by a complainant in a sexual offence about sexual assault or about failure to complain about the instant offence were not about the sexual behaviour of the complainant. They related not to her sexual behaviour, but to her statements in the past or failure to complain and were, therefore, not prohibited by section 41 of the YJCEA 1999.
241. See note 91 above.
242. **De officiis** 1.10.33.
243. See M.L. Friedland, **Double Jeopardy** (Oxford: Clarendon Press, 1969), vii.
244. The Constitution of the United States of America annexed to James Madison, Alexander Hamilton and John Jay, **The Federalist Papers** (Harmonsworth: Penguin, 1987), 491 at 501.
245. **Connelly v DPP** [1964] AC 1254 at 1353 (Per Lord Devlin).
246. M.L. Friedland, op cit, 5.

247. See **R v Charlesworth** (1861) 1 B &S 460, 121 ER 786 and **R v Winsor** (1866) 10 Cox CC 327.
248. (1866) 10 Cox CC 327 at 329 (emphasis added).
249. See **R v Mitchell** (1848) 3 Cox CC 93 and **Galliard v Laxton** (1862) 2 B&S 363 at 370, 121 ER 1109 at 1111.
250. See **Wiltshire JJ** (1983) 8 LT (NS) 242 *sub nom* **Ex p Bryant** (1863) 27 JP 277. Cf. **Owens v Minoprio** [1942] 1 KB 193, DC where Viscount Caldecote held that withdrawal "on the merit" could constitute a bar.
251. **R v Vodden** (1853) Dears 229, 169 ER 706 and **R v Young** (1964) 48 Cr App R 292 at 295.
252. **R v Randall** [1960] Crim LR 435, **R v Carter** (1963) 48 Cr App R 122 and **R v Brookes** [1966] Crim LR 114.
253. [1914] 2 KB 570.
254. (1920) 26 Cox CC 64, KBD.
255. [1914] 2 KB 570 at 574 (Per Lord Reading).
256. Supra, note 11.
257. [1914] 2KB 570 at 576 (Per Lord Reading).
258. Supra, note 12.
259. [1914] 2 KB 570 at 647.
260. (1796) 2 Leach CC 708, 168 ER 455.
261. Ibid, 717 Leach; 168 ER 459.
262. Ibid, 720 Leach; 168 ER 460.
263. Ibid, 718 Leach; 168 ER 461.
264. See Note, "Twice in Jeopardy" (1965) 75 Yale LJ 262, 269ff.
265. See **R v Clark** (1820) 1 Brod & B 473, 129 ER 804; **R v Bird** (1851) 5 Cox CC 20; and **Connelly v DPP** [1964] AC 1254.
266. [1964] AC 1254.
267. Ibid, 1309.
268. Ibid, 1314–5.
269. [1950] AC 458, PC. Cf. **R v Griffiths** [1990] Crim LR 181 where the plea of autrefois acquit failed because the second offence (conspiracy to import cocaine) was different from the first offence (conspiracy to supply cocaine or being in possession of cocaine with intent) for which the defendant had been previously acquitted.
270. [1950] AC 458 at 479.
271. (1861) 1 B&S 688.
272. Ibid, 696.
273. [1997] 3 WLR 758, [1997] Crim LR 747, CA.
274. [1998] Crim LR 422.
275. 284 US 299 (1931).
276. 220 US 338, 342, 55L ed 489, 490, 31 S Ct 421 (1910).
277. HMSO, 1999, 952.

278. Ibid, 939-942.
279. [2000] 3 WLR 117; [2000] 3 All ER 385.
280. See **Barberà, Messegué and Jabardo v Spain** (1989) 11 EHRR 360.
281. [1935] AC 309.
282. [1960] 2 QB 207.
283. Supra, note 38.
284. [1944] AC 315.
285. By the Criminal Evidence Act 1979, s.1; by the Criminal Justice and Public Order Act 1994, s.31; and by the Youth Justice and Criminal Evidence Act 1999, Schedule 4, para 1 (5).
286. **R v Hsi En Feng** [1985] 1 NZLR 222. Cf **R v O** [1999] 1 NZLR 347.
287. See **Kemp v R** (1951) 83 CLR 341 which followed **Sambasivan v Public Prosecutor, Federation of Malaya** [1950] AC 458.
288. See **Grdic v R** [1985] 1 SCR 810 and **R v Arp** [1998] 2 SCR 339 (Supreme Court of Canada).
289. See **R v Smith** (1915) 1 Cr App R 229 and **R v Straffen** [1952] 2 QB 911.
290. Paul Roberts and Adrian Zuckerman, **Criminal Evidence** (Oxford: Oxford University Press, 2004), 517.
291. Similar fact evidence might "(i) distort the inferential process, (ii) threaten two central principles of justice: (a) that the accused stands to be tried, acquitted or convicted in respect of the offence with which he is now charged; and (b) that conviction must take place only if the jury are persuaded of the accused's guilt beyond reasonable doubt." (See A.A.S. Zuckerman, **The Principles of Criminal Evidence** (Oxford: Clarendon Press, 1989), 222).
292. (2005) The Times, 18 November.
293. Law Commission Consultation Paper No 156, **Double Jeopardy** (TSO, 1999), Part VIII.
294. The Home Affairs Committee's Third Report, **The Double Jeopardy Rule** (TSO, 2000).
295. **Justice For All**, Cm 5563, 2002, para 43.
296. Note that in **R v Terry** [2004] EWCA Crim 3252, [2005] 3 WLR 379 it was held that an acquittal was not conclusive evidence of innocence unless by that word it was meant not guilty in law of the alleged offence to which it related; nor did it mean that all relevant issues had been resolved in favour of a defendant.
297. The Explanatory Report to Protocol 7.
298. Cm 5563, 2002, paras 4.65 and 4.66.
299. Part I of Schedule 5 to the CJA 2003.
300. Section 78 (2) and (3) of the CJA 2003.
301. [2007] 1 WLR 1657.
302. [2008] 1 WLR 627.
303. Ibid, 635.
304. [2009] 2 All ER 898.
305. Ibid, 907.
306. Supra, note 269.

307. See Alex Stein, **Foundations of Evidence Law** (Oxford: Oxford University Press, 2005), 133.
308. Immanuel Kant, **Groundwork for the Metaphysics of Morals** (1785), translated by H.J. Paton (New York: Harper Torchbooks, 1964), 442.
309. I. Dennis, "Rethinking Double Jeopardy: Justice and Finality in Criminal Process" [2000] Crim LR 933.
310. For an outline of Adolph Beck's case, see W.M. Best, **The Principles of the Law of Evidence**, ed. S.L. Phipson (London: Sweet & Maxwell, 1922), 448-450.
311. Report of the Secretary of State for the Home Department of the Departmental Committee and Evidence of Identification in Criminal Cases, HC 338, London, 1976.
312. Guidelines enunciated in **R v Turnbull** [1976] 3 All ER 549.
313. W. Twining, **Rethinking Evidence: Explanatory Essays**, 2nd edn. (Cambridge: Cambridge University Press, 2006), 181.
314. See **R v Ryan** [1990] Crim LR 50, CA. Contrast **R v Bentley** [1991] Crim LR 620, CA.
315. See **R v Doheny, R v Adams** [1997] 1 Cr App R 369 discussed in Chapter 7.
316. **R v Stagg** [1994] 9 Arch News 4.
317. **R v Gilfoyle** [2001] 2 Cr App R 5.
318. **R v O'Brien** (2000) The Times, 16 February.
319. Experts are called to inform the courts about the results of their empirical research on a rape victim's failure promptly to report the crime.
320. **R v Dallagher** (2002) The Times 21 August; and **R v Kempster** (2008) The Times, 16 May.

321. **R v Johnson** [1995] Crim LR 53 and **R v Roberts** (1999) The Times, 14 September.
322. [1975] QB 834.
323. Ibid, 841 (*per* Lawton LJ).
324. [1993] 2 Ll R 68.
325. Ibid, 81 cited with approval by Otton LJ in **Stanton v Callaghan**[1999] 2 WLR 745 at 774.
326. Section 118 (1), para 8 of the Criminal Justice Act 2003 preserves section 30 of the Criminal Justice Act 1988.
327. Section 30 of the Criminal Justice Act 1988 is extended by section 127 of the Criminal Justice Act 2003 which allows experts to give evidence of facts and opinions stated by others.
328. (1990) The Times, 8 November.
329. [1994] Arch News 4.
330. Ibid.
331. [2003] EWCA Crim 1020.
332. [2001] 2 Cr App R 5.
333. [1995] Crim LR 53.
334. **R v Roberts** (1999) The Times, 14 September and **R v O'Doherty** [2002] Crim LR 761.
335. **R v Pfenning** (1995) 182 CLR 461 (High Court of Australia) and **R v Deenik** [1992] Crim LR 578.
336. **R v Deenik**, supra, note 335.
337. (2002) The Times, 21 August.
338. (2008) The Times, 16 May.
339. Ivo Alberink and Arnount Ruifrok, "Repeatability and Reproducibility of Earprint Acquisition" (2008) 53 J Fr Sci 325–330.
340. Ibid, 330.
341. Ibid, 325.
342. [2001] 2 Cr App R 5.
343. 293 F. 1013 (D.C. Cin 1923).
344. 753 F. 2d 1224 (3d Circ 1985).
345. **Daubert v Merrell Dow Pharmaceuticals, Inc**, 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 (1993).
346. **General Electric Co v Joiner** 552 US 136, 118 S Ct 512 (1997)
347. **Kumho Tire Company Ltd v Carmichael**, 526 US 137, 143 L Ed 2d 238, 119 S Ct 1167 (1999).
348. Falsifiability is a criterion for deciding whether or not a system belongs to empirical science. See K.R. Popper, **The Logic of Scientific Discovery** (London and New York: Routledge, 2000), 86.
349. See D. Ormerod, "Sounding Out Expert Voice Identification" [2002] Crim LR 771.
350. For an overview on assessors and expert witnesses, see Sir Louis Blom-Cooper, "Experts and Assessors: Past, Present and Future" (2002) 21 CJQ 341.
351. J.H. Wigmore, **The Principles of Judicial Proof** (Boston: Little, Brown, 1913).

352. See R. Cross, **Evidence**, 3rd edn. (London: Butterworths, 1967), p.vii where he said: "It is impossible to give a satisfactory account of the theory of our law of evidence without frequent reference to the *ipsissima verba* of the judges and the work of such great American exponents of the subject as Thayer, Wigmore, Morgan and Maguire."
353. R. Dworkin, "Principle, policy, procedure" in C.H. Tapper (ed.), **Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross** (London: Butterworths, 1981), 193–225.
354. W. Twining, **Rethinking Evidence: Explanatory Essays**, 2nd edn. (Cambridge, Cambridge University Press, 2006), Chapter 7.
355. M. MacCormick, **Rhetoric and the Rule of Law: A Theory of Legal Reasoning** (Oxford: Oxford University Press, 2009).
356. Wesley Newcomb Hohfeld, **Fundamental Legal Conception as Applied in Judicial Reasoning**, ed. Walter Wheeler Cook (New Haven, Yale University Press, 1966).
357. See R.W.M. Dias, **Jurisprudence** (Butterworths: London, 1995), 40–42.
358. See Arthur L. Corbin's Foreword to Wesley Newcomb Hohfeld, **Fundamental Legal Conception as Applied to Judicial Reasoning**, xi.
359. **Air Canada v Secretary of State for Trade** [1983] 2 AC 394.
360. **Asiatic Petroleum Co. Ltd v Anglo-Persian Oil Co. Ltd** [1916] 1 KB 822; **Duncan v Cammell Laird & Co. Ltd** [1942] AC 624; and **Conway v Rimmer** [1968] AC 910.
361. **R v Agar** [1990] Crim LR 183, (1990) 90 Cr App R 318; **R v Langford** [1990] Crim LR 653; **R v Keane** [1994] 2 All ER 478; **R v Ward** [1993] 2 All ER 577; **Neilsen v Langharne** [1981] 1QB 736; **Makanjuola v COP** [1992] 3 All ER 617; **Halford v Sharples** [1992] 3 All ER 624; **Metropolitan Police Commissioner v Looker** (1993) 143 NLJ 543; and **R v Chief Constable of West Midlands Police, ex p Wiley, R v Chief Constable of Nottinghamshire Police, ex p Sunderland** [1994] 3 WLR 433.
362. **D v NSPCC** [1978] AC 171; **Gaskin v Liverpool City Council** [1980] 1 WLR 1549; **Re M (A Minor)** (1990) The Times, 4 January; and **R v Brushett**, Dec. 21, 2000, Unreported, CA.
363. **Burmah Oil v Bank of England** [1980] AC 1090; **Attorney General v Times Newspaper** [1988] 3 WLR 776; **Attorney General v Blake** [2000] 4 All ER 385, **R v Shayler** [2002] 2 All ER 477; and **R (Binyam Mohammed) v Secretary for State for Foreign and Commonwealth Affairs** (2009) The Times, 27 October, QBD.
364. **Church of Scientology v Johnson-Smith** [1972] 1 All ER 378.
365. (1990) 90 Cr App R 318.
366. Ibid, 324.
367. Prior to the decision in **Rogers v Home Secretary** [1973] AC 388, the term "Crown privilege" was inaptly attached to public interest in the administration of justice because it described the *privilege* (or *liberty*) claimed by the Crown to prevent the disclosure of relevant evidence on the ground of national security (e.g., documents relating to the construction of a submarine – **Duncan v Cammell Laird & Co Ltd** [1942] AC 62) and the implied presence, in Hohfeldian terms, of *no-claim* in litigants who rely on such documents to use them to prove facts in issue.

In time, the term "Crown privilege" became a misnomer for two reasons: (i) in most of the cases the Crown did not initiate the proceedings but intervened to claim the privilege; and (ii) the elasticity of the public policy interest is so remarkable that it has been applied to matters which are of no high national concern such as local government and analogous records (**D v NSPCC** [1978] AC 171) and commercial transactions (**Burmah Oil v Bank of England** [1980] AC 90).

368. Wesley Newcomb Hohfeld, op cit, 36.

369. Ibid, 36–37.

370. A.A.S. Zuckerman, "Privilege and public interest" in C.H. Tapper (ed.), **Crime, Proof and Punishment. Essays in Memory of Sir Rupert Cross** (London: Butterworths, 1981), 293–294.

371. [1978] AC 171.

372. (1890) 25 QBD 494.

373. In this case, the submarine, 'Thetis', which had been built by the respondents under contract with the Admiralty, while undergoing its submergence tests in Liverpool Bay sank to the bottom owing to the flooding of her two foremost compartments. Ninety-four crew members lost their lives. In an action instituted by the appellants (the representatives and dependents of these men) against the respondents claiming damages for negligence, objection was taken to the production of documents including the reports as to the condition of 'The Thetis'. Hilbery J refused inspection of the documents and his decision was confirmed by the House of Lords. The House held that the documents otherwise relevant and liable to production must not be produced if the public interest required that they should be withheld and that the public interest test could be found to be satisfied either (a) by having regard to the contents of a particular document, or (b) by the fact that the document belongs to a particular class which on grounds of public interest must be withheld from production
374. [1990] Crim LR 183, (1990) 90 CR App R 318.
375. [1990] Crim LR 653.
376. **D v NSPCC** [1978] AC 171; and **Gaskin v Liverpool City Council** [1980] 1 WLR 1549.
377. **Re M (A Minor)** (1990) The Times, 4 January.
378. Dec. 21, 2000, Unreported, CA.
379. (1993) 143 NLJ 543.
380. [1994] 3 WLR 433.
381. [1978] AC 171 at 230.
382. [2002] UKHL 11, [2002] 2 All ER 477, HL. See, also, **Attorney General v Times Newspaper** [1988] 3 WLR 776, HL; **Attorney General v Blake** [2000] 4 All ER 385, HL; and **R (Binyam Mohammed) v Secretary of State for Foreign and Commonwealth Affairs** (2009) The Times, 27 October, QBD.
383. Supra, note 22.
384. Ronald Dworkin, "Principle, policy, procedure" in C.H. Tapper (ed.), **Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross** (London: Butterworths, 1981), 193.
385. See Alex Stein, **Foundations of Evidence Law** (Oxford: Oxford University Press, 2005), Chapters 6 and 7
386. H. Lévy-Bruhl, **La preuve judicare: Étude de sociologie juridique** (Paris: Riviere, 1964), 150–2 quoted in R. Cotterrell, **The Sociology of Law** (London: Butterworths, 1992), 51.
387. R. Eggleston, **Evidence, Proof and Probability** (London: Butterworths, 1997), 8.
388. See Laurence H. Tribe, "Trial by Mathematics: Precision and Ritual Process in the Legal Process" (1971) 84 Harv L Rev 1329 at 1338-1343.
389. Lee Lovinger, "Standards of Proof in Science and Law" (1992) 32 Jurimetrics Journal 323 at 340–341.
390. David A. Schum, "Probability and the Processes of Discovery, Proof, and Choice" (1986) 66 Boston University Law Review 825 at 826.

391. J.H. Wigmore, **Evidence in Trials at Common Law**, P. Tillers rev. (Boston: Little, Brown, 1983, 1056, n.12.
392. Ibid.
393. Michael O. Finkelstein and Williams B. Fairley, "The Continuing Debate Over Mathematics in the Law of Evidence" (1971) 84 Harv L Rev 1801–1820.
394. [1997] 1 Cr App R 369.
395. Ibid, 369–370.
396. [1996] 2 Cr App R 467.
397. Ibid, 482.
398. Francis Bacon, **The New Organon** ed. by Lisa Jardine and Michael Silverthorne (Cambridge: Cambridge University Press, 2000), Book I, LXIX and Book II, XV.
399. John Stuart Mill, **System of Logic** (London: Longmans, Green and Co, 1879), Volume II, Book III.
400. L. Jonathan Cohen, **The Probable and the Provable** (Oxford: Clarendon Press, 1977), 224–229.
401. Glenn Shafer, **A Mathematical Theory of Evidence** (Princeton: Princeton University Press, 1976), 3.
402. David A. Shum, op cit, 869–872.
403. Ken Berger, "Science Convicting the Innocent" (2010) 29 Medicine and Law 1 at 8–9.
404. Thayer, **Evidence**, 273.
405. Ibid., 274.

406. See, for example, **Commonwealth v Woodward**, http://www.lawyersweekly.com (also excerpted in The Times (UK), 11 November 1997 where Judge Hillier B. Zobel in the Superior Court of Cambridge, Massachusetts (USA) ordered that the verdict of "guilty of murder in the second degree" returned by a jury in the trial of Louise Woodward, a British nanny charged with the murder of Matthew Eappen, be reduced to voluntary manslaughter.
407. **Buckley v Rice Thomas** (1554) 1 Plowden 118, 124 where Saunders J said: "…if matters arising in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty it concerns: which is an honourable and commendable thing in our law. For thereby it appears that we do not despise all other sciences but our own, but we approve of them and encourage them as a thing worthy of commendation."
408. **Folkes v Chadd** (1782) 3 Doug 157.
409. Ibid.
410. **R v Turner** [1975] QB 834 at 841 (*per* Lawton LJ).
411. **R v Silverlock** [1894] 2 QB 766.
412. **Sophocleus v Ringer** [1988] RTR 52.
413. **Sidaway v Bethlem Royal Hospital Governors** [1985] 1 All ER 643 and **Bolitho v City and Hackney Health Authority** [1997] 2 All ER 771, HL.
414. **R v Robb** (1991) 93 Cr App R 161.
415. **R v Dallagher** (2002) The Times, 21 August.
416. **R v Cooke** [1995] Crim LR 39, **R v Adams** [1996] 2 Cr App R 467 and **R v Doheny** [1997] 1 Cr App R 369.
417. **R v Clarke** [1995] 2 Cr App R 45. *Cf.* **R v H**, unreported, December 1998 (Bristol Crown Court and **G v DPP** [1997] 2 All ER 755.
418. **R v Chard** (1971) 56 CR App R 268 where medical evidence concerning intention at the material time of someone charged with murder was excluded.
419. See A. Campbell-Tiech, "Lip reading as expert evidence" [2002] 5 Arch News 5.
420. **R v Stagg** [1994] 9 Arch News 4.
421. **R v Gilfoyle** [2001] 2 Cr App R 57.
422. See D.W. Barnes, **Statistics As Proof: Fundamentals of Qualitative Evidence** (Boston: Little, Brown, 1983), 393.
423. See **R v Doheny**, supra n.13.
424. See also the Civil Procedure Rules, Part 35. 15 and the Practice Direction to Part 35. For an overview on assessors, see Sir Louis Blom-Cooper, QC, "Experts and Assessors: Past, Present and Future" (2002) 21 CJQ 342–356.
425. See **Van Orshoven v Belgium** (1998) 26 EHRR 55.
426. For a résumé of the difficult gestation of the HRA 1998, see M. Zander, **A Bill of Rights?** (London: Sweet and Maxwell, 1997).
427. Sir Isaiah Berlin, **Two Concepts of Liberty** (Oxford: Clarendon Press, 1958), 7–16.

428. M. Sandel, ***Democracy's Discontent: America in Search of a Public Philosophy*** (Cambridge, Mass.: Harvard University Press, 1996), passim.
429. See **Law Society of Upper Canada v Skapinker** (1984) 9 DLR (4th) 161 (the first Charter case to reach the Supreme Court of Canada) and **R v Big M Drug Mart Ltd.** (1985) 18 DLR (4th) 321 at 359–360 (*per* Dickson J).
430. see **Palmer v Superintendent of Auckland Maximum Security Prison** [1991] 3 NZLR 315 at 321 (*per* Wylie J) and **Ministry of Transport v Noort** [1992] 3 NZLR 260 (Court of Appeal).
431. **R v A (No. 2)** [2001] 2 WLR 1546 and **R v Loosely, Attorney-General's Ref. (No. 3 of 2000)** [2001] 1 WLR 2060.
432. **R v DPP, ex parte Kebilene** [2001] 1 Cr App R 275 and **L v DPP**[2002] 3 WLR 863, DC. *Cf.* **Sheldrake v DPP, Attorney General's Reference (No. 4 of 2002)** [2002] 2 ALL ER 517, HL.
433. See S.E. Salako, "Hearsay in English Criminal Trials: A Violation of the Convention?" [2001] HR 232–238.
434. For a gloomy foreboding, see D. Birch and R. Leng, **Blackstone's Guide to the Youth Justice and Criminal Evidence Act 1999** (London: Blackstone, 2000), 1: "Fears have been expressed that the new means of receiving evidence (under the YJCEA 1999) may undermine the oral and the adversarial traditions of the criminal trial or work unfairness for the defendants; and an unusual alliance of the press and police have expressed concern that reporting restrictions to protect victims may hamper the proper functions of the press in reporting crimes and assisting investigations."
435. See A.F. Jennings and D. Friedman, "The Future of Covert Policing: Will it rest in peace?" [2000] 8 Arch News 6 and [2000] 9 Arch News 6.
436. See, for example, Lord Lloyd of Hampstead in **Hansard**, HL Vol 369, col 794 (March 25, 1976). *Cf.* H.L.A. Hart, **The Concept of Law** (Oxford: Clarendon Press, 1994), 71–78.
437. That such a bold move in on the cards, see Frances Gibb, "Judicial shake-up as 'supreme court' nears", The Times, 10 April 2000; and "US-style court role for the Lords", The Times, 14 April 2000.
438. Lord Cooke of Thorndon, "The British Embracement of Human Rights" [1999] EHRLR 243 at 244.
439. An "activist state" embarks on propulsive policies and welfare programmes. The society is statized. Social problems and social policies are dissolved into state problems and state policies. A "reactive state" is limited to providing the framework for adjudication. See M.R. Damaska, **The Faces of Justice and State Authority** (New Haven: Yale University Press, 1986), 73–80.