

SCOTS CRIMINAL EVIDENCE AND PROCEDURE – MEETING THE CHALLENGES AND EXPECTATIONS OF MODERN SOCIETY AND LEGAL THINKING

1. Introduction

At a speech given in Edinburgh in 1867, Benjamin Disraeli said something sufficiently profound to have stood the test of time. It was this:

“Change is inevitable. In a progressive country change is constant.”

This was at the time of the Second Reform Bill, which, when enacted along with its Scottish counterpart¹, enfranchised for the first time a significant portion of the male working class. One change brought about by the Act was the removal of its promoters, namely Disraeli’s Conservative government, in favour of Gladstone’s Liberals. That is a classic example of an unintended consequence of reform and it provides sound cautionary advice to anyone daring enough to recommend radical change; especially amendments to practices and procedures in daily use by lawyers.

There is going to be change in relation to both criminal evidence and procedure. Such changes, in the short to medium term, will involve alterations in the law of arrest and detention which, in broad terms, may not be too controversial. They may also focus on the consequences of the abolition of the requirement for corroboration. The Government has sought views in particular on whether it would be desirable for

¹ Representation of the People (Scotland) Act 1868

the simple majority for a verdict of guilty to be reviewed in favour of a qualified majority of, say, 10 out of 15. It has consulted on the sustainability of the not proven verdict and on whether a trial court ought to have the power to acquit an accused person on the basis that the judge or sheriff considers that no reasonable jury could convict on the evidence presented. This paper will touch on those aspects of criminal procedure. However, it is really aimed at a point further into the future. It is about where the Scottish system will be, not in five years time but a generation ahead. It is a look at the long term.

There must be change because the system of criminal justice which exists in Scotland is one which remains to a large extent geared to the values and conditions of the Victorian age. The central pillar of the procedure is the trial; the show piece at which almost everyone involved in the case comes, or ought to come, together in one place at the same time before judge, jury and the public gaze. The singular feature of the proof is oral testimony; that is an account given upon oath, from the witnesses appearing at that diet. This is the mode of enquiry deemed the best way of establishing the truth of whatever is alleged to have happened or at least whether the accused committed the crime charged. The “best evidence” then is sworn testimony. The perceived significance of the witness answering for that testimony at the great day of judgment, as the original form of oath had it², remains considerable.

² See Green’s Encyclopaedia (3rd ed) “Oath of Witness”

It is not difficult to see why the rules of procedure and evidence developed into this form. In the Victorian era, communication (other than in person) was by way of the postal service; and latterly by telegraph for short, urgent and expensive messages. There was no guaranteed accurate way of recording what a witness might say other than by the quill pen of the judge at the trial³ or, after 1926, the shorthand writer⁴. The criminal justice system remained, and largely remains, adverse to proof by affidavit⁵ because of the lack of transparency and control perceived to be inherent in that method. The written words may not have emanated from the witness but from the mind of the parties' agent; a person traditionally regarded by the Victorian judges as biased⁶. What is said on the face of an affidavit may not be all that might have been said in response to suitably open questions.

There was a need, in order to enhance the reliability of evidence, for all persons to assemble at the cited time and place. All had to be seen to give their evidence from the open but isolated witness box. Hence, however, the inbuilt inconvenience to those cited as witnesses came to be established as cases came to be belatedly scheduled for progress in the course of the day, week or month for which the trial was fixed. Adjournments and postponements were not common features in the

³ or in the form of the sheriff precognosing the witnesses (latterly on oath) prior to committal of the accused

⁴ Criminal Appeals (Scotland) Act 1926 s 11

⁵ *Glyn v Johnston* (1834) 13 S 126

⁶ *Macdonald v Union Bank* (1864) 2 M 963, LJC (Inglis) at 969

Victorian age. Trials would proceed on the appointed day or not at all. Times have changed. Waiting time, which is fundamentally wasted time, is inherent and endemic in the current system of justice which still, like its Victorian counterpart, requires a succession of live appearances by the witnesses to fact or opinion before a case can be resolved.

Proof by the use of copies of documents or descriptions of things not produced was firmly discouraged for fear of inaccuracy⁷ or even forgery. Photography was in its infancy and there was no efficient method of copying papers or recording events electronically. Hearsay of witnesses was regarded with extreme antipathy for similar reasons. A secondary report might deviate from that available from its originator. It was not circumscribed by the protection of the oath or tested by cross examination in the public forum.

The present rules of criminal procedure and evidence remain largely the same as they developed to address these problems. Summary procedure is not that dissimilar to that outlined in the Act of 1908⁸. The system of appeals from summary decisions remains that of the stated case as originally devised in an Act of 1875⁹, coupled with the more ancient and antiquated processes of suspension and

⁷ See eg *Dowgray v Gilmour* (1907) 14 SLT 906, LP (Dunedin) at 907-8; *Anderson v Laverock* 1976 JC 9

⁸ Summary Jurisdiction (Scotland) Act 1908, largely re-enacted in the Summary Jurisdiction (Scotland) Act 1954 and the Criminal Procedure (Scotland) Acts 1975 and 1995

⁹ Summary Prosecutions Appeals (Scotland) Act 1875

advocation. The solemn trial proceeds in much the same way as that of *Madeleine Smith* in 1857¹⁰, including sometimes too the “not proven” outcome. Where there have been advances is in solemn appeals, although even these have their origins in the 1926 Act¹¹. There are recommendations in my Report on streamlining appeals. This paper does not rehearse them except to stress that the general proposal is that every order of a court should (within reason) be appealable with leave and anything final without leave, all using a modern format.

2. Modes of Proof

It is with the practices and procedures at trial level that this paper is primarily concerned. The improvements in the representation of accused persons even in the 18th century had aided the development of a law of evidence by the time of the later Institutional Writers¹². It had become relatively sophisticated by the end of the nineteenth century. This is not the place to engage in an essay detailing the history of the rules of evidence. Suffice it to say, however, having made these rapid advances the principles are now very largely the same as those set out in 1887 by the editor of Dickson on *Evidence*¹³ following the substantial reforms in the mid to late 19th Century, which abolished the remaining prohibitions which existed in relation to

¹⁰ (1857) 2 Irv 641

¹¹ Criminal Appeal (Scotland) Act 1926

¹² See Davidson: *Evidence* paras 1.10-13

¹³ *Evidence* (3rd Grierson ed) (1887)

categories of witness¹⁴ and allowed the accused to testify on his own behalf¹⁵. After all, Dickson remains revered as *the* authoritative exposition of the law of evidence despite the growing status of modern works¹⁶.

In contrast to the world of Dickson, however, this is an age in which what a person says can be accurately recorded electronically at any time in both audio and video format. Events can be caught on CCTV or on a mobile phone or tablet. Of course, it is said that, whereas the camera cannot lie, it can be an accessory to untruth¹⁷. It is no doubt possible, and perhaps increasingly so, to doctor recordings using complex computer software; although I have not come across this having been done outwith the realms of science fiction¹⁸. However, one question which is worth posing by way of introduction to the substantive content of this paper is this: which is more likely to be true: a record of an event as caught on camera; a video recorded statement made by a witness in the hours immediately following the event; or the testimony of a witness at a trial months and perhaps years later? The answer to that, at least for the lawyer, may be “well, it depends”, and no doubt it does. Nevertheless, is it not worth considering why the Scottish¹⁹ courts afford so much precedence, if not quite exclusivity, in terms of value, to the testimony of a witness at a trial in the face of

¹⁴ Evidence (Scotland) Acts 1840 and 1852 (see *infra*)

¹⁵ Criminal Evidence Act 1898

¹⁶ especially, but not exclusively, the new editions of Walker & Walker: *Evidence*; see also Davidson: *Evidence*

¹⁷ Harold Evans: *Pictures on a Page - Photojournalism and Picture Editing*

¹⁸ eg F/X, *Murder by Illusion* (1986)

¹⁹ and, it is true, many common law systems

what might be the obvious truth as recorded digitally²⁰ or in accounts given by the witnesses at the time of the incident under scrutiny?

A second question is whether the courts, as a public service, ought not to be arranging their calendars and procedures in a manner which does not just suit themselves, or the lawyers and others practising before them, but is also “user friendly” to parties and witnesses. There have been some piecemeal reforms in this regard whereby, for example, routine matters may be proved by certificate²¹ and the court may determine a particular fact to be uncontroversial²². There are provisions which allow evidence to be given by *live* television link, where the witness is not in Scotland²³ or is deemed vulnerable²⁴. It is competent, but very rare, for evidence to be taken on commission. However, there is a much more radical approach to be considered if the blight of wasted time in the courts is to be addressed. Why should it not be competent for all evidence to be given in the form of a video and audio recording of the witness’s account or the relevant event or thing? This would enable witnesses to provide their testimony at a time and place suitable to themselves as well as the lawyers and the court. At least in the case of formal or potentially unchallenged evidence, there may not even require to be a lawyer present as the

²⁰ See *Donnelly v HM Advocate* 2000 SCCR 861, Lord Allanbridge at 872; cf *Steele v HM Advocate* 1992 JC 1, LJG (Hope) at 4-5

²¹ Criminal Procedure (Scotland) act 1995, s 280

²² *ibid* s 258

²³ *ibid* s 273, 273A

²⁴ *ibid* s 271

witness narrates his or her account to camera in the form of an iphone or ipad or skypes it to a designated website.

Many lawyers may throw up their hands in horror at such a suggestion. It is a change to what exists. What is wrong with what we have? There is the European Convention Article 6(3)(d) right of an accused:

“to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”.

That right, it is acknowledged immediately, has to be protected in a practical and effective way. However, there are certain features of the article which fall to be noticed, apart from the notion that a witness must be for or “against” an accused²⁵. First, although the right is undoubtedly one permitting a party, in short, to test the evidence, there is no absolute right to *cross-examine* every, or indeed any, witness in the manner which is in common use in this jurisdiction and, in particular, to do so in open court. Were there to be such a right, very many systems in Europe, where oral testimony does not feature, or is at least a rarity, would be regarded as not being Convention compliant. In other systems, a written statement of a witness presented at trial may constitute that witness’s evidence. The absence of the witness to speak to it at the trial does not convert it into hearsay, were another witness or a party to

²⁵ this is not common to European systems (see eg Trechsel: *Human Rights in Criminal Proceedings* p 300 *et seq*) and it is only in recent years that a habit has grown up in Scotland of referring to “Crown” witnesses, labels or productions

attempt to introduce it, as might be the position under Scots law. There must, of course, be an opportunity to pose questions to a witness, but that is the extent of the entitlement. Secondly, there is no time specified in the article at which the examination of a witness by the opposing party is to take place. It may be when the initial account is given by the witness, but it could also be at any time thereafter, yet still well in advance of a trial diet²⁶. Any questioning need not be by the party or his/her lawyer in front of a judge. It can be conducted by the judge; hence the use of the phrase “or have examined”. Thirdly, there is no specification of what is meant by obtaining the “attendance” of a witness; attendance where?

There may be certain situations in which it may remain appropriate or desirable for a witness to be cross-examined, *viva voce*. A critical, central eye witness may be an example of this, but only if his/her account is to be seriously challenged. It may be that his/her cross-examination should occur live in front of the judge and jury as occurs at present; although why it cannot be by live video link in every case is unclear and why it cannot be recorded is less so. However, the issue is whether, especially but not exclusively in summary proceedings, these situations should be the exception rather than the norm. In short, what is required of our law reformers is not mere tinkering with a Victorian system of proof to meet limited situations²⁷.

²⁶ Trechsel (*supra*) at 307 under reference to *SN v Sweden* (2004) 39 EHRR 13 at para 44

²⁷ eg Scottish Law Commission: *Evidence: Report on Hearsay Evidence in Criminal Proceedings* (Report No 149 (1994)) following *Affidavit Evidence, Hearsay and Related Matters in Criminal Proceedings* (Discussion Paper No 77)

What is needed is clear sky thinking on how best to prove or disprove fact efficiently and in the interests of justice in the modern age, given the advances in technology which have occurred over the last twenty years since the worldwide web hit our consciousness.

3. Changes in thinking

The clear sky thinking ought to bear in mind the three central principles long since yet undoubtedly well expressed by the Scottish Law Commission in relation to the law of evidence²⁸:

- “(1) The law should be simplified to the greatest degree consistent with the proper functioning of a law of evidence.
- (2) As a general rule all evidence should be admissible unless there is a good reason for it to be treated as inadmissible.
- (3) The rules of evidence in civil and criminal proceedings should be identical unless there is good reason to the contrary”.

The last two of these are of particular significance.

What ought to be under consideration ultimately is the abolition of all restrictive rules which are designed to exclude evidence deemed, as a pure matter of law, to be unreliable. That is to say, the “best evidence” principle as it currently operates should be abandoned in favour of a much more fluid approach to all sources of information. Scots law is on a journey in this respect – albeit a slow one edging

²⁸ 100th Report para 1.3

forward (mostly) over the last three centuries. At the start of the journey, there was in our civil law a distrust of all oral testimony as a generality²⁹. Stair³⁰ refers to the need for “great caution” in admitting witnesses at all. At the time of Hume in the early 19th century, there were fixed rules, which were designed to assist the fact finder, not on what was and was not competent *testimony* but on who was and who was not a competent *witness*. Once a witness was competent, his evidence (that gender being used advisedly) and that of all other witnesses was regarded almost automatically as credible and reliable³¹. The art then was persuading the court to accept the witness as competent in the first place.

Females were generally excluded from testifying except in domestic or occult matters³². As time went by, they might have been allowed to speak *cum nota* on matters “without doors” but *simpliciter* on events “within doors”. Pupil children were in a similar category because “they may not be sufficiently confirmed in their attachment to truth, or the sense of the obligation of an oath”³³. Partiality was an important ground for disqualifying a witness altogether: for example, if a witness were a near relation of the prosecutor. Infamy was another; by that being meant that the witness had been convicted of dishonesty. The panel could not testify at all, because the Claim of Right prohibited accused persons from giving evidence

²⁹ see generally Wilkinson: *Hearsay; A Scottish Perspective* in Hunter (ed): *Justice and Crime* 66 at 69 *et seq*

³⁰ *Institutes* IV, xliii

³¹ *ibid* 70 under reference to More’s Notes on Stair

³² *Commentaries* i, 339

³³ *ibid* 340

presumed (no doubt because of the prevalence of torture) to be against themselves. All of these were grounds for disqualification and not merely matters to be taken into account in assessing weight. Lawyers believed in their individual merits. Change was not universally welcomed.

Surely but slowly, the rules have been abolished in favour of a more liberal approach whereby everyone – or almost anyone – can testify and it is for the tribunal of fact to assess the weight to be attached to the testimony. However, what grew up were new rules which, although often not adhered to now, prohibited, and still technically prohibit, types of evidence; notably the hearsay of persons, the use of copies or the giving of secondary evidence in relation to a thing not produced. In the modern era, however, are the courts, including juries, not capable of taking all of this type of information into account and giving it such appropriate weight as they deem fit? The route that Scots law should continue to follow, not now so much in relation to the exclusionary rules applicable to witnesses, but in connection with the types of information capable of being made available, should be towards freedom.

The fundamental change which requires to be considered, or rather re-considered, in order to achieve compliance with the three principles is the abolition of the current form of the rule against hearsay; the central pillar of the “best evidence” rule in criminal trials. Many criminal lawyers will once more cry shock and horror.

Nevertheless, as with corroboration, it is a rule long since departed from in civil litigation³⁴ without significant protest. The rule prohibiting hearsay in criminal trials has already been, quite accurately, described as “eviscerated” by one of our leading academics³⁵. The question to be answered is whether it should now be cast aside completely in favour of rules which recognise the general accuracy of electronically recorded information. It is that simple step which would allow accurate information to be delivered to the courts in different forms according to what is really “best”. What is not being suggested is that persons should be convicted on the basis of hearsay, in the sense of reports by witnesses of what other persons have said. However consideration ought to be given to abolishing the rule in so far as it excludes modes of proving fact by the use of material which accurately records what persons have actually said. It is an important distinction. The rule against hearsay is designed to prevent reliance on reports which are likely to be inaccurate. If the report is electronically recorded, it may be untrue but it will seldom be other than an accurate representation of what was said.

Returning to evisceration, two areas of practice illustrate just how out of touch with reality the law may be growing. The first is the general one concerning the use of the previous statements of witnesses. Once more there is a feeling of unintended consequences following upon an unanticipated combination of well-meaning

³⁴ Civil Evidence (Scotland) Act 1988 s 2

³⁵ Davidson: *Evidence* para 12.01

reforms coincident with *obiter dicta* from the courts. Many will recall with nostalgia the days when evidence really did consist of the testimony of witnesses untrammelled by references to what a police officer might have written down at an early stage of the investigation for police purposes rather than proof. Reference to such statements was confined to the situations envisaged by the old Evidence Act 1852³⁶ whereby it was possible to put to a witness, for the purpose only of testing his credibility and reliability, that he/she had made a statement *different* from his testimony. These days are long gone and, over the last two decades, there has emerged a culture of indiscriminate use of police statements, usually signed but not often recorded electronically, almost as a substitute for testimony. This is presumably because (assuming the accuracy of the statement(s)) they are in fact regarded by lawyers and fact finders alike as better indicators of truth. This trial by statement culture has been caused by the reforms concerning the “adoption” of prior statements, which were suggested by the Scottish Law Commission in 1994³⁷ and implemented the following year³⁸, coupled with the explosion in the use of such statements, and consequent demise of the precognition, following upon the remarks of the then Lord Justice General (Rodger) in *McLeod*³⁹ two years later.

³⁶ s 3; now s 263(4) of the 1995 Act

³⁷ Report No 149 (*supra*)

³⁸ Criminal Justice (Scotland) Act 1995 s 18, now s 260 of the Criminal Procedure (Scotland) Act 1995

³⁹ *McLeod v HM Advocate (No 2)* 1998 JC 67

This sea change in the way criminal trials are conducted requires to be recognised. In particular the problems caused by questioning witnesses about what they said previously are significant in the common situation in which the witness may accept that he said parts of his statement, did not say other parts, cannot remember yet others, accepts the truth of some parts, does not accept the truth of others and is unable to remember others but may or may not be prepared to say that what he is recorded as saying is, or must be, true if it is what is in the statement. Although a judge or sheriff may be able to conduct a detailed analysis of the various answers if he/she has made a precise note of what the witness said about each line of the statement, he/she is put to considerable trouble in deciding what to make of what is often just confusion and when directing a jury on the meaning of "adoption"⁴⁰ and consequently whether what is in the statement, but not spoken to directly in testimony, can be used as proof of fact. This increasing problem should not be ignored. The fact that the witness may have signed the statement is significant, but that is not to say that the statement contains the words or the emphasis that the witness might have used. A signed statement can hardly be regarded as comparable to an audio and video recording of what was said and how it was said.

The second area of practice relates to the hearsay of accused persons, notably the legalistic intricacies of exculpatory, mixed and incriminatory statements by accused

⁴⁰ see *Tomney v HM Advocate* [2012] HCJAC 138, *A v HM Advocate* [2012] HCJAC 29 under reference to *Hughes v HM Advocate* [2010] HCJAC 84; and *Sean Hughes v HM Advocate* 2009 SLT 325

persons. In keeping with what has been said generally in relation to hearsay, consideration requires to be given to the abolition of all exclusionary rules relative to statements made by suspects especially in the early stages of an investigation. All statements could be regarded as potentially probative *quantum valeat*. That is not to say that the dangers of self-serving statements should be ignored. The dangers of these were recognised at the time of the celebrated *Meehan case*⁴¹, when the appellant wanted to lead evidence of the results of a lie detector test. They are covered in my own Review⁴². It is not unreasonable to comment that the rules, as developed by the courts⁴³, have become somewhat convoluted and have given rise to significant problems in jury trials. In my report I made reference to the peculiarity that, working from similar principles, the courts in Canada and those in Scotland had come up with directions to juries to an almost exactly opposite effect in an almost identical set of facts⁴⁴.

If we have significant problem areas of practice, such as the two mentioned, the correct course must be reform rather than blundering on through the recognised confusion.

⁴¹ *Meehan v HM Advocate* 1970 JC 11

⁴² Carloway Review: Report and Recommendations (2011) paras 7.4.3 *et seq*

⁴³ *Morrison v HM Advocate* 1990 JC 299 and *McCutcheon v HM Advocate* 2002 SLT 27

⁴⁴ Carloway Review (*supra*) para 7.4.12 under reference to *Jamieson v HM Advocate* [2011] HCJAC 58 and *R v Illes* [2008] SCC 57

4. A new system

How would a new system work in practice? What I am suggesting for consideration is not simply that, as with civil cases, modes of proof at a trial diet should be extended to include electronic recordings of information (especially statements by witnesses to events), which would currently be excluded as hearsay in the criminal courts. The proposal is much more fundamental and involves new modes of production of that information, in such form as may be, in the lead up to the set trial diet, rather than only at the diet itself. Such a move would finally result in an acceptance that previous statements from a witness, if in a proper electronically recorded form, are capable of proving fact and not just affecting credibility and reliability. This is, once more, a route down which the system has already progressed a good distance, albeit that the route may never have been intended and the journey has been in the face of some not inconsiderable and well merited judicial disquiet⁴⁵.

What is now called a trial diet would remain as such, but it would no longer be a diet at which witnesses would be expected to appear as a matter of routine. In a summary case, it could simply be the diet by the time of which all information relative to the case should have been placed before the court and the date upon which the lawyers can make such submissions as they wish relative to that

⁴⁵ see *Sean Hughes v HM Advocate (supra)*, Lord Marnoch at paras [11] and [12] commenting upon s 260 of the 1995 Act and *Jamieson v HM Advocate* 1994 JC 251; *A v HM Advocate* 2012 SCCR 384

information. The information would, as a generality, be in the public domain at that time. What would the information be? It could, in part, take the form of an affidavit or signed witness statement, but that is not the direction which, it is suggested, should be followed as a priority in the modern era. The norm should be a recording or recordings, which could be uploaded to a website, in which the witness (or indeed even the accused) can state what his/her account may be. This might “best” be a recording of what the witness said at or about the time of the event and it will be capable of constituting proof of fact whether or not the witness later denies the veracity or accuracy of its content. In a solemn case, the recordings can be played to the jury, perhaps with the advantage of putting almost all accounts by witnesses on the same footing and eradicating any perceived problems between the use of video link and courtroom testimony⁴⁶.

What is being postulated is not a move towards an inquisitorial system. Far from it; it would remain for the Crown or the defence to assemble the relevant material, to present it to the sheriff or the jury and to make submissions upon it.

If a new system were in place, the idea of the discharged or adjourned trial diets ought to be a thing of the past. The outcome of trials would cease to depend, as sometimes occurs, on whether the witnesses appear for what can be a third, fourth,

⁴⁶ see *I v Dunn* 2012 SCCR 673

fifth or later diet. The failure of the accused to appear at a diet, having been given the opportunity to do so, may also be of peripheral relevance in relation to a conviction or an acquittal, since his account will already be (or deliberately not be) on record. People should not need to wait for hours or days, whether in witness rooms or on standby. Courts would be far more accessible in form and content. There would cease to be rules on the admissibility of types of testimony. All information could be admissible as proof if it is *relevant*. In that regard, it is interesting to note that, when the Scottish Law Commission were examining the issue in the mid 1990s, they observed⁴⁷, correctly, that:

“the rule against hearsay is among the most important of many exclusionary rules of evidence which are designed to disallow the admission of particular categories of evidence, however relevant and persuasive”.

Well, precisely! Why is persuasive and relevant information being excluded from consideration in proof of fact?

All of this is not suggesting a departure from the rule that a person should not be convicted on the basis of hearsay alone; in so far as that term is understood to be a conviction based upon a report by one witness of what another person has said, where that report cannot be challenged. That rule should, in so far as it survives⁴⁸, remain as part of the general principle requiring a fair trial, but almost all other technical rules in this area could be abolished. As already touched upon, what is

⁴⁷ Report No 149 (*supra*) para 2.21

⁴⁸ *Al Khawaja v United Kingdom* [2011] ECHR 2127, para 118 *et seq*

being suggested is merely another step on the road to abolishing technical rules concerning the admissibility of testimony in favour of a system which allows a free approach upon the part of the fact finder to determine what is proved from all available information and not just the testimony available from the fallible memories of those responding to a citation to a trial long after the event.

5. Relevance

The recommendation to abolish the requirement for corroboration, and this paper's suggestion that further consideration should be given towards significant change in the rule against hearsay following the same course for quite similar reasons, stem in part from the desire to encourage a fundamental change in the way in which evidence is analysed in Scotland. The Scots criminal lawyer is constantly looking at competence and technical sufficiency. That has been, and remains, a distraction from the real task, which is the search for relevant quality information meriting conviction or acquittal.

That does not mean that there ought to be a free-for-all in the canvassing of information; quite the reverse. The key is the word "relevant". What is desired is that, in relation to what information is acceptable and what is not, the courts should focus far more than they do at present on the *relevance* of that information. When it comes to the assessment of relevance, that focus should be on *quality* and not, as is

currently predominant in Scots criminal law, quantity. The Scots lawyer is used to relevancy in the context of whether a charge on a complaint or indictment libels a crime. Where the courts may be failing is in determining in advance of trial what evidence, especially testimony, is, and what is not, relevant to proof of the criminal charge.

What then is relevant evidence? Is this something which all lawyers should know? Well yes, of course, but, from the cases that come before the appeal courts, it is not immediately apparent that the general rule (that only evidence which is relevant should be admitted) is being applied. There are classic definitions⁴⁹ such as the test in Walker and Walker⁵⁰ that:

“Evidence is relevant if in some way it is logically connected with the matters in dispute or if it is consistent or inconsistent with, or gives rise to a logical inference regarding, the facts in issue”.

This is quite loose phraseology. However, the latest edition⁵¹, contains the following:

“...evidence of any fact, which renders probable or improbable the existence of the fact in issue, is relevant. This includes any fact which is consistent or inconsistent with, or gives rise to a logical inference regarding, the fact in issue”.

This is interesting because of the opening, which is consistent with the *dictum* of

Lord Simon in *DPP v Kilbourne*⁵² that:

⁴⁹ see eg Davidson: *Evidence* at para 2.05

⁵⁰ *Evidence* (1st ed) pp 5-6

⁵¹ (3rd) para 1.5.1

⁵² [1973] AC 729, at 756; see for a more complex approach *R v Kearley* [1992] 2 AC 228, Lord Oliver at 263 citing Stephen: *Digest of the Law of Evidence* (12th ed) art 1

“relevant evidence is evidence which makes the matter which requires the proof more or less probable”.

This all goes back to Bentham’s approach⁵³ that:

“As there are facts – evidential facts – by force of which, a fact, considered in the character of a principal fact, is *probabilized*; so it will generally happen that there are others by which the same fact may be *disprobabilized*:- the existence of it rendered more or less improbable”.

There is such a thing as “collateral” or ancillary evidence which is regarded as admissible because of its bearing on the credibility or reliability of a witness. However, the scope of such evidence (eg of previous convictions for dishonesty) is very limited⁵⁴. The question which should generally be asked, and the answer to which should define admissibility, is: “does the piece of information make a fact more or less probable?”

In that context, one illustrative question is whether, in the trial of an alleged rape in a hotel bedroom, if a woman emerges from the room and says to the night porter that X has just raped her, is that evidence *relevant* to proof of the charge? Supposing she emerges and passes the porter without a word. Is that *relevant*? In the modern world, the answer must be: yes. It does not just bear upon the woman’s credibility and reliability but upon the fact in issue. It is qualitative even if, with our current rules, it cannot be regarded as probative, in the sense of being corroborative of a

⁵³ *Rationale of Judicial Evidence* (ed JS Mill) (1832) vol 3, p 3)

⁵⁴ *CJM v HM Advocate* 2013 SCCR 215, ss 274-275 of the Criminal Procedure (Scotland) Act 1995

complainer's testimony. This again is the type of inflexible and outmoded approach requiring attention.

6. Sufficiency

It is not my intention to rehearse what has already been said elsewhere on corroboration. Suffice it to say, but for the Union with England, it is highly likely that Scotland would have abandoned what is an anachronism in this jurisdiction by the early part of the 19th Century. When the requirement is finally abolished in criminal cases, the courts can take a proper look at the quality of evidence and take decisions accordingly. As a result of the recommendation to abolish the technical requirement of corroboration, there has been some debate about whether other reforms should follow; notably in relation to the majority required for jury verdicts and the "not proven" verdict. In my Report, I did not take the view that the issues of verdicts and corroboration were strongly linked⁵⁵. The standard of proof, which, of course is the real practical protection against miscarriages of justice, remains "beyond reasonable doubt". The existence or not of a technical rule relative to corroboration neither strengthens nor weakens that standard.

So far as weighed majorities are concerned, if Parliament wishes to increase the required majority to, say, 10 out of 15, it is doubtful whether there will be any outcry

⁵⁵ Report para 1.0.20

at such a move⁵⁶. That is not really the issue for debate. It is important for a variety of reasons for Scotland to retain its own legal system and for its laws to reflect the social values and aspirations of its own people. Some traditions are well worth retaining for the purposes of Scottish identity, even if some others may be less worthy of homage. If the majority is to be increased, it is recognised that the value of the third “not proven” verdict has also to be reconsidered. I offer no view on what the answer should be. That is an issue for Parliament, based upon what practical effect the removal of the third verdict might be thought to have. I do not have sufficient comparative statistical information on that matter to allow me to form such a view.

Another area requiring review, if verdicts are to be re-assessed, is this. In all other jury systems, the majority required for a verdict applies to any verdict and not just that of “guilty”. It was not that long ago that this was thought by some judges to apply in Scotland also; even to each of the two acquittal verdicts⁵⁷. Be that as it may, in system in which at least 10 out of 12 are required for a guilty verdict, that majority is required equally for a not guilty verdict. Thus, whereas in Scotland at present, 8 or 9 out of 15 being in favour of an acquittal will result in an acquittal, elsewhere it does not. It results either in the jury deliberating until the number for a particular verdict reaches 10 or there is a “hung” jury with the prospect of a re-trial. Once

⁵⁶ In wartime, 5 out of 7 was required; see *Mackay v HM Advocate* 1944 JC 153

⁵⁷ *Glen v HM Advocate* 1988 JC 42; see now *Beck v HM Advocate* [2013] HCJAC 51

more, I am not in a position to advance a view on what form of verdicts should be taken forward. That too is essentially for the Government, and ultimately Parliament, to decide. All that this paper does is to suggest that obvious care must be taken in determining what represents the correct balance, particularly if it is decided that the “not proven” verdict is to go.

What I did say in my report⁵⁸, and what I continue to consider important in jury trials, is that a single judge or sheriff should not be given the power to withdraw cases from a jury on the basis of a submission that “no reasonable jury” could convict upon the evidence available. There is a perception held by some that there is a greater power to do this in common law jurisdictions. That is true, at least in the legal theory of some of those other jurisdictions⁵⁹, but the modern practice in almost all jurisdictions is different from that theory⁶⁰. In most of these, the age of the patrician judge seeing himself as entitled as of right to impose his/her singular view on the sufficiency of evidence in a solemn criminal case is confined to the past. This power was specifically negated in Scotland, because of existing misunderstandings, in recent legislation⁶¹ and, my Report concluded, ought not to be encouraged. The principle ought to remain that, in solemn cases, the issue of what the evidence proves is, as a matter of fact, to be determined by the jury. Until that principle is

⁵⁸ para 7.3.19

⁵⁹ In England see *Galbraith* [1981] WLR 1039, Lane CJ at 1042

⁶⁰ see eg *R v Christou* [2012] EWCA Crim 450; and in Australia *Doney v The Queen* (1990) CLR 207

⁶¹ 1995 Act s 97D, introduced by the Criminal Justice and Licensing (Scotland) Act 2010 s 73

departed from, no individual judge or sheriff should be able to remove a solemn case from the jury where there is evidence, which, if believed and considered reliable, entitles the jury to return a verdict of guilt. If the verdict is unreasonable, that can be reviewed in due course by a panel of three judges on appeal⁶², where the prospect of an idiosyncratic or maverick view of the evidence is less likely to prevail.

7. The way forward

Returning then to where this paper started, this is an era of electronic recording and broadcast. As technology progresses, more and more of the incidents which are tried in court will be captured in some form of digitally recorded format; be it someone's mobile phone, CCTV files or pictures taken by a policeman at the scene at the time. What the witnesses say at the time will be recorded in sound and vision. Let us move with the times and devise an approach to the production of all of this information which is consistent with modern thinking. The days of the lengthy trial, in the sense of a diet (or rather several diets) at which all the witnesses and parties are supposed to turn up at the same time— and where the trial may be aborted in the event of a failure by a crucial witness or the accused to appear on a particular day — should be considered numbered. Such trials are time consuming, expensive and unnecessary in the modern era. They are not conducive to justice either for the accused, the victim or the public. They do not operate in a manner best suited to the

⁶² 1995 Act s 106

ascertainment of fact. We ought to be moving towards a situation where the trial diet is the day set down for the final determination of the case. The evidence will to a significant extent be in the form of electronically recorded material of one sort or another. If a witness requires to appear before the sheriff or jury for cross-examination or other purposes – that will be a matter for application to, and determination by, the sheriff or judge. If it is necessary, the process ought to be by appointment and recorded. There will be an end to the uncertainty caused by waiting to see who turns up for the trial and what they, after much reflection, mature or otherwise, have decided to swear to under oath. A much fairer system of justice for all will take Scotland forward to 2020 and beyond.

9 May 2013
Lord Carloway