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The law of evidence is a fascinating blend of practical and academic issues. It is practical because it is the law which is applied in the courts every day to determine, amongst other things, whether evidence ought to be admitted, the use which may be made of evidence once it has been admitted and the questions which witnesses may be asked. It is a body of law which must be known and understood thoroughly by any advocate (particularly those who practise in the criminal courts), as he or she may need to make submissions on a question of evidence or related procedure at very short notice. But this does not mean the law of evidence is simply a body of rules to be learnt by rote. Far from it. The law of evidence is a discipline which can and ought to be studied at an academic level, for no advocate will be able to support his or her submissions on what the law is, or on what it ought to be, or on how a discretionary power should be exercised, without an appreciation of the principles and considerations of policy which underpin the subject. Certainly, one can comprehend the law of criminal evidence only if something is known of the rights-based theories of jurisprudence, of concepts such as 'logical relevance' and 'proof', and of the weaknesses and prejudices which are an inherent part of the human psyche.

The law of evidence, criminal evidence in particular, is a dynamic body of flexible discretionary powers and inflexible rules which have evolved out of (and continue to be influenced by) considerations of public policy, common sense, logic, psychology, philosophy and legal principle. An important consequence is that decided cases do not usually amount to binding precedents to be slavishly followed by judges in subsequent cases. More often than not, a case on the law of evidence provides nothing more than an illustration of how logic and certain well-established principles or policy considerations have been applied to a particular factual scenario. For example, if a man charged with committing a sexual offence against a boy had photographs of naked boys in his home, and such evidence is held on appeal to have been properly admitted at his trial, the judgment of the Court of Appeal does not set a precedent to the effect that incriminating articles of this sort can always be admitted against a man charged with a sexual offence against another male. Nor does a case where indecent photographs in the accused's possession are held to have been wrongly admitted at his trial for sexually assaulting a woman provide any precedent for the exclusion of such evidence. To determine whether evidence of this sort should or should not be admitted requires an understanding of the particular circumstances of the case, the context in which the relevance and, in particular, the *cogency* of the evidence are determined. But it is also necessary to understand the various other factors which may militate against the admission of the evidence, that is to say, the principles and policy considerations which could justify excluding relevant evidence. Much of the law of criminal evidence was developed by the courts during the nineteenth and twentieth centuries on the premise that certain types of relevant evidence should be kept from the jury, and although Parliament has recently intervened to make the admission of some types of evidence easier, or even possible for the first time, the exclusionary principles which influenced the courts in the past are no less valid today.

The fact that logically relevant evidence can quite properly be excluded is the practical outcome of a conflict which lies at the heart of the law of evidence – a conflict between the ‘principle of free proof’ on the one hand and countervailing considerations of public policy on the other (Figure 1.1). The principle of free proof demands the admission of all available evidence which is logically relevant to a disputed issue of fact on the ground that the exclusion of any relevant evidence encourages the jury to determine the issue on a false factual basis, thereby increasing the possibility that they will reach an erroneous verdict. The problem with this analysis is that it ignores the fallible nature of the human fact-finding tribunal. An item of evidence may well be logically relevant to the determination of a disputed issue of fact, but its admission may distract the jury from other more valuable evidence, or engender in them a feeling of hatred for the accused, or lead them along a path of reasoning which would exaggerate the true worth of the evidence. Other evidence may simply be too unreliable to leave to the jury notwithstanding the high value it would have if true. Accordingly, relevant evidence may be excluded to *reduce* the possibility that the jury will reach the wrong verdict. In practice, the exclusionary considerations tend to militate against the admission of prosecution evidence rather than evidence tendered by the accused because of the importance attached to the desirability of acquitting the innocent. The conflict between the principle of free proof and countervailing considerations of policy is often, therefore, a conflict between free proof and the principle in criminal proceedings that the accused should receive a fair trial.

Great weight is attached to the ‘fair trial principle’, but it is not the only reason for excluding logically relevant evidence. In other words, the law of evidence is not solely concerned with ensuring that the right decision is reached at the end of the trial. An example is provided by s. 76(2)(a) of the Police and Criminal Evidence Act 1984, which renders any confession inadmissible (as a matter of law) if it was, or might have been, obtained in consequence of oppressive conduct. A confession obtained by oppression is inadmissible even if it is demonstrably true, regardless of the nature of the crime committed. The underlying policy is that the rights and dignity of the suspect must be protected if this country is to regard itself as a free and democratic society, even if the result is that the occasional criminal, indeed murderer, should go unpunished (the ‘protective principle’). Another important consideration is the desirability of not bringing the criminal justice system into disrepute by admitting the fruits of serious police misconduct (the ‘integrity principle’).

Logically, relevant evidence may also be excluded on the ground that it is too unreliable to be placed before the jury, for example where the evidence comprises a witness statement made by a proven reprobate who is unwilling to face cross-examination. Conversely, it may be more difficult to justify the exclusion of demonstrably reliable evidence. In other words, the ‘reliability principle’ may add cogency to the principle of free proof or detract from it. If, for example, the police break into the accused’s home and unlawfully remove a diary containing incriminating statements, the principle of free proof and the reliability principle would work together in favour of admitting that evidence. Its admission would not have an unfair effect on the trial itself, although it might be regarded as unfair to admit evidence which has been obtained by police impropriety. In order to exclude such evidence, some other principle must be found, such as the integrity principle referred to above or the principle that citizens should be protected from unlawful interference in their private affairs. The fact that even a demonstrably reliable

confession is inadmissible if there is a realistic possibility that it was obtained by oppression is the most obvious example of the reliability principle being trumped by the integrity and/or protective principles.

Demonstrably reliable evidence may also be excluded on purely pragmatic grounds if its probative value would be too low to justify the expense, delay or vexation its admission

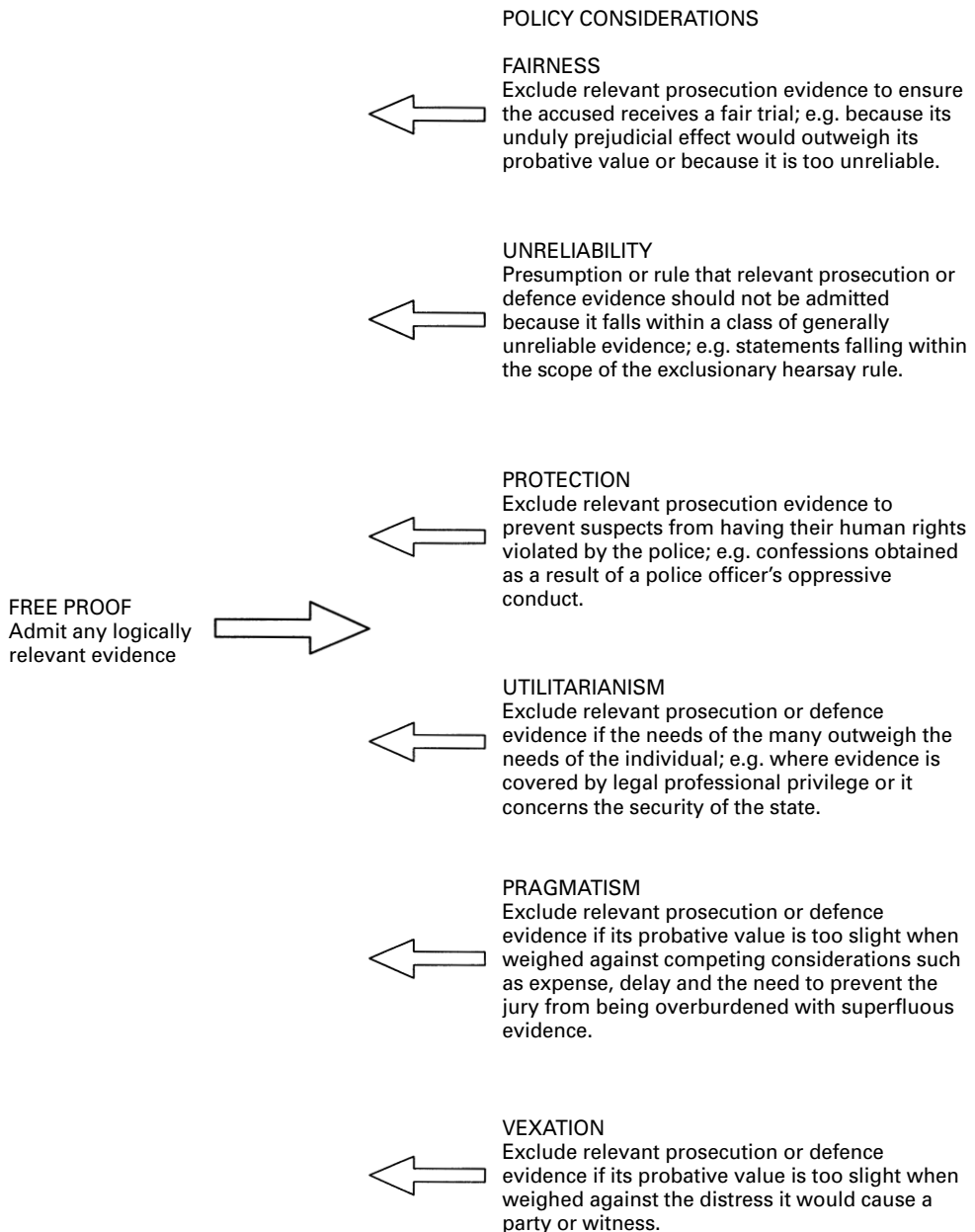


Figure 1.1 The law of criminal evidence

would bring; or if it would not be in the public interest to allow the evidence to be revealed (the utilitarian policy of 'public interest immunity'). However, even highly sensitive information may need to be revealed if its admission would be necessary to ensure that the accused receives a fair trial.

Many of the considerations which justify the exclusion of evidence in criminal proceedings are of only marginal importance in civil proceedings tried by a professional judge sitting alone. Judges are generally thought to be better able to assess the reliability and weight of evidence and to put aside any personal prejudices they might have; so evidence which might be excluded in criminal proceedings may be freely admitted in civil proceedings. Furthermore, the evidence gathering process which precedes the civil trial is usually undertaken by private individuals rather than the police, so the protective and integrity principles are of less importance, particularly as the judge may penalise improper conduct by an appropriate order for the payment of costs. The governing principle in civil proceedings is that of free proof. The risk of unreliability is generally an insufficient reason for the exclusion of evidence: unreliability goes to weight rather than admissibility. Nevertheless, some aspects of the law of evidence apply equally to civil and criminal proceedings. Evidence may be excluded if it is insufficiently probative to make its admission worthwhile or if it would be in the public interest to suppress it (for example because it concerns the security of the state).

It is also important to understand that the law of evidence developed in the context of jury trials, where there is a sharp division between the respective roles of the judge (the 'tribunal of law') and the jury (the 'tribunal of fact'). Questions of law, including the admissibility of evidence, are for the judge alone. The jury's role is limited to deciding whether disputed issues of fact have been proved. The judge will consider the evidence and, if it is excluded, the jury will never hear about it. If the evidence is admitted, the judge will direct the jury on the use which may be made of it and on any factors which might render it unreliable. Accordingly, much of the law of evidence is irrelevant to civil proceedings and of only limited significance in proceedings before magistrates, although in theory the law is the same whether the accused is tried summarily (in a magistrates' court) or on indictment (before a judge and jury in the Crown Court).

The purpose of the trial is, of course, to give the claimant or prosecution the opportunity to prove an allegation which has been made against the civil defendant or criminal accused. The law of evidence regulates the admission of evidence and the use which may be made of it during the trial, with appropriate directions from the judge in jury trials, but it also establishes who should prove disputed issues of fact and the degree of likelihood which has to be met before a fact can be said to have been 'proved'. In the context of a trial, the term 'proof' must be treated with caution. Very little, if anything, can be proved with certainty, so all that can be hoped for is a sufficiently high probability that the assertion of fact is true or false (as the case may be). As Lord Simon said in *DPP v. Shannon* [1974] 3 WLR 155 (HL) (at p. 191):

'The law in action is not concerned with absolute truth, but with proof before a fallible human tribunal to a requisite standard of probability in accordance with formal rules of evidence (in particular, rules relating to admissibility of evidence).'

The function of the tribunal of fact – the Crown Court jury in particular – is therefore somewhat similar to that of the historian, trying to piece together a picture of what happened in the past from fragments of evidence which may be of uncertain (and

unascertainable) reliability. The task of the professional historian is arduous enough, but the jury's difficulties are exacerbated by the exclusionary rules which prevent them from seeing much relevant (and even highly probative) evidence, their own 'amateur' composition, and the very nature of the English adversarial system. The evidence presented by each side may have been subjectively selected by the parties to support their respective cases. The defence will withhold anything which undermines the accused's case; the police may intentionally or negligently lose or fail to gather some evidence or perhaps even withhold evidence from the prosecution. Then there is the question of the witnesses' credibility – mistaken observations, misremembered details, confusion, bias, lies, self-interest, self-delusion, self-preservation and so on. All these human failings tend to undermine the jury's search for 'absolute truth'. The seemingly credible witness may in reality be a dishonest and skilled hypocrite; the convincing eye-witness may be honestly mistaken or have his own interests to serve; and the jury itself, as a disparate group of individuals, will have their own personal preferences and prejudices.

A case in point, with horrendous consequences for the accused, was that of Mr Mahmoud Mattan. In July 1952, Mattan, a Somali, was tried for the murder of a shopkeeper, V, and sentenced to death and executed in September of that year. V had had her throat cut by someone on the evening of 6 March 1952. The case against Mattan depended almost entirely on the identification evidence of one man (W), who claimed that he saw Mattan leave V's shop at 8.15 p.m. on that evening. W's witness statement to the police made on 7 March differed materially from the evidence he gave from the witness box, but it had not been disclosed to the defence. W's statement described the person he had seen as a Somali with a gold tooth, but Mattan had no such tooth, and W did not repeat that part of his description during the trial. (W's identification evidence was also demonstrably flawed in other respects.) Furthermore, W had received a reward from the police, but that fact had not been disclosed. Nor had the defence been informed that four other witnesses who had seen a man near V's shop at or about the time of the murder had failed to pick Mattan out at an identification parade. One witness had even told the police that Mattan was *not* the man she had seen. A witness statement which supported Mattan's alibi was withheld, as was evidence that another suspect, also a Somali, had admitted being near the shop at the time of the murder. That suspect (who did have a gold tooth) was subsequently tried for a separate murder by stabbing in 1954 and found not guilty by reason of insanity. Mattan's conviction for the murder of V was quashed in 1998 (*R v. Mattan (Deceased)* (1998) *The Times* 5.3.98 (97/6415/S2) (CA)). Rose LJ, having noted that there had been many changes in the law since 1952, said:

'The case has a wider significance in that it clearly demonstrates five matters. First, capital punishment was not perhaps a prudent culmination for a criminal justice system which is human and therefore fallible . . . Fourthly, no-one associated with the criminal justice system can afford to be complacent. Fifthly, injustices of this kind can only be avoided if all concerned in the investigation of crime, and the preparation and presentation of criminal prosecutions, observe the very highest standards of integrity, conscientiousness and professional skill.'

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