# Brief CASE

# LAW OF EVIDENCE

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# Briefcase on the Law of Evidence

Second Edition

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# 1 Preliminary Matters

## 1.1 Relevance

### 1.1.1 The general rule is that evidence must be relevant in order for it to be admissible

**DPP v Kilbourne (1973) HL**

The defendant was charged with sexual offences against two groups of boys. One of the issues related to the admissibility of evidence given by one group of boys in relation to the charges involving the other group.

*Held* In order for evidence to be admissible, it must first be relevant. Relevant evidence is evidence which has probative value; this may be defined as truth proving value. In other words, does it help to determine whether the facts in issue exist or do not exist? Lord Simon held that:

> Evidence is relevant if it is logically probative or disprobative of some matter which requires proof…It is sufficient to say, even at the risk of etymological tautology, that relevant (that is, logically probative or disprobative) evidence is evidence Which makes the matter which requires proof more or less probable.

**Hui Chi-Ming v R(1991)PC**

The defendant was charged, as an accomplice, with murder. The trial judge refused to allow evidence to be given of the earlier acquittal of the principal on a charge of murder. The defendant appealed, *inter alia*, against this ruling.

*Held* The evidence of the outcome of an earlier trial, even though arising out of the same transaction, was irrelevant and, therefore, inadmissible. The decision of the jury in the previous case amounted only to the opinion of that jury and therefore had no probative value in this case.

**R v Kearley (1992) HL**

The defendant was charged with possession and supply of controlled drugs. The prosecution called as witnesses police officers who stated that, while they were in the defendant's flat, after he had been arrested, they intercepted 10 telephone calls in which the callers asked to speak to the defendant in order to buy drugs. Also, seven persons called at the flat in order to buy drugs. The prosecution was either unwilling or unable to call any of these

persons as witnesses. The defendant objected to this evidence being admitted.

*Held* The evidence was irrelevant. Lord Ackner stated:

> An oral request or requests for drugs to be supplied by the defendant, not spoken in his presence or in his hearing, could only be evidence of the state of mind of the person or persons making the request and, since his or their state of mind was not a relevant issue at the trial, evidence of such a request or requests, however given, would be irrelevant and therefore inadmissible.

### 1.1.2 Evidence must be relevant in order to be admissible, but relevant evidence is only admissible to the extent that it is not excluded by any rule of evidence

#### Sparks v R (1964) PC

The defendant was charged with the indecent assault of a girl under four years of age. The trial judge had ruled as inadmissible evidence from the girl's mother to the effect that the girl had told her shortly after the incident that her attacker was 'a coloured boy'. The defendant was a 27 year old white man. One of the grounds of appeal was that this evidence was relevant in that it had high probative value and, therefore, should have been admitted.

*Held* The fact that evidence was relevant is not enough in itself. The other rules of admissibility also had to be considered. Here, the evidence was inadmissible because of the exclusionary hearsay rules.

#### R v Blastland (1985) HL

The defendant was charged with the murder of a boy. At his trial, he sought to adduce evidence that another man, M, had made statements to a number of people about the body of a boy having been found. These statements had been made before the boy's body had been discovered. This indicated that M was involved in the murder. This evidence was rejected by the trial judge.

*Held* The evidence of the persons to whom M had made these statements could not be admitted. These statements were hearsay and, although they were probative, had to be excluded.

## 1.2 Judicial discretion

### 1.2.1 Even if evidence is relevant and not excluded by any rule of evidence, the trial judge has a general discretion to exclude it

**R v List (1965) CA**

The defendant was charged with receiving stolen goods under the Larceny Act 1916 (see, now, the Theft Act 1968). The prosecution sought to prove guilty knowledge by adducing evidence that the defendant had within the previous five years been convicted of offences involving fraud and dishonesty. This was allowed under the terms of the 1916 Act. The defendant appealed on the grounds that the trial judge should have excluded this evidence.

*Held* Roskill J held that:

> A trial judge always has an overriding duty in every case to secure a fair trial and, if in any particular case he comes to the conclusion that, even though certain evidence is strictly admissible, yet its prejudicial effect once admitted is such as to make it virtually impossible for a dispassionate view of the crucial facts of the case to be thereafter taken by the jury, then the trial judge, in my judgment, should exclude that evidence.

Note

This general discretion to exclude evidence if 'its prejudicial effect is more than its probative value' has always been recognised under the common law and is now given statutory authority by virtue of s 78 of the Police and Criminal Evidence Act 1984 (PACE).

### 1.2.2 Provided that the evidence is relevant, there is no discretion to exclude evidence merely because that evidence has been illegally obtained

**Jeffrey v Black (1978) DC**

The defendant was arrested for stealing a sandwich. The police then searched his home without first obtaining a search warrant and found drugs on the premises. The justices ruled that the evidence obtained during the search had been improperly obtained. The prosecution appealed.

*Held* The mere fact that evidence was obtained in an irregular fashion did not prevent it from being relevant and admissible. Lord Widgery, however, went on to say, *obiter:*

> But, if the case is exceptional, if the case is such that not only have the police officers entered without authority, but they have been guilty of trickery or they have misled someone, or they have been oppressive or they have been

> unfair or, in other respects, they have behaved in a manner which is morally reprehensible, then it is open to the justices to apply their discretion and decline to allow the particular evidence to be let in as part of the trial. I cannot stress the point too strongly that this is a very exceptional situation and the simple, unvarnished fact that evidence was obtained by police officers who had gone in without bothering to get a search warrant is not enough to justify the justices in exercising their discretion to keep the evidence out.

### R v Sang (1980) HL

The defendants were charged with conspiracy to utter counterfeit currency. The allegation was raised that they had been induced by a police informer to commit an offence they otherwise would not have committed. The issue of entrapment was raised during a trial within a trial. The trial judge refused to exclude the evidence and the appeal finally reached the House of Lords on the following certified point of law: does a trial judge have a discretion to refuse to allow evidence—being evidence other than evidence of admission—to be given in any circumstances in which such evidence is relevant and of more than minimal probative value?

*Held* Lord Diplock, delivering the unanimous decision of the House of Lords, answered this question as follows:

> (1) A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value. (2) Save with regard to admissions and confession and generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained. It is no ground for the exercise of discretion to exclude that the evidence was obtained as the result of the activities of an *agent provocateur.*

*Note*

It is a matter of debate as to whether this decision survives the enactment of s 78 of PACE 1984. The section provides explicitly that the court may exclude evidence 'if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it'.

### R v Christou (1992) CA

The defendants were charged with burglary and handling stolen goods. The police had mounted an undercover operation by running a shop that bought and sold jewellery. The transactions were recorded by hidden

cameras. The defendants argued that this evidence ought to be excluded under s 78 of PACE 1984 because of the manner in which it had been obtained.

*Held* The evidence was properly admitted. Although a trick was involved, Lord Taylor ruled that 'the trick was not applied to the appellants; they voluntarily applied themselves to the trick. It is not every trick…which results in unfairness'.

**Williams v DPP (1993) QBD**

The police had parked a van in the street which apparently contained cartons of cigarettes. The defendants were then observed removing these cartons. These were, in fact, dummy cartons. At their trial, the defendants sought to exclude the evidence under s 78 of PACE.

*Held* that the police had done nothing to force, persuade, encourage or coerce the defendants. The defendants had acted voluntarily with full understanding of their own dishonesty. Accordingly, there was no basis for the application of s 78.

**R v Smurthwaite; R v Gill (1994) CA**

In both these cases, the defendants were charged with soliciting to murder and the person solicited in each case was an undercover police officer. The issue which arose concerned the admissibility of what was said by each defendant to the undercover officer. It was submitted that this should be excluded under s 78.

*Held* Reviewing both the common law and the statutory position, the evidence had been rightly admitted. It was true that both s 78 and s 82(3) preserved the common law power to exclude evidence at the court's discretion. However, it was not enough merely to consider the manner in which the evidence had been obtained. It was necessary to go further and demonstrate that the manner in which it was obtained would have the adverse effect on the fairness of the proceedings as required by the statute. Lord Taylor went on to say that 'it is not possible to give more general guidance as to how a trial judge should exercise his discretion under s 78 in this field, since each case must be decided on its own facts'.

**R v Khan (1996) HL**

The defendant and his cousin had travelled on a flight from Pakistan to England. Both men were stopped and searched by customs officers. The cousin was found to be in possession of a large quantity of heroin and was arrested and charged. No drugs were found on the defendant and he was released without charge. However, police suspicions were aroused and they mounted an undercover operation. This involved placing an electronic listening device on the outside of premises without the consent of the occupier, but in accordance with Home Office guidelines. By this means,

the police obtained a tape recording of a conversation in which the defendant indicated that he had been involved in the importation of heroin. During the trial, the prosecution admitted that the installation of the listening device had constituted a civil trespass and that some damage had been done to the premises. The defence submitted that the evidence of conversations in a private house was inadmissible and that it should be excluded under s 78. The trial judge refused. The defendant pleaded guilty, but only on the basis of the ruling by the trial judge and he reserved the right to appeal against it. His appeal was dismissed by the Court of Appeal and the issues, for the House of Lords, were whether the tape recorded conversation was admissible and whether the trial judge had rightly exercised his discretion at common law or under s 78.

*Held* There was no right of privacy under English law, despite the attempt to argue that it arose under Art 8 of the European Convention on Human Rights. Even if there had been such a right which had been breached, this was merely one of the matters to be taken into account when exercising discretion. Moreover, evidence which had been obtained improperly, or even unlawfully, remained admissible. This was subject to the power of the trial judge to exclude it in the exercise of his common law discretion or under s 78. This discretion would be exercised if the admission of the evidence would render the trial unfair. On the facts of this case, the trial judge was fully entitled to hold that the circumstances in which the evidence was obtained did not cause unfairness to the defendant.

**R v Khan, Sakkaravej and Pamarapa (1996) CA**

P was a diplomat at the Thai embassy and it was alleged that he brought into the country a considerable quantity of drugs in his luggage. This luggage was examined in the hold of the aircraft at Heathrow Airport without P's knowledge. P carried his luggage through customs while wearing his diplomatic identity card. He was then stopped and his bag opened in his presence. The Thai embassy waived his diplomatic immunity upon his arrest. The issue on appeal was whether the trial judge should have excluded the evidence under s 78 as: (a) the initial examination of P's luggage breached the Diplomatic Privileges Act 1964; (b) the initial search of the luggage was unlawful as it had not taken place in P's presence and that this illegality tainted the second search; and (c) his arrest was wrongful under the 1964 Act as, at that time, diplomatic immunity had not yet been waived.

*Held* Even if the searches had been illegal, the trial judge had a discretion, not an obligation, to exclude. It is only where there is unfairness to the defendant that the evidence would be excluded. On the facts of this case, the trial judge had ruled that, even if there was any illegality, it had no effect on the quality of the evidence or on the fairness of admitting it. The

Court of Appeal would only interfere if the trial judge had not exercised his discretion at all or if he had done so unreasonably in the *Wednesbury* sense (see *Associated Provincial Picture Houses v Wednesbury* (1948)).

*Note*

The use of s 78 will also be considered when dealing with the cases involving confessions.

# 2 Burden and Standard of Proof

## 2.1 Burden of proof in criminal cases

### 2.1.1 The general rule is that the prosecution has the burden of proving all the facts in issue

**Woolmington v DPP (1935) HL**

The defendant was charged with the murder of his estranged wife. He claimed that he had been trying to persuade her to return to him by threatening to shoot himself and that the gun had gone off accidentally. The trial judge directed the jury that, once the prosecution proved the fact of killing, it was for the defence to prove the absence of malice.

*Held* The House of Lords held that this direction was wrong. Viscount Sankey laid down the following general principle:

> 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 prisoner's guilt…No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

However, two exceptions were recognised by the House of Lords: insanity and any statutory exception.

**Bratty v AG for Northern Ireland (1963) HL**

The defendant was charged with murder. He pleaded both automatism and insanity.

*Held* The House of Lords held that, so far as automatism is concerned, the burden was on the prosecution to prove that the act was voluntary. This was because voluntariness was part of the proof of the *actus reus.*

**DPP v Morgan (1976) HL**

The defendants were charged with rape under s 1 of the Sexual Offences Act 1956. It appeared that the husband of the woman concerned had told them that his wife would consent to sexual intercourse. The issue which arose was whether: (a) it was for the prosecution to prove that she did not consent and that the defendants either (i) knew this or (ii) had no reasonable grounds for believing that she consented; or (b) it was for the defendants to prove a reasonable belief in her consent?

*Held* The prosecution had the duty of proving all the elements of the offence. In order to prove rape, the burden on the prosecution was to prove lack of consent, or lack of reasonable belief in consent.

Note

(a) The House of Lords upheld the conviction on the grounds that no miscarriage of justice had occurred. It was impossible that there could have been any reasonable belief in consent, (b) This area of the law was considered by Parliament in the Sexual Offences (Amendment) Act 1976 s 1(1), which had the effect of upholding the decision of the House of Lords, (c) Although the Criminal Justice and Public Order Act 1994 repealed s 1(1) of the 1976 Act, a similar provision has been added to the 1956 Sexual Offences Act. This leaves the decision of the House of Lords intact.

### 2.1.2 It is sometimes the case that, while the legal burden remains on the prosecution, the evidential burden may 'shift' to the defendant

**Mancini vDPP (1941) HL**

The defendant was charged with murder and pleaded provocation.

*Held* The prosecution has the legal duty to prove the murder and that this may mean a duty to negative provocation. However, this issue does not arise until and unless the defendant raises some evidence as to the existence of provocation, that is, satisfies the evidential burden of proof.

Note

The defence of provocation is now contained in statutory form, in s 3 of the Homicide Act 1957. This Act does not specifically put a legal burden on the defendant and so the rule laid down in this case is not affected.

**R v Lobell (1957) CCA**

The defendant was charged with intent to cause grievous bodily harm. He pleaded that he had been acting in self-defence.

*Held* The rule that the prosecution always has the burden of proof was held to be subject only to two exceptions insanity and any statutory exception. However, this does not mean that the prosecution is obliged to negative all possible defences. If the issue of self-defence is to be left to the jury, it is for the defendant to give some evidence of the possible existence of such a defence.

**Hill v Baxter (1958) DC**

On a charge of dangerous driving, the defendant pleaded that he had become unconscious and, consequently, was acting in a state of automatism.

*Held* Although it is for the prosecution to prove voluntariness (that is, disprove automatism), it is for the defence to provide evidence of its possible existence.

**R v Gill (1963) CCA**
The defendant was charged with conspiracy to steal and with larceny. He relied on the defence of duress.

*Held* It was for the defendant to raise evidence of the existence of duress. *Per* Edmund Davies J: 'Once he has succeeded in doing this, it is then for the Crown to destroy that defence.'

**R v Spight (1986) CA**
The defendant was charged with attempting to procure an act of gross indecency under the Sexual Offences Acts of 1956 and 1967.

*Held* The effect of the statutory provisions is that there is an evidential burden on the defendant to raise privacy, consent or exempted age. The prosecution only has a legal burden to negative these defences if the defendant has first satisfied the evidential burden.

### 2.1.3 If insanity is raised as a defence, then the legal, as well as the evidential, burden is on the defendant

**Bratty v AG for Northern Ireland (1963) HL**
See 2.1.1.

*Held* On the issue of insanity, the prosecution is entitled to rely on the presumption that every defendant has sufficient mental capacity to be criminally responsible. *Per* Lord Denning: '…so far as the defence of insanity is concerned, the defence must prove that the act was an involuntary act due to disease of the mind.'

### 2.1.4 A statute may expressly place the burden of proof on the defendant, for example, diminished responsibility under s 2 of the Homicide Act 1957

**R v Campbell (1986) CA**
The defendant was charged with and convicted of murder. The question which arose was whether the trial judge should have directed the jury as to the possible existence of diminished responsibility, even though this had not been raised by the defence.

*Held* Section 2(2) of the Homicide Act 1957 not only placed the burden of proving diminished responsibility on the defence, but it also left to the defence the decision whether or not to raise it.

**R v Carr-Briant (1943) CCA**
The defendant was charged with corruption under the Prevention of Corruption Acts 1906 and 1916. These provided that any money paid 'shall

be deemed to have been paid or given and received corruptly…unless the contrary is proved'.

*Held* The burden is shifted to the defendant to show that the money was received innocently.

> Note
> In this case, the sentence was quashed because of a wrong direction as to the standard of proof.

**R v Champ (1981) CA**

The defendant was charged under the Misuse of Drugs Act 1971 in that she had unlawfully cultivated cannabis. A defence was available under s 28 of the Act if the defendant could prove, *inter alia,* that she did not know it was a cannabis plant. She claimed that she had been led to believe that the plant in question was hemp.

*Held* Section 28 had the effect of placing the burden of proof on her to prove this.

**R v Rautamaki (1993) CA**

The defendant was charged under the Misuse of Drugs Act 1971 with possession with intent to supply. One of the issues concerned the use of s 28.

*Held* As the defendant had admitted possession of the drugs, the burden of proving his innocence lay on him under s 28. He would only be acquitted if he proved that he neither believed or suspected, nor had reason to suspect, that the substance was a controlled drug.

### 2.1.5 A statute may impliedly, that is, through a process of statutory interpretation, place the burden of proof on the defendant

**R v Edwards (1975) CA**

The defendant was charged with and convicted of selling intoxicating alcohol without a licence, contrary to the Licensing Act 1964. On appeal, it was argued that the prosecution should have adduced evidence to show that there was, in fact, no license, since the prosecution had access to the register of licences. The prosecution argued, *inter alia,* that s 81 of the Magistrates' Courts Act 1952 (the precursor of the present s 101 of the Magistrates' Courts Act 1980) was a statutory statement of the common law and this ought to be applied in this case. Under that section, if the defendant wished to rely on any exception, exemption, proviso, excuse or qualification, the burden of proof shifted to the defendant. The defendant argued that this only applied if the charge concerned facts which were peculiarly within the defendant's own knowledge.

*Held* The same rule applied to trials on indictment as was applied to summary trials (as laid down in the Magistrates' Courts Act), provided that, on the true construction of the statute, it provided an exception, exemption, proviso, excuse or qualification. Here, as the defendant was relying on a licence, he came within that formulation. Accordingly, he had the burden of proving its existence. Furthermore, the shift in the burden of proof did not depend on whether or not the defendant had any particular knowledge.

**R v Spurge (1961) CCA**

The defendant was charged with dangerous driving and raised the defence of a mechanical defect. He was convicted and the conviction was upheld on appeal. One of the issues concerned the burden of proof and whether there was a rule which placed the burden of proof on the defendant if the facts were within the particular knowledge of the defendant.

*Held Per* Salmon J:

> There is no rule of law that, where the facts are peculiarly within the knowledge of the accused, the burden of establishing any defence based on those facts shifts to the accused. No doubt, there are a number of statutes where the onus of establishing any statutory defence is placed on the accused because the facts relating to it are peculiarly within his knowledge. But, we are not here considering any statutory defence.

**R v Hunt (1987) HL**

The defendant was charged with possessing a controlled drug contrary to s 5 of the Misuse of Drugs Act 1971. Under the Misuse of Drugs Regulations 1973, it was provided that s 5 would not have any effect if the proportion of morphine was less than 0.2% and that it was compounded in such a way that the morphine could not be recovered and there was no risk to health. The police had discovered some white powder at the defendant's home which, when analysed, was found to contain morphine. The prosecution, however, did not adduce any evidence of the proportion of morphine contained in the powder. A submission of no case to answer was made. This was rejected by the trial judge. The defendant pleaded guilty but subsequently appealed.

*Held* It was the task of the prosecution to prove all the elements of the offence. An essential element of the offence was that the powder contained a proportion of morphine which was greater than 0.2%. The prosecution had failed to do this and, applying the rule laid down in the *Woolmington* case (see 2.1.1), the conviction had to be quashed. The House of Lords also held that *Edwards* had been correctly decided and, *per* Lord Ackner:

> …a statute may impose upon the accused the burden of proof…and may do so either expressly or by necessary implication…Where Parliament has made

> no express provision as to the burden of proof, the court must construe the enactment under which the charge is laid. But, the court is not confined to the language of the statute. It must look at the substance and the effect of the enactment.

This means, inevitably, that the courts will have recourse to issues of public policy.

**Q** (1) Can the decision in this case be reconciled with the *Woolmington* case (1935), see 2.1.1?

**Q** (2) Is it right that the courts should have this discretion in deciding if it is the prosecution or defendant who should have the burden of proof?

## 2.2 The burden of proof in civil cases

### 2.2.1 The general rule is that 'he who asserts must prove'. This is supplemented by considering the pleadings, the existence of any statute, any agreement between the parties or the question of which party would find it easier to prove the facts alleged

**Abrath v North Eastern Railway Co (1883) CA**

Abrath was a doctor who had treated M, an alleged victim of a collision involving the North Eastern Railway Co. M had sued the railway company and recovered damages. The railway company then brought an action against Abrath, alleging that he and M had conspired to defraud them by making up a fictitious account of the injuries purported to have been sustained by M. This action was dismissed and Abrath now sought to sue the railway company for malicious prosecution.

*Held* The initial burden of proof was first placed on the plaintiff, but this burden may shift backwards and forwards. *Per* Bowen LJ:

> …the plaintiff is the first to begin; if he does nothing, he fails; if he makes a *prima facie* case, and nothing is done to answer it, the defendant fails. The test, therefore, as to the burden of proof or onus of proof, whichever term is used, is simply this: to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious that as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the onus of proof shifts…it is not a burden that goes on for ever resting on the shoulders of the person upon whom it is first cast. As soon as he brings evidence which, until it is answered, rebuts the evidence against which he is contending, then the balance descends on the other side and the burden rolls over until again there is evidence which once more turns the scale.

On the facts of the instant case, the plaintiff was asserting that the defendants had acted without reasonable and probable cause; the burden therefore lay on him.

Note

It is an essential part of this judgment that: (a) the burden of proof is not static and constantly shifts; and (b) there is no one rule for determining the incidence of the burden.

**Joseph Constantine Steamship Line v Imperial Smelting Corporation (1942) HL**

The plaintiffs were charterers of a ship who claimed damages against the defendant-owners for breach of contract. The defendants pleaded that the contract had been frustrated by an explosion which had destroyed the ship. The plaintiffs responded that the defendants could only rely upon frustration if they could prove that they had not been at fault in the first place. The trial judge ruled that frustration could not apply if it was selfinduced and that the burden of proving that it was self-induced lay on the plaintiffs. This was difficult as there was no explanation of how the explosion had occurred. The plaintiff appealed to the Court of Appeal who ruled in his favour and the defendants appealed to the House of Lords.

*Held* Ordinarily, the burden of proving that the frustration was not selfinduced might lie on the party seeking to rely on it as a defence. In this case, however, it was an integral part of the plaintiffs' claim that the contract had been breached due to the fault of the defendants. Accordingly, the burden lay on them. *Per* Viscount Simon LC:

> When 'frustration' in the legal sense occurs, it does not merely provide one party with a defence in an action brought by the other. It kills the contract itself and discharges both parties automatically. The plaintiff sues for breach at a past date and the defendant pleads that at that date no contract existed. In this situation, the plaintiff could only succeed if it were shown that the determination of the contract were due to the defendants' 'default', and it would be a strange result if the party alleging this were not the party required to prove it.

**Levison and Another v Patent Steam Carpet Cleaning Co Ltd (1978) CA**

The plaintiffs were the owners of a valuable carpet delivered to the defendants for cleaning. The carpet had been lost. Under the terms of the contract between the parties, there was a clause which exempted the defendants from liability for negligence, but not for fundamental breach. The plaintiffs obtained damages and the defendants appealed. One of the issues concerned the burden of proof, that is, whether it was for the plaintiffs to prove fundamental breach, such that the exemption clause could not apply, or whether it was for the defendant to prove the absence of fundamental breach.

*Held* The burden lay on the defendants to prove that there was no fundamental breach. It was held that the contract in question was a contract of bailment and, as such, if the bailee wished to escape liability on the ground that there was an exclusion clause, then it was for the bailee to show what had happened to the goods. *Per* Lord Denning MR:

> The cleaning company in this case did not show what happened to the carpet. They did not prove how it was lost. They gave all sorts of excuses for nondelivery and eventually said it had been stolen. Then I would ask: by whom was it stolen? Was it by one of their own servants? Or with his connivance? Alternatively, was it delivered by one of their own servants to the wrong address?

The defendant had not answered any of these questions and accordingly they were liable.

> Note
>
> This case is often cited as authority for the proposition that the burden of proof is on the party who would find it easiest to discharge.

### Rhesa Shipping Co SA v Edmunds and Another (1985) HL

The plaintiffs were owners of a ship that sank in good weather and calm seas. They sought to recover under insurance policies underwritten by the defendants for loss occasioned by 'perils of the sea', contending that the proximate cause of the ship's loss was a collision with a submarine. The defendants' claimed that the cause of the loss was prolonged wear and tear. It was not possible to examine the ship because it had sunk in deep water.

*Held* The burden of proof lay on the plaintiff to establish the cause of loss. They were unable to do so and, therefore, failed in their action. Although the defendants had put forward an alternative explanation, they incurred no burden of proof. The House of Lords noted that, in cases of this kind success or failure of an action might depend solely on which party had the burden of proof. *Per* Lord Brandon:

> No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take.

## 2.3 Standard of proof in criminal cases

### 2.3.1 Where the burden of proof is on the prosecution, it must be satisfied beyond reasonable doubt

**Miller v Minister of Pensions (1947) KB**

The case concerned an appeal against a decision of a pensions appeal tribunal. One of the issues concerned the standard of proof.

*Held Per* Denning J:

> The degree of cogency…required in a criminal case…is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

**R v Ewing (1983) CA**

The defendant was charged with a number of counts including theft and forgery. The prosecution sought to prove that documents were in his handwriting and made use of s 8 of the Criminal Procedure Act 1865 which allowed for comparisons of handwriting to be made. The question arose as to the standard of proof required.

*Held* The trial judge should have required proof that the documents were in the defendant's handwriting beyond reasonable doubt. *Per* O'Connor LJ:

> The words in s 8, 'any writing proved to the satisfaction of the judge to be genuine', do not say anything about the standard of proof to be used, but direct that it is the judge, and not the jury, who is to decide, and the standard of proof is governed by the common law…and when it is applied in criminal cases the criminal standard should be used.

### 2.3.2 There is no special formula that has to be adopted when directing the jury as to the standard of proof on the prosecution

**R v Kritz (1950) CCA**

The defendant was charged with obtaining money by false pretences. The trial judge, when directing the jury, told them that they had to be reasonably satisfied. One of the points of appeal was whether this was sufficient direction.

*Held* It was immaterial that the phrase 'beyond reasonable doubt' had not been used. *Per* Lord Goddard CJ:

> It would be a great misfortune, in criminal trials especially, if the accuracy of a summing up were made to depend upon whether or not the judge or chairman had used a particular formula of words. It is not the particular formula that matters: it is the effect of the summing up. If the jury are made to understand that they have to be satisfied and must not return a verdict against a defendant unless they feel sure, and that the onus is all the time on the prosecution and not on the defence, then whether the judge uses one form of language or another is neither here nor there…When, once a judge begins to use the words 'reasonable doubt' and to try to explain what is reasonable doubt and what is not, he is much more likely to confuse the jury than if he tells them in plain language: 'It is the duty of the prosecution to satisfy you of the prisoner's guilt.'

**Q** Is there any advantage to be gained from using a particular formula of words?

### R v Summers (1952) CCA

The defendant was charged with theft. On appeal, the issue concerned the direction given by the trial judge as to the standard of proof.

*Held Per* Lord Goddard CJ:

> If a jury is told that it is their duty to regard the evidence and see that it satisfies them so that they can feel sure when they return a verdict of guilty, that is much better than using the expression 'reasonable doubt' and I hope, in future, that that will be done. I never use the expression when summing up. I always tell a jury that, before they convict, they must feel sure and must be satisfied that the prosecution have established the guilt of the prisoner.

### R v Walters (1969) PC

The defendant was charged with murder. One of the issues on appeal concerned the direction of the trial judge as to the standard of proof.

*Held* The view expressed by Lord Goddard in *Kritz* was correct. *Per* Lord Diplock:

> By the time he sums up, the judge at the trial has had an opportunity of observing the jurors…it is best left to his discretion to choose the most appropriate set of words in which to make that jury understand that they must not return a verdict against a defendant unless they are sure of his guilt.

### R v Gray (1974) CA

The defendant was convicted of shoplifting. The trial judge directed the jury that, when considering the question of reasonable doubt, 'it is the sort of doubt which might affect you in the conduct of your everyday affairs'.

*Held* This amounted to a misdirection as it might suggest too low a standard. Megaw LJ expressed the view that it might have been sufficient if the direction had referred to the conduct of 'important affairs'.

**R v Ferguson (1979) PC**

On a charge of murder, the trial judge directed the jury that reasonable doubt was the sort of doubt 'which might affect the mind of a person in the conduct of important affairs'.

*Held* The formula used in the summing up does not matter, so long as the point is made clear to the jury. However, the point was made, *per* Lord Scarman:

> Though the law requires no particular formula, judges are wise, as a general rule, to adopt one. The time honoured formula is that the jury must be satisfied beyond reasonable doubt…It is generally sufficient and safe to direct a jury that they must be satisfied, so that they feel sure of the defendant's guilt. Nevertheless, other words will suffice, so long as the message is clear.

**R v Yap Chuan Ching (1976) CA**

The defendant was charged with theft. In seeking to explain to the jury the standard of proof required of the prosecution, the trial judge directed them that reasonable doubt:

> …is a doubt to which you can give a reason as opposed to a mere fanciful sort of speculation…It is sometimes said the sort of matter which might influence you if you were to consider some business matter. A matter, for example, of a mortgage concerning your house, something of that nature.

*Held* On the facts of this case, there was no danger that the conviction was unsafe. Nevertheless, the use of analogies was not to be recommended. *Per* Lawton LJ:

> Judges would be well advised not to attempt any gloss upon what is meant by 'sure' or what is meant by 'reasonable doubt'…We point out and emphasise that, if judges stopped trying to define that which is almost impossible to define, there would be fewer appeals.

### 2.3.3 Where the burden of proof is on the defendant, this may be satisfied on a balance of probabilities

**Sodeman v R (1936) PC**

The defendant raised the defence of insanity and the issue that arose concerned the standard of proof.

*Held* The standard of proof required was merely on the balance of probability.

**R v Carr-Briant (1943) CCA**

See 2.1.4.

The trial judge had directed the jury that the standard of proof that the defendant was required to prove was beyond reasonable doubt.

*Held Per* Humphreys J:

> In any case where, either by statute or common law, some matter is presumed against an accused person 'unless the contrary is proved', the jury should be directed that it is for them to decide whether the contrary is proved, that the [standard] of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the [standard] may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish.

**R v Campbell (1986) CA**

See 2.1.4.

*Held* Even where the burden of proving diminished responsibility is on the defendant under s 2 of the Homicide Act 1957, the standard is the civil standard, that is, on the balance of probabilities.

## 2.4 The standard of proof in civil cases

### 2.4.1 The general rule is that the standard of proof for parties to a civil action is on the balance of probabilities

**Miller v Minister of Pensions (1947) KB**

See 2.3.1.

*Held Per* Denning J: 'The degree of cogency…required to discharge a burden in a civil case…is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "We think it more probable than not," the burden is discharged but, if the probabilities are equal, it is not.'

> Note
>
> As many of the problems arising in criminal cases concern the direction given to the jury, the general absence of the jury in civil cases leads to few problems in this area.

### 2.4.2 The standard of proof in civil cases, where a criminal offence is alleged, is also on the balance of probabilities

**Hornal v Neuberger Products Ltd (1957) CA**

The plaintiff, in an action for damages arising out of breach of contract, alleged fraud. The issue concerned the required standard for proof of the fraud.

*Held* It was sufficient to prove the fraud on the balance of probability.

**Re Dellow's Will Trusts (1964) ChD**

Under the will of the testator, the wife was the general legatee. However,

both husband and wife died on the same occasion and the wife was deemed to be the survivor under s 184 of the Law of Property Act 1925 (incorporating the presumption of *commorientes*). An allegation was made that the wife had, in fact, killed the testator and the issue raised concerned the standard of proof required.

*Held* It was the civil standard that would be applied, although, *per* Ungoed-Thomas J: 'the more serious the allegation, the more cogent is the evidence required.'

**Q** Is it not inconsistent, on the one hand, to rule that it should be the civil standard and, on the other, to rule that 'the more serious the allegation the more cogent' the evidence should be?

Note

See *Bater v Bater* (1951), *per* Denning LJ: 'In civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter.'

**Post Office v Estuary Radio Ltd (1967) CA**

The plaintiffs sought an injunction against the defendants, alleging that they were operating a 'pirate' wireless transmitting station in the Thames estuary. This required proof that the defendants' operations were taking place within UK internal waters. The defendants contended that, since proof of this would render them criminally liable under the relevant statute, it had to be proved on the criminal standard of proof.

*Held* Proof on the civil standard was sufficient.

**H v H and C; K v K (1996) HL**

See 2.4.3.

*Held* Where sexual abuse is alleged in actions to deny access to children, the standard of proof is on the civil standard.

### 2.4.3 In matrimonial cases, the better view is that the standard of proof is the usual civil standard, even though there are conflicting cases

**Bater v Bater (1951) P**

On a petition for divorce on the ground of cruelty, the question arose as to whether there had been a misdirection for the trial judge to state that this had to be proved beyond reasonable doubt.

*Held* There was no misdirection. *Per* Bucknill LJ: 'I regard proceedings for divorce as proceedings of very great importance, not only to the parties, but to the State…I think that, if a high standard of proof is required because of the importance of a case to the parties and also the community, divorce proceedings are the kind of case which requires that high standard.'

**Q** Would you agree about the current importance of divorce to the State and community such that the criminal standard of proof is required?

### Preston-Jones v Preston-Jones (1951) HL

The husband petitioned for divorce on the ground of adultery, alleging that he had been away from England during the time when the wife's child could have been conceived. One issue concerned the standard of proof required.

*Held* Since the finding of adultery would have the effect of bastardising the child, the court would require proof beyond reasonable doubt that the conception did, in fact, take place while the husband was away from England. However, Lord MacDermott pointed out that this decision was not based on an analogy with criminal law:

> The true reason, it seems to me, why both accept the same general standard—proof beyond reasonable doubt—lies not in any analogy, but in the gravity and public importance of the issues with which each is concerned.

### Blyth v Blyth (1966) HL

On the husband's petition for divorce, it was alleged that he had condoned the alleged adultery of his wife. This would have been a bar to the petition. The question arose as to the standard of proof with regard to the condonation of adultery.

*Held* A majority held that the appropriate standard was on the balance of probability. Of the majority, Lord Pearson was of the view that a distinction was to be drawn between proof of grounds for divorce (the criminal standard) and proof of the non-existence of a bar to divorce (the civil standard). Lord Denning seems to have gone furthest by holding that even adultery may be proved on the balance of probability:

> In short, it comes to this: so far as the *grounds* for divorce are concerned, the case, like any civil case, may be proved by a preponderance of probability, but the degree of probability depends on the subject matter.

### Bastable v Bastable (1968) CA

The husband was granted a divorce on the grounds, *inter alia*, of his wife's adultery.

*Held* Adultery had to be proved beyond reasonable doubt. Edmund Davies LJ regarded the views of Lord Denning in *Blyth v Blyth* (1966), above, as *obiter. Per* Wilmer LJ:

> In the present case, what is charged is 'an offence'. True, it is not a criminal offence; it is a matrimonial offence. It is for the husband petitioner to satisfy the court that the offence has been committed. Whatever the popular view may be, it remains true to say that in the eyes of the law the commission of adultery is a serious matrimonial offence. It follows, in my view, that a high standard of proof is required.

**Q** (1) To what extent do you agree with the characterisation of adultery as an 'offence'?

**Q** (2) Even if it were to be regarded as an 'offence', is it not the case that where an offence is raised in civil action, it is the civil standard that should apply?

Note

The better view is that these cases are no longer good law in the light of the statutory changes that have affected divorce. See, for instance, the Divorce Reform Act 1969, the Matrimonial Causes Act 1973 and the Family Law Reform Act 1996. Consequently, the ground for divorce is the breakdown of the marriage rather than the proof of a matrimonial 'offence'.

### Pheasant v Pheasant (1972) Fam D

The husband petitioned for divorce on the ground that the marriage had irretrievably broken down under the Divorce Reform Act 1969.

*Held* He had not proved irretrievable breakdown of the marriage. Ormrod J commented, *obiter:*

> It would be consistent with the spirit of the new legislation if this problem were now to be approached more from the point of view of breach of obligation than in terms of the now outmoded idea of the matrimonial offence.

### Serio v Serio (1983) CA

On a petition for divorce, the husband alleged that the wife's son was not a child of the family.

*Held* The purpose of the Family Law Act 1969 was to do away with the old principle that there had to be proof beyond reasonable doubt to rebut the presumption of legitimacy. However, this did not mean that the standard of proof was to be the same as in, for instance, breach of contract or negligence.

### H v H and C; K v K (1996) HL

In both cases, it was sought to deny access by the father to the children on the ground of sexual abuse. One issue concerned the standard of proof required.

*Held* When exercising matrimonial jurisdiction involving custody and access applications, the appropriate standard of proof for determining whether sexual abuse of children by a father had taken place was the ordinary civil standard of proof on the balance of probabilities. However, the more serious the allegation, the more convincing is the evidence needed to tip the balance in respect of it. *Per* Lord Nicholls:

> The standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability.

> This is the established general principle. There are exceptions such as contempt of court applications, but I can see no reason for thinking that family proceedings are, or should be, an exception…Despite their special features, family proceedings remain essentially a form of civil proceedings. Family proceedings often raise very serious issues, but so do other forms of civil proceedings…Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.

### 2.4.4 The appropriate standard in committal proceedings for civil contempt is, exceptionally, the criminal standard of beyond reasonable doubt

**Re Bramblevale Ltd (1970) CA**

The case concerned H who was committed for contempt for failing to comply with a court order to surrender certain documents and accounts relating to a company to the liquidator of that company. The question arose as to the standard required to prove a contempt arising out of a civil case.

*Held* The standard was the criminal standard. *Per* Lord Denning MR: 'A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase it must be proved beyond reasonable doubt.'

### 2.4.5 Statute may sometimes require the criminal standard, even though the proceedings are essentially civil

**Judd v Minister of Pensions and National Insurance (1966) CA**

Judd had sustained an injury during Army service and the question arose as to his eligibility for a war pension and whether the Minister concerned had satisfactorily proved his non-eligibility.

*Held* A war pensions claim was a civil action, but one where it was specifically provided, in the Royal Warrant 1949, that the standard of proof required was beyond reasonable doubt in resisting a claim.

# 3 Facts Which Need Not be Proved

## 3.1 Presumptions

### 3.1.1 When certain basic facts (primary facts) are proved, there is a rule of evidence that certain other facts (the presumed facts) are presumed to exist

**Chard v Chard (1955) PDA**
The husband had entered into a marriage with the respondent. The question arose as to whether it was a valid marriage, it being claimed that the husband had previously entered into a marriage with X. The husband sought to rely on a presumption that X was dead at the time of his marriage to the respondent.

*Held* In order for a presumption of death to arise, certain basic facts had first to be proved. These basic facts are: (a) there was no evidence that X was alive during a continuous period of seven years; (b) during this period she was not heard of by those persons who would be likely to have heard of her; (c) all appropriate inquiries have been made. On the facts of this case, these basic facts had not been satisfactorily proved and the presumption of death could not, therefore, arise.

**Bratty v AG for Northern Ireland (1963) HL**
See 2.1.1.

Note
Although references were made in this case to a presumption of sanity, this is simply a way of referring to the fact that the defendant bears the burden of proving insanity. The presumption of sanity is often called a false presumption as: (a) it expresses a general principle of law that everyone is sane until the contrary is proved; (b) it does not depend upon the proof of basic facts.

### 3.1.2 Certain presumptions are rebuttable presumptions. These may be either presumptions of fact or rebuttable presumptions of law

**S v S (1972) HL**

The spouses were married in 1946 and the question arose regarding the paternity and/or legitimacy of the youngest child, born in 1965. The husband obtained a divorce in 1966 on the grounds of the wife's adultery but, at the time of the child's birth, they were still married. Normally, in such circumstances, there is a presumption that all children born during the continuance of a marriage are legitimate. The question arose as to whether this presumption was rebuttable and, if so, what evidence would be required to rebut the presumption.

*Held* The presumption is a rebuttable one and is adequately dealt with by s 26 of the Family Law Reform Act 1969. This is to the effect that any presumption of law as to legitimacy or illegitimacy may be rebutted by evidence which shows that it is more probable than not that the person is illegitimate or legitimate. Proof beyond reasonable doubt is not necessary to rebut the presumption.

**R v Roberts (1878) CCA**

The defendant was convicted of perjury, but contended that the conviction could stand only if it could be established that the judge before whom the perjury occurred had, in fact, been lawfully appointed. The prosecution relied upon the presumption of *omnia praesumuntur rite esse acta.* In this context, this referred to the presumption that, where a public official has acted in an official capacity, there was a presumption that the official had been properly appointed. *Per* Lord Coleridge CJ:

> The mere acting in a public capacity is sufficient *prima facie* proof of the proper appointment; but it is only a *prima facie* presumption and it is capable of being rebutted.

Here, the defendant had not adduced evidence to rebut the presumption and his conviction was upheld.

**Mahadervan v Mahadervan (1964) P**

The parties were married in Ceylon under the relevant legislation and thereafter cohabited as man and wife. The husband later come to live in England and went through another ceremony of marriage. The first wife petitioned for divorce and the husband claimed that his first marriage was invalid, as there had been a failure to comply with the formalities required under the Ceylonese legislation.

*Held* In this case, two presumptions came into operation: (a) *omnia praesumuntur rite esse acta,* that is, that all acts which are necessary are

presumed to have been done. There was a presumption that the formalities required by the Ceylonese legislation had been complied with; (b) *omnia praesumuntur pro matrimonio,* that is, a presumption of marriage existed where the man and the woman: (i) went through a ceremony of marriage; and (ii) cohabited together. It was for the husband to rebut both of these presumptions, which he was unable to do. *Per* Sir Jocelyn Simon P:

> Where a ceremony of marriage is proved followed by cohabitation as husband and wife, a presumption is raised which cannot be rebutted by evidence which merely goes to show on a balance of probabilities that there was no valid marriage: it must be evidence which satisfies beyond reasonable doubt that there was no valid marriage.

> Note
> There is some doubt as to whether that part of the judgment requiring proof beyond reasonable doubt is still good law. It may be argued that the presumption may be rebutted by proof on a balance of probabilities: see *Blyth v Blyth* (1966), 2.4.3.

### Tingle Jacobs & Co v Kennedy (1964) CA

A collision at a crossroads controlled by traffic lights had occurred between a car driven by the plaintiffs' employee and a car driven by the defendant. Both drivers alleged that the traffic lights had been green in their favour and produced witnesses in support. The trial judge was unable to decide whether the lights had been faulty and decided to apportion liability equally between the parties.

*Held* The traffic lights had been examined by the police and found to be in good working order. There been no other complaints about their working before or after the collision. In such circumstances, there was a presumption that the lights were in proper working order until there was evidence to the contrary. It was, therefore, for the trial judge to adjudicate on the evidence and a retrial was ordered.

### Scott v London & St Katherine Docks (1865) Exchequer Chamber

The plaintiff was injured when bags of sugar fell on him from a warehouse that was being unloaded by the defendants' employees. The plaintiff sued in negligence.

*Held* It was for the plaintiff to produce evidence of negligence, but, *per* Erle CJ:

> Where the thing is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

**JM v Runeckles (1984) DC**

The defendant, a girl aged 13 at the time of the offence, had stabbed another girl and was charged with assault under s 47 of the Offences Against the Person Act 1861. The Juvenile Court first applied the presumption of *doli incapax.* This was a rebuttable presumption of law that children between the ages of 10 and 14 are deemed not to possess *mens rea.* However, in this case, the court held that the prosecution had succeeded in rebutting the presumption. Evidence had been adduced, *inter alia,* that the defendant had followed her victim home, knocked on the door and threatened to kick it down. She then hit the victim a number of times before stabbing her and then running away. She also ran away from the police. The defendant appealed on the ground that this was insufficient evidence to rebut the presumption and that the prosecution had to prove, in addition, that she knew that what she was doing was morally wrong.

*Held* The prosecution had only to prove that the defendant knew that what she was doing was seriously wrong and the evidence was sufficient to do this; the presumption of *doli incapax* was, therefore, rebutted. It was not necessary for the prosecution to prove that the defendant knew that her actions were morally wrong.

**C v DPP (1995) HL**

The defendant was a boy aged 12, charged with interfering with a motorcycle with intention to commit theft, contrary to s 9(1) of the Criminal Attempts Act 1981. The prosecution contended that the presumption of *doli incapax* had been rebutted by evidence that he had damaged the motorcycle and had run away from the police. He was convicted and appealed. The Court of Appeal ruled that the presumption was no longer good law and it was no longer necessary for the prosecution to rebut it. There was further appeal to the House of Lords.

*Held* The House of Lords, overruling the Court of Appeal, held that the presumption was still part of English law. There were difficulties and inconsistencies in applying the presumption, but it was still necessary for the prosecution to rebut it. In order to rebut the presumption, the prosecution was required to prove that the child knew that his act was seriously wrong, as distinct from an act of mere naughtiness or childish mischief.

### 3.1.3 Certain presumptions are conclusive, that is, evidence may not be given to rebut them. These are referred to as irrebuttable presumptions of law

**Walters v Lunt (1951) CA**

A husband and wife were charged with receiving stolen property, knowing it to be stolen, from their son, aged seven years.

*Held* In order for the charge to be sustained, it had to be proved that the son had stolen the tricycle. This could not be done because of the irrebuttable presumption that a child below the age of 10 was *doli incapax*, that is, incapable of forming the necessary *mens rea*. This presumption is contained in s 50 of the Children and Young Persons Act 1933, as amended by s 16(1) of the Children and Young Persons Act 1963.

Note

Most irrebuttable presumptions of law are in statutory form and express rules of substantive law.

### 3.1.4 Rebuttable presumptions shift the burden of proof in civil cases; if one party shows that a presumption exists, the burden shifts to the other party to rebut the presumption

**Barkway v South Wales Transport Co Ltd (1949) CA**

The plaintiff was injured when a bus operated by the defendants mounted a footpath. The plaintiff relied on the presumption of *res ipsa loquitur* in order to prove negligence.

*Held* Since there was presumption of negligence, this had the effect of shifting the burden of proof onto the defendant. This meant that the defendant had the burden of proving that the mounting of the bus onto the footpath was not due to negligence.

**Henderson v Henry E Jenkins & Sons (1970) HL**

A lorry owned and operated by the defendants struck and killed the plaintiff's husband when its brakes failed due to the sudden escape of brake fluid from a hole caused by corrosion. The plaintiff claimed damages for the defendants' negligence in failing to keep the brake system in efficient repair. The defendants responded that the corrosion had occurred due to a latent defect occurring without any fault on their part and that the existence of the corrosion was not discoverable by the exercise of reasonable care. The trial judge ruled in favour of the defendants on the ground that they had taken proper care to maintain the lorry, there had been adequate inspection and that the corrosion had taken place at a point which could only have been detected if the pipe had been removed, something which was not recommended by the Ministry of Transport and the manufacturers. The plaintiff eventually appealed to the House of Lords.

*Held* On the facts as shown by the plaintiff, there was a presumption that negligence existed. Accordingly, the burden of proof shifted to the defendant. *Per* Lord Pearson:

> If, in the course of a trial, there is proved a set of facts which raises a *prima facie* inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favour, unless the

defendants, by their evidence, provide some answer which is adequate to displace the *prima facie* inference.

### 3.1.5 In certain circumstances, presumptions may conflict

**R v Willshire (1881) QBD**
The defendant had married A in 1864 and then went through a ceremony of marriage with B in 1868. He was convicted of bigamy as A was still alive. In 1879, he married C and then went through another ceremony of marriage with D in 1880. He was charged and convicted with bigamy in relation to D. The defendant claimed that the conviction could only be sustained if the prosecution could prove that his marriage to C was valid. He contended that the marriage to C was not valid, since there was a presumption that A was still alive. This meant that the marriage to C was not valid and therefore there was, in fact, no marriage to D.

*Held* The conviction was quashed. The case involved two conflicting presumptions. The first was a presumption of life, that is, that A was still alive. The second was the presumption that the marriage to C was valid, since there had been a ceremony of marriage plus cohabitation. In effect, the presumptions cancelled each other out and the burden remained on the prosecution.

## 3.2 Judicial notice

### 3.2.1 Where facts are within common knowledge, judicial notice may be taken of their existence; they do not have to be proved

**R v Luffe (1807) KB**
An issue arose as to the legitimacy of a child. From the evidence, it appeared that the husband did not have access to the wife until a fortnight before the birth.

*Held* The court could take judicial notice of the commonly known fact that the period of gestation was certainly longer than a fortnight and that, therefore, the husband could not be the father of the child.

**Preston-Jones v Preston-Jones (1951) HL**
The husband petitioned for divorce on the grounds of the wife's adultery based on the fact that he had not been in England during the period when her child had been conceived. The husband had been absent from 18 August 1945 until 6 February 1946 and the child (who was normal) was born on 13 August 1946.

*Held* The court could take judicial notice of the fact that the normal period of gestation was about nine months. Accordingly, the adultery was proved.

**Nye v Niblett (1918) DC**

The defendants were charged under s 41 of the Malicious Damage Act 1861 (since repealed), which provided for the killing of animals kept for 'any domestic purpose'. The animals in question were two cats and the question arose as to whether the prosecution was obliged to prove that cats were domestic animals.

*Held* The prosecution did not have to prove this as judicial notice could be taken of the fact that cats were domestic animals.

**DPP v Hynde (1998) QBD**

A search of the defendant's baggage at Heathrow Airport revealed a butterfly knife. She was charged with possessing an article 'made or adapted for use for causing injury' contrary to s 4 of the Aviation Security Act 1982. A butterfly knife had been outlawed under the Criminal Justice Act 1988 and the Criminal Justice Act 1988 (Offensive Weapons) Order 1988. The issue which arose was whether judicial notice could be taken that a butterfly knife was a dangerous weapon under these two provisions when dealing with a charge under the Aviation Security Act 1982, which made no specific mention of butterfly knives. The stipendiary magistrate ruled that the prosecution was bound to provide evidence that a butterfly knife was made or adapted for causing injury and that he was not entitled to take judicial notice of this without such evidence.

*Held* The stipendiary magistrate could and should have taken judicial notice of the fact that a butterfly knife had been outlawed by Parliament and that, accordingly, it was not necessary for the prosecution to provide any further evidence.

**Q** Would you agree with Henry LJ in this case that judicial notice is, 'in large measure, an application of common sense'?

### 3.2.2 Judicial notice may be taken of facts which are not within common knowledge, but this may be done only after inquiry

**Duff Development Co Ltd v Government of Kelantan (1924) HL**

The issue which arose was whether Kelantan was a sovereign independent State.

*Held* Inquiry had to be made before judicial notice could be taken. *Per* Viscount Cave:

> It has for some time been the practice of our courts, when such a question is raised, to take judicial notice of the sovereignty of a state and, for that purpose, (in any case of uncertainty) to seek information from a Secretary of State.

**McQuaker v Goddard (1940) CA**
The plaintiff was bitten by a camel. In an action for damages, the question arose as to whether the camel was a domestic or wild animal; the distinction was important for purposes of liability.

*Held* In deciding that camels were domestic animals, the trial judge was entitled to make some inquiry and to hear evidence before taking judicial notice of that fact.

### 3.2.3 Judicial knowledge may be taken of facts which are within the particular knowledge of the court

**Wetherall v Harrison (1976) DC**
In a criminal action tried by magistrates, an issue arose as to whether a defendant from whom a blood sample was about to be taken had suffered a fit, or was merely pretending. One of the magistrates was a doctor and the bench gave effect to his particular knowledge in deciding that the fit was genuine.

*Held* The justices had been acting properly. A justice with specialised knowledge was entitled to draw upon that knowledge for the purpose of interpreting evidence.

**Paul v DPP (1989) DC**
The defendant was charged with 'kerb crawling' under s 1(1) of the Sexual Offences Act 1985. The question arose as to whether the justices were entitled to take into account their own knowledge of the area in which the offence had taken place.

*Held* It was proper for the justices to apply their local knowledge that the area in question was a heavily populated residential area which was frequented by prostitutes and their clients.

### 3.2.4 When judicial notice is taken of a fact, the jury may be directed to take that fact as proved

**R v Simpson (1983) CA**
The defendant was convicted under s 1 of the Prevention of Crime Act 1953 for the possession of an offensive weapon, that is, a flick knife. One of the issues concerned the question as to whether judicial notice could be taken of the fact that a flick knife is an offensive weapon and whether the jury could be directed on this point.

*Held* Judicial notice could be taken of the fact that a flick knife is an offensive weapon. Once the judge had decided this, it was proper for the jury to be directed on this point.

# 4 Competence and Compellability of Witnesses

## 4.1 The defendant in criminal cases

### 4.1.1 The general rule is that all persons who are competent are also compellable; the defendant in criminal cases is an exception to this rule

**R v Rhodes (1899) CCR**

The defendant was convicted on a charge of obtaining by false pretences. The issue rose as to whether he was a competent witness.

*Held* Section 1 of the 1898 Criminal Evidence Act permitted a defendant to be a witness, but only for the defence. The defendant was not competent or compellable as a witness for the prosecution.

> Note
> Until the 1898 Act, the defendant was not competent to be a witness even on his own behalf.

### 4.1.2 Defendants in criminal cases are not compellable, even on their own behalf, but, once they elect to testify, they are treated in the same way as other witnesses

**R v Paul (1920) CCA**

The defendant was jointly charged with a number of co-defendants for robbery. One of the co-defendants went into the witness box and pleaded guilty, He was then cross-examined by the prosecution and testified that it was his co-defendants who were primarily responsible. No objection was made to this line of cross-examination. An appeal was later taken on the grounds that the cross-examination was not proper.

*Held* Once a defendant chooses to testify and to take the oath, he is to be treated like any other witness. *Per* Earl of Reading CJ:

> When a prisoner goes into the witness box to give evidence for the defence and has been sworn, he is in the same position as an ordinary witness and therefore subject to cross-examination…As soon as a prisoner goes into the

witness box as a witness for the defence and is sworn counsel for the prosecution is entitled to cross-examine him.

Note

(a) Section 35(4) of he Criminal Justice and Public Order Act 1994 reaffirms the rule that the defendant is not compellable to give evidence on his own behalf, (b) A defendant who elects to testify exposes himself to cross-examination within the terms of s 1(e) of the Criminal Evidence Act 1898, although he is still protected under s 1(f).

**R v Hilton (1972) CA**

A number of defendants were charged with aiding and abetting an affray. The issue arose as to whether one co-defendant had a right to crossexamine another co-defendant who had gone into the witness box.

*Held* There was such a right. Since a defendant who elected to testify was to treated as an ordinary witness, this meant that he could be crossexamined in the same way. In such cases, there is a protection accorded under s 1(f) in that no questions as to character may be put. Provided that this limitation was observed, the cross-examination was entirely proper.

### 4.1.3 If a defendant in a criminal trial elects not to testify, the trial judge may comment on this failure when directing the jury

**R v Bathurst (1968) CCA**

The defendant was convicted of murder. Although he raised the defence of diminished responsibility and evidence was tendered on his behalf, he did not testify. The trial judge made a number of unfavourable comments on this when directing the jury. The defendant appealed.

*Held* The occasions when the trial judge should have commented on a defendant's failure to testify were rare. If comment were justified, it ought to have been in the following manner, *per* Lord Parker CJ:

> The accused is not bound to give evidence that he can sit back and see if the prosecution have proved their case and that, while the jury have been deprived of the opportunity of hearing his story tested in cross-examination, the one thing that they must not do is to assume that he is guilty because he has not gone into the witness box.

Note

(a) The issue is now governed by the amendments to the law introduced by s 35(3) of the Criminal Justice and Public Order Act 1994 which provides that, if a defendant elects to remain silent, that is, elects not to go into the witness box, 'the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper…'. The precise effect of

this change in the law is not yet clear, although the Court of Appeal has issued a *Practice Note*, reported at [1995] 2 All ER 500. Some guidance may be obtained from the Northern Ireland case of *Murray v DPP* (1994) (see below), (b) As far as comment by the prosecution is concerned, the bar on such comment has now been lifted, as the Criminal Justice and Public Order Act 1994 (Sched 11) specifically repeals s 1(b) of the Criminal Evidence Act 1898.

**R v Fullerton (1994) CA**

The defendant was convicted of a conspiracy to obtain property by deception. He elected not to testify. One of the grounds of appeal concerned the comments made on this point by the trial judge when directing the jury. The judge said that the defendant had a right not to testify, but, because he had exercised that right, the jury were deprived of hearing his account of what had happened and that account being tested through crossexamination.

*Held* The conviction ought to be quashed. If comment was to be made regarding a defendant's failure to testify, it ought to be made in the terms recommended in the *Bathurst* case (see above).

Note:
See the note to *R v Bathurst* (1968), above.

**R v Martinez-Tobon (1994) CA**

The defendant was charged with the importation of drugs. He claimed that he mistakenly thought that it was emeralds, not drugs, that were being imported, but did not go into the witness box. The trial judge directed the jury that, although he had every right not to go into the witness box, in the circumstances, 'one might have thought that he would be very anxious to do so'. The defendant appealed.

*Held* The long line of cases established that, where a defendant elects not to testify, the trial judge, when directing the jury, should tell them that he is under no obligation to do so and that they cannot assume he is guilty because he does not testify. However, if this is done, *per* Lord Taylor CJ:

> …the judge may think it appropriate to make a stronger comment where the defence case involves alleged facts which: (a) are at variance with prosecution evidence or additional to it and exculpatory; and (b) must, if true, be within the knowledge of the defendant.

The comment was a matter for judicial discretion, depending on the circumstances of the case.

**Q** Would the position be any different under s 35(3) of the Criminal Justice and Public Order Act 1994? See the cases of *Murray v DPP* (1994) and *R v Cowan* (1995) below.

**Murray v DPP (1994) HL**

The defendant was charged with attempted murder and possession of firearms. He elected not to testify. The trial judge, acting under Art 4 of the Criminal Evidence (Northern Ireland) Order 1988 (in similar terms to s 35(3) of the Criminal Justice and Public Order Act 1994) held that he was entitled to draw adverse inferences from the failure to testify.

*Held* This was proper. Whether an adverse inference was to be drawn depended on the nature of the case, the weight of the prosecution evidence and the extent to which the defendant should give his own account of the facts. *Per* Lord Slynn:

> If aspects of the evidence taken alone or in combination with other facts clearly call for an explanation which the accused ought to be in a position to give, if an explanation exists, then a failure to give any explanation may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty

Note:
(a) It may be that this approach will now be followed under the provisions introduced by the Criminal Justice and Public Order Act 1994. (b) The trial judge was sitting without a jury, as permitted by the law in Northern Ireland. The fact that there was no jury may have influenced the decision, (c) An appeal was lodged in the European Court of Human Rights. The court, on the issue of the right to silence, upheld the decision of the House of Lords: Case 417 (1996).

**R v Cowan; R v Gayle; R v Riciardi (1995) CA**

The accused were charged with unrelated offences and in each case did not testify. Under s 35 of the Criminal Justice and Public Order Act 1994, the court was allowed to 'draw such inferences as appear proper' from the failure to testify. The trial judge directed the jury that they could draw adverse inferences from the failure to testify: all three were convicted. They appealed on the grounds of a misdirection, contending that the trial judge should have used his discretion under s 35 to direct the jury that they could draw adverse inferences only in exceptional cases where there was no reasonable possibility of an innocent explanation for the defendants' silence.

*Held* There was no justification in limiting the words of s 35 only to exceptional cases. The section permitted 'proper inferences' to be made. What was proper lay within the discretion of the trial judge. It was essential for the trial judge to tell the jury that the burden of proof remained on the prosecution, that the defendant was entitled to remain silent and that silence could not, on its own, prove guilt. On the facts presented by these appeals, the Court of Appeal quashed the convictions of the first two defendants as

these guidelines had not been followed. The conviction of the third defendant was upheld.

**R v Price (1996) CA**

The defendant did not give evidence on a charge of obtaining property by deception and was convicted. The trial judge concluded that s 35 of the 1994 Act applied and directed the jury in relation to the drawing of adverse inferences. However, he did not observe the accompanying requirement in s 35(2) that he should satisfy himself in the presence of the jury that the accused was aware of the consequences that would follow from his failure to testify. At the end of the summing up, this point was raised with the judge in the jury's absence and an application was made that the jury be discharged and a re-trial ordered. The trial judge refused the application, but gave the jury a further direction.

*Held* The appeal would be allowed on the basis that the original direction amounted to a material irregularity which was incurable. The defendant had, in fact, been wrongly advised that he could exercise his right to silence without an adverse inference being raised against him. If the trial judge had complied with the requirements of s 35(2), this would have been corrected.

### 4.1.4 An adverse inference may not be proper if the physical or mental condition of the accused make it undesirable for him to testify

**R v A (1997) CA**

The defendant was charged with a number of sexual offences. A psychologist's report was produced during the trial which indicated that A was intellectually impaired. However, it had not been properly served on the prosecution. The defendant did not testify and the trial judge directed the jury that, in accordance with s 35 of the Criminal Justice and Public Order Act 1994, they could draw an adverse inference from his failure to testify on the grounds that there was no evidence of the requirements stated in s 35(1)(b). The defendant appealed on the basis that it was wrong to rule that the defence must provide evidence of these requirements.

*Held* The judge was merely shown the psychologist's report, which was not accepted by the prosecution. The report dealt with irrelevant matters and was not directed to the question of whether or not the defendant should testify. Moreover, the judge had not been invited by the defence to conduct a *voir dire;* it was not incumbent on the judge to order the *voir dire* on his own motion.

Note
The effect of this decision is that there is at least an evidential burden imposed on the defence to satisfy the requirements of s 35(1)(b).

**R v Friend (1997) CA**

The defendant, who was 14 years and five months old at the time of the offence and 15 at the time of trial, was charged with murder. A *voir dire* was held to assess his mental capacity to testify. Expert evidence was given that he had a very low IQ, amounting to a mental handicap, that he was educationally disadvantaged and that his mental age shortly before the trial was nine. The expert also testified that he was restless and tense, would find it hard to concentrate under stress and would find giving evidence from the witness box difficult. The trial judge refused a defence submission that the jury should not be invited to draw inferences from his failure to give evidence under s 35(1)(b).

*Held* This was not a case of a defendant who was unfit to plead. The defence was not contending that this low IQ had this effect. While under s 35(1), a defendant under the age of 14 enjoyed an immunity from an adverse inference, this immunity did not automatically extend to the defendant who was over that age, but who had a mental age of nine. It was the age expressed in years from the date of birth that had been intended by the draftsman of s 35. There may have been an evidential basis for the defence submission, but the trial judge was entitled to take into account the rest of the evidence when coming to a decision and the appellate court would only interfere if this exercise of discretion was *Wednesbury* unreasonable, that is, that no judge faced with this evidence could rationally have reached this conclusion (*Associated Provincial Picture Houses v Wednesbury* (1948)). If it appears to a trial judge that s 35(1)(b) applies—'that the physical or mental condition of the accused makes it undesirable for him to give evidence'—the judge will so rule and direct the jury accordingly. Otherwise, the jury may draw such inferences as appear proper from a failure to testify and when doing so may take account of medical or other evidence directed on this issue. *Per* Otton LJ:

> We do not consider that the judge erred in principle by applying the wrong test. It cannot be said that he applied the wrong test if only because there is no right test. Indeed, we do not consider it appropriate to spell out a test to be applied in such a situation. The language of this part of the section is simple and clear. It is for the judge in a given case to determine whether or not it is undesirable for the accused to give evidence. A physical condition might include a risk of an epileptic attack; a mental condition, latent schizophrenia where the experience of giving evidence might trigger a florid state. If it appears to the judge on the *voir dire* that such a physical or mental condition of the accused makes it undesirable for him to give evidence, he

> will so rule and the inference cannot, therefore, be drawn and he will so direct the jury… Thus, we consider that the clarity of the language is such that it is not necessary to supplement the Act with a test.

### 4.1.5 An adverse inference may also be drawn upon failure to answer police questions during interview

**R v Condron and Condron** (1997) CA

The defendants were charged with the possession and supply of drugs. After they were arrested, their solicitor advised them not to answer police questions during interview, as he was of the view that they were unfit to be interviewed because of their drug withdrawal symptoms. During trial, the prosecution wished to refer to the 'no comment' interviews. The defence objected, *inter alia,* on the grounds that this had been done on the basis of legal advice and that no adverse inference could be drawn under s 34 of the Criminal Justice and Public Order Act 1994. The trial judge held a *voir dire* during which the solicitor testified as to the reasons for his advice, but concluded that the evidence could be admitted.

*Held* (a) The trial judge had been right to leave it open to the jury, under s 34 of the 1994 Act, to draw an adverse inference, notwithstanding the fact that the 'no comment' interview had been on the basis of legal advice. The trial judge had, quite properly, followed closely the specimen direction from the Judicial Studies Board that:

> If he failed to mention…when he was questioned, decide whether, in the circumstances which existed at the time, it was a fact which he could reasonably have been expected to mention. The law is that you may draw such inferences as appear proper from his failure to mention it at that time. You do not have to hold it against him. It is for you to decide whether it is proper to do so. Failure to mention such a fact at that time cannot, on its own, prove guilt, but, depending on the circumstances, you may hold that failure against him, when deciding whether he is guilty, that is, take it into account as some additional support of the prosecutor's case. It is for you to decide whether it is fair to do so.

The Court of Appeal accepted the defence submission that this did not go far enough and that it was also desirable to direct the jury that if, despite any evidence relied upon to explain the failure to answer questions, they concluded that the failure could only sensibly be attributed to the defendants' having subsequently fabricated evidence, only then might an adverse inference be drawn. The trial judge had not done this, but the convictions were not unsafe.

*Held* (b) Communication between solicitor and client were protected by legal professional privilege, but this could be waived by the client. If he gives as a reason for a 'no comment' interview that it was based on legal

advice, that does not amount to a waiver of legal professional privilege. But, this assertion, by itself, cannot prevent an adverse inference from arising. He has to go further and call his legal adviser to give evidence as to the reasons why the advice to make a 'no comment' interview was given. This would amount to a waiver, but only on that issue.

**R v Argent (1997) CA**

The defendant was convicted of manslaughter. He was identified at an identity parade and was then interviewed, but failed to answer questions. At the trial, his case was that he had left the premises before the killing took place. The trial judge, while summing up, directed the jury that, under s 34 of the 1994 Act, they were entitled to take into account his failure to answer questions as giving rise to an adverse inference if they were sure that he could reasonably have mentioned those facts which he had failed to mention. The defendant appealed on the basis that the trial judge had erred in so directing the jury, when the police had given insufficient information of the case against the defendant to enable his solicitor to advise him otherwise than to say nothing.

*Held* In the circumstances of this case, the trial judge had acted properly. There were six conditions to be satisfied before an inference might arise under s 34 of the 1994 Act, that is, where it would be reasonable for the defendant to answer police questions:

(1) there must be proceedings against a person for an offence;

(2) the alleged failure to answer questions must occur before a defendant was charged;

(3) the questions must be proceeded by a caution;

(4) the questions must be directed to trying to discover whether, or by whom, the alleged offence had been committed;

(5) the alleged failure must be in relation to any fact relied upon in his defence at trial.

This raised two questions of fact:

(a) was there some fact which the defendant had relied on in his defence?; and

(b) did the defendant fail to mention it when questioned? Both of these were questions of fact for the jury to decide;

(6) the defendant failed to mention a fact which, in the circumstances existing at the time, it would be reasonable to expect him to mention.

The circumstances to be taken into account should not be restrictive—matters, such as the time of day, the defendant's age, experience, mental capacity, state of health, sobriety, tiredness, knowledge, personality and legal advice might all be relevant. These were subjective issues and were questions of fact for the jury. The trial judge may give appropriate directions on these points, but it was for the jury to decide.

## 4.2 The co-defendant in criminal cases

### 4.2.1 A co-defendant is not competent and compellable for the prosecution

**R v Grant (1944) CCA**

Five persons were jointly charged with a number of offences. Three of these were called by the prosecution to testify.

*Held* This was not proper. A co-defendant was not competent to testify for the prosecution. In order for such a person to testify, it would first be necessary for the prosecution to ensure that: (a) his name was omitted from the charge, that is, he is no longer accused; (b) he has pleaded guilty; (c) he has been acquitted; (d) no evidence is offered against him; or (e) a *nolle prosequi* is entered, that is, there is an undertaking to stay proceedings against him.

**R v Rudd (1948) CCA**

The defendant was charged with receiving stolen property. A codefendant gave evidence which implicated him and led to his conviction. He appealed on the basis that, since a co-defendant was not competent and compellable to testify for the prosecution against him, the evidence should have been excluded.

*Held* Although one co-defendant could not be compelled to testify against another, if the co-defendant elects to go into the witness box, then he is to be treated as any other witness and what he says becomes evidence for all the purposes of the trial, including being evidence against his codefendant.

**R v Payne (1950) CCA**

Three men were jointly charged with burglary. One of them pleaded guilty and was sentenced. He was then called by the prosecution to testify at the trial of the other two.

*Held* The usual rule is that, where there is a joint charge and one of the defendants pleads guilty, sentence should not be passed until the others have been tried, so that the court will have the information before it in order to decide the appropriate sentence. However, this rule will not apply if the one who pleads guilty is called by the prosecution to testify against

his co-defendants. If this is the case, he should be sentenced first before being allowed to testify. *Per* Lord Goddard CJ:

> It is right that he be sentenced there and then so that there can be no suspicion that his evidence is coloured by the fact that he hopes to get a lighter sentence.

**R v Pipe (1967) CCA**

The defendant was charged with burglary. Another man who had been jointly charged but was being tried separately, was called as a witness by the prosecution.

*Held* The prosecution was under a duty, if they wished to call this accomplice as a witness, to let it be known that they would not continue proceedings against him. Since this was not done, the conviction was quashed.

**R v Rowland (1910) CCA**

Two defendants were jointly charged with a number of property offences. One of them elected not to testify on his own behalf, but went into the witness box to testify on behalf of his co-defendant. He was then crossexamined by the prosecution and questions were put which incriminated him.

*Held* Although one co-defendant was not competent or compellable for the prosecution against a fellow co-defendant, if he elected to testify on behalf of that co-defendant, he was to be treated like any other witness and could be cross-examined by the prosecution. As such, he came within the terms of s 1(e) of the Criminal Evidence Act 1898 and could be crossexamined, even if it meant that he was forced into incriminating himself.

> Note
> The trial judge has a discretion as to the conduct of the crossexamination under s 1(e) of the 1898 Act

### 4.2.2 A co-defendant is a competent, but not a compellable witness for a fellow co-defendant

**R v Boal (1964) CCA**

A number of defendants were jointly charged. One of them pleaded guilty. One issue which arose concerned the question as to whether he was now competent and compellable to give evidence for a co-defendant.

*Held* A co-defendant who was jointly charged was a competent witness for the defence, but was not compellable under the terms of s 1 of the Criminal Evidence Act 1898. However, in this case, the witness had already pleaded guilty. Accordingly, he was no longer within the terms of the 1898 Act and was to be treated as an ordinary witness. He was both competent, as well as compellable.

**R v Richardson (1967) CCA**
The defendant H was originally charged jointly with a number of others, but a separate trial was ordered in the case of one of these, M. At a later stage in the trial, the defendant proposed to call M as a witness in his defence. It was clear that M was a competent witness and the only issue was whether M was a compellable witness.

*Held* In cases where there are separate trials of two people charged in the same indictment, on the trial of one, the other can be compelled to testify. Accordingly, M was compellable.

## 4.3 The general rule in civil cases is that all persons, including the parties, are competent and compellable

**Baker v Rabetts (1954) DC**
The issue arose as to whether a child who did not understand the nature of the oath was a competent witness.

*Held* Although in criminal cases, such a child could give unsworn evidence under s 33 of the Children and Young Persons Act 1933, this was only possible in criminal cases.

> Note
> The position is now governed by s 96 of the Children Act 1989 which provides that unsworn evidence may be given if the child understands the duty of speaking the truth and he has sufficient understanding to justify the evidence being heard.

**Monroe v Twistleton (1802) *Nisi Prius***
The issue which arose was whether a former spouse was a competent witness.

*Held* A former spouse is incompetent following the termination of the marriage in so far as the evidence in question relates to events which occurred during the marriage.

> Note
> This case has never been overruled, although there are grave doubts about whether it is still good law. This is especially the case as the combined effect of s 1 of the Evidence Amendment Act 1853 and the Evidence Further Amendment Act 1869 renders spouses, that is, current spouses, both competent and compellable.

**Harmony Shipping Co SA v Saudi Europe Line Ltd (1979) CA**
An expert on handwriting, who had been consulted by the plaintiffs, was also later consulted by the defendants. The defendants wished him to testify

for them in court. He refused on the grounds that he had inadvertently advised both sides.

*Held* The expert was competent and compellable. There was no possibility of any kind of contractual obligation between him and the plaintiff which would be enforceable to prevent him appearing for the defendant.

## 4.4 The general rule in criminal cases is that all persons are competent

### Section 53 of the Youth Justice and Criminal Evidence Act 1999

(1) At every stage in criminal proceedings all persons are (whatever their age) competent to give evidence.

(2) Sub-section (1) has effect subject to sub-ss (3) and (4).

(3) A person is not competent to give evidence in criminal proceedings if it appears to the court that he is not a person who is able to—

(a) understand questions put to him as a witness, and

(b) give answers to them which can be understood.

(4) A person charged in criminal proceedings is not competent to give evidence in the proceedings for the prosecution (whether he is the only person, or is one of two or more persons, charged in the proceedings).

(5) In sub-s (4) the reference to a person charged in criminal proceedings does not include a person who is not, or is no longer, liable to be convicted of any offence in the proc eedings (whether as a result of pleading guilty or for any other reason).

Note

Section 54 contains the procedure to be followed in determining the issue of competence.

## 4.5 Spouses in criminal cases

### R v Deacon (1973) CA

The defendant was charged with two counts related to: (a) the murder of his brother in law; and (b) the attempted murder of his wife. His wife gave evidence for the prosecution and the defendant was convicted of murder under the first count. The trial judge then discharged the jury from returning a verdict on the second count.

*Held* As far as the second count was concerned, that is, attempted murder against the wife, under the common law, she was a competent witness.

However, this was immaterial as the jury had been discharged from giving a verdict on this count. As far as the first count was concerned, that is, murder, she was, as the defendant's wife, not competent for the prosecution. Accordingly, the conviction was quashed.

> Note
> Under the Police and Criminal Evidence Act 1984 (PACE), the position would be as follows: (a) under s 80(1)(a) a spouse is competent for the prosecution but is not compellable; (b) under s 80(3)(a), the spouse would be competent and compellable for the prosecution if the charge involved an offence of violence against that spouse or a person who at that time was under the age of 16; (c) under s 80(3)(b), the spouse would be competent and compellable if the charge concerns a sexual offence against a person who at the time was under the age of 16; (d) under s 80(3)(c), the spouse would be competent and compellable if the charge was of an attempt, conspiracy or aiding and abetting one of the above offences.

**R v Khan (1986) CA**

The defendant was convicted on a drug importation charge. At his trial, evidence was given by a woman who had previously gone through a Muslim ceremony of marriage with the defendant. If she was to be treated as his spouse, then she was not competent or compellable for the prosecution. However, it turned out that the defendant's first wife was still alive and so the ceremony of marriage with the woman who testified against him was void under English law.

*Held* Under the law as it stood before the coming into force of PACE 1984, a spouse was not competent or compellable for the prosecution. If this witness was to be treated as a 'spouse', she should not have been allowed to testify. However, since the ceremony of marriage with the defendant was void under English law, his first wife still being alive, she was to be treated as an ordinary witness and was, therefore, both competent and compellable.

> Note
> This case is good law for the definition of 'spouse', even after the coming into force of s 80 of PACE 1984.

**R v Pitt (1983) CA**

The defendant was charged with assault against his eight month old baby. His wife had made a witness statement which was prejudicial to him. During the trial, she gave answers inconsistent with this statement and the question arose as to whether she was to be treated as an ordinary witness.

*Held* The wife had a choice as to whether to testify. If she chose to testify she was to be treated like any other witness.

Note
This case was decided before PACE 1984 came into force. The position today would be that the wife would be both competent and compellable within the terms of s 80 of the 1984 Act. See the note to *R v Deacon* (1973), above.

**R v Woolgar (1991) CA**
The defendant was charged with criminal damage and his co-defendant was charged in the same proceedings with the separate offence of assault. The question arose as to whether the defendant could call the wife of the co-defendant to testify on his behalf. The trial judge ruled that she could not be compelled to testify under the terms of s 80 of PACE 1984.

*Held* Section 80(3) of PACE applied only if the co-defendants were 'jointly charged'; this was not the case here as they were charged with separate offences, although in the same indictment. Accordingly, the trial judge had been wrong and the wife was both competent and compellable.

**R v Naudeer (1984) CA**
The defendant was charged with theft. He gave evidence on his own behalf, but did not call his wife as a witness, even though it appeared that she had something she could have said relevant to the facts. The prosecution made adverse comments on this failure to the jury.

*Held* These comments were wrong and the conviction quashed.

Note
This rule is contained in s 80(8) of PACE 1984 and is untouched by the changes introduced by the Criminal Justice and Public Order Act 1994 on adverse inferences.

**R v Cruttenden (1991) CA**
Two defendants had been convicted on a number of charges of corruption. The issue which arose on appeal concerned the competence of the former wife of one of the defendants. She had divorced him one year before the date of the trial and had given evidence for the prosecution in respect of matters that had occurred during the marriage. Section 80(5) of PACE 1984 provides that a former spouse shall be competent and compellable. However, at the time of the trial, this provision had not yet come into force.

*Held* At common law, it had been decided that a former spouse was not competent or compellable for the prosecution in relation to events occurring during the marriage. Section 80(5) of PACE 1984 had altered the common law position; the only question was whether this could be given

retrospective effect. The Court of Appeal held that this provision was procedural and, therefore, could be applied retrospectively.

## 4.6 The competence of children as witnesses depends upon the discretion of the trial judge

### R v Wallwork (1958) CCA

The question concerned a five year old girl who had been called to give evidence.

*Held* A child as young as this should not have been called. *Per* Lord Goddard CJ:

> The jury could not attach any value to the evidence of a child of five; it is ridiculous to suppose that they could…in any circumstances to call a little child of five seems to us to be most undesirable and, I hope, it will not occur again.

Note

See the case of *R v* Z (1990) as to the possibility of having a definite cut off point.

### R v Hayes (1977) CA

Three boys, aged 12, 11 and nine, gave evidence against the defendant on an indecency charge. The youngest boy gave unsworn evidence while the two others gave their evidence on oath. The question arose as to whether they were competent witnesses.

*Held* This was a matter for judicial discretion. In determining whether evidence ought to be given on oath, it is immaterial that the child does not understand the divine sanction of the oath, or that he is ignorant of the existence of God. *Per* Lord Bridge LJ:

> It is unrealistic not to recognise that, in the present state of society, amongst the adult population the divine sanction of the oath is probably not generally recognised. The important consideration, we think, when a judge has to decide whether a child should properly be sworn, is whether the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking the oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct.

Note

(a) Section 33A of the Criminal Justice Act 1988 (as amended by s 52 of the Criminal Justice Act 1991) now provides that all children under the age of 14 shall give unsworn evidence. This removes the necessity of determining whether a child under that age should, or should

not, take the oath. The test laid down in this case, however, still applies in cases of children above 14 years, (b) In civil cases, the *Hayes* test has now been effectively incorporated into s 96 of the Children Act 1989.

### R v Z (1990) CA

On a charge of incest, the defendant's six year old daughter was called as a witness. The trial judge, in order to determine her competence, asked her some questions through a video link. He then determined that she was sufficiently intelligent and understood the duty of telling the truth and allowed her to give unsworn evidence. The defendant appealed on the grounds that the trial judge had been wrong to permit a child as young as this to testify, even if it was unsworn testimony.

*Held* There was no minimum age for receiving the unsworn evidence of a child witness under s 38(1) of the Children and Young Persons Act 1933 and cases, such as *R v Wallwork* (1958) (see above), were not to be followed. *Per* Lord Lane CJ:

> The question, in each case which the court must decide, is whether the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth. Those criteria will inevitably vary widely from child to child and may indeed vary according to the circumstances of the case, the nature of the case, and the nature of the evidence which the child is called on to give. Obviously, the younger the child, the more care the judge must take before he allows the evidence to be received. But, the statute lays down no minimum age and the matter accordingly remains in the discretion of the judge in each case. It may be very rarely that a five year old will satisfy the requirements of s 38(1). But, nonetheless, the discretion remains to be exercised judicially by the judge according to the well known criteria for the exercise of judicial discretion.

Note

(a) The giving of evidence through a live television link is allowed under s 32 of the Criminal Justice Act 1988. (b) Section 38(1) of the 1933 Act has now been repealed by the Criminal Justice Act 1991, which provides that all evidence by children below 14 years of age shall be given unsworn.

### R v Hampshire (1995) CA

The defendant was charged with indecent assault against a nine year old girl. The police had video taped an interview with the girl and, at the end of the interview, she was asked whether she understood the importance of telling the truth. The prosecution applied under s 32A of the Criminal Justice Act for the video tape to be played to the jury as her evidence-inchief. The trial judge, having watched the video tape, decided that she was a competent witness and the video tape was played to the jury. The trial

judge then considered that her competence should have been investigated in front of the jury and she was called and examined in the presence of the jury, the trial judge concluding that she understood the importance of telling the jury the truth. The defendant was convicted, but appealed on the ground that the trial judge should have examined the girl in the presence of the jury before the video tape had been played to them.

*Held* (a) In deciding whether to allow a video taped recording to be admitted, the trial judge must watch the video tape and his decision whether to admit it necessarily includes a determination as to competence. If he decides to admit the video tape, this, in effect, means that he has decided that there is competence and, therefore, *per* Auld J:

> …there is no logical reason why he should have to investigate the child's competence again, at the trial, before the playing of the video recording or before the cross-examination. Of course, the trial judge still has the power to exclude such evidence if, in the course of it, he forms the view that the child is, after all, incompetent to give evidence.

*Held* (b) The effect of the statutory changes has been to remove any special duty on the trial judge to conduct a preliminary investigation of a child's competence but, *per* Auld J: 'at the same time to retain such a power if he considers it necessary, say because the child is very young or has difficulty in expression or understanding.' In this connection, regard must be had to s 33A(2A) of the Criminal Justice Act 1988 (added by Sched 9, para 33 of the Criminal Justice and Public Order Act 1994) which provides: 'A child's evidence shall be received unless it appears to the court that the child is incapable of giving intelligible testimony.'

*Held* (c) If the trial judge considers that there should be preliminary investigation as to competence, he should examine the child to decide whether the child is of sufficient intelligence to give material evidence and whether the child understands the difference between the truth and a lie and the importance of telling the truth.

*Held* (d) If a preliminary investigation is deemed necessary, it is no longer the case that this must be done in the presence of the jury, although it should, as a matter of fairness, take place in open court and in the presence of the defendant.

## 4.7 Witnesses under a disability

### R v Hill (1851) CCR

The witness, on a trial for manslaughter, was a patient in a mental asylum. An attendant at the asylum testified, before the patient was called as a witness, that he suffered under the delusion that spirits spoke to him. In

addition, the medical superintendent at the asylum testified that on all other matters he was capable of giving rational evidence.

*Held* The fact that a witness suffers from delusions does not automatically rule him out as a competent witness; it is a matter of degree for the trial judge to determine. In this particular case, the trial judge was satisfied that the witness understood the nature of the oath. *Per* Lord Campbell CJ:

> He had a clear apprehension of the obligation of an oath and was capable of giving a trustworthy account of any transaction which took place before his eyes and he was perfectly rational upon all subjects except with respect to his particular delusion.

**R v Bellamy (1985) CA**

The question arose as to whether the complainant in a rape case, who was mentally handicapped, was competent to testify. The trial judge questioned her social worker about her belief in God and her understanding of the importance of telling the truth. He decided that she was a competent witness, but that she should not take the oath as she lacked a sufficient belief in the existence of God. He allowed her to affirm instead under s 5 of the Oaths Act 1978. The defendant was convicted and appealed on the grounds that the complainant should have given sworn evidence.

*Held* The trial judge had been wrong on two points. First, a belief in God was no longer necessary. Secondly, having decided that she was competent to be a witness, he should have required her to be sworn. However, the appeal was dismissed under the proviso to s 2(1)(c) of the Criminal Appeal Act 1968, as no miscarriage of justice had occurred.

**R v Deakin (1994) CA**

The defendant was charged with indecent assault against a mentally handicapped complainant. The issue rose as to whether the complainant was competent to testify. The jury heard evidence from two psychologists that she was capable of telling the truth. The trial judge then directed the jury that, in his opinion, the complainant was a competent witness, but that it was for them to decided whether she was telling the truth. One of the grounds of appeal was that competence was a question of admissibility, to be decided by the judge alone in the absence of the jury.

*Held* It was an irregularity for the psychologists to give their evidence before the jury as the question of competence was for the judge to decide. However, there had been no miscarriage of justice and the appeal was dismissed.

## 4.8 The trial judge in criminal cases has a right to call witnesses not called by either the prosecution or the defendant

### R v Harris (1927) CCA

Five defendants were tried together. Two pleaded guilty. At the trial of the others, after the defence had closed its case, the trial judge called one of those who had pleaded guilty to give evidence.

*Held* It was permissible for the trial judge in a criminal case to call a witness not called by either the prosecution or the defendant, and without the consent of either, if this course is necessary in the interests of justice. This rule does not apply in civil cases, where a trial judge may only call a witness with the consent of the parties. In the instant case, however, the interests of justice did not require that the trial judge should have done what he did and the conviction was quashed.

### R v Cleghorn (1967) CA

The issue arose as to whether the trial judge had been right to call a witness not called by either prosecution or defendant.

*Held Per* Lord Parker CJ:

> It is abundantly clear that a judge in a criminal case, where the liberty of the subject is at stake and where the sole object of the proceedings is to make certain that justice should be done as between the subject and the state, should have a right to call a witness who has not been called by either party. It is clear, of course, that the discretion to call such a witness should be carefully exercised.

## 4.9 A witness who is outside the UK may be permitted to testify through a live television link under s 32 of the Criminal Justice Act 1988

### R v Forsyth (1997) CA

The allegation against the defendant was that, knowing or believing that certain money had been stolen, she had arranged for it to be transferred out of the UK to an account in Switzerland. The main witnesses were living in northern Cyprus. The defence applied for permission for these witnesses to give evidence under s 32 of the Criminal Justice Act 1988. This provided, *inter alia,* that a person other than the accused who was outside the UK could give evidence through a live television link and that any such evidence given under oath would be subject to the Perjury Act 1911. The trial judge refused leave for this to be done on the basis that, since there was no extradition treaty between the UK and northern Cyprus, the ultimate

sanction of a perjury conviction against an untruthful witness did not apply. Further, one of the witnesses was himself a fugitive from justice who had fled to northern Cyprus precisely because no extradition treaty existed.

*Held* The trial judge was wrong to consider the non-existence of an extradition treaty to be crucial. Parliament had not included such a requirement within the terms of s 32 of the 1988 Act. In general, once it was shown that there was difficulty in obtaining the attendance of a witness abroad whose evidence was relevant, the court should lean towards the evidence being adduced in this way.

# 5 Presentation of Oral Testimony: Examination of Witnesses

## 5.1 Witnesses testifying in court are required to take the oath or make an affirmation

### R v Chapman (1980) CA

The defendant was charged with murder. Her 16 year old son was called as a witness. When he was sworn, he did not take the New Testament in his hand, as required by s 1 of the Oaths Act 1978. The trial judge later ruled that the jury should treat his evidence as being unsworn. The defendant was convicted and appealed on the basis that there had been a material irregularity.

*Held* The words of s 1 of the Oaths Act 1978 were directive so that, although they should be complied with, failure did not invalidate the testimony. The efficacy of the oath depended on its being taken in a way that was binding upon the conscience of the witness. This had been the case here, therefore there was no material irregularity.

### R v Kemble (1990) CA

The defendant was charged with a number of firearms offences. At his trial the main prosecution witness, despite being a Muslim, took the oath using the New Testament. An appeal was taken on the basis that the Oaths Acts 1978 was not complied with. The Act provides in s 1 that 'in the case of a person who is neither a Christian nor a Jew, the oath shall be administered in any lawful manner'. It was contended that, as the witness was a Muslim the only way in which he could be lawfully sworn was by taking the oath on a copy of the Koran in Arabic.

*Held Per* Lord Lane CJ:

> We take the view that the question of whether the administration of an oath is lawful does not depend on what may be the considerable intricacies of the particular religion which is adhered to by the witness. It concerns two matters and two matters only in our judgment. First of all, is the oath an oath which appears to the court to be binding on the conscience of the witness? And, if so, secondly, and most importantly, is it an oath which the witness himself considers to be binding on his conscience?

It was held that the answers to both questions were in the affirmative. The witness had stated that he considered the oath he had taken was binding on him. Accordingly, there had not been any material irregularity.

**R v Hayes (1977) CA**
See 4.6.

Note
Under s 33A of the Criminal Justice Act 1988 (introduced by s 52(1) of the Criminal Justice Act 1991), evidence of children under 14 years of age must be given unsworn. In civil cases, s 96 of the Children Act 1989 provides that a child may give unsworn evidence.

## 5.2 Special measures to be taken in cases of vulnerable and intimidated witnesses

Note
Special provisions have been introduced under Part II of the Youth Justice and Criminal Evidence Act 1999 in relation to witnesses judged by the court to be in need of special protection on the grounds of age, mental incapacity or fear or distress about testifying. In such circumstances, the court may make a 'special measures direction'. Such a direction may include the following:

(a) screening the witness from the accused (s 23);
(b) evidence by live link (s 24);
(c) evidence given in private (s 25);
(d) removal of wigs and gowns (s 26);
(e) admission of video recording as evidence-in-chief (s 27);
(f) video recording of cross-examination (s 28);
(g) examination of witnesses through an intermediary (s 29);
(h) providing appropriate aids to communication (s 30).

## 5.3 Parties are free to call as witnesses whomsoever they choose; in criminal cases, the prosecution must make available to the defence any witnesses the prosecution does not intend to call

**Briscoe v Briscoe (1966) PDA**

The parties were involved in matrimonial proceedings. The magistrate refused to allow counsel for the husband to call any witnesses until counsel had first called the husband.

*Held* The magistrate was wrong. There was complete discretion as to which witnesses to call.

**Dallison v Caffery (1964) CA**

The plaintiff had previously been charged with theft. The prosecution had offered no evidence against him on the basis that he had been wrongly identified. The plaintiff now sued the police officer in charge of the case for false imprisonment and malicious prosecution. The trial judge had dismissed the claim on the basis that the defendant had reasonable grounds for proceeding with the prosecution. The plaintiff appealed against this ruling. One of the issues concerned a number of statements made to the defendant by three persons which indicated that the plaintiff could not have committed the theft. These statements had been handed to the prosecution solicitors. At the committal proceedings, the persons who made these statements were not called, nor were their statements made available to the magistrates.

*Held* The defendant had done all that he was required to do by putting the statements before his superior officers and the prosecution solicitors. It was not his fault that the solicitor did not put them before the magistrates. *Per* Lord Denning MR:

> The duty of a prosecuting counsel or solicitor…is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence. It would be highly reprehensible to conceal from the court the evidence which such a witness can give.

Here, the prosecuting solicitor had made these statements available to the solicitor for the defence immediately after the committal proceedings; this was sufficient.

**Q** Should the prosecuting solicitor have made these statements available to the defence before the committal proceedings? If this had been done, it was unlikely that the plaintiff would have been committed for trial.

**R v Oliva (1965) CCA**

The defendant was charged and convicted with wounding with intent to cause grievous bodily harm outside a nightclub. The victim and the

doorman of the club made statements to police in which they identified the defendant and described the attack. They repeated these statements during committal proceedings. However, there was an adjournment. During this time, they sought to retract their evidence. When the committal proceedings continued, they were recalled and both testified that their earlier statements had been made under pressure from the police. Their names were subsequently added to the back of the indictment. At the trial, the prosecution declined to call either of them. However, the victim was called by the defence and cross-examined on his previous statements. The defendant appealed against his conviction.

*Held* The general rule is that the prosecution must have in court those witnesses who have given evidence during committal proceedings and whose names have been added to the indictment. However, the prosecution has a wide discretion as to whether they should call and examine them, or call them and tender them to the defence for crossexamination. The duty on the prosecution extends to a discretion to call witnesses who are capable of belief, even though their testimony may work against the prosecution. *Per* Lord Parker CJ:

> If the prosecution appear to be exercising that discretion improperly, it is open to the judge of trial to interfere and in his discretion in turn to invite the prosecution to call a particular witness and, if they refuse, there is the ultimate sanction in the judge himself calling that witness.

In this case, the prosecution had rightly used their discretion in concluding that these witnesses were not reliable and that the interests of justice would not be served by calling them. In any case, the prosecution had ensured that these witnesses were present in court for the defence to call if they so wished.

### R v Nugent (1977) CCA

The defendant was charged with murder. The defence solicitors gave the police a list of eight witnesses who could support the defendant's alibi defence. The police took statements from these witnesses and these statements were tendered by the prosecution during committal proceedings. At the trial, the prosecution decided that these witnesses would not be called. The defence made an application to the judge asking him to exercise his discretion to invite the prosecution to call these witnesses. The defence contended that it was the prosecution's duty to call these witnesses.

*Held* The prosecution had a discretion as to the witnesses they would call in support of their case, especially as the evidence of these witnesses was not essential to explain the sequence of events involved in the killing. To compel the prosecution to call these witnesses would be tantamount to imposing on the prosecution the function of prosecution and defence. In

the instant case, the prosecution had ensured that these witnesses were present in court; they were, therefore, available should the defence wish to call them.

**R v Balmforth (1992) CA**

The defendant was charged and convicted of wounding. He claimed that he had acted in self-defence. After the incident in question, he had been driven away from the scene by a friend. This friend, S, made a statement which was partly favourable to the defendant and partly favourable to the prosecution. The statement formed part of the committal papers. Counsel for the prosecution agreed, since S was a credible witness, that the prosecution would call S and then tender him to the defence for crossexamination. When counsel was about to do so, he was stopped by the judge who reminded him that the prosecution had a complete discretion as to the witnesses to be called. The prosecution, accordingly, did not call S. The defence, however, did call S to testify. The defendant appealed on the ground that the trial judge had been wrong to rule that the prosecution had an unfettered discretion. It was contended that, once the prosecution had determined that S was a credible witness, they were under a duty to call him.

*Held* The prosecution did have a discretion. However, if the witness was capable of belief, the prosecution was under a duty to call and either examine the witness or tender the witness for cross-examination. The prosecution had properly exercised his discretion. S was worthy of belief and the judge was wrong to suggest that he had a remaining discretion not to call him. The defence was under a disadvantage as a result. Although they could call S themselves, they were not able to subject him to crossexamination.

## 5.4 In civil cases, witnesses may be called in any order; certain constraints exist in criminal cases

**Briscoe v Briscoe (1966) PDA**

See 5.3.

*Held* The order in which witnesses were to be called in civil cases is entirely a matter for each party to decide.

**R v Smith (1968) CA**

The defendant was charged with driving while unfit. The main ground of appeal was that the magistrates were wrong in ruling that the defendant should be called before any other of the defence witnesses.

*Held* The rule in criminal cases is that the defendant, if he has elected to testify, should be called before any of the other defence witnesses. The reason for this, *per* Cusack J, 'is that, if they are permitted to hear the evidence of

other witnesses, they may be tempted to trim their own evidence'. There may be rare exceptions, for example, a witness about whom there is no controversy, but this requires leave of court.

Note
This rule has now been given statutory force in s 79 of the Police and Criminal Evidence Act 1984.

## 5.5 The trial judge in criminal cases may, in certain circumstances, call witness on his own motion; in civil cases, this power is restricted

### R v Harris (1927) CCA

The defendant was charged with handling stolen property. The alleged thieves had pleaded guilty and were still in the dock. The defendant, who pleaded not guilty, was examined and cross-examined and the defence closed its case. The trial judge then called one of the thieves to give evidence. The trial judge conducted the examination himself and the witness gave evidence which implicated the defendant.

*Held* A trial judge has the right to call witnesses not called by either side and to do so without consent if, in his opinion, that course is necessary in the interests of justice, but a judge should not call a witness after the case for the defence had closed, except where a matter arises *ex improvisa* which no human ingenuity could have foreseen. This was not the case here, and the conviction was quashed.

### R v Cleghorn (1967) CA

The defendant was charged and convicted with rape. The appeal concerned the question as to whether the trial judge had a discretion to call a witness not called by either side.

*Held* The general rule was that such a discretion existed. *Per* Lord Parker CJ:

> It is abundantly clear that a judge in a criminal case where the liberty of the subject is at stake and where the sole object of the proceedings is to make certain that justice should be done as between the subject and the state should have a right to call a witness who has not been called by either party.

However, this discretion should only be exercised if no injustice or prejudice would be caused to the defendant or if some issue arose *ex improvisa.*

### R v McDowell (1984) CA

The defendant, an employee at Heathrow Airport, was charged with handling stolen property. It was alleged that the property, cigarettes, had been stolen from passengers. The defendant contended that he had bought

the cigarettes from employees of British Airways. During the trial the jury sent a note to the judge asking whether employees of British Airways were permitted to buy duty free cigarettes. The judge put this to counsel for both the prosecution, as well as the defence, but they declined to call witnesses to establish this point. Thereupon, the judge called a witness himself.

*Held* The trial judge had committed an irregularity by seeking to gratify the jury's wish. He should have told them that they had to deal with the case only on the evidence brought to them by prosecution and defence.

**Fallen v Cal vert (1960) CA**

The plaintiff sued under a contract for a commission on the defendant's earnings. One of the issues dealt with the question as to whether the judge had a power to call witnesses.

*Held* Although a judge did not have the power to call a witness without the consent of the parties, in this case, he was merely seeking to recall a witness who had already testified; there was such a right to recall.

**Yianni v Yianni (1966) ChD**

The plaintiff had obtained an injunction against the defendant to restrain him from further collecting certain rents. It was alleged that the defendant was in breach of the injunction. On the hearing of committal for contempt the court had ordered that a subpoena should be served on one of the tenants, who had stated that he had in fact paid rents to the defendant. He had been called and examined.

*Held* The rule in civil proceedings was that the judge should not himself call witnesses unless the parties consent or at least do not object. However, *per* Cross J:

> I am satisfied, however, that the general rule cannot apply to a committal motion. The contempt alleged here is a civil contempt: but, if the party who has obtained the order, not having released the other party from compliance with it, alleges that it has been broken, then the matter has a quasi-criminal aspect and I do not doubt that the court has power, in order to find out the truth of the matter, to serve subpoenas.

## 5.6 Examination-in-chief

The purpose of the examination-in-chief is to obtain testimony in support of the version of the facts in issue or relevant to the issue for which the party calling the witness contends.

### 5.6.1 The general rule is that leading questions should not be put during examination-in-chief

**Moor v Moor (1954) CA**

The wife petitioned for divorce on the grounds of the husband's adultery. She also asked for the court to exercise its discretion in relation to her own adultery. One of the issues related to the use of leading questions. A number of these had been put to the wife during examination-in-chief, including the question: 'Did you suspect your husband was having relations with someone else?' To which she replied 'Yes'.

*Held* Such questions were irregular and the answers to them inadmissible. In particular, they carried no weight and had no value. This was especially so in this case, as the wife had not been asked for the basis of her suspicions.

> Note
> It is always relative as to what is a leading question. It may be said, generally, that a leading question is one which either: (a) suggests the answer desired; or (b) assumes the existence of disputed facts to which the witness is to testify.

### 5.6.2 Witnesses may experience difficulty in recollecting the events to which their testimony relates; in such circumstances, they are permitted to refresh their memory by reference to documents such as notes, logbooks or diaries

**R v Richardson (1971) CA**

The defendant was charged with a number of counts of burglary. Before the trial, four of the prosecution witnesses were shown statements they had made to the police a few weeks after the offences. The defence submitted that this meant that their evidence was inadmissible. The trial judge rejected this contention.

*Held* The general rule is not to permit witnesses to refresh their memory from written statements, unless those statements had been made contemporaneously. However, this rule did not apply if those witnesses did so before testifying. It is common practice to allow witnesses to have copies of their statements and to refresh their memories from them up to the moment that they go into the witness box. *Per* Sachs L: 'One has only to think for a moment of witnesses going into the box to deal with accidents which took place five or six years previously to conclude that it would be highly unreasonable if they were not allowed to see them.' The court also approved earlier statements made in other cases to the effect that 'testimony in the witness box becomes more a test of memory than of truthfulness if

witnesses are deprived of the opportunity of checking their recollection beforehand by reference to statements or notes made at a time closer to the events in question' and that 'refusal of access to statements would tend to create difficulties for honest witnesses, but be likely to do little to hamper dishonest witnesses'.

> Note
> Refreshing the memory while testifying could only be done if the document used: (a) was made, or verified, by the witness himself contemporaneously with the events in question; (b) is produced for inspection; and (c) is, in prescribed cases, the original.

**Worley v Bentley (1976) QBD**

This was appeal by way of case stated on a charge of assault. During crossexamination, a witness for the prosecution stated that the police had shown her a copy of a statement she had made shortly after the alleged assault. The defence argued that this was improper; it was contended that it was essential that the defence should have been informed that this had taken place. The justices had agreed with the defence and the prosecution appealed.

*Held* There was no rule of procedure that made it essential that the defence should be informed. This was especially so, as the fact that the witness had refreshed her memory outside court had emerged during cross-examination. *Per* Kilner Brown J:

> The situation, here, could easily have been met by the advocate during crossexamination, if he was so minded, to ask for a short adjournment, maybe to look at the statement or, alternatively, without any adjournment to proceed to attack the witness's reliability on the basis that it was not a true recollection, but was one supported by a view of the statement recently seen.

However, it was desirable and a good rule of practice for the prosecution to have informed the defence, as this might be relevant to the weight that could be attached to the evidence.

**R v Simmonds (1967) CA**

The main prosecution witnesses were two customs officers who had conducted interviews with the defendant. They did not make any note at the time, but made up their notes later, based on their recollections and a questionnaire, as soon as they returned to their offices. When they testified, they had their notes in front of them and read out from these notes.

*Held* There could not be any objection to the use of the notes. The question as to whether the notes were to be regarded as having been made contemporaneously was a matter of fact and degree. Here, the notes had

been made up as soon as the officers returned to their offices and at the first available opportunity. As far as reading from the notes was concerned, *per* Atkinson LJ:

> …assuming that notes of interviews of such length and complexity have to be introduced in evidence-in-chief, no other course was sensible or practicable. It is the course which is constantly adopted by police officers giving evidence of a long interview or series of interviews with suspected persons and is certainly a better and fairer practice than the witness trying to learn his evidence by heart.

**R v Kelsey (1982) CA**

The defendant was convicted of burglary. A prosecution witness had refreshed his memory about a car registration number by reference to a note made at the witness's dictation by a police officer. This number had been read back to the witness and verified orally; the witness did not actually see what had been written down.

*Held* There was no rule which required that the witness should have seen what was written. *Per* Taylor J: 'There is no magic in verifying by seeing as opposed to hearing—what must be shown is that the witness… has verified in the sense of satisfying himself whilst the matters are fresh in his mind: (1) that a record had been made; and (2) that it is accurate.'

**R v Westwell (1976) CA**

Certain prosecution witnesses asked to see the statements they had made before the trial of the defendant on a charge of assault. They were allowed to do so. Prosecution did not inform the defence of this.

*Held* Witnesses may see their own statements before they testify and it is immaterial whether they ask for this or merely accept an offer to do so. There may be occasions where the witness has, *per* Bridge LJ, 'some sinister or improper purpose in wanting to see his statement'. If this was so, then the interests of justice require that he be denied the opportunity. However, in most cases, the interests of justice are better served by allowing witnesses to refresh their memories. In addition, there is no rule which requires the prosecution to inform the defence that this has been done, although it is desirable for the prosecution to do so. Here, the defence knew, before the prosecution case was concluded, that the witnesses had seen their statements and they could have cross-examined the witnesses on those statements.

**R v Bass (1953) CCA**

The only evidence against the defendant, on a charge of shopbreaking and larceny, was contained in a confession alleged to have been made during police interrogation. At the trial, the police officers who had conducted the interrogation gave evidence and read their account of the interrogation

from their notebooks. It appeared their accounts were identical and the defence alleged that there had been collaboration and asked that the jury be allowed to inspect the notebooks.

*Held* The notes of the interview had not been made at the time of the interview. One officer made his notes after the defendant had been charged, while the other made his an hour later. It had been wrong not to allow the jury to see the notebooks. *Per* Byrne J:

> The credibility and accuracy of the two police officers was a vital matter…and, as they had denied collaboration in the making of their notes, the jury should have been given the opportunity of examining them.

**R v Virgo (1978) CA**

The defendant, the head of the Obscene Publications Squad, was convicted of conspiracy and corruption. A prosecution witness was allowed to use his diaries to refresh his memory, while giving evidence and copies were given to the jury. The object of the diaries was to enable the witness to give accurate dates. The trial judge had directed the jury that the diaries were the most important evidence against the defendant.

*Held* It was important to remember the status of documents used to refresh the memory; it was the oral testimony of the witness which constituted the evidence and not the document used to refresh the memory. In this case, the prosecution witness was, in fact, an accomplice. As such, his testimony required corroboration. There was a danger that the jury might think that the diaries corroborated his evidence. The conviction was quashed.

> Note
> In civil cases, under s 3 of the Civil Evidence Act 1968, a memory refreshing document may be treated as evidence of the facts which that document contains.

### 5.6.3 Previous consistent statements made by a witness are generally inadmissible

**Corke v Corke and Cook (1958) CA**

The husband alleged that he had discovered his wife committing adultery with her lodger. This was denied. Ten minutes later, the wife had telephoned her doctor asking him to examine her and the lodger to show that there had not been recent sexual intercourse. The doctor refused. On the husband's petition for divorce, the court allowed evidence to be given of the telephone conversation between the wife and her doctor.

*Held* This evidence was inadmissible. *Per* Sellers LJ: 'Not only is the evidence of what the wife did and said valueless and might, indeed, be misleading to the court, but it is not admissible.'

**Fox v General Medical Council (1960) PC**

This was an appeal by a doctor against disciplinary action by the General Medical Council. Allegations had been made of adultery with a woman patient who was since deceased. The doctor had sought to call evidence from a friend to whom he had told the same general story about his relations with the woman patient. This had not been allowed at the hearing.

*Held* This evidence was of a previous consistent statement and was inadmissible. *Per* Lord Radcliffe:

> Generally speaking, as is well known, such confirmatory evidence is not admissible, the reason presumably being that all trials, civil and criminal, must be conducted with an effort to concentrate evidence upon what is capable of being cogent and…it does not help to support the evidence of a witness, who is the accused person, to know that he has frequently told other persons before the trial what his defence was. Evidence to that effect is, therefore, in a proper sense, immaterial.

Note

There are a number of exceptions to the rule that previous consistent statements are inadmissible. These may be summarised to include: (a) complaints in cases of sexual assault; (b) statements made during reexamination to rebut allegations of recent fabrication; (c) statements admitted as part of the *res gestae;* (d) statements made immediately upon being accused or when confronted with incriminating facts; (e) evidence of identification.

**R v Lillyman (1896) CCR**

The defendant was charged with rape and other sexual offences. Evidence was sought to be adduced of statements made by the complainant to her employer, an objection being taken that such statements ought to be excluded.

*Held* In cases of rape and other sexual offences, the fact that a statement, in the form of a complaint, was made by the complainant shortly after the alleged offence may be given in evidence by the prosecution. In this case, such a statement was evidence of the complainant's consistency and was relevant to the question of whether she had consented. However, it is important that the jury is informed that such a statement is not evidence of the facts and the statement must be made as soon as practicable.

### 5.6.4 A party calling a witness may not seek to discredit that witness, unless leave of court has been obtained to treat that witness as unfavourable or hostile

**Ewer v Ambrose (1825) KB**

In an action for money had and received, on the basis of joint liability within a partnership, the defendant called a witness to prove the existence of that

partnership. The witness, however, gave evidence to the contrary and the question arose as to whether the defendant could seek to discredit the testimony of his own witness.

*Held Per* Holroyd J:

> It is undoubtedly true that, if a party calls a witness to prove a fact, he cannot, when he finds the witness proves the contrary, give general evidence to show that that witness is not to be believed on his oath, but he may show by other evidence that he is mistaken as to the fact which he is called to prove.

Note

A fundamental distinction is made between a witness who proves to be unfavourable and one who proves to be hostile (or adverse). An unfavourable witness is one who fails to come up to proof or gives unfavourable evidence but who displays no hostile animus to the party calling him. A hostile witness is one who shows no desire to tell the truth at the instance of the party calling him and towards whom he displays a hostile animus.

### Greenough v Eccles (1859)

A witness called by the defendants supported the plaintiff's case instead.

*Held* Leave of court must be obtained before a witness is to be regarded as adverse (that is, hostile).

### Section 3 of the Criminal Procedure Act 1865

A person producing a witness shall not be allowed to impeach his credit by general evidence of bad character but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but, before such last mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness and he must be asked whether or not he has made such statement.

Note

Section 3 of the Civil Evidence Act 1968 extends the Criminal Procedure Act 1865 to civil cases.

### R v Thompson (1976) CA

The defendant was charged with a number of counts of incest and attempted incest. One of his daughters made a statement to the police implicating her father. She was called at the trial, but refused to give evidence after taking the oath. The trial judge gave counsel permission to treat her as a hostile witness; she was asked leading questions and her previous statement was put to her.

*Held* Once leave of court had been granted for the witness to be treated as hostile, it was possible to cross-examine the defendant. This meant that leading questions, as well as previous inconsistent statements, could be put.

**R v Maw (1994) CA**

The defendant was convicted on a charge of unlawful wounding. The trial judge had permitted the prosecution to treat its chief witness, the victim of the alleged assault, as hostile. The issue on appeal related to the correct procedure to be followed when it was alleged that a witness was hostile.

*Held* Before a prosecution witness is treated as hostile, the prosecution and the trial judge should first invite him to refresh his memory from material which it is legitimate to use for that purpose. It was undesirable on not getting the expected answer to immediately treat the witness as hostile. If the witness refused to refresh his memory and did not give an explanation of why he chose to give different evidence, the trial judge could then consider whether it was proper to give leave that he be treated as hostile. If the witness was treated as hostile, he could then be crossexamined and previous inconsistent statements could be put to him. It was also necessary for the trial judge to give the jury clear directions as to the creditworthiness of such a witness.

> Note
> Although a previous statement may be put to a witness who has been declared to be hostile, this previous statement is not to be regarded as evidence in the case.

**R v Honeyghon and Say les (1998) CA**

Three witnesses to a murder were reluctant to give evidence. Two had agreed to speak to the police, but refused to give written statements. The third had signed a witness statement implicating the two defendants, but refused to answer questions at committal proceedings and, at the Crown Court, maintained that she could not remember anything. The prosecution applied for leave to treat these witnesses as hostile and was allowed to do so in respect of two of these witnesses. The defendants were convicted and appealed on the basis that the trial judge should have held a *voir dire* in order to determine whether each of these witnesses were likely to persist in their refusal to assist the court. It was argued that, if this had been done, it would have been clear that they would continue in their refusal and, consequently, they would not have been put before the jury. The result would have been that the jury would then have been unaware that material evidence was being withheld.

*Held* This case illustrated the basic conflict between two principles:

(a) it was in the interest of justice that potential witnesses assisted the court in the detection of crime; the court should not readily accept a refusal or reluctance to testify;

(b) on the other hand, in the interests of fairness of the proceedings, the court has a duty to ensure that evidence whose prejudicial effect outweighed its probative value should not be put before the jury. It was to be left to the discretion of the trial judge as to whether the holding of a *voir dire* was appropriate.

## 5.7 Cross-examination

The purpose of cross-examination is: (a) to obtain evidence concerning the facts in issue or relevant to the facts in issue; and (b) to cast doubt upon the evidence given during examination-in-chief.

**R v Hart (1932) CCA**

The defendant was convicted of assault. He relied on a defence of alibi and called three witnesses in support. None of these three witnesses were cross-examined by the prosecution. When counsel for the prosecution was making his closing speech, he invited the jury to disbelieve these three witnesses.

*Held* Counsel for the prosecution should have challenged these witnesses through cross-examination. The lack of cross-examination meant that his closing speech was improper.

### 5.7.1 The testimony of a witness may be discredited during crossexamination by the use of previous inconsistent statements

**Sections 4 and 5 of the Criminal Procedure Act 1865**

4 If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did, in fact, make it; but, before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness and he must be asked whether or not he has made such a statement.

5 A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject matter of the indictment or proceeding, without such writing being shown to him. If it is intended to contradict the witness by this writing, his attention must be called to those parts which are to be used to contradict

him before such contradictory proof can be given. The judge can require the production of the writing for his inspection at any time during the trial, and he may make such use of it for the purposes of the trial as he thinks fit.

Note
Section 3 of the Civil Evidence Act 1968 extends these provisions to civil cases.

### 5.7.2 The answer given by a witness during cross-examination concerning collateral facts or matters is final and other evidence may not be called to contradict it

**AG v Hitchcock (1847) Exchequer**
The defendant was charged with a regulatory offence in connection with the use of a cistern for the making of malt. The prosecution called a witness who testified that the cistern had been used as alleged. The witness was asked in cross-examination whether it was true that he had made a statement to someone named Cook to the effect that he had been offered money to testify that the cistern had been used. He denied this. Counsel for the defendant then called Cook and proposed to ask him what the witness had told him.

*Held* This evidence was not allowed. The witness had been asked a question which related to a collateral issue. He had answered the question and the answer was to regarded as final. If there was no such rule, *per* Alderson B:

> …an endless amount of collateral issues would have to be tried. The convenient administration of justice, therefore, requires that this course should not be adopted. If the witness has spoken falsely, he may be indicted for perjury. When the answer given is not material to the issue, public convenience requires that it be taken as decisive, and that no contradiction be allowed.

**Q** Could it not be argued that the question as to whether the witness had been bribed to testify against the defendant was sufficiently important to merit a further witness and further questions to be put? See *R v Mendy* (1976), below.

**R v Mendy (1976) CA**
The defendant was charged with assault. At the trial, in accordance with the usual practice, all the witnesses were kept out of court until they testified. While a police officer was giving evidence about the assault, it was noticed that a man in the public gallery was taking notes. This man was seen to leave court and talk to the defendant's husband, apparently telling him what the police officer had said. The defendant's husband then gave

evidence and in cross-examination denied talking with the man who had been in the public gallery. The prosecution was then given leave to call other witnesses to show that the husband had been lying. The defendant was convicted and one of the grounds of appeal was that the trial judge had been wrong to allow the prosecution to call evidence to rebut what her husband had said.

*Held Per* Lane LJ:

> A party may not, in general, impeach the credit of his opponent's witnesses by calling witnesses to contradict him on collateral matters…The rule is of great practical use. It serves to prevent the indefinite prolongation of trials which would result from a minute examination of the character and credit of witnesses…The truth of the matter is, as one would expect, that the rule is not all embracing. It has always been permissible to call evidence to contradict a witness's denial of bias or partiality towards one of the parties and to show that he is prejudiced so far as the case being tried is concerned…The witness was prepared to cheat in order to deceive the jury and help the defendant. The jury were entitled to be apprised of that fact.

Note

The finality rule may often be raised in connection with questions designed to show bias or partiality (see 5.6.4) on the part of witnesses.

**R v Nagrecha (1997) CA**

The defendant was convicted of an indecent assault, which he denied. The only evidence against him was that of the complainant, U. Under crossexamination, It was put to U that she had made previous allegations of sexual misconduct against others; she denied this. The defence now sought to call a witness, L, to the effect that U had previously made allegations of a sexual nature against him. The trial judge refused to allow the evidence to be adduced due to the finality rule.

*Held* U's credibility was crucial to the case. Since she had denied making any complaint against L, it was proper that L should be called to refute this. Whether the complaint against L was true or not was peripheral. What was crucial was whether U had, in fact, made such a complaint. Accordingly, the trial judge should have allowed L to testify on this point.

**Q** Would it be true to say that this case ignores the distinction between evidence which goes to the issue (where the finality rule does not operate) and where it relates to credit (where it does apply)? Would it not be the case that the rationale of the finality rule would be eroded if L had been permitted to testify?

### 5.7.3 A witness may be cross-examined about previous criminal convictions

**Section 6 of the Criminal Procedure Act 1865**
A witness may be questioned as to whether he has been convicted of any felony or misdemeanour and, upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction.

> Note
> This provision does not apply to defendants in criminal trials who elect to testify.

### 5.7.4 A witness may be cross-examined to show bias or partiality; medical evidence may also be adduced in order to discredit reliability

**R v Mendy (1976)**
See 5.7.2.

**R v Busby (1981) CA**
The defendant was charged and convicted with offences of burglary and handling stolen goods. It was alleged that he had made incriminating remarks to the police. Two police officers were cross-examined at the trial and it was put to them that one of them, in the presence of the other, had threatened a potential witness to prevent him giving evidence favourable to the defendant. This was denied by the police officers. This witness was then called in order to testify as to the alleged threat. The prosecution objected on the grounds that this related to a collateral issue. The trial judge upheld the objection.

*Held* It is often difficult to determine when questions relate to facts which are collateral or to facts which are relevant to the issue. In this case, the trial judge had been wrong to refuse to allow the evidence to be given. *Per* Eveleigh LJ:

> If true, it would have shown that the police were prepared to go to improper lengths in order to secure the accused's conviction. It was the accused's case that the statement attributed to him had been fabricated, a suggestion which could not be accepted by the jury unless they thought that the officers concerned were prepared to go to improper lengths to secure a conviction.

**R v Edwards (1991) CA**
The defendant was convicted of robbery and the possession of a firearm. The main issue on appeal related to allegations made against the police officers involved in the case, as well as of the West Midlands Serious Crime Squad, in that their behaviour and conduct had been the subject of

investigation. In particular, that they had regularly fabricated evidence, that one of the police officers involved in the case had been charged with perjury and that other trials involving the Crime Squad had resulted in acquittals or the quashing of convictions because of improper police conduct. It was contended that, if the defence had been aware of this information, they would have been able to cross-examine the police officers concerned.

*Held* Cross-examination would have been permitted in order to show that the police evidence could not be relied on because of the allegations made against the West Midlands Serious Crime Squad. If this was denied, independent evidence could be called to rebut police denials. *Per* Lord Lane CJ:

> The distinction between the issue in the case and matters collateral to the issue is often difficult to draw, but it is of considerable importance. Where crossexamination is directed at collateral issues, such as the credibility of the witness, as a rule, the answers of the witness are final and evidence to contradict them will not be permitted…There are, however, exceptions to that rule, of which one of the most important is to show bias on the part of the witness…

### R v Clark (1998) CA

The defendant had been arrested for theft and burglary. He was convicted on the basis, *inter alia*, of a confession. He appealed on the grounds that the police officers involved in his arrest had provided him with heroin, as he was experiencing withdrawal symptoms, and that his confession was made as a result of the heroin. He stated that he had not mentioned these circumstances before, as he did not think he would be believed. He applied for leave to introduce this further evidence for the purposes of the appeal. One of the issues which arose was whether, if the police officers concerned had been examined on this point, their answers would be regarded as collateral and, therefore, subject to the finality rule.

*Held* If the allegation had been raised at the trial, and, if it had been denied by the police officers, cross-examination would have been possible and would not have been precluded by the finality rule. Accordingly, the conviction would be quashed and a re-trial ordered.

### Toohey v Commissioner of Police of the Metropolis (1965) HL

The defendant was charged, together with two others, for assault. The jury was unable to reach a decision and a second trial was ordered. The defendants alleged that they had come upon the alleged victim, a boy of 16, in a dishevelled and hysterical state. He had been drinking. They had attempted to help him, but he had thought they were trying to assault him. At the first trial, evidence had been given, without any objection, by a police surgeon who had examined the boy at the police station. He testified that the boy was in a state of hysteria and that his alcohol consumption had exacerbated this state. He also gave it as his opinion that the boy was more

prone to hysteria than the normal person. However, at the re-trial, the trial judge ruled that he would not permit the police surgeon to give this evidence. The defendant was convicted and appealed.

*Held* The trial judge had been wrong to exclude the evidence of the surgeon. Medical evidence to the effect that the victim of an assault was hysterical and unstable was relevant, especially as the issue had been raised that there was, in fact, no assault at all. *Per* Lord Pearce:

> Medical evidence is admissible to show that a witness suffers from some disease or defect or abnormality of mind that affects the reliability of his evidence. Such evidence is not confined to a general opinion of the unreliability of the witness, but may give all the matters necessary to show, not only the foundation of and reasons for the diagnosis, but also the extent to which the credibility of the witness is affected.

### 5.7.5 Certain limitations apply in relation to the cross-examination of complainants in sexual offences

**Section 41 of the Youth Justice and Criminal Evidence Act 1999**

(1) if, at a trial, a person is charged with a sexual offence, then, except with leave of the court:
   (a) no evidence may be adduced; and
   (b) no question may be asked in cross-examination by, or on behalf of, any accused at the trial about any sexual behaviour of the complainant;

(2) the court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused and may not give such leave unless it is satisfied:
   (a) that sub-ss (3) or (5) apply; and
   (b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case;

(3) this sub-section applies if the evidence or question relates to a relevant issue in the case and either:
   (a) that issue is not an issue of consent; or
   (b) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at the same time as (or within the period of 24 hours before or after) the event which is the subject matter of the charge against the accused;

(4) for the purposes of sub-s (3), no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose)

for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness;

(5) this sub-section applies if the evidence in question:

(a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and

(b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

Note

(a) this provision is intended to replace s 2 of the Sexual Offences (Amendment) Act 1976 (see below) which has been the subject of much criticism; (b) the 1976 Act dealt only with rape; the new provision will deal with any sexual offence.

### Section 2 of the Sexual Offences (Amendment) Act 1976

(1) If, at a trial, any person is, for the time being, charged with a rape offence to which he pleads not guilty, then, except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with a person other than that defendant.

(2) The judge shall not give leave in pursuance of the preceding sub-section for any evidence or question except on an application made to him in the absence of the jury by or on behalf of a defendant; and, on such an application, the judge shall give leave if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked.

### R v Viola (1982) CA

On a trial for rape, the issue was whether or not the complainant had consented. The complainant testified and during cross-examination leave was obtained, under s 2 of the 1976 Act, to cross-examine her about her sexual experiences with men other than the defendant. The proposed questions were based on statements made by eye witnesses concerning her relations with different men some hours before and some hours after the alleged rape. The trial judge refused to give leave and the defendant was convicted.

*Held* In dealing with the 1976 Act, the first question to be decided by the trial judge is whether the questions which the defence propose to put are relevant according to the ordinary rules of evidence. If the questions are not relevant, that is the end of the matter. It is only if the questions are relevant that s 2 of the 1976 Act come into play. The 1976 Act was designed to protect the complainant from cross-examination as to credit only. The

Act could not be used to exclude evidence which was relevant. In this case, the issue concerned consent and the evidence of sexual promiscuity. The evidence was closely contemporaneous in time to the alleged rape and so came close to the border separating mere credit and relevance to the issue. As far as the discretion of the trial judge was concerned, *per* Lord Lane CJ:

> …it is wrong to speak of a judge's 'discretion' in this context. The judge has to make a judgment as to whether he is satisfied or not in the terms of s 2. But, once having reached his judgment on the particular facts, he has no discretion. If he comes to the conclusion that he is satisfied, it would be unfair to exclude the evidence, then the evidence has to be admitted and the questions have to be allowed.

**R v Cox (1987) CA**

The defendant was charged with rape. He alleged that the complainant had consented to sexual intercourse while her boyfriend was away. The defence wished to cross-examine the complainant about a previous occasion when the complainant had made an allegation of rape against another man. When confronted by this man and her boyfriend, she had admitted that the accusation was false. The trial judge ruled that this evidence should not be admitted. The defendant was convicted.

*Held* It was not the evidence relating to her previous sexual experience which was important. What was important was the subsequent retraction of her accusation. On the facts of this case, it was unfair to the defendant that he had not been allowed to cross-examine her in relation to this evidence.

**R v Brown (1989) CA**

On a charge of rape, the defence claimed that the complainant had consented. An application for leave of court was made in order to crossexamine her about her sexual relations with other men. In particular, the defence wished to put to the complainant evidence that the police doctor had found signs of venereal disease, that she had stated that she had a casual sex relationship with her boyfriend and that she had had a child six months earlier by another man. The trial judge refused leave. The defendant was convicted and appealed against this ruling.

*Held* It was always a question of degree as to whether such questions went merely to credit or to relevance. In this case, the evidence of sexual promiscuity was not so closely contemporaneous in time to the event in issue as to tip the balance in the defendant's favour.

**Q** Given the difficulty in drawing a distinction between relevance to an issue and credibility, do the cases which seek to apply s 2 of the 1976 Act strike a proper balance between the legitimate protection of the complainant and the interests of the defendant?

**R v Funderburk (1990) CA**

The defendant was charged with a number of counts of unlawful sexual intercourse with a girl of 13. He alleged that she was lying in order to support her mother who had been involved in disputes with the defendant. The complainant gave detailed descriptions of the acts of intercourse and there was a clear implication that she had been a virgin at the time. In order to explain how it was that such a young girl could have such detailed knowledge, the defence sought to show that she was, in fact, sexually experienced. The defence wished to adduce evidence that the complainant had told a woman, who was a potential defence witness, that she had had sexual intercourse with two other men and that she wanted to have a pregnancy test. The trial judge refused to allow the defence to put this to the complainant. The trial judge further refused to allow the defence to call this witness. One of the issues also related to the question as to whether the Sexual Offences (Amendment) Act 1976 was applicable.

*Held* Sexual intercourse with a girl under the age of 16 was not a 'rape offence', within the terms of the 1976 Act. However, the principle that the court should ensure that cross-examination is not abused or unnecessarily extended meant that the same principles would be applied. On the facts of this case, the trial judge had been wrong not to allow questions to be put to the complainant about her statement that she had had sexual experiences with other men. The clear implication of her testimony was that she had been a virgin and this evidence rebutted that and went beyond a mere question of credibility. *Per* Henry J:

> Otherwise, there would be the danger that the jury would make their decision as to credit on an account of the original incident in which the most emotive, memorable and potentially persuasive fact was, to the knowledge of all in the case save the jury, false.

Further, it should have been open to the defence to call the potential witness if the complainant denied having made the statement.

**R v C (1996) CA**

The defendant was convicted of indecently assaulting one stepdaughter and raping and indecently assaulting another. The appeal related to the conviction for rape. The complainant alleged that she was a virgin and that she had not had any previous sexual experience. An application was made by the defence to cross-examine her under s 2 of the 1976 Act. This related to evidence that she had in fact had sexual relations with a boyfriend. The judge refused leave after considering whether there was any material to support a cross-examination.

*Held* The question for the judge was whether the question was relevant to the issue, not whether there was any material to support a crossexamination. The possibility of someone other than the defendant

having had intercourse with the complainant was clearly an issue in the case, rather than a matter going solely to credit.

**Q** Compare the old and new provisions. To what extent do you consider that the new proposals will make a difference to the way in which complainants in sexual offences are treated during cross-examination? Would it have been preferable, or even possible, to have instituted a total ban on questions relating to previous sexual behaviour?

Note

There are a number of other limitations which may apply to the crossexamination of a witness. One such limitation, not dealt with above, relates to the ban on cross-examining a witness on matters covered by the rules on confidentiality, as well as to matters on which disclosure will not be ordered.

### 5.7.6 Certain limitations apply to protect witnesses from being cross-examined by an accused in person

#### Section 31 of the Youth Justice and Criminal Evidence Act 1999

No person charged with a sexual offence may in any criminal proceedings cross-examine in person a witness who is the complainant, either—

(a) in connection with that offence, or

(b) in connection with any other offence (of whatever nature) with which that person is charged in the proceedings.

Note:

1 Under s 35 of the 1999 Act, a similar prohibition applies to child witnesses in situations where the accused has been charged with a range of offences including sexual offences, kidnapping, false imprisonment and assault.

2 The procedure to be followed where an accused is prevented from cross-examining a witness in person is laid down in s 38.

# 6 Admissibility of Opinion Evidence

## 6.1 The general rule is that the opinions, beliefs and inferences of a witness are inadmissible

### R v Chard (1971) CA

The defendant was charged with murder. No question of either insanity or diminished responsibility was raised. Nevertheless, the defence sought to call a medical witness to testify as to the defendant's state of mind.

*Held* This evidence would not be allowed, as it amounted to an attempt to introduce the opinions of the witness. Such evidence might be permitted if insanity or diminished responsibility had been pleaded. This not being the case, the jury were well able to decide issues relating to the defendant's state of mind by themselves. Where the jury were (*per* Roskill LJ):

> …dealing with someone who by concession was on the medical evidence entirely normal, it seems to this court abundantly plain on first principles of the admissibility of expert evidence, that it is not permissible to call a witness …merely to tell the jury how he thinks an accused man's mind…operated at the time of the alleged crime.

### R v Stamford (1972) CA

The defendant was charged with sending indecent articles through the post, contrary to the Post Office Act 1953. The question arose as to whether expert evidence might be called on the question as to whether the articles were, in fact, indecent.

*Held* The words 'indecent or obscene' used in the statute were ordinary words to be construed by the jury; expert opinion was irrelevant.

> Note
> Compare this case with that of *DPP v A & BC Chewing Gum Ltd* (1967), 6.2.1.

### R v Turner (1975) CA

The defendant was charged with murder and pleaded provocation. The basis for this defence was that his girlfriend had told him that she had been sleeping with other men and that the child she was carrying was not

his. The defence sought to call evidence from a psychiatrist as to the defendant's mental and emotional state, among other things. The trial judge refused to allow this evidence to be tendered.

*Held* The trial judge had acted properly. Whether the defendant had, in fact, been provoked was a matter on which the trial judge and jury could form their own conclusions, without the need for expert assistance. *Per* Lawton LJ:

> 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 that of the jury themselves; but there is a danger that they may think it does…Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life.

### R v Robinson (1994) CA

The defendant was charged with indecent assault and rape. The complainant was aged 15 and mentally retarded. The prosecution was allowed to call as a witness an educational psychologist to testify whether the complainant was suggestible, likely to pick up suggestions made to her and was likely to fantasise. The defendant appealed on the ground that this was an attempt by the prosecution to improve the reliability or veracity of their own witness.

*Held* While such opinion evidence may have been admissible if the defence had sought to impugn the complainant's evidence, the prosecution could not introduce the evidence merely to boost, bolster or enhance the testimony of their witness. *Per* Lord Taylor CJ:

> Thus, in a proper case, evidence from a psychiatrist or psychologist may be admissible to show that a witness is unreliable or a confession is unreliable. But,…there is no case in which psychiatric or psychological evidence has been admitted to boost, bolster or enhance the evidence of a witness for the Crown or indeed of any witness.

> Note
> The rule against the admissibility of opinion evidence is not applied strictly in civil cases; see, *inter alia,* s 3 of the Civil Evidence Act 1972.

## 6.2 Exceptional situations where opinion evidence is admissible

### 6.2.1 Expert opinion on matters not within the competence of the court

**DPP v A & BC Chewing Gum Ltd (1967) QBD**
The defendants were charged with contravening the Obscene Publications Acts 1959 and 1964 by publishing obscene battle cards which were sold with packets of chewing gum. The prosecution sought to introduce the opinions of experts in child psychiatry as to the likely effect of these cards on the minds of children.

*Held* (a) It would be improper to ask an expert whether the cards tended to deprave and corrupt (the statutory test of obscenity) as this was a matter for the court, (b) In this case, however, the question related to the effect of these cards on the minds of children and, as such knowledge was outside the competence of an ordinary court (*per* Lord Parker CJ), 'any jury and any justices need all the help they can get'.

> Note
> There are situations where statute may specifically either allow or require opinion evidence. See, for instance, s 8 of the Criminal Procedure Act 1865 (comparison of disputed handwriting); s 4(2) of the Obscene Publications Act 1959 (to prove the 'public good defence'); s 4(1) of the Civil Evidence Act 1972 (proof of foreign law).

### 6.2.2 Opinion evidence is admissible when the opinion is simply another way of stating facts which have been directly perceived

**Rasool v West Midlands Passenger Transport Executive (1974) QBD**
The plaintiff sued for damages arising out of injuries caused by the negligence of a bus driver employed by the defendants. The defendants wished to use a statement made by C, a woman who was an eye witness to the accident. The statement was to the effect that the bus driver was in no way to be blamed for the accident.

*Held* The statement might be regarded as her opinion as to whether the driver had or had not been negligent. However, in reality, it was her way of stating the facts as she had witnessed them.

**R v Davies** (1962) **Courts-Martial Appeal Court**
The defendant was charged with driving while unfit due to intoxication. The prosecution called a number of witnesses who testified that in their opinion he was drunk and unfit to drive.

*Held* The question as to whether he was unfit to drive was to be answered by the court and the opinion of the witnesses was inadmissible. However, the statement that he was drunk was not, strictly speaking, opinion, it was simply a way of stating facts which had been observed. *Per* Lord Parker CJ, the witness was 'perfectly entitled to give his impression as to whether drink had been taken or not'.

## 6.3 A witness who is deemed to be an expert may give opinion evidence

### 6.3.1 It is necessary to determine whether the witness is competent and qualified as an expert

**R v Silverlock (1894) CCR**

On a charge of obtaining a cheque by false pretences, it was necessary to prove that certain documents were in the defendant's handwriting. The solicitor acting for the prosecution was called as an expert for this purpose. An objection was made on the basis that the solicitor was not an expert and that, therefore, his opinion was inadmissible.

*Held* The solicitor had given considerable study and attention to handwriting over a period of years. He had also, on several occasions, compared evidence in handwriting in a professional context. He was, therefore, rightly treated as an expert; the fact that he did not have academic or professional training and qualifications was immaterial.

**R v Oakley (1979) CA**

On a charge of causing death by dangerous driving, the prosecution had called a police officer. This officer had 15 years experience in the traffic division, had attended a course on accident investigation, had passed an examination as an accident investigator and had practical experience. He gave evidence of his observations at the scene of the accident and his theories and conclusions relating to the cause of the accident.

*Held* Although he was giving his opinion, his testimony was entirely proper. He was an expert testifying to matters on which he was properly qualified to testify.

**R v Mackenney; R v Pinfold (1983) CA**

The defendants had been convicted of murder. The question on appeal was whether the trial judge had been correct when he refused to let the defence call a psychologist to testify to the mental state of the chief prosecution witness.

*Held* A psychologist was not qualified to testify to the question of the existence of a mental disorder, defect or abnormality of mind. He was not qualified to give his opinion; only a psychiatrist could be so qualified.

### 6.3.2 The function of expert witnesses is to furnish the court with opinions on specialised matters which are outside the knowledge or experience of the court

**R v Turner (1975) CA**

See 6.1.

*Per* Lawton LJ:

> An expert's opinion is admissible to furnish the courts with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If, on the proven facts, a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary.

**DPP v A & BC Chewing Gum Ltd (1967)**

See 6.2.1.

One objection raised was that the expert opinion being given related to the 'ultimate issue', that is, the issue that the jury was required to answer.

*Held Per* Lord Parker CJ:

> Those who practise in the criminal courts see every day cases of experts being called on the question of diminished responsibility and, although, technically, the final question: 'Do you think he was suffering from diminished responsibility?' is strictly inadmissible, it is allowed time and time again without any objection.

Note

It appears that the so called rule against testifying on the ultimate issue is merely a matter of form in criminal cases. In civil cases, the rule has been abrogated by s 3 of the Civil Evidence Act 1972.

**R v Stockwell (1993) CA**

The defendant was charged with several counts of robbery. At the trial, one of the issues concerned evidence of identification. Identification was based, *inter alia,* on a set of photographs taken by a security video camera. The trial judge ruled that the prosecution could call a facial mapping expert to testify that in his opinion the man shown on the security photographs was the defendant.

*Held* There was evidence that the defendant had tried to disguise himself by growing a beard and wearing clear glasses. This meant that the jury needed some assistance in deciding identification. In any case, this was a matter which lay in the discretion of the trial judge. *Per* Lord Taylor:

> Since counsel can bring the witness so close to opining on the ultimate issue that the inferences as to his view is obvious, the rule can only be…a matter of form rather than substance…It is, however, important for that reason that the judge should make clear to the jury that they are not bound by the expert's opinion, and that it is for them to decide.

**R v Jeffries (1997) CA**

The defendant was charged with possession of drugs. At the trial, a police officer, H, gave evidence as to the drugs paraphernalia found at his flat. H also gave it as her opinion that certain lists found, there, related to the sale of drugs. It was argued, on appeal, that she did not have the expertise to give that opinion. Such evidence as she had was gleaned from police officers, drug dealers and users and was inadmissible. It was contended that the jury were capable of forming their own conclusions and this was not the sort of evidence which fell within the rule relating to admissible opinion evidence.

*Held* While it was proper for H to give evidence based on her experience as to values or prices and that the items found in the defendant's flat were of a type frequently found in the home of drugs dealers, the evidence of H went further than this. Her evidence was that, essentially, the defendant was guilty as charged. This could not be permitted.

**Q** Assuming that H was accepted as an expert, why was it improper for her to have stated her opinion that the list related to drug dealing? It appears that this was because of the 'ultimate issue' rule. Does this not, however, conflict with the principle in *R v Stockwell*, above?

### 6.3.3 When giving his opinion, the general principle is that the expert must confine himself to facts within his personal knowledge or to facts which have already been proved to the court

**R v Mason (1911) CCA**

On a charge of murder, evidence was given by one witness, who had seen the dead body, of the extent of the wounds inflicted. A medical witness was then called who had not himself seen the body, but who was asked for his opinion as to whether the wounds could have been self-inflicted.

*Held* This would be allowed. The facts relating to the wounds had already been proved to the court and the expert witness was being asked his opinion as to those facts.

**Crossland v DPP (1988) QBD**

The defendant was charged with an offence under the Road Traffic Regulation Act 1984. The main issue concerned the speed at which she had been driving. The only witness to be called was the police officer who had inspected the scene of the accident, the damage to the defendant's car and the skid marks made while braking. He has also carried out speed and braking tests on the car. He testified that, in his opinion, she had been driving at not less than 41 mph before she started to brake. An objection was made that this evidence should have been excluded.

*Held* Although the testimony of the witness included an element of opinion, this was based on matters within his personal knowledge; he had himself inspected the scene of the accident, the damage to the car and the skid marks. He had also tested the car himself.

### 6.3.4 When giving the basis for his opinion, the expert may rely on matters such as his general knowledge, education and experience, as well as published research materials; these materials, however, constitute the basis for his opinion and cannot be admitted as evidence in the case

**English Exporters v Eldonwall (1973) ChD**

A question arose as to what would constitute a fair rent under the Landlord and Tenant Act 1954. Two valuers gave evidence as expert witnesses.

*Held* As an expert, the valuer was entitled to give his opinion of what constituted a fair rent. This opinion had to be based on his personal knowledge of the rents being paid in the area. However, *per* Megarry J:

> He will also have learned much from other sources, including much of which he could give no first hand evidence. Textbooks, journals, reports of auction and other dealings and information obtained from his professional brethren and others, some related to particular transactions and some more general and indefinite, will all have contributed their share.

**R v Abadom (1983) CA**

The defendant was charged with robbery. The prosecution relied on the fact that a window had been broken during the robbery and that glass from this window had been found on the defendant's shoes. The prosecution called an expert witness who testified that: (a) the glass from the window and the glass taken from the shoes had the same refractive index; (b) he had consulted statistics compiled by the Home Office to the effect that this refractive index was found in only 4% of all glass samples examined; and (c) in his opinion, there was a strong likelihood that the glass found on the shoes had come from the broken window. An appeal was taken on the ground that the statistics was hearsay, as being outside the personal knowledge of the witness.

*Held* It was permissible for expert witnesses to draw upon material produced by others in the field of their expertise. *Per* Kerr LJ:

> It is part of their duty to consider any material which may be available in their field and not to draw conclusions merely on the basis of their own experience, which is inevitably likely to be more limited than the general body of information which may be available to them. Further, when an expert has to consider the likelihood or unlikelihood of some occurrence or factual association in reaching his conclusion, as must often be necessary, the statistical

> results of the work of others in the same field must inevitably form an important ingredient in the cogency or probative value of his own conclusion in the particular case.

It was not necessary that experts should restrict themselves to published work, as part of their experience and expertise may lie in their knowledge of unpublished material.

**H and Another v Sobering Chemicals and Another (1983) CA**
The plaintiffs alleged that the defendants had negligently manufactured and marketed a drug. The question arose as to whether the expert witness was allowed to support his opinion by reference to summaries of research results, published articles and letters taken from medical journals.

*Held* These documents were hearsay and, therefore, inadmissible. However, it was permitted for expert witness to refer to them as part of the general corpus of medical knowledge provided that it was made clear that it was the expert opinion that was to be treated as evidence in the case, not these documents.

## 6.4 In cases of conflicting opinion evidence, it is for the trial judge to determine how that conflict is to be resolved. This may be to prefer the opinion of one, or to reject both

**Hotson v East Berkshire Area Health Authority (1987) HL**
The plaintiff had injured his hip in a fall and was taken to a hospital run by the defendants. The injury was not properly diagnosed and he was sent home. A proper diagnosis was only made when he returned to the hospital five days later. He suffered permanent disability and sued for damages in negligence. The defendants admitted that the delay amounted to a breach of duty, but claimed that a correct initial diagnosis would not have prevented the disability. Both parties relied on expert opinion evidence on the issue of causation. This evidence attributed conflicting reasons for the disability.

*Held* In cases of conflict, it was open to the trial judge to reject the expert opinion called by both sides, leaving the matter to be resolved by reference to the standard and burden of proof.

## 6.5 Expert witnesses have certain responsibilities, including that of disclosure

### National Justice Compania Naviera SA v Prudential Assurance (The Ikarian Reefer) (1993) QBD

The plaintiff shipowners sued the defendants upon their insurance contract for the loss of their ship. The defendants alleged that the ship had been deliberately set on fire. One of the issues concerned the duties and responsibilities of expert witnesses.

*Held* The duties of expert witnesses were summarised by Cresswell J as:

(1) expert evidence should be independent and not influenced by the exigencies of litigation;

(2) expert opinion should be unbiased and objective; an expert witness 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 there was insufficient data upon which to reach an opinion this had to be stated with an indication that the opinion was provisional; any doubts had to be stated;

(6) if the expert changed his mind this had to be made known to the other side without delay;

(7) there ought to be full disclosure of documents referred to in the expert evidence.

### R v Ward (1993) CA

The defendant had been convicted on three charges of causing explosions and 12 counts of murder in relation to the IRA bombing campaign. She appealed on a number of grounds which included the allegation that there had been a failure by the prosecution to disclose relevant evidence to the defence and that fresh evidence cast doubts on the scientific evidence used to convict her.

*Held* The prosecution had been in possession of expert psychiatric evidence that her confession was not reliable. It was a material irregularity that this evidence had not been made available to the defence. Further, the experts relied on by the prosecution had not acted impartially or objectively; instead, they had become partisan. *Per* Glidewell LJ: It is the clear duty of government forensic scientists to assist in a neutral and impartial way in criminal investigations. They must act in the cause of justice. That duty

should be spelt out to all engaged or to be engaged in forensic services in the clearest possible terms.' In addition, the surest way to prevent misuse of scientific evidence is by full disclosure. *Per* Glidewell LJ: 'That duty exists irrespective of any request by the defence.'

Note

(a) The rules of disclosure of expert evidence in criminal cases are now contained in Crown Court (Advance Notice of Expert Evidence) Rules 1987. (b) In civil cases, the disclosure procedure is contained in RSC Ord 38 rr 21–31 and rr 36–44 read together with the provisions of the Civil Evidence Acts 1968 and 1972.

# 7 The Rule against Hearsay Evidence: Common Law Exceptions

## 7.1 The general principle is that hearsay evidence is inadmissible

### 7.1.1 Out of court assertions, repeated by a witness while testifying as evidence of the truth of what is being asserted, are inadmissible; witnesses must speak only of facts directly perceived

**Subramaniam v Public Prosecutor (1956) PC**

The defendant was charged with unlawful possession of ammunition. His defence was one of duress; to support this, he sought to give evidence that he had been apprehended by terrorists who forced him into joining them. The trial judge refused to allow evidence to be given of what had been said to him by these terrorists. The appeal before the Privy Council concerned the definition of hearsay.

*Held* Evidence would be regarded as hearsay not simply because it was an out of court assertion being repeated by a witness while testifying, but only if the purpose of adducing that evidence was to prove that what was contained in the statement was true. If there was some other purpose served by adducing the statement, it would not be hearsay. *Per* Mr De Silva (delivering the opinion of the Privy Council):

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct, thereafter, of the witness or of some other person in whose presence the statement was made.

**R v Sharp (1988) HL**

The defendant was charged with burglary. He elected not to testify, but evidence was given in court of a statement he had subsequently made to

the police. This statement was partly an admission and partly exculpatory. The appeal concerned the manner in which such 'mixed' statements were to be treated and whether they amounted to hearsay evidence.

*Held Per* Lord Havers:

> I accept the hearsay rule in Cross *on Evidence* 6th edn, 1985, p 38: 'an assertion other than one made by a person while giving [Cross's emphasis]. The rule is so firmly entrenched that the reasons for its adoption are of little more than historical interest, but I suspect that the principal reason that led the judges to adopt it many years ago was the fear that juries might give undue weight to evidence the truth of which could not be tested by cross-examination and, possibly, also the risk of an account becoming distorted as it was passed from one person to another. It is the application of this rule that has led the courts to hold that an exculpatory or, as it is sometimes called, a self-serving statement made by an accused to a third party, usually the police, is not admissible as evidence of the truth of the facts it asserts.

### Ratten v R (1972) PC

The defendant was charged with the murder of his wife. He claimed that she had been shot accidentally while he had been cleaning his gun. The prosecution adduced evidence of three telephone calls that had been made:

(1) at 1.09 pm, the defendant's father telephoned and spoke to the defendant; he heard the wife's voice in the background and all appeared normal;

(2) at 1.15 pm, the local telephone exchange received a call from the defendant's house. The caller, a woman, was hysterical and asked for the police;

(3) the telephonist informed the police and, at 1.20 pm, the police telephoned the defendant's house. The defendant asked them to come immediately. By this time, the wife was already dead.

The defendant denied that the second call was ever made and contended that the evidence of the telephonist should have been excluded as it was an inadmissible hearsay statement which was being used by the prosecution as evidence that the wife was in fear of the defendant.

*Held* The evidence was not hearsay; it was admissible as evidence of a fact relevant to an issue before the court. *Per* Lord Wilberforce:

> The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called, is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on 'testimonially', that is, as establishing some fact narrated by the words.

Note
The House of Lords also considered whether the evidence would be admissible under the *res gestae* exception to the hearsay rule: see 7.2.3.

**Woodhouse v Hall (1981) DC**
The defendant was charged under s 33 of the Sexual Offences Act 1956 with managing a brothel. Evidence was given by police officers to the effect that women employed as masseuses made offers of immoral services to them. The question arose as to whether this amounted to hearsay evidence when repeated by the police officers in court.

*Held* It was not the case that the statements were adduced in order to show their truth. The fact that such statements were made was relevant to the charge facing the defendant; the offers made by the women were necessary in order to show that the premises were being used as a brothel.

### 7.1.2 Hearsay evidence may lack relevance and, therefore, be excluded under the usual rule relating to irrelevant evidence

**R v Kearley (1992) HL**
See 1.1.1.

*Held* The requests made by the callers were hearsay; they were also irrelevant. The requests were manifestations of the callers' state of mind, that is, their belief that the defendant would supply them with drugs. Their state of mind was irrelevant as far as the charge against the defendant was concerned. The fact that the prosecution was able to tender evidence of the number of calls and visits to the defendant's flat showed no more than a common reputation on the part of the defendant, this was inadmissible as evidence.

### 7.1.3 Hearsay statements are inadmissible, even if they have relevance to the issue before the court

**Sparks v R (1964) PC**
The defendant was convicted of indecently assaulting a girl under four years of age. The girl did not testify. The trial judge ruled as inadmissible evidence from the girl's mother that the girl had told her shortly after the assault that the person who assaulted her was a 'coloured boy'; the defendant was a 27 year old white man. He appealed on the grounds that the trial had been wrong to exclude this evidence, as it was highly relevant.

*Held* The statement was hearsay and was inadmissible, as it could not be brought within any of the recognised exceptions to the hearsay rule. The fact that it was highly probative was immaterial.

Note
The appeal was allowed on other grounds.

**Myers v DPP (1965) HL**

The defendant was convicted of offences of dishonesty in relation to motor vehicles. He was alleged to have stolen cars and then matched these with wrecked cars, which he bought together with their log books. The stolen cars were then sold as if they were the wrecked cars which he pretended to have had repaired. The prosecution relied on evidence consisting of the manufacturing details of the stolen vehicles. In particular, a witness was called who gave evidence of the cylinder block number which was stamped indelibly on the engine of each vehicle. These numbers were recorded by workmen on cards; the cards were then compiled by another worker and reduced to microfilm; the cards were then destroyed. The witness called by the prosecution was the employee of the manufacturer who was responsible for keeping the microfilm records. The defendant appealed against his conviction on the basis that this witness had no personal knowledge of the records and, therefore, his evidence was hearsay. The prosecution contended that this evidence was highly relevant in proving the true identity of the vehicles in question and that the court should use its discretion to include the evidence because of this probative value.

*Held* Although highly relevant, this evidence was hearsay and should have been excluded. There was no inclusionary discretion to allow the court to allow evidence which was excluded by a technical rule of evidence. *Per* Lord Reid:

> The witness could only say that a record made by someone else showed that, if the record was correctly made, a car had left the works bearing three particular numbers. He could not prove that the record was correct or that the numbers which it contained were in fact the numbers on the car when it was made…In argument, the Solicitor General maintained that, although the general rule may be against the admission of private records to prove the truth of entries in them, the trial judge has a discretion to admit a record in a particular case if satisfied that it is trustworthy and that justice requires its admission. That appears to me to be contrary to the whole framework of the existing law. It is true that a judge has a discretion to exclude legally admissible evidence if justice so requires, but it is a very different thing to say that he has a discretion to admit legally inadmissible evidence.

Note

(a) The effect of this decision was reversed by legislation in the Criminal Evidence Act 1965. This was repealed by s 68 of the Police and Criminal Evidence Act 1984 which was, in turn, repealed and replaced by ss 23 and 24 of the Criminal Justice Act 1988, see Chapter 9. (b) This case remains good authority for the principle that, while judges have an exclusionary discretion (to exclude otherwise relevant evidence), there is no inclusionary discretion (to include otherwise irrelevant evidence): see Chapter 1.

**R v Blastland (1985) HL**

The defendant was charged with murder and buggery of a 12 year old boy. He pleaded not guilty, claiming that he had made an attempt at buggery, but had stopped. He also claimed to have seen another man, M, nearby and had run off as he was afraid that M had seen him. He claimed that it was M who had committed the offences. He sought to adduce evidence from a number of witnesses that M had told them that a young boy had been murdered before the body had been discovered and that M had been distressed. This implied that M must have had some involvement in the murder. The trial judge refused to allow this evidence to be given on the grounds that it was hearsay.

*Held* The House of Lords decided that the statements were sought to be adduced in order to show M's state of mind and as an implied assertion that he was the murderer. As such, the evidence was rightly excluded because of the danger that untested hearsay evidence would be treated as having a probative force which it did not deserve. *Per* Lord Bridge:

> Hearsay evidence is not excluded because it has no logically probative value. Given that the subject matter of the hearsay evidence is relevant to some issue in the trial, it may clearly be potentially probative. The rationale of excluding it as inadmissible, rooted as it is in the system of trial by jury, is a recognition of the great difficulty, even more acute for a juror than for a trained judicial mind, of assessing what, if any, weight can properly be given to a statement by a person whom the jury have not seen or heard and which has not been subject to any test of reliability by cross-examination.

**Q** Would the jury have come to a different conclusion about the guilt of the defendant if they had heard the evidence relating to M?

## 7.2 The common law has developed a number of exceptions whereby hearsay statements may be admitted

Note
Many common law exceptions are now covered by statute. In particular, the Civil Evidence Act 1968 expressly preserves their application: see Chapter 8.

### 7.2.1 Statements made by persons now deceased may be admitted if they fall into the following categories: (a) declarations made in the course of duty; (b) declarations against interest; (c) declarations as to paternity; (d) declarations as to public and general rights; (e) dying declarations in cases of homicide; (f) declarations by testators as to the contents of their wills

Note
Since the passing of the Criminal Justice Act 1988, this common law exception now covers only such statements made orally.

**Lloyd v Powell Duffryn Steam Coal Co Ltd (1914)**
The plaintiff and her child claimed damages, as the dependants of a workman who had been killed, against the defendants for negligently causing his death. The defendants disputed that they were the workman's dependants and the plaintiff sought to prove this by adducing evidence of statements made by the deceased in which he had acknowledged the child as his and had stated his intention to marry her.

*Held* Evidence of these statements were admissible as an exception to the hearsay rule.

Note
It is not easy to determine the basis for the admissibility of the hearsay evidence, in this case, as each of the Law Lords gave different reasons for ruling it admissible. It might be possible to treat the case as authority for a general proposition that statements made by a deceased person in relation to paternity are admissible.

**R v Woodcock (1789) Old Bailey**
The defendant was charged with the murder of his wife. She made a statement on oath to a magistrate and died about 48 hours later. The question which arose related to the admissibility of her statement, the defence contending that she had not expressed any apprehension or awareness of death.

*Held* The statement was held to be admissible, the court laying down the general principles applicable. *Per* Eyre CB:

> The general principle on which the species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death and, when every hope of this world is gone; when every motive to falsehood is silenced and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice…Declarations so made are certainly entitled to credit; they ought, therefore, to be received in evidence; but the degree of credit to which they are entitled must always be a matter for the sober consideration of the jury, under all the circumstances of the case.

**Q** (1) Could the statement in this case be properly regarded as a dying declaration when the wife seemed not to be aware of her own approaching death? See *R v Perry* (1909), below.

**Q** (2) Do you consider as accurate the basis for the admission of such statements? Might it not be the case that someone on the point of death might lie for reasons of revenge or in order to protect a third person? What about an honest mistake, given that someone on the point of death may be in a weakened or confused state?

**R v Mead (1824) KB**

The defendant was convicted of perjury. He obtained an order for a new trial. Before this could take place, however, he shot the witness. When the retrial for perjury took place, the prosecution attempted to use a dying declaration made by the deceased in relation to the alleged perjury.

*Held* This statement was inadmissible. Dying declarations could only be admitted, *per* Abbott CJ, 'where the death of the deceased is the subject of the charge and the circumstances of the death the subject of the dying declarations'.

> Note
> The reported cases where dying declarations have been admitted have all been cases where the charge has been either murder of manslaughter and the declaration has been held admissible only to the extent that it indicates the circumstances of the maker's own death.

**Q** Is there any good reason as to why dying declarations should not be admitted where the charge relates to the death of the deceased in cases other than that of murder and manslaughter, for example, causing death by dangerous driving under s 1 of the Road Traffic Act 1988?

**Nembhard v The Queen (1982) PC**

The defendant was charged in Jamaica with murder. The prosecution case was that the deceased's wife had run out of their house when she heard gunshots. He died a few hours later. There were no witnesses and the prosecution sought to adduce as a dying declaration what the deceased had said to his wife. The trial judge when summing up told the jury that they must be satisfied as to the reliability of the wife and that they should also assess the probative value of the dying declaration itself, as it had not been tested in cross-examination. The defendant was convicted. The basis of the appeal was that the trial judge should have also told the jury that it was dangerous to convict of murder solely on the basis of a dying declaration with no supporting or corroborating evidence.

*Held* A trial judge has a general duty to direct the jury so that they are aware of the need for care in assessing the evidence of a dying declaration and the probative value to be attached to it. This had been adequately done. There was no further rule of law or practice which required a special warning to the jury about the absence of corroborative evidence.

**R v Perry (1909) CCA**

The defendant was charged with murder. The prosecution used a dying declaration made by the deceased woman to her sister.

*Held* The statement was properly admitted as a dying declaration. The court laid down the conditions under which such a statement would be admitted. *Per* Lord Alverstone CJ:

> …the declarant must be under a 'settled hopeless expectation of death'…In other words, the test is whether all hope of life has been abandoned so that the person making the statement thinks that death must follow.

The court also held that it was not necessary that the death must follow immediately.

**Chandrasekera v R (1937) PC**

On a charge of murder, the prosecution sought to adduce as a dying declaration the fact that the deceased, who had her throat cut, nodded when asked whether it was the defendant who had done this to her.

*Held* A dying declaration need not be made by words alone; nods or gestures may also be admitted.

**R v McGuire (1985) CA**

The defendant was charged with arson of a hotel owned by his wife. An expert had examined the premises shortly after the fire had been extinguished and had prepared a report. This report was favourable to the defendant as it suggested that the prosecution case was flawed. The expert had died before the trial began and the defence wished to adduce his report.

*Held* That part of the report which related to facts which the expert had recorded could be admitted as a statement made by a person, since deceased, of matters in the ordinary course of duty. The Court of Appeal also held that the trial judge had been right to exclude that part of the report which consisted of the expert's opinion.

Note
Section 24 of the Criminal Justice Act 1988 contains specific provisions for the admission of such statements, see Chapter 9.

**The Sussex Peerage Case (1844) HL**
The deceased, a clergyman, made a statement to his son concerning a marriage ceremony at which he had officiated. The question arose as to whether this statement could be admitted in order to prove that the marriage had in fact taken place.

*Held* The marriage contravened the Royal Marriages Act 1772 and the clergyman knew that, by performing the marriage, he had committed a criminal offence under that Act. Accordingly, his statement was against his interest. As such, it was likely to be true and admissible under the exception to the hearsay rule, which related to statements made by deceased persons against their interests.

**Tucker v Oldbury Urban Council (1912) CA**
The plaintiffs, dependants of a deceased workman, sued for damages under the Workmen's Compensation Act for an injury which had caused the workman's death. The case for the plaintiffs was that in the course of his work something had been driven under the thumb nail of the workman. This had caused septic poisoning leading to septicaemia and death. The defendants sought to put in evidence a statement made by the workman to a manager which implied that the original injury was not work related. The question which arose was whether this statement was to be treated as a statement made by a deceased against his interests.

*Held* At the time the deceased workman made the statement, there was no contemplation of possible legal proceedings and he could not have known or anticipated that it was against his interests. *Per* Fletcher Moulton LJ:

> Such declarations are admitted as evidence in our jurisprudence on the ground that declarations made by persons against their own interests are extremely unlikely to be false. It follows, therefore, that, to support the admissibility, it must be shown that the statement was to the knowledge of the deceased contrary to his interests. And it is now settled that the declaration must be against pecuniary interests (or against proprietary interests, which is much the same thing).

### 7.2.2 Statements made in public records are admissible as *prima facie* evidence of the facts contained in them

**Lilley v Pettit (1946) CA**

The question arose as to whether the mother of a child had made a false declaration contrary to the Perjury Act 1911 in naming her husband as the father of her child. The prosecution contended that her husband had been called up for military service and was overseas at the time the child was conceived. In order to prove the date when the husband went overseas, the prosecution relied on an officer at the War Office who had charge of the military records. The court refused to allow these records to be admitted.

*Held* It was the case that statements in public documents could be admitted as evidence of the facts contained in them under an exception to the hearsay rule. However, there were doubts as to whether the records relied on by the prosecution in this case came within the exception. In order to come within the exception, it had to be shown that the documents were public records to which the public had access and that they were kept for the use or information of the public. This was not the case, here, as the records were not open to the public and were kept for governmental purposes.

**R v Halpin (1975) CA**

On a charge of conspiracy to cheat and defraud, the prosecution sought to prove that the defendant and his wife were the sole shareholders and directors of a certain company. In order to do so, they sought to produce a file from the Companies Register containing the statutory annual returns made by the company as required by the Companies Act. The defence disputed the admissibility of the annual returns. The trial judge ruled that the returns were admissible as being statements made in public documents and, therefore, as an exception to the hearsay rule. The defence appealed on the grounds that the conditions under which such documents were admissible had not been satisfied, that is: (a) the document must be brought into existence and preserved for public use on a public matter; (b) it must be open to public inspection; (c) the entry must be made promptly after the events which it purports to record; and (d) the entry must be made by a person having a duty to inquire and satisfy himself of the truth of the recorded facts.

*Held* The first and second conditions were satisfied. The third condition was merely a factor to be taken into account when determining weight, not admissibility. The real dispute concerned the alleged fourth condition. As far as this was concerned, it was clear that the official in the Companies Registry had no personal knowledge of the matters he was recording. Although the common law cases seemed to indicate that this was necessary, it was not a condition that had to be fulfilled. *Per* Lord Lane LJ:

> But, the common law should move with the times and should recognise the fact that the official charged with recording matters of public import can no longer in this highly complicated world, as like as not, have personal knowledge of their accuracy…Where a duty is cast upon a limited company to make accurate returns of company matters to the Registrar of Companies, so that those returns can be filed and inspected by members of the public, the necessary conditions, in the judgment of this court, have been fulfilled for that document to have been admissible. All statements on the return are admissible as *prima facie* proof of the truth of their contents.

### 7.2.3 Statements relating to the contemporaneous physical or mental state of the speaker, including his emotions and feelings, are admitted as part of the *res gestae*

**Ratten v R (1972) HL**

See 7.1.1.

*Held* The House of Lords concluded that the disputed evidence relating to the telephone call was not hearsay evidence, but, nevertheless, went on to hold that, even if it were, the evidence would have been admissible under the *res gestae* exception to the hearsay rule. *Per* Lord Wilberforce

> The expression *'res gestae',* like many Latin phrases, is often used to cover situations insufficiently analysed in clear English terms. In the context of the law of evidence it may be used in at least three different ways:
>
> (1) when a situation of fact (for example, a killing) is being considered, the question may arise when does the situation begin and when does it end. It may be arbitrary and artificial to confine the evidence to the firing of the gun or the insertion of the knife, without knowing in a broader sense what was happening
> (2) the evidence may be concerned with spoken words as such (apart from the truth of what they convey). The words are then themselves the *res gestae,* ie are the relevant facts or part of them;
> (3) a hearsay statement is made either by the victim of an attack or by a bystander—indicating directly or indirectly the identity of the attacker. The admissibility of the statement is then said to depend on whether it was made as part of the *res gestae.*

Lord Wilberforce went on to state that the reported cases tended to apply varying standards for the admission of such evidence. That was because of either the uncertainty as to the exact words used (a question of weight) or the possibility of concoction or fabrication (a ground for the exclusion of the evidence). *Per* Lord Wilberforce:

> The possibility of concoction, or fabrication, where it exists, is, on the other hand, an entirely valid reason for exclusion and is probably the real test which

judges in fact apply. In their Lordships' opinion, this should be recognised and applied directly as the relevant test: the test should not be the uncertain one whether the making of the statement was in some sense part of the event or transaction.

Note
In the three cases below, the 'real test' put forward by Lord Wilberforce was applied by the courts.

**R v Andrews (1987) HL**

The victim was attacked by two men. He managed to make his way to a flat below for help. When the police arrived, he made a statement naming the two men who had attacked him. He died from his injuries two months later and the men he had identified were charged and convicted of aggravated burglary and manslaughter. On appeal, it was argued that the statement of the victim made to the police was hearsay and ought to have been excluded.

*Held* The statement had been properly admitted under the *res gestae* exception, the House of Lords ruling that *Ratten v R* (1972) represented the correct common law position. The House of Lords, *per* Lord Ackner, summarised the factors to be taken into account:

(a) the primary question which the judge must ask himself is—can the possibility of concoction or distortion be disregarded;

(b) to answer that question, the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation, the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate, but not exact contemporaneity;

(c) in order for the statement to be sufficiently 'spontaneous', it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event;

(e) whether there were any special factor which might affect the possibility of concoction or fabrication, such as malice or other personal motive;

(f) the possibility of error, which might arise in cases of intoxication or due to factors such as defective eyesight.

Note
The statement could not have been admitted as a dying declaration, as it had not been made under a 'settled hopeless expectation of death'.

**Tobi v Nicholas (1988) DC**

The defendant was charged with road traffic offences. A driver of a coach which had been involved in the accident gave a statement some 20 minutes later to the police in which he identified the defendant as the driver of the car that had caused the accident. The coach driver was not called at the trial and it was held that the statement he had made to the police had been wrongly admitted.

*Held* The principles laid down in *Andrews* above were applicable but this case was to be distinguished on its facts. *Per* Glidewell LJ:

> The event in this case was not so unusual or dramatic as in the ordinary way to dominate the thoughts of the victim. Of course, anyone whose vehicle has been damaged is annoyed about it, but there is a world of difference between such an unfortunately commonplace situation and the thought of someone who has been assaulted and stabbed.

**R v Kearley (1992) HL**

See 1.1.1 and 7.1.2.

*Held Per* Lord Ackner:

> The rationale of excluding hearsay evidence as inadmissible, rooted as it is in the system of trial by jury, is a recognition of the great difficulty, even more acute for a juror than for a trained judicial mind, of assessing what, if any, weight can be properly given to a statement by a person whom the jury has not seen or heard and which has not been subject to any test of reliability by cross-examination. Professor Cross, in his book, *Evidence* 5th edn, 1979, p 479, stated that a further reason justifying the hearsay rule was the danger that hearsay evidence might be concocted. He dismissed this as 'simply one aspect of the great pathological dread of manufactured evidence which beset English lawyers of the late 18th and early 19th centuries'. Some recent appeals, well known to your Lordships, regretfully demonstrate that currently that anxiety, rather than being unnecessarily morbid, is fully justified.

**Q** Why was it that, on the facts of this case, the possibility of concoction or fabrication of the hearsay evidence could not be easily eliminated?

# 8 Statutory Exceptions to Hearsay Evidence in Civil Cases

## 8.1 The hearsay rule has been abolished for most purposes in civil cases by the Civil Evidence Act 1995. Prior to the 1995 Act, wide reaching exceptions to the hearsay rule in civil cases were enacted in the Civil Evidence Act 1968

### Section 1 of the Civil Evidence Act 1995

(1) In civil proceedings, evidence shall not be excluded on the ground that it is hearsay.

(2) In this Act—

(a) 'hearsay' means a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated; and

(b) references to hearsay include hearsay of whatever degree.

Note

The Act received Royal Assent on 8 November 1995. It makes hearsay admissible in civil proceedings and repeals the hearsay provisions in the Civil Evidence Act 1968. However, there will, for some considerable time, continue to be cases which will be governed by the 1968 Act and this Chapter contains the provisions of that Act and the cases decided under it.

### Section 1 of the Civil Evidence Act 1968

(1) In any civil proceedings a statement other than one made by a person while giving oral evidence in those proceedings shall be admissible as evidence of any fact stated therein to the extent that it is so admissible by virtue of any provision of this Part of this Act or by virtue of any other statutory provision or by agreement of the parties, but not otherwise.

Note
(a) Only hearsay statements which can be brought within the terms of s 1(1) of the 1968 Act are admissible. The common law exceptions are specifically preserved by s 9 of the Act: see 8.2. (b) The reference to statements of fact in the section has been extended to also include hearsay statements of opinion by virtue of s 1(1) of the Civil Evidence Act 1972.

**Savings and Investment Bank Ltd v Gasco Investments (Netherlands) BV and Others (No 2) (1988) CA**

The plaintiff bank sued the defendant companies for repayment of certain loans. An undertaking had been given to the effect that the assets of the defendant companies would not be reduced until after the plaintiff's claims had been settled. The plaintiff alleged that there had been a breach of these undertakings and applied for the committal of the defendant companies for contempt for breach of the undertaking. In support of their application, they sought to adduce affidavits containing hearsay evidence which purported to prove the breach. One of the questions which arose concerned the question whether committal for contempt was a 'civil proceeding' within the terms of s 1 of the Civil Evidence Act 1968.

*Held* The original undertaking had been made in civil proceedings. If an application was made to enforce that undertaking through committal for contempt, the committal proceedings took their character from the original civil proceedings, notwithstanding the possible penal consequences. Accordingly, the hearsay statements came within s 1(1) of the 1968 Act.

## 8.2 Statements admissible under the 1968 Act are covered by ss 2, 4, 5 and 9

### Section 2 of the Civil Evidence Act 1968

(1) In any civil proceedings, a statement made, whether orally or in a document or otherwise, by any person, whether called as a witness in those proceedings or not, shall subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

Note

(a) Sections 2(2) and (3) contain limitations on the use of such statements. (b) The major limitation is that leave of court is required and this, in turn, requires that the notice procedure under s 8, read together with Ord 38 rr 21 and 22(2) of the RSC, is satisfied, (c) If the person who made the hearsay statement is called, the statement can only be adduced after the conclusion of the examination-in-chief unless the court allows it to be adduced beforehand by some other person or if it is necessary to ensure the intelligibility of the evidence, (d) As far as oral hearsay statements are concerned, only direct evidence by the person who made the statement or who heard the statement being made is permitted under s 2(3). There is a proviso that, if the statement was originally made while giving evidence in some other proceedings, then the court has a discretion to allow the statement to be adduced in 'any manner'.

**Rasool v West Midlands Passenger Transport Executive (1974) QBD**

The plaintiff sued for damages for personal injury arising out of the alleged negligence of a bus driver employed by the defendants. The defendants denied negligence and sought to adduce, under s 2, a statement made by an eye witness to the accident to the effect that the driver was in no way to blame. This eye witness was not available to testify and the defendants gave a notice as required under the 1968 Act and the RSC. The notice asserted that the eye witness was no longer at her former address, that she was 'beyond the sea', probably in Jamaica. The plaintiff objected on the grounds that the defendants had not gone further to show that they had made reasonable efforts to trace her.

*Held* If a party wished to use a hearsay statement under s 2, it was necessary to comply with the notice procedure in s 8 of the Act, as well as under Ord 38 of the RSC. The other party may then issue a counter-notice to require the maker of the statement to attend court and testify. However, such a counter-notice could not apply under the terms of s 8(2)(b) if the maker of the statement 'is dead, or beyond the seas, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected…to have any recollection of matters relevant to the accuracy or otherwise of the statement'. The provisions in the RSC are in substantially the same terms. The five reasons laid down as to why the maker of the statement could not be called were disjunctive. This meant that it was sufficient for the defendants to show that the eye witness was beyond the seas; it was not necessary for them to also show the existence of one or more other reasons. Furthermore, the court had no discretion to exclude the statement once the terms of the notice and the provisions of s 8 and the RSC had been complied with, even if it could be shown that the

defendants had not exercised reasonable diligence in attempting to trace the eye witness.

> Note
> As far as discretion is concerned, see *Ford v Lewis* (1971) and *Morris v Stratford on Avon RDC* (1973), below.

**Ford v Lewis (1971) CA**

The plaintiff (an infant) sued for damages for personal injury arising out of a road accident caused by the defendant. By the time of the trial (10 years later), the defendant had become a patient in a mental hospital and it was agreed that he was unfit to testify. Counsel for the defendant sought to put in evidence, under s 2, a statement made by the defendant giving his version of the accident, as well as hospital records, under s 4, which showed that the plaintiff's father was, at the time of the accident, in a state of intoxication. However, the notice procedure required for statements under ss 2 and 4 had not been complied with. Nevertheless, the trial judge used his discretion to admit the statements and eventually dismissed the claim.

*Held* The trial judge had been wrong to allow the statements to be admitted. The notice procedure was laid down in s 8 and in Ord 38 of the RSC. This procedure was obligatory. It was true that, under s 8(3)(a) and Ord 38 r 29, the court had a discretion to allow the statement to be admitted even if the notice procedure had not been followed. However, this was only possible if the court thought it 'just to do so'. On the facts of this case, the notice procedure had not been followed because defendant's counsel wished to preserve the element of surprise, that is, it was a deliberate tactical ploy. Accordingly, discretion should not have been exercised in the defendant's favour. *Per* Edmund Davies LJ:

> Put in plain words, this means that the tactics adopted were precisely those which the statutory provisions as to notice and counter-notice were designed to prevent, namely, the taking of a party by surprise by suddenly and without warning producing at the trial an out of court statement of someone not proposed to be called as a witness.

> Note
> The notice procedure required by the 1968 Act has been abolished under the 1995 Act. However, s 2 of that Act requires notice to be given as a 'safeguard'. This avoids the complexities of the notice procedure. Further, failure to give notice does not affect admissibility. See 8.3.

**Morris v Stratford-upon-Avon RDC (1973) CA**

The plaintiff sued for damages for personal injury arising out an accident involving a lorry driven by an employee of the defendants. The trial took place five years later and the driver testified on behalf of the defendants.

His testimony was inconsistent and confused. After the examination-inchief, counsel sought to adduce a statement made by the driver to the defendants' insurers nine months after the accident. The required notice had not been given under s 8 and the RSC but, despite the plaintiff's objections, the trial judge admitted the statement and eventually dismissed the plaintiff's claim.

*Held* Non-compliance with the notice procedure was not something that could lightly be overlooked. However, in exercising his discretion, the trial judge is required to take into account all relevant matters. This included a consideration of the reasons why there had been non-compliance. In this case, unlike that of *Ford v Lewis* (1971) (above), there was no deliberate decision not to comply. Counsel could not have anticipated the use of the statement. Furthermore, no injustice had been done to the case of the plaintiff. *Per* Megaw LJ:

> If there is ground to suppose that there will be any injustice caused, or that the other party will be materially prejudiced or embarrassed, then the judge should either refuse to allow the document to be admitted or, in his discretion, allow it on terms, such as an adjournment at the cost of the party seeking to put in the statement.

Note
See the note to *Ford v Lewis* (1971), above.

### Section 4 of the Civil Evidence Act 1968

(1) In any civil proceedings, a statement contained in a document shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if the document is, or forms part of, a record complied by a person acting under a duty from information which was supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information and which, if not supplied by that person to the compiler of the record directly, was supplied by him to the compiler of the record indirectly through one or more intermediaries each acting under a duty

(3) Any reference in this section to a person acting under a duty includes a reference to a person acting in the course of any trade, business, profession or other occupation in which he is engaged or employed or for the purposes of any paid or unpaid office held by him.

Note:
(a) The same limitations as apply to s 2 apply also to s 4: see the note above, (b) The position for admissibility of records of this type has been greatly simplified by s 9 of the Civil Evidence Act 1995, see below.

**Knight and Others v David and Others (1971) ChD**

The plaintiffs' claim to title to certain land depended on whether they could give evidence of a map and survey made under the Tithe Act 1836. They sought to do so under the terms of s 4. The defendants contended that the requirements of the section had not been satisfied in that: (a) the statements related to title and as direct oral evidence as to title would not be admissible, so also would such hearsay statements; and (b) it could not be shown that the map and survey had been compiled from information supplied by persons who had personal knowledge.

*Held* Both these contentions were rejected. The first objection could be met if a living person could state in evidence that the machinery of the Act was carried out and that a certain person either was, or was not, entered as proprietor. As for the second objection, the court would be willing, given the nature of the documents and the lapse of time, to make an inference that the conditions as to personal knowledge were satisfied.

**H v Schering Chemicals (1983) QBD**

The plaintiffs claimed damages for injury allegedly caused by a drug manufactured and marketed by the defendants. In order to substantiate the claim they sought to adduce, under s 4, certain documents consisting of summaries of the results of research, articles and letters published in medical journals about the drug.

*Held* These documents were not records within the terms of s 4. *Per* Bingham J:

> The intention of that section was, I believe, to admit in evidence records which a historian would regard as original or primary sources, that is, documents which either give effect to a transaction itself or which contain a contemporaneous register of information supplied by those with direct knowledge of the facts…[The] documents in the present case, I think, are not records and are not primary or original sources. They are a digest or analysis of records which must exist or have existed, but they are not themselves those records.

**Q** Do you consider the approach taken by the court in this case with regard to s 4 unduly restrictive? Is it necessary that records under s 4 should be from 'original and primary' sources?

**Savings and Investment Bank Ltd v Gasco Investment (Netherlands) BV and Others (1984) ChD**

The plaintiff bank sought repayment of a loan made to one of the defendant companies. It also sought an interlocutory injunction to protect the security upon which that loan had been made. The application for the injunction referred to a critical report that had been made by inspectors under the Companies Act 1948. The question arose as to whether that report was admissible under s 4.

*Held* The report compiled by the inspectors could not be considered as an original or primary source of information and was not, therefore, a 'record' within the terms of s 4 of the Act. *Per* Gibson J:

> It falls short of simply compiling the information supplied to them, in the sense that some information will not be included in the report, and it goes beyond such a compilation in that it expresses opinions thereon.

### Section 9 of the Civil Evidence Act 1995

(1) A document which is shown to form part of the records of a business or public authority may be received in evidence in civil proceedings without further proof.

(2) A document shall be taken to form part of the records of a business or public authority if there is produced to the court a certificate to that effect signed by an officer of the business or authority to which the records belong.

### Section 5 of the Civil Evidence Act 1968

(1) In any civil proceedings a statement contained in a document produced by a computer shall, subject to rules of court, be admissible, if it is shown that the conditions mentioned in sub-s (2) below are satisfied in relation to the statement and computer in question.

Note
(a) The conditions contained in sub-s (2) are complex. The most important of these include proof that the computer in question was used regularly to store or process information of the kind contained in the statement and that the computer was operating properly. A certificate is required under sub-s (4) to the effect that the necessary conditions are satisfied, (b) See the equivalent provisions under s 69 of the Police and Criminal Evidence Act 1984 in Chapter 9.

### Section 9 of the Civil Evidence Act 1968

(1) In any civil proceedings, a statement which, if this Part of this Act had not been passed, would by virtue of any rule of law mentioned in sub-s (2) below have been admissible as evidence of any fact stated therein shall be admissible as evidence of that fact by virtue of this sub-section.

(2) The rules of law referred to in sub-s (1) above are the following, that is to say any rule of law—

(a) whereby, in any civil proceedings, an admission adverse to a party to the proceedings, whether made by that party or by another person, may be given in evidence against that party for the purpose of proving any fact stated in the admission;

(b) whereby, in any civil proceedings, published works dealing with matters of a public nature (for example, histories, scientific works, dictionaries and maps) are admissible as evidence of facts stated therein;

(c) whereby, in any civil proceedings, public documents (for example, public registers, and returns made under public authority with respect to matters of public interest) are admissible as evidence of facts stated therein; or

(d) whereby, in any civil proceedings, records (for example, the records of certain courts, treaties, Crown grants, pardons and commissions) are admissible as evidence of facts stated therein.

Note
(a) Statements establishing reputation or family tradition (including pedigree) are dealt with in detail in s 9(3) and (4). In particular, such statements are admissible for the purpose of establishing good or bad character, questions of pedigree, the existence of a marriage or of a family tradition, or proving or disproving the existence of any public or general right or of identifying any person or thing, (b) The common law rules preserved by the 1968 Act continue to be preserved by s 7 of the 1995 Act.

## 8.3 Consequent upon the abolition of the hearsay rule in civil cases by the 1995 Act, certain safeguards have been included

### Section 2 of the Civil Evidence Act 1995

(1) A party proposing to adduce hearsay evidence in civil proceedings shall, subject to the following provisions of this section, give to the other party or parties to the proceedings—

(a) such notice (if any) of that fact; and

(b) on request, such particulars of or relating to the evidence,

as is reasonable and practicable in the circumstances for the purpose of enabling him or them to deal with any matters arising from its being hearsay.

(2) Provision may be made by rules of court—

(a) specifying classes of proceedings or evidence in relation to which subs (1) does not apply; and

(b) as to the manner in which (including the time within which) the duties imposes by that sub-section are to be complied with in the cases where it does apply.

(3) Sub-section (1) may also be excluded by agreement of the parties; and compliance with the duty to give notice may in any case be waived by the person to whom notice is required to be given.

(4) A failure to comply with sub-s (1) or with rules under sub-s (2)(b), does not affect the admissibility of the evidence but may be taken into account by the court—

(a) in considering the exercise of its powers with respect to the course of proceedings and costs; and

(b) as a matter adversely affecting the weight to be given to the evidence in accordance with s 4.

## 8.4 Special statutory provisions allow for the admissibility of hearsay evidence in relation to matters concerning the welfare of children

### Section 96 of the Children Act 1996

(3) The Lord Chancellor may by order make provision for the admissibility of evidence which would otherwise be inadmissible under any rule of law relating to hearsay.

(4) An order under sub-s (3) may only be made with respect to—

(a) civil proceedings in general or such civil proceedings, or class of civil proceedings, as may be prescribed; and

(b) evidence in connection with the upbringing, maintenance or welfare of a child.

Note

(a) Such rules were first made in 1991. The present rules are contained in the Children (Admissibility of Hearsay Evidence) Order 1993 (SI 1993/62) and provide that evidence given in connection with the upbringing, maintenance or welfare of a child shall be admissible, notwithstanding any rule of law relating to hearsay, (b) The Act and the Rules overturn earlier cases that had held that there were no common law exception to permit hearsay evidence in cases of child custody or access.

### Re C and Others (Minors) (Hearsay Evidence: Contempt Proceedings) (1993) CA

The applicant had obtained a non-molestation order against her exhusband, as well as an injunction restraining him from approaching within 100 yards of the matrimonial home. She alleged that he had breached the injunction and applied to commit him for contempt. In order to prove the breach of the injunction, she sought to adduce statements made by the parties'

children to a welfare officer and a church minister. The judge hearing the application ruled that these statements were not covered by the Children Act 1989 and the Order made under it as the proceedings were contempt proceedings and not civil or family proceedings.

*Held* It was not the case that the sort of hearsay evidence covered by the 1989 Act and the Order made under it could never be used in contempt proceedings. If an injunction was designed in order to protect a child, then a breach of that injunction would clearly involve issues relating to the upbringing, maintenance or welfare of that child. However, in this particular case, the injunction arose out of a dispute between the parents and was not designed to protect the children. Furthermore, the children were not seriously affected by the actions of their father. As such, the hearsay statements had not been made in connection with upbringing, maintenance or welfare of the children and were inadmissible. The Court of Appeal also ruled that, if such evidence came within the terms of the Act and the Order, there was no judicial discretion to exclude the evidence on the grounds that it would be unfairly prejudicial to the defendant.

**Q** Does this decision mean that it is only when the upbringing, maintenance or welfare of a child is directly affected that the hearsay evidence would be admitted? Surely, it is possible to argue that anything affecting the health, stability and safety of the mother is something that would also have an adverse impact on the children in her care.

# 9 Statutory Exceptions to Hearsay Evidence in Criminal Cases

## 9.1 Wide reaching exceptions to the hearsay rule have been enacted in a series of statutes, notably in the Criminal Justice Act 1988

**R v Lockley and Corah (1995) CA**

The defendants were convicted of murder after a retrial. At the first trial, a witness had given evidence of certain admissions made by Corah to the effect that the deceased had raped her and that his murder was motivated by revenge. At the retrial, however, this witness could not be traced and the prosecution sought to adduce a transcript of her evidence given in the first trial. The trial judge concluded that the transcript was not admissible under statute but that there was a common law power to admit it.

*Held* First, the transcript was admissible under s 23, as well as s 24 of the Criminal Justice Act 1988: see below. Secondly, if the 1988 Act applies then admissibility must be determined under its provisions and the common law principles would be inapplicable. *Per* Pill LJ:

> It was initially submitted…that there was a more tolerant approach to admissibility at common law and a judge who found the transcript inadmissible under statute might then go on to find it admissible at common law. We do not accept that submission. If the 1988 Act applies, admissibility should be determined under its provision and the discretion it incorporates.

Note

(a) The court in this case was not saying that documents which were inadmissible under the 1988 Act could not be admissible under the common law. There were a number of common law exceptions that were not covered by the 1988 Act, for instance, *res gestae* and oral dying declarations. However, if evidence is admissible under both the common law, as well as the 1988 Act, then it should be the statutory provisions which prevail, (b) Corah's appeal was allowed for the reasons discussed in 9.2.

### Section 23 of the Criminal Justice Act 1988

(1) …a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if—

(i) the requirements of one of the paragraphs of sub-s (2), below, are satisfied; or

(ii) the requirements of sub-s (3) below are satisfied.

(2) The requirements mentioned in sub-s (1)(i) above are—

(a) that the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness;

(b) that-

(i) the person who made the statement is outside the UK; and

(ii) it is not reasonably practicable to secure his attendance; or

(c) that all reasonable steps have been taken to find the person who made the statement, but that he cannot be found.

(3) The requirements mentioned in sub-s (1)(ii) above are—

(a) that the statement was made to a police officer or some other person charged with the duty of investigating offences or charging offenders; and

(b) that the person who made it does not give oral evidence through fear or because he is kept out of the way.

Note

(a) This section is made subject to s 69 and s 76 of the Police and Criminal Evidence Act 1984 (computer records and confessions) and to the provisions in the Criminal Appeal Act 1968 relating to the requirement that any evidence given orally at an original trial ought also to be given orally at a retrial, (b) The requirements listed in sub-s (2), above, are to be regarded as questions of fact and it is unlikely that the appellate court will interfere with the decision of a trial judge: see *R v Radak and Others,* 9.2.

### Section 24 of the Criminal Justice Act 1988

(1) …a statement in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence would be admissible, if the following conditions are satisfied—

(a) the document was created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office; and

(b) the information contained in the document was supplied by a person (whether or not the maker of the statement) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with.

(2) Sub-section (1), above, applies whether the information contained in the document was supplied directly or indirectly, but, if it was supplied indirectly, only if each person through whom it was supplied received it—

(a) in the course of a trade, business, profession or other occupation; or

(b) as the holder of a paid or unpaid office.

Note

(a) The limitations applicable to s 23 apply also to s 24: see the note above, (b) Under s 24(4), statements made for the purposes of a criminal investigation or of pending or contemplated criminal proceedings may not be admitted under s 24 unless the conditions specified in s 23(2) or (3) have been satisfied or, under s 24(4)(iii), unless the maker of the statement cannot reasonably be expected to have any recollection of the matters contained in the statement, having regard to the time which has elapsed and to all the circumstances of the case.

### R v Hogan (1996) CA

The prosecution, in this case, relied on the custody record and property sheet prepared during the defendant's period of detention. One of the issues on appeal was whether this was proper.

*Held* The documents in question came within s 24 of the Criminal Justice Act 1988, in that the person who made the statement contained in them 'could not reasonably have been expected…to have had any recollection of the matters dealt with in the statement' and it was obvious that the documents had been prepared for the purpose of contemplated criminal proceedings. A remaining issue related to the question as to whether the document satisfied s 24(1)(a) and (b). Here, the document had been 'created' by the custody officer and the information contained within it had either been supplied by the defendant himself or was based on the direct observation of the custody officer.

### R v Mattey and Queeley (1995) CA

The defendants were charged and convicted with assault and affray. The main ground of appeal concerned the admissibility of statements under s 23(2) of witnesses who were in France. The trial judge refused to allow the defence to use these statements on the grounds that the defendant had to prove, beyond reasonable doubt, that the conditions contained in s 23(2) were satisfied.

*Held* If the prosecution was seeking to admit statements under s 23, then the ordinary criminal standard of proof beyond reasonable doubt applied. However, the proper standard of proof on the defence should be merely on a balance of probabilities. The trial judge had been clearly wrong on this point. However, even if he had correctly directed himself on the standard of proof, he would have come to the same conclusion. This was because the defendants had not done anything to satisfy the court that the conditions in s 23(2) had been satisfied. It was not enough to simply produce the hearsay statement; the court may not look at the statement by itself in order to decide admissibility under s 23. The defendants had to go further and provide some evidence, for instance, in the form of an affidavit, as to why the witnesses could not be produced in court. They had not done this and the appeal was dismissed.

### R v Jiminez-Paez (1993) CA

The defendant was charged with the illegal importation of drugs into the UK from Colombia. She admitted the fact of illegal importation, but claimed to be under the mistaken belief that she was smuggling emeralds. The defence sought to put in evidence a letter written by an official of the Colombian Embassy in London. The prosecution objected on the grounds that this would be hearsay. The defence submitted that it was covered by the terms of s 23 of the 1988 Act on the grounds that the embassy official was immune from the process of the court and was therefore to be regarded, in law, as 'outside the UK'.

*Held* The defence submission could not be accepted. The provisions in s 23 could not be extended to cover someone who was physically present within the UK.

### R v Hurst (1995) CA

The defendant was charged with the importation of drugs. One of the issues concerned the admissibility of a statement made by the defendant's mother. The mother was in the US and it was submitted that her statement ought to be admitted, under s 23(2)(b), as a statement made by a person outside the UK where it was 'not reasonably practicable' to secure attendance. In addition, it was alleged that the mother could not obtain or afford time off work and that her husband had lost his job.

*Held* The words 'reasonably practicable' require the court to consider the normal steps that would be taken to secure the attendance of a witness, and includes the costs of that witness attending and the practicable arrangements that have to be made to secure attendance. The burden was on the defendant to satisfy the court that the requirements of the section had been satisfied. In this case, the trial judge had considered the factors put forward but had nonetheless discounted them. The Court of Appeal was unwilling to interfere with the decision of the trial judge that the section had not been satisfied. This was especially so because the mother had three months previously visited the UK.

**R v Ashford Magistrates' Court ex p Hilden (1993) QBD**

The defendant was charged with causing grievous bodily harm and false imprisonment of his girlfriend. During committal proceedings, the girlfriend gave evidence, but the examining magistrate formed the opinion that she was failing to give evidence through her fear of the defendant; this opinion was based on her demeanour and her responses to questions put to her. The prosecution made an application that her previous written statement to the police should be admitted under s 23(3)(b) and s 26 (see 9.2) and this was allowed. The magistrate had not seen or read the statement before making this decision. The defendant subsequently applied for judicial review of this decision on the grounds that: (a) such a statement was only admissible if the witness had not given any oral evidence at all; (b) that the witness had actually to state that there was a fear of testifying or that there had to be evidence from someone who had seen the witness outside court and had come to that conclusion; and (c) the magistrate was required to see and read the statement before deciding on admissibility.

*Held* A written statement is admissible under s 23 not only when the witness does not testify at all and stands mute, but also when the witness refuses, through fear, to give any evidence of significance or when the witness is prevented from giving further oral evidence. The court was entitled to form its own opinion as to whether the witness was prevented by fear from testifying. It was not necessary that this should be deposed to by the witness or by someone else who has seen the witness. *Per* McCowan LJ:

> I cannot for my part understand how that is better evidence than a magistrate seeing the witness and forming her own view that the witness is shaking with fear. I see nothing in the section which requires that the witness herself should say, 'I am not giving evidence through fear'.

Further, there was no necessity for the magistrate to have actually seen and read the statement before deciding on admissibility, provided that the magistrate was made aware of the contents of that statement.

**R v Foxley (1995) CA**

The defendant, who was employed by the Ministry of Defence, was charged with corruption under the Prevention of Corruption Act 1916. The prosecution alleged that he had corruptly placed contracts with foreign companies and arranged for money to be paid into Swiss bank accounts on his behalf. The prosecution case consisted, *inter alia*, of documents produced by two Ministry of Defence police investigators. Of these, the defence objected to certain documents that had been obtained through the formal legal procedures in the relevant foreign countries which related to the corrupt transactions. The defence objected on the ground that the requirements of the Criminal Justice Act had not been satisfied. In particular:

no witness was called to speak on the documents or to the transactions referred to in them; the defendant had not seen these documents; there was no evidence as to the purpose for which the documents were created or that the makers had personal knowledge of the contents or that they were created in the course of a trade or business or were authentic; there was no evidence of their provenance, that is, where the documents had been kept or who had kept them. The trial judge overruled these objections.

*Held* To accept the defence objections would be to defeat Parliament's intentions in passing the hearsay provisions of the 1988 Act. The purpose of the statutory provisions was that the documents should speak for themselves and that the court could draw such inferences as it thought proper from the nature of the documents, as well as from the manner in which the documents had been obtained for production in court. The documents had been obtained through the legitimate, legal, routes for obtaining such documents in foreign jurisdictions and no objection could be taken on that point. Further, it was not necessary to call witnesses who had personal knowledge of the contents of those documents. Section 24 makes certain statements in documents admissible if two conditions are satisfied. The condition contained in s 24(1)(ii) demonstrates that courts may draw inferences as to the personal knowledge of the person supplying the information contained in the document. *Per* Roch LJ:

> The purpose of s 24 is that the documents should prove the facts stated in the document. To require a witness with personal knowledge of those facts to be called to give evidence and to be cross-examined would defeat the purpose of s 24.

Note

See 9.3 for the question of authenticity.

**R v Castillo, Caba and Almanzar (1996) CA**

The defendants were convicted of importing cocaine. The evidence against Castillo was that he had made the travel arrangements for all three. The prosecution sought to prove this by adducing a statement made by a travel agent in Barbados under s 23. Proof of the travel agent's inability to attend was provided by a statement made by a Customs and Excise officer who, because he was based in Venezuela, was himself unable to attend. The reason for the non-attendance of this officer was given in oral evidence by the officer in the case. The judge was told that he could attend, but for him to do so would be disruptive, expensive and against the policy of Customs and Excise. On appeal, it was argued that the prosecution was seeking to prove one hearsay statement (that of the travel agent) by the use of another hearsay statement (that of the Customs and Excise officer) and this amounted to double hearsay which was not permitted under s

23. It was further argued that given this officer had said that he could come, the evidence did not show that it was not reasonably practicable for him to do so.

*Held* (a) The statements were admitted to prove different things and therefore there was no question of second hand hearsay, (b) The mere fact that it was possible for a witness to attend did not mean that it was 'reasonably practicable' for him to do so. The trial judge had to take into account the following factors: (i) the importance of the evidence and the extent to which non-attendance was prejudicial to the defence; (ii) the expense and inconvenience bearing in mind that the statement might refer to a matter which could not seriously be challenged in cross-examination if the maker of the statement was actually in court; and (iii) the reasons put forward as to why it was not convenient or reasonably practicable for the witness to attend. Finally, it was a matter for the discretion of the trial judge and the Court of Appeal would not lightly interfere.

## 9.2 The discretion of the court in deciding admissibility is preserved by ss 25 and 26 of the 1988 Act

### Section 25 of the Criminal Justice Act 1988

(1) If, having regard to all the circumstances [the court] is of the opinion that in the interests of justice, a statement which is admissible by virtue of ss 23 or 24 above, nevertheless, ought not to be admitted, it may direct that the statement shall not be admitted.

(2) Without prejudice to the generality of sub-s (1) above, it shall be the duty of the court to have regard—

(a) to the nature and source of the document containing the statement and to whether or not, having regard to its nature and source and to any other circumstances that appear to the court to be relevant, it is likely that the document is authentic;

(b) to the extent to which the statement appears to supply evidence which would otherwise not be readily available;

(c) to the relevance of the evidence that it appears to supply to any issue which is likely to be determined in the proceedings; and

(d) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them.

Note

The approach taken, here, is that once the statement satisfies the conditions in ss 23 and 24 the court may, nonetheless, use its discretion to exclude it. This contrasts with the approach taken in s 26, below.

### Section 26 of the Criminal Justice Act 1988

Where a statement which is admissible in criminal proceedings by virtue of ss 23 or 24 above appears to the court to have been prepared…for the purposes—

(a) of pending or contemplated criminal proceedings; or

(b) of a criminal investigation,

the statement shall not be given in evidence in any criminal proceedings without the leave of court, and the court shall not give leave unless it is of the opinion that the statement ought to be admitted in the interests of justice; and, in considering whether its admission would be in the interests of justice, it shall be the duty of the court to have regard—

(i) to the contents of the statement;

(ii) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and

(iii) to any other circumstances that appear to the court to be relevant.

Note

(a) In contrast to s 25, the approach taken here is that if the statement is one that has been prepared for: (i) pending or contemplated criminal proceedings; or (ii) of a criminal investigation, then it is not enough to satisfy the requirements of s 23 or s 24. The party seeking admissibility must also obtain leave of court under the terms set out. In other words, the issue here is not whether an admissible statement ought to be excluded, but whether leave of court ought to be granted to have the statement admitted in the first place, (b) In effect, under s 25, the party objecting to the evidence has the burden of putting the case for exclusion. By contrast, under s 26, it is the party seeking to adduce the statement that has the burden of showing reasons why the interests of justice require admission

**Q** Why should an extra restriction be placed on the types of statements with which s 26 is concerned?

**R v Lockley and Corah (1995) CA**

See 9.1.

*Held* The trial judge had not been referred to s 25 or s 26 of the Act. In particular, s 26 required a consideration of 'the interests of justice' before the statement could be admitted. In this case, the statement had been made by a witness who was repeating a cell confession made in the absence of any other witnesses. Such statements should always be treated with caution. Moreover, although the bad character of the witness is not an overriding factor, here, the witness had demonstrated and even boasted of a remarkable ability to deceive. In this context, therefore, the potential unfairness to the defendant in the jury not having the opportunity to see the witness tested in cross-examination meant that the statement ought to have been excluded.

**R v Setz-Dempsey and Richardson (1993) CA**

The defendants were charged and convicted with theft. One of the defendants was identified by a witness from video clips and a written statement was made to this effect. However, at the trial, this witness appeared unable to recollect any of the relevant evidence, despite being given an opportunity to refresh his memory. After hearing medical evidence from a psychiatrist, the trial judge ruled that he was 'unfit to attend as a witness' under s 23(2)(a). The defendants appealed on the basis that this witness had in fact 'attended' and had taken the oath. A further ground of appeal was that the trial judge had been wrong to base his decision on a consideration of s 25 instead of s 26.

*Held* There was no substance in the first ground of appeal; the terms of s 23 would extend to cover a witness who, after taking the oath, was found to be unfit. However, the trial judge was wrong not to have considered the requirements of s 26, as the statement was clearly made for the purpose of a criminal proceeding or investigation. *Per* Beldam LJ:

> Under s 25, the court exercises its discretion by holding that the statement ought not to be admitted in the interests of justice. Under s 26, the court is required to start from the position that the statement cannot be given in evidence without leave and that leave should not be given unless the interests of justice require admission of the statement.

Under s 26, the first matter to be considered related to the contents of the statement and the quality of the evidence contained in it. According to the evidence of the psychiatrist, there were doubts as to the mental condition of the witness at the relevant time, especially with regard to his ability to give a coherent account and his powers of recall. This was all the more important, as the statement related to identification evidence. The second matter to be considered related to the issue of fairness to the defendant and the inability to probe or undermine the evidence through cross-examination.

In this case, the trial judge should have considered the requirements of s 26 and refused leave for the statement to be admitted, since the expert psychiatric evidence had undermined the quality of the evidence and the evidence of identification might have been undermined by cross-examination.

**R v Cole (1990) CA**

The defendant was charged and convicted of assault occasioning actual bodily harm. The main prosecution evidence consisted of a statement made by an eye witness to the effect that the defendant had assaulted the victim. This eye witness had since died, but had made the statement in the usual form in which he stated his awareness that he would be liable to prosecution if he stated anything other than the truth. In particular, this statement was relied on to show that there was no substance in the defendant's claim that he had been acting in self-defence. The defence appealed on the grounds that the trial judge had misdirected himself when deciding whether to admit the statement under s 26. In particular, this was because the trial judge took into consideration the fact that the defendant could have controverted the statement of the eye witness, if he had chosen to do so, through his own evidence, or that of other witnesses. The availability of possible defence evidence was submitted to be irrelevant.

*Held Per* Gibson LJ:

> By s 25, if, having regard to all the circumstances, the court is of the opinion that a statement, admissible by virtue of s 23 or s 24, 'in the interests of justice ought not to be admitted', it may direct that it be not admitted. The court is then, in considering that question, directed to have regard to the list of matters set out in s 25(2). They include 'any risk' or unfairness caused by admission or exclusion of the statement 'having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend'. In short, the court must be made to hold the opinion that the statement ought not to be admitted. By contrast, under s 26, which deals with documents prepared for purpose of criminal proceedings or investigations, when a statement is admissible in criminal proceedings by virtue of s 23 or s 24 and was prepared for the purposes of criminal proceedings, the statement shall not be given in evidence unless the court is of opinion that the statement 'ought to be admitted in the interests of justice'. The matters to which the court must have regard…include, again, 'any risk' of unfairness caused by admission or exclusion having regard to the possibility of controverting the statement. Again, in short, the court is not to admit the statement unless made to hold the opinion that in the interests of justice it ought to be admitted. The emphasis is the other way round.

When deciding on admissibility under s 26, the trial judge was right to consider the possibility of the defendant controverting the statement. There is no necessity for the court to consider the possibility that the defendant

may choose not to give evidence on this point or not to call witnesses. It would have been better for the trial judge to have referred specifically to the terms of s 26, but there was no irregularity The court should also take into account the quality of the evidence in deciding whether it ought to be admitted in the interests of justice. This would involve a consideration of whether the risks of potential unfairness to the defendant may be effectively counter-balanced by an adequate warning and explanation to the jury while summing up. In this case, the defence had conceded that the trial judge's direction to the jury had been correct and fair.

**R v Grafton (1995) CA**

The defendant was charged with failure to keep records relating to his business with the intention of evading VAT. The prosecution sought to rely on a statement from the defendant's accountant to the effect that the accounts were incomplete, that there were discrepancies and that the defendant had been unable to answer his queries. The accountant had since died. The defendant was convicted largely on the basis of this evidence and he appealed on the grounds that the trial judge ought not to have admitted the statement.

*Held* The trial judge had directed himself correctly as far as his use of discretion under s 25 and s 26 was concerned. Under s 25, the court had to consider the authenticity of the document, whether it supplied evidence not available elsewhere, the relevance of the evidence and the ability to controvert it. The emphasis of s 25 began in favour of admitting the statement, while the emphasis of s 26 was against its admission. However, in this case, it was open to the defendant to himself controvert the statement or to call other evidence. He had chosen not to do so and this was a relevant consideration in deciding to admit the statement. As far as the exercise of discretion was concerned, the Court of Appeal would not interfere merely because it might have reached a conclusion different from that of the trial judge. In the event, the trial judge had acted correctly.

**R v Batt and Batt (1995) CA**

The defendants were convicted of robbery. One of the issues on appeal concerned the prosecution use of two statements which implicated the defendants. The makers of the statements had since emigrated to Australia. The trial judge allowed the use of these statements under s 23(2)(b), as it was not reasonably practicable to secure their attendance.

*Held* When hearsay statements were admitted, it was necessary for trial judges to warn the jury of the risk involved in the fact that the makers of such statements were not available for cross-examination. However, there was no rule in the 1988 Act as to the precise terms of the warning. Here, the trial judge had made references to this risk during the summing up and that was sufficient. Further, s 26 explicitly invoked the interests of justice as

a necessary criterion and emphasised that one factor which had to be taken into account was the contents of the statement itself. Here, the statement had considerable significance in implicating the defendants and the trial judge was right to take this into account in support of its admission, rather than against it.

**Q** Do you not think that 'the interests of justice' would have required these statements to be excluded precisely because of their significance in implicating the defendants, bearing in mind that there were no other witnesses and that the statements could not be tested through crossexamination?

**R v Radak, Adjei, Butler-Rees and Meghjee (1998) CA**

The defendants were charged with various money laundering offences. S, the main witness for the prosecution, was resident in the US. An officer visited him there and he made a statement, but indicated that he was unwilling to attend court as a witness because of business reasons and also because he was afraid of repercussions on him and his family. The officer concerned informed the officer in the case that S was concerned about his business affairs, but failed to mention his fears about safety. At a later date, when it became clear that S would not attend, the possibility was raised that a commissioner be appointed to take evidence orally from S in the US. This possibility was rejected. At the trial, the prosecution applied for leave to have his earlier statement read. The defence objected, as they wished to cross-examine him. The trial judge ruled, under s 23(2)(b), that it was not reasonably practicable to secure the attendance of S. He also ruled, under s 26, that the statement be admitted in the interest of justice. A number of issues arose on appeal.

*Held* (a) The first issue that arose was whether the trial judge was correct in ruling that it was not reasonably practicable for S to attend. On this point, the Court of Appeal held that this was a finding of fact which the trial judge was entitled to make on the evidence presented to him. (b) The second issue related to the application of s 26, as to whether it was in the interest of justice that the statement be admitted. The question for consideration was whether the admission of the statement would result in unfairness, having regard to the possibility of the defence controverting the statement if S did not attend. On this issue, the trial judge had concluded that any line of cross-examination would not have been of value to the defence and that, therefore, the risk of unfairness was minimal. The Court of Appeal held that this line of reasoning was wrong. It was not appropriate for a trial judge to speculate about the possible outcome of cross-examination. Here, the evidence of S was an essential link in the prosecution case. If his statement was admitted in evidence without cross-examination, this would result in a degree of unfairness to the defendants, (c) In

considering whether, under s 26(iii), there were 'any other circumstances that appear to the court to be relevant', the Court of Appeal held that the prosecution's failure to anticipate the problems posed by the failure to attend should be taken into consideration. The prosecution had known from the outset that S might not attend and, yet, had done nothing. It would have been possible to obtain the evidence of S under the Criminal Justice (International Co-operation) Act 1990. In this sense, the prosecution were culpable and the trial judge should have taken this into account.

**R v W (1997) CA**

W was convicted of a number of sexual offences in relation to his own children. His wife had originally been jointly charged, but proceedings against her were stayed indefinitely on the grounds of ill health. Some months after the trial had commenced, Mrs W made a written statement and the defence applied for the statement to be admitted under ss 23 and 26. The trial judge refused for the following reasons:

(a) Mrs W had originally been a co-defendant and had received full disclosure by the time she made her statement; she was, therefore, in a position to compose a statement which would anticipate the evidence to be given;

(b) if the statement were to be admitted, the prosecution would be deprived of the opportunity to cross-examine her about other events and to assess her as a witness; this was especially important in this case, as credit was crucial;

(3) there was a risk of hearsay evidence being admitted through the statement.

*Held* It was clear that the judge had taken into account the crucial point that to exclude the evidence could be prejudicial to the defence. However, the interests of justice affected both the prosecution, as well as the defence. He had come to the conclusion, after reading the statement, that the unfairness to the prosecution by inclusion outweighed any unfairness to the defence by exclusion. The Court of Appeal would not interfere with this finding. Further, s 26 refers to statements prepared for the purposes 'of pending or contemplated criminal proceedings' or of 'a criminal investigation'. Here, the statement had been made after proceedings had been commenced. Nonetheless, a literal interpretation was not necessary in these circumstances.

## 9.3 Hearsay statements admitted under the 1988 Act must be proved in the required manner

### Section 27 of the Criminal Justice Act 1988

Where a statement contained in a document is admissible as evidence in criminal proceedings, it may be proved—

(a) by the production of that document; or

(b) (whether or 1not that document is still in existence) by the production of a copy of that document, or of the material part of it, authenticated in such manner as the court may approve; and it is immaterial for the purposes of this subsection how many removes there are between a copy and the original.

### R v Foxley (1995) CA

See 9.1.

*Held* As far as the question of authenticity was concerned, the court can infer the authenticity of a document from the nature of the document itself, its source and the method by which it has been brought before the court.

## 9.4 Documentary evidence produced by computer

Note

Under s 69 of the Police and Criminal Evidence Act 1984, special provisions applied to documents produced by computer. These provisions have now been abolished by s 60 of the Youth Justice and Criminal Evidence Act 1999. Consequently, documents produced by computer are subject to the same general principles and exceptions as apply to all documents.

# 10 Confessions

## 10.1 An adverse admission relevant to the issue of guilt may be admissible in criminal cases as a confession

### Police and Criminal Evidence Act 1984

76 (1) In any proceedings a confession made by an accused person ay be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section…

82 (1) …'confession', includes any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise.

Note

Under the old common law rules, an adverse statement only amounted to a confession if it was made to a person in authority; this is no longer the case. See 10.1.1.

### 10.1.1 Under the old common law rules, a confession was admissible if it was voluntary and satisfied the Judges' Rules

### Judges' Rules (Home Office Circular 89/1978)

[I]t is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.

### Ibrahim v R (1914) PC

The defendant was charged with murder and appealed on the ground that a confession he had made was inadmissible.

*Held* In order to be admissible, the prosecution had to show that the confession had been made voluntarily. *Per* Lord Sumner:

> It has long been established…that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

Here, the appeal was dismissed as the confession was shown to be voluntary.

> Note
>
> The Judges' Rules were developed over a period of time and contained in various practice directions. They did not have the force of law, but were generally agreed to represent a statement of the way in which judicial discretion would be used in order to exclude confession on the grounds they were involuntary or obtained through oppression. The Judges' Rules have been effectively superseded by the Police and Criminal Evidence Act 1984 (PACE), see 10.2.

**R v Isequilla (1975) CA**

The defendant was arrested for a number of offences, including the possession of an imitation firearm, and having articles for use in connection with theft. He was cautioned and taken to a police station. It was clear that he was very frightened and, by the time he arrived at the police station, he was completely hysterical. He then made a confession. At the trial, the judge allowed this confession, despite defence objections. He was convicted and appealed on the basis that: (a) although the police had acted properly, their conduct had been such as to amount to an inducement to confess; and (b) given the defendant's mental state at the time, he was not capable of making a free choice as to whether to confess or not.

*Held* (a) It could not be said that there was any inducement to confess. *Per* Lord Widgery:

> Under the existing law, the exclusion of a confession as a matter of law because it is not voluntary is always related to some conduct on the part of authority which is improper or unjustified. Included in the phrase 'improper or unjustified', of course, must be the offering of an inducement, because it is improper, in this context, for those in authority to try to induce a suspect to make a confession.

(b) Although it may be the case that a defendant's mind can be so unbalanced as to render it unsafe to act upon a confession, there was no evidence that in the present case there was anything more than the fact that he was sobbing and frightened and later became hysterical; this was insufficient evidence on which to exclude the confession.

Note

The test of whether or not the confession was voluntary caused considerable confusion and inconsistency. This test has now been replaced by the test in PACE 1984, see 10.2.

**Q** Would both of these cases above be decided the same way under the current law?

**Wong Kam-Ming v R (1979) PC**

See 10.6.

*Held Per* Lord Hailsham:

> Any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because, in a civilised society, it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions. It is, therefore, of very great importance that the courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was, therefore, in the truest sense voluntary.

## 10.2 The current position is that a confession must satisfy the requirements of s 76 of the Police and Criminal Evidence Act 1984 in order to be admissible

### Section 76 of the Police and Criminal Evidence Act 1984

(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained—

(a) by oppression of the person who made it; or

(b) in consequence of anything said or done which was likely in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

(3) In any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in sub-s (2) above.

Note

(a) The two grounds for excluding the confession are that it was obtained as a result of oppression or that the circumstances under which the confession was obtained renders it unreliable; although involuntariness may be taken into account, it is not longer the test, (b) Once the trial judge has determined that either of the conditions in paras (a) and (b) of s 76(3) have been satisfied, the confession must be excluded, (c) It is the manner in which the confession was made that is in issue; it is immaterial whether the confession is, or is alleged to be, true, (d) The section makes clear that the burden of proof is on the prosecution to prove beyond reasonable doubt that the confession is admissible, (e) A challenge to the admissibility of the confession is usually made by the defence although the trial judge may, on his own motion, put the prosecution to proof.

### 10.2.1 A confession obtained by oppression must be excluded

**Section 76 of the Police and Criminal Evidence Act 1984**

(8) In this section, 'oppression' includes torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture).

**R v Fulling (1987) CA**

The defendant was arrested and detained in a police cell for questioning. During interrogation, it was alleged that the police had told her that her boyfriend was having an affair with another woman who had also been arrested and was in the next cell. The defendant was permitted to talk to this woman and this was confirmed. The defence objected to the admissibility of the confession that was subsequently made by the defendant on the grounds that it had been obtained by oppression, since she was extremely distressed by what she had been told and that the only way she could get out of the police cell was by making the confession. The issue before the Court of Appeal was the way in which the term 'oppression' had to be defined and applied.

*Held* (a) PACE 1984 was intended to be a codifying statute. Accordingly, the older cases decided under the common law rules did not necessarily apply, (b) The term 'oppression' ought to be given its ordinary dictionary meaning, and the definition given in the Oxford English Dictionary was: 'Exercise of authority

or power in a burdensome, harsh, or wrongful manner; unjust or cruel treatment of subjects, inferiors, etc; the imposition of unreasonable or unjust burdens.' Moreover, oppression would inevitably involve some impropriety on the part of the interrogator. There was no such impropriety in what the police had done in this particular case and therefore there was no oppression.

Note

(a) The Court of Appeal made no mention of the definition of oppression in s 76(8). (b) The Court of Appeal ruled, *obiter,* that the position under s 76(2)(b) was different; no impropriety need be proved.

**R v Emmerson (1990) CA**

It was alleged that a police officer had raised his voice and sworn at the defendant who subsequently made a confession. The admissibility of the confession was challenged on the ground that it had been obtained by oppression.

*Held* Mere loss of patience or bad language did not come within the definition of oppression.

Note

Compare this case with that of *Paris, Abdullahi and Miller* (1993), below.

**R v Paris, Abdullahi and Miller (1993) CA**

The defendants had been arrested for murder. One of the issues raised on appeal concerned a confession made by Miller; it was alleged that the manner in which this was obtained amounted to oppression.

*Held* The hectoring and bullying manner of the questioning, which had been tape recorded, amounted to oppression. The period of questioning had amounted to more than 13 hours. For much of this time, the defendant had been sobbing and crying, but had been given no respite. Considering the manner and length of the interviews, it was clear that the confession had been obtained by oppression. *Per* Lord Taylor:

> The officers…were not questioning him so much as shouting at him what they wanted him to say. Short of physical violence, it is hard to conceive a more hostile and intimidating approach to a suspect. It is impossible to convey on the printed page the pace, force and menace of the officer's delivery.

### 10.2.2 A confession will be excluded if the circumstances under which it was obtained render it unreliable

**R v Everett (1988) CA**

The defendant was charged with indecent assault. He made a confession which was challenged by the defence under s 76(2)(b). It was claimed that he had a mental age of eight years.

*Held* In deciding whether the confession was unreliable, it was proper to consider such factors as the mental age of the defendant. In this case, the confession ought to have been excluded.

Note

See 10.5 below for the detailed provisions to be followed when dealing with a confession by a defendant who is mentally handicapped.

**R v Barry (1992) CA**

The defendant was charged with conspiracy to steal. He made a confession to the police after they promised to assist him in obtaining bail. This was especially important to him, as he had custody of his young son and he did not want his estranged wife to obtain custody.

*Held* This was sufficient to render the confession unreliable. The correct approach was as follows: (a) the court must take into account everything said or done by the police; (b) there must be consideration of whether this was likely in the circumstances to render the confession unreliable; and (c) whether the prosecution had proved beyond reasonable doubt that the confession was not obtained as a consequence, this was a question of fact to be approached in a common sense way.

**R v Doolan (1988) CA**

The issue arose as to whether a confession made by the defendant ought to be excluded on the grounds that it was unreliable.

*Held* The question of unreliability under s 76(2)(b) had to be decided on the whole of the evidence. Here, the police had failed to administer a caution, failed to keep a contemporaneous record of the interview, failed to show the defendant a subsequent note of the interview and failed to record the times of the interview. Accordingly, there were sufficient grounds on which to rule that the confession was unreliable.

Note

Unlike 'oppression', there is no corresponding definition in the 1994 Act of what would amount to unreliability. The case law indicates that unreliability: (a) may arise as a result of breaches of the law or the Codes; and (b) that there must be some causal connection: see below.

**R v Goldenberg (1989) CA**

The defendant was convicted for drugs offence. The defence challenged the confession on the grounds that he was an heroin addict and was prepared to do and say anything in order to obtain release from custody; this made the confession unreliable. It was part of the defence challenge that the words of s 76(2)(b) which referred to 'anything said or done' could include anything said or done by the defendant, especially as there was no longer any reference to anything said or done by a person in authority (as there had been under the old Judges' Rules).

*Held* (a) What was said or done by the defendant and the state of mind of the defendant caused by his heroin addiction did not come within the scope of s 76(2)(b). *Per* Neill LJ:

> In our view, it necessarily follows that 'anything said or done' is limited to something external to the person making the confession and to something which is likely to have some influence on him.

(b) The words of the section make it quite clear that there must be a causal link between what was said or done and the making of the confession. *Per* Neill LJ:

> It is clear from the wording of the section and the use of the words 'in consequence' that a causal link must be shown between what was said or done and the subsequent confession.

**Q** (1) If the police are aware that the defendant is a drug addict and detain him so that he makes a confession as a consequence of being deprived of the drugs, would this satisfy s 76(2)(b)?

**Q** (2) Would there be a difference if the police were unaware of his addiction?

### R v Harvey (1988) CA

The defendant had confessed to committing murder. She had a low IQ and suffered from a psychopathic disorder aggravated by alcohol abuse. Psychiatric evidence also indicated that she was suffering from diminished responsibility. It appeared that her lover had confessed to the murder and the psychiatric evidence adduced by the defence was to the effect that her confession was an attempt to protect her lover.

*Held* Taking all the circumstances into account, it was clear that the confession should be set aside on the grounds of its unreliability.

> Note
>
> In this case, there was nothing 'said or done' by the police to render the confession unreliable. Compare this with the case of *R v Goldenberg* (1989), above.

### R v Walker (1997) CA

W was a prostitute charged with robbery. After being arrested, she told the police doctor that she was a heroin addict and was taking methadone. She was prescribed methadone and valium. During an interview, she admitted trying to frighten the complainant into giving her money. An application was made to exclude her confession under s 76. On the *voir dire,* she gave evidence that she had smuggled crack cocaine into the police station and was under its influence during the interview. Psychiatric evidence was given to the effect that she suffered from a severe personality disorder and the psychiatrist was of the opinion that, taken together with the drug use, her confession might be unreliable. The trial judge concluded that there was no

evidence of mental impairment or subnormality in terms of IQ or that the personality disorder rendered the interview unreliable.

*Held* The test in s 76(2) (b)—'anything said to done'—replaced the old common law and, while it would usually be the case that this was concerned primarily with police misconduct, this was not necessarily so. The defendant's mental condition was one of the circumstances to be taken into account and the existing case law could not be taken to have limited or defined the particular form of mental or psychological condition or disorder upon which a defendant might rely in order to show that a confession was unreliable. This was especially so, as the evidence of the psychiatrist had been uncontradicted. Consequently, the decision of the trial judge was flawed.

## 10.3 In addition to the grounds of exclusion under s 76, a confession may also be excluded through the exercise of judicial discretion

### 10.3.1 A confession may be excluded under the power to exclude evidence provided by s 78 of the Police and Criminal Evidence Act 1984

#### Section 78 of the Police and Criminal Evidence Act 1984

(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

#### R v Mason (1988) CA

The defendant was convicted of arson. The police told him and his solicitor that his fingerprints had been discovered at the scene of the offence. As a consequence of this the defendant made a confession. In reality, no fingerprints had been discovered. The defendant appealed on the basis that the trick by the police meant that the confession ought to have been excluded under s 78.

*Held* The trial judge has a discretion to exclude evidence under s 78; the word 'evidence', in that section, referred to all the evidence adduced by the prosecution, including the confession. This power was in addition to that provided by s 76. *Per* Watkins LJ:

> Regardless of whether the admissibility of a confession falls to be considered under s 76(2), a trial judge has a discretion to deal with the admissibility of a

> confession under s 78 which, in our opinion, does no more that to restate the power which judges had at common law before the Act of 1984 was passed. That power gave a trial judge a discretion whether solely in the interests of the fairness of a trial he would permit the prosecution to introduce admissible evidence sought to be relied upon, especially that of a confession or an admission.

In this case, the actions of the police clearly came within the ambit of s 78 and the confession should have been excluded by virtue of this discretionary power. *Per* Watkins LJ:

> It is obvious from the undisputed evidence that the police practised a deceit not only upon the appellant, which is bad enough, but also upon the solicitor whose duty it was to advise him. In effect, they hoodwinked both solicitor and client. That was a most reprehensible thing to do…we think we ought to say that we hope never again to hear of deceit, such as this, being practised upon an accused person and, more particularly, possibly on a solicitor whose duty it is to advise him unfettered by false information from the police.

> Note
>
> Section 78 may also be used to exclude a confession which has been obtained through a breach of other provisions of PACE 1984 or of the Codes of Practice.

**Q** Could it be argued that, apart from s 78, the confession ought to have been excluded under s 76(2)(b)?

### R v Brine (1992) CA

The defendant was charged with indecent assault. The defendant was arrested at 6 am and detained until his interview began after noon. The initial interview lasted for five hours during which time his solicitor was present. No admissions were made until the solicitor left and he was interviewed further. The total interview time was over eight hours. There were breaches of Code C also in that there were no sufficient breaks during the interrogation and insufficient meals were provided. It was not alleged that any of these breaches were motivated by malice on the part of the police. Evidence was given by a psychologist during the *voir dire* that when the defendant made the admissions he had been suffering from a mild form of paranoid psychosis, which would have made him feel under threat when questioned. This would be likely to make him tell lies and to make false admissions. The prosecution did not call any evidence to rebut this…The trial judge allowed the confession on the basis that the provisions in the 1984 Act and Code C were there to prevent police misconduct: there was no such misconduct in this case.

*Held* It may be true that s 76(2) was primarily concerned with misconduct, but s 78 was much wider than this. Accordingly, the trial judge had

misdirected himself as to the effect of s 78; the conviction was, therefore, unsafe and unsatisfactory.

### 10.3.2 A confession may be excluded when there has been a breach of s 58 of the Police and Criminal Evidence Act 1984

#### Section 58 of the Police and Criminal Evidence Act 1984

(1) A person who is in a police station shall be entitled, if he so requests, to consult a solicitor privately at any time.
(4) If a person makes such a request, he must be permitted to consult a solicitor as soon as is practicable except to the extent that delay is permitted in this section.
(9) If delay is authorised—
  (a) the person in police detention shall be told the reason for it; and
  (b) the reason shall be noted on his custody record.

Note

This section is further amplified by detailed rules in the Codes of Practice. For example, Annex B of Code C provides: 'Access to a solicitor may not be delayed on the grounds that he might advise the person not to answer any questions…'

#### R v Samuel (1988) CA

The defendant was charged with burglaries and robbery. He was denied access to a solicitor even after he had confessed to, and been charged with the burglaries. On being further detained and questioned without access to legal advice, the defendant made a further confession to robbery. The confessions were admitted at trial and the defendant convicted. He appealed on the grounds that the denial of access to legal advice meant that the confessions ought to have been excluded. It was not argued that the conduct of the police was oppressive or that the confession was unreliable.

*Held* The right to legal advice was fundamental and the prosecution had not discharged the burden of showing that it had been justified in this case. *Per* Hodgson J, the defendant was 'denied improperly one of the most important and fundamental rights of citizen'. Accordingly, the trial judge should have used his power of discretion under s 78 to exclude it because of its adverse effect on the fairness of the proceedings.

**Q** Would it be the case that every improper denial of access to a solicitor would lead to the confession being excluded? See *R v Alladice* (1988), below.

**R v Alladice (1988) CA**

The defendant was convicted of robbery, largely on the basis of a confession he had made. It was admitted that he had been denied access to a solicitor and the appeal was on the grounds that the trial judge should have excluded the confession because of this breach of s 58.

*Held* It is not always the case that a breach of s 58 would lead to the exclusion of a confession. If the breach had been occasioned by bad faith on the part of the police, then the confession would, of course, be excluded. If there was no bad faith, then the confession would only be excluded if its admission would adversely affect the fairness of the proceedings. This required a finding that the confession had been obtained as a result of the denial of access to a solicitor. This was not the case here. *Per* Lord Lane CJ:

> Had the solicitor been present, his advice would have added nothing to the knowledge of his rights which the appellant already had. The police, as the judge found, had acted with propriety at the interviews and therefore the solicitor's presence would not have improved the appellant's case in that respect. This is, therefore, a case where a clear breach of s 58 nevertheless does not require the court to rule inadmissible subsequent statements made by the defendant.

**Q** Do you agree that the distinction between good and bad faith on the part of the police is justifiable? If s 58 confers a right accepted to be fundamental (see *R v Samuel* (1988), above), should not any breach lead to exclusion of the confession? See *R v Walsh* (1989), below.

**R v Walsh (1989) CA**

The defendant was convicted of robbery and having a firearm with intent to commit an indictable offence. He appealed on the basis that the confession he had made ought to have been excluded because he had been denied access to a solicitor. It was conceded by the prosecution that this was improper, but it was argued that this did not render the confession inadmissible.

*Held* Each case must be considered on its own facts. It was only where the breach of s 58 was significant and substantial that the confession would be excluded. *Per* Saville J:

> The main object of s 58 of the Act and of the Codes of Practice is to achieve fairness—to an accused or suspected person so as, among other things, to preserve and protect his legal rights, but also fairness for the Crown and its officers so that again, among other things, there might be reduced the incidence or effectiveness of unfounded allegations of malpractice. To our minds, it follows that, if there are significant and substantial breaches of s 58 or the provisions of the Code, then, *prima facie,* at least, the standards of fairness set by Parliament have not been met. So far as a defendant is concerned, it seems to us also to

> follow that to admit evidence against him which has been obtained in circumstances where these standards have not been met, cannot but have an adverse effect on the fairness of the proceedings. …In the present case, we have no material which would lead us to suppose that the judge erred in concluding that the police officers were acting in good faith. However, although bad faith may make substantial or significant that which might not otherwise be so, the contrary does not follow. Breaches which are, in themselves, significant and substantial are not rendered otherwise by the good faith of the officers concerned.

In this case, the breach was significant and substantial and the confession should have been excluded.

**Murray v UK (1996) European Court of Human Rights**

The defendant had been convicted with a terrorist offence. One of the issues on appeal to the Court of Human Rights concerned the fact that he had been denied access to legal advice for the first 48 hours of his detention.

*Held* The denial of access to legal advice was a breach of Art *6, para* 3 of the European Convention of Human Rights in so far as the fairness of the trial was likely to be seriously affected.

> Note
>
> The above decision indicates the importance placed on the right of access to legal advice by the Court of Human Rights within the context of Art 6 (the right to a fair trial) of the European Convention on Human Rights. It is likely that this will be strengthened when the Human Rights Act 1998 comes into force.

**Q** Would it be possible to argue that denial of access to legal advice would automatically render a confession inadmissible?

### 10.3.3 A confession may be excluded if there has been a breach of the relevant Codes of Practice

**Section 66 of the Police and Criminal Evidence Act 1984**

The Secretary of State shall issue Codes of Practice in connection with…

(b) the detention, treatment, questioning and identification of persons by police officers.

**Section 67(11) of the Police and Criminal Evidence Act 1984**

In all criminal and civil proceedings, any such Code shall be admissible in evidence and, if any provision of such a Code appears to the court or tribunal conducting the proceedings to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question.

Note

The relevant Code of Practice is Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers. The third edition of this Code came into effect in April 1995 (SI 1995/450). The Code also contains notes for guidance which are not strictly part of the Code, but which are useful in interpreting the Code.

**R v Keenan (1989) CA**

The defendant was convicted of various driving offences and the possession of an offensive weapon. The prosecution gave evidence of certain admission that were alleged to have been made by the defendant during interviews with the police. However, the prosecution could give no reason as to why the interview had not been recorded at the time it took place. Also, the defendant was not given the opportunity to read the police notes of the interview. The defendant appealed on the grounds that breaches of Code C had, therefore, taken place and the admissions should not have been allowed in evidence.

*Held* There had been clear breaches of the provisions in Code C relating to the recording of interviews and admissions. These breaches were significant since the prosecution had little other evidence. *Per* Hodgson J:

> Code C…addresses two main concerns. First, it provides safeguards for detained persons and provides for their proper treatment with the object of ensuring that they are not subjected to undue pressure or oppression. Equally importantly, these Code provisions are designed to make it difficult for a detained person to make unfounded allegations against the police which might otherwise appear credible. Secondly, it provides safeguards against the police inaccurately recording or inventing the words used in questioning a detained person. These practices are compendiously described by the slang 'to verbal' and 'the verbals'. Again, equally importantly, the provisions, if complied with, are designed to make it very much more difficult for a defendant to make unfounded allegations that he has been 'verballed' which appear credible.

At the same time, it was not every breach of the Code of Practice that would lead to the exclusion of a confession. It was only when the breach of the Code was significant and substantial that this would be the case.

**R v Delaney (1989) CA**

The defendant was convicted for an indecent assault. The issue on appeal concerned the admissibility of a confession he had made, it being contended that it should have been excluded because of the breaches of Code C. These included the failure to make a record of what was said during the interview, as well as the fact that the police had said things to the defendant which could be said to amount to improper persuasion to make a confession. The defendant

was 17 years old and the evidence from an educational psychologists was that he was educationally subnormal, with an IQ of about 80.

*Held* The confession should have been excluded due to the circumstances under which it had been obtained. *Per* Lord Lane CJ:

> These were circumstances in which, *par excellence,* any interrogation should have been conducted with meticulous observance of the rules of fairness, whether those rules were by virtue of the common law or by statute or otherwise. Unhappily, that is not what happened…The officers' assertion that it was not practicable to make a verbatim record was described by the judge as being the sheerest nonsense, a comment with which this court entirely agrees. That flagrant breach of the Code, as the judge correctly described it, was the starting point of the submission made to the judge by counsel for the appellant that the confessions should be rejected. But, the mere fact that there has been a breach of the Codes of Practice does not of itself mean that evidence has to be rejected. It is no part of the duty of the court to rule a statement inadmissible simply in order to punish the police for failure to observe the Codes of Practice.

However, in this particular case the breaches of the Code of Practice were of such a nature as to lead to the exclusion of the confession. *Per* Lord Lane CJ: 'It is a case, in our judgment, where the conviction can properly be described as unsafe or unsatisfactory.'

**Q** Given that Lord Lane described the breaches of the Code of Practice as 'flagrant', do you agree that it 'is no part of the duty of the court to rule a statement inadmissible simply in order to punish the police for failure to observe the Codes of Practice'? Would you agree that the decision in *Mason* (above) could be taken to be an attempt to discipline the police?

### R v Miller (1997) CA

The defendant had been arrested for drugs offences and had been put into what was known as 'quick handcuffs' which were designed to prevent movement of the hands. While he was being escorted to the custody office, a police officer, W, alleged that he dropped a package of four tablets. W asked him 'Are these ecstasy tablets?', to which he was alleged to have 'yes'. A second police officer, B, then alleged that he saw the defendant with a green bag in his handcuffed hands which he forced through a slot in the bench on which he was sitting. Neither the custody officer nor W saw this. Later on, B realised that the slot was not large enough for the bag and alleged that the defendant had instead pushed it down the side of the bench. At this point, B alleged that the defendant asked him, *inter alia,* 'What will I get for this?', to which B replied 'That's not for me to say'. The defendant was then alleged to have said This is the first time I have done this'. At the trial, the defence objected to the inclusion of the conversations on the basis that they constituted interviews within the terms of Code C and that there had been breaches of the code in

that the defendant had not been cautioned nor had a record been made or the defendant given an opportunity to see or comment on any record. The trial judge ruled that there was no breach, as the conversations did not constitute an interview, the police officers were entitled to make inquiries before cautioning, the defendant had been cautioned earlier, he was familiar with police station interviews from previous offences, he knew his rights and also that he had volunteered the information.

*Held* The trial judge had misdirected himself. The first conversation was an interview for the purposes of Code C in that it was a question regarding a suspect's involvement in a criminal offence. He may have been cautioned earlier, but he should have been cautioned again before the question 'Are these ecstasy tablets?' was put to him; one caution was not necessarily enough. Further, a contemporaneous record should have been made and the defendant given an opportunity to comment on it. This was not a mere formality. The second conversation did not amount to an interview, as it was an unsolicited comment. However, under the code, even an unsolicited comment required a written record which was timed and signed and, where practicable, the maker given an opportunity to read and sign it as correct. These were serious breaches of the code and might have had a material effect on the fairness of the proceedings. This was especially so, as it was extremely unlikely that the defendant, handcuffed as he was, would have been able to do what he was alleged to have done; the change of evidence on the part of B and the total futility of what the defendant was alleged to have done, as it was bound to have been observed and discovered. This was one of the instances when the Court of Appeal would say that the judge's discretion was wrongly exercised.

## 10.4 Evidence yielded by an inadmissible confession may be nonetheless admissible

### Section 76 of the Police and Criminal Evidence Act 1984

(4) The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence—
(a) of any facts discovered as a result of the confession; or
(b) where the confession is relevant as showing that the accused speaks, writes or expresses himself in a particular way, of so much of the confession as is necessary to show that he does so.

(5) Evidence that a fact to which this sub-section applies was discovered as a result of a statement made by an accused person shall not be admissible unless evidence of how it was discovered is given by him or on his behalf.

(6) Sub-section (5) above applies—
  (a) to any fact discovered as a result of the confession which is wholly excluded in pursuance of this section; and
  (b) to any fact discovered as a result of a confession which is partly so excluded, if the fact is discovered as a result of the excluded part of the confession.

Note

These provisions preserve the common law rules to the effect that, even where a confession has been ruled inadmissible, facts discovered as a result of that confession may be admitted. This is on the condition that those facts can be introduced into court without making any reference to the inadmissible confession.

**R v Warickshall (1783)**

The defendant confessed to receiving stolen property and, as a result, her lodgings were searched and the stolen property was found concealed in the sackings of her bed. The confession was ruled inadmissible because of the inducements that were offered. The issue arose as to whether the evidence of the discovery of the stolen property was admissible.

*Held* The evidence of the discovery of the stolen property was admissible, provided it could be adduced without any reference to the inadmissible confession. In this case, the finding of the stolen property hidden in her bed implicated her as the receiver of stolen property without there being any need to refer to her confession.

**Lam Chi-Ming and Others v R (1991) PC**

The defendants made confessions to the police. They later re-enacted the actions described in their statements, this re-enactment being video taped. They also directed the police to the point where the murder weapon, a knife, had been thrown into the sea. A knife, later identified as the murder weapon, was discovered at the place indicated by the defendants. At the trial, the confession was excluded on the grounds that it had been improperly obtained but the trial judge allowed the video tape to be shown (without sound) in which the defendants indicated the location of the murder weapon. The defendants appealed against this.

*Held* Evidence discovered as a result of an inadmissible confession could be admitted. However, this was only the case if the evidence could be introduced without any reference being made to the inadmissible confession. In this case, the only way the evidence of the discovery of the knife could be introduced was through a reference to the inadmissible confession. *Per* Lord Griffiths: The mere finding of the gun or knife in the sea did not implicate the defendants. What implicated them was their admission that they had

thrown it into the sea.' The common law rule (which applied in Hong Kong) was similar to the position under the 1984 Act. *Per* Lord Griffiths: 'It is, thus, clear that the appellants' evidence relating to the discovery of the knife would not be admissible in English proceedings.' See s 76(5).

## 10.5 Confessions made by the mentally handicapped and by children are specially regulated because of their vulnerability

### Section 77 of the Police and Criminal Evidence Act 1984

(1) Without prejudice to the general duty of the court at a trial on indictment to direct the jury on any matter on which it appears to the court appropriate to do so, where at such a trial—
   (a) the case against the accused depends wholly or substantially on a confession by him; and
   (b) the court is satisfied—
      (i) that he is mentally handicapped; and
      (ii) that the confession was not made in the presence of an independent person,

   the court shall warn the jury that there is special need for caution before convicting the accused in reliance on the confession, and shall explain that the need arises because of the circumstances mentioned in paragraphs (a) and (b) above.

(3) In this section—
   'independent person' does not include a police officer or a person employed for, or engaged on, police purposes;
   'mentally handicapped', in relation to a person, means that he is in a state of arrested or incomplete development of mind which includes significant impairment of intelligence and social functioning.

Note

The 1984 Act has no specific provision for children. However, Code C makes it clear that a similar protection to that accorded to the mentally handicapped is to apply and detailed provision is made for the protection of such vulnerable suspects. See below for a brief selection of the rules from Code C.

### Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers

11.14 A juvenile or a person who is mentally disordered or mentally handicapped, whether suspected or not, must not be

interviewed or asked to provide or sign a written statement in the absence of an appropriate adult…

11.16 Where the appropriate adult is present at an interview, he shall be informed that he is not expected to act simply as an observer; and also that the purposes of his presence are, first, to advise the person being questioned and to observe whether or not the interview is being conducted properly and fairly and, secondly, to facilitate communication with the person being interviewed.

Note

(a) The notes for guidance accompanying para 11 go on to say, *inter alia*, that 'because of the risk of unreliable evidence, it is also important to obtain corroboration of any facts admitted whenever possible', (b) Code C also contains a definition of 'the appropriate adult' in para 1.

**R v Lament (1989) CA**

The defendant had made a confession to attempted murder and causing grievous bodily harm. He was mentally subnormal, with a reading and comprehension ability of a child of eight years and an IQ of 73 against a normal adult range of 90–100. His counsel sought to have the confession excluded under ss 76, 77 and 78 as well as for breaches of Code C in that, *inter alia*, no independent person had been present during the interviews. The trial judge had dismissed the defence objections, concluding that the defendant was not handicapped within the meaning of s 77 and that, accordingly, it was not incumbent upon him to give the warning required by that section.

*Held* The confession should have been excluded. The defendant had to be considered as falling within s 77 and therefore entitled to the special protection afforded by the 1984 Act and Code C. In particular, the required direction under s 77 was not a matter of prudence but an essential part of the summing up. Finally, the trial judge had been wrong to imply that the presence of an appropriate person was of little importance; this was directly contrary to s 77 and Code C.

**R v McKenzie (1992) CA**

The defendant was charged with arson and murder. At the trial, evidence was produced that he was suggestible and compliant and might confess just to be the centre of attention and that in an interview with a psychiatrist he had confessed to a fictitious murder. His counsel submitted that he was mentally handicapped and, therefore, came within the provisions of the 1984 Act and that part of Code C which required an appropriate adult to be present during interviews. Since this had not been done, the confession should have been excluded. The trial judge accepted the evidence of mental

handicap, but allowed the confession to be admitted on the ground that no pressure had been applied and that failure to have an appropriate adult present did not render the confession unreliable. The defendant was convicted and appealed.

*Held* Not only should the confession have been excluded, but the trial judge should have gone further and have withdrawn the case from the jury. *Per* Lord Taylor CJ:

> We consider that where: (1) the prosecution case depends wholly upon confessions; and (2) the defendant suffers from a significant degree of mental handicap; and (3) the confessions are unconvincing to a point where a jury properly directed could not properly convict upon them, then the judge, assuming he has not excluded the confessions earlier, should withdraw the case from the jury.

### R v Wood (1994) CA

The defendant was charged and convicted of manslaughter and the wilful neglect of a child. There were two interviews with the police. In the first interview, the defendant admitted hitting the child. However, this interview had been conducted in breach of Code C in that there was no caution, no information as to legal representation and no recording of the interview. The admission made as a result of this first interview were excluded. In the second interview, the defendant again admitted hitting the child. The facts showed that the defendant had a verbal IQ of 76 and a reading age of nine years; his mental defect made him more suggestible and influenced by leading questions in the interview.

*Held* The appeal was allowed, (a) Although, at the time of the first interview, the police had no means of knowing the defendant's mental handicap, the breaches of Code C during the first interview were linked with the second given the defendant's mental incapacity and the unreliability of the confession and other inconsistencies with the medical evidence. The prosecution could not, therefore satisfy the court that the confession was not obtained in breach of the law. (b) The Court of Appeal had ruled in *R v McKenzie* (1992) (see above) that in cases such as these the trial judge should withdraw the case from the jury. This should have been done here.

### R v Delroy Fogah (1989) CA

The defendant, who was aged 16 at the time of arrest, was charged with robbery. The evidence against him included a confession which he made after being questioned. All the questioning took place while the defendant was standing in the street.

*Held* The confession would be excluded under s 78 due to the clear breach of Code C which required that an appropriate adult should be present to protect the interests of a juvenile.

**R v Jefferson (1994) CA**

The defendant was one of a number of person charged with a variety of public order offences. He was aged 15 at the time and one of the grounds of appeal concerned that part of Code C which dealt with the requirement for there to be an 'appropriate adult' present at the time of the interview. The defendant's father had, in fact, been present. However, the father intervened robustly during the interviews, sometimes joined in the questioning of his son and sometimes challenging and contradicting the answers he gave police.

*Held* The father was not disqualified from being an 'appropriate person' by his behaviour. The fact that he may have been a critical observer at the interview did not mean that he had failed to fulfil the functions required of him under Code C, since he was not estranged from the defendant or unwanted at the interview. There was no duty for the father to protect the son from fair and proper questioning by the police. Any encouragement by an appropriate adult of a juvenile who was being questioned that he should tell the truth should not be stigmatised as a failure to fulfil the duties required by Code C.

## 10.6 The admissibility of a confession is determined through the holding of a *voir dire*

**Wong Kam-Ming v R (1979) PC**

The defendant was charged with murder and malicious wounding. The only evidence against him was his own confession that he had been present at the scene of the attack and that he had 'chopped' someone with a knife. The defence objected to the confession. A *voir dire,* or trial-withina-trial was held in the absence of the jury. The defendant testified on the *voir dire* that he had made a statement, but that he had not been cautioned, that the police had offered him inducements to make it and that he had been forced to copy the statement and sign it against his will. Under crossexamination, however, he admitted that he had been present and involved in the attack. At the end of the *voir dire,* the trial judge ruled that the confession ought to be excluded. The trial then continued. The prosecution then called two shorthand writers who had been present at the *voir dire* to testify that during cross-examination the defendant had admitted to being present at the scene of the attack. This was admitted, despite the objections of the defence. The defendant then testified and, during cross-examination was asked about the discrepancies between his evidence and what he had said during the *voir dire.* He was convicted and appealed.

*Held* (a) The sole purpose of the *voir dire* was to determine whether the confession was admissible; the defendant, therefore, should not have been asked questions as to whether his confession was true, (b) Once a confession has been ruled inadmissible during the *voir dire,* the prosecution could not

lead evidence regarding what had been said by the defendant. This would be the case even where a confession has been ruled admissible, (c) It was not possible to adduce evidence of what had been said by the defendant during the *voir dire;* the evidence of the shorthand writers should not have been admitted, (d) It was only where a confession had been ruled admissible after a *voir dire* that a defendant could be asked questions about discrepancies in his evidence. Here, the confession had been excluded and the questions asked in cross-examinations should not have been allowed. Accordingly, the appeal was allowed.

Note

Although this was a decision of the Privy Council, it would apply as being based on the common law.

# 11 Similar Fact Evidence

## 11.1 Evidence that the defendant has, on other occasions, behaved in the same way that he is alleged to have behaved on the current occasion may be admissible as similar fact evidence

**R v Smith (1915) CCA**

The defendant was charged with the murder of his wife. The defendant, who benefited financially from her death, claimed, in his defence, that she had died by drowning in her bath due to an epileptic fit. The prosecution sought to adduce evidence that two other women the defendant had previously married had also died in similar circumstances. These included the fact that they had drowned in their bathtubs from epileptic fits, even though there had been no previous medical history of epilepsy and that he benefited financially from their deaths.

*Held* The evidence relating to the deaths of the two other women had been rightly admitted. Counsel for the prosecution quoted the following words of the trial judge to the jury which were then specifically approved by Lord Reading CJ:

> And then comes in the purpose, and the only purpose, for which you are allowed to consider the evidence as to the other deaths. If you find an accident which benefits a person and you find that the person has been sufficiently fortunate to have that accident happen to him a number of times, benefiting him each time, you draw a very strong, frequently irresistible inference, that the occurrence of so many accidents benefiting him is such a coincidence that it cannot have happened unless it was design.

Note

Some caution must be exercised with regard to the terminology in this area of the law. References are sometimes made to evidence of disposition, but this term is wide enough to cover similar fact evidence as well as evidence of character.

## 11.2 Similar fact evidence is admissible if it can be shown that the evidence is relevant and not excluded on some other ground

### Makin v AG for New South Wales (1894) PC

The defendants, husband and wife, were charged with the murder of a child. The child's body had been discovered buried in the garden of a house occupied by them. The prosecution sought to give evidence that the bodies of other young children had been discovered buried in the gardens of other houses that had been occupied by the defendants. This evidence was admitted and the defendants convicted.

*Held* Since the defendants claimed that the child in question had died either from accident or natural causes, the prosecution had been entitled to adduce evidence of the buried bodies of the other children in order to prove the deliberate killing. *Per* Lord Herschell LC:

> It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the incident for the purpose of leading to the conclusion that the accused person is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence tends to show the commission of other crimes does not render it inadmissible, if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.

> Note
>
> The decision of the Privy Council, although not strictly binding, has been approved by the House of Lords on numerous occasions.

### R v P (1991) HL

The defendant was charged with rape and incest with his two daughters. The defendant applied to have the counts relating to each of the daughters tried separately on the grounds that there was an insufficient similarity between them. The trial judge refused the application on the grounds that in both cases the actions of the defendant had gone on for over a long period of time, force and threats and been used and he had paid for them to have abortions.

*Held* The evidence of an offence against one victim could be admitted as proof of an offence against a second victim if the threshold test of relevance was satisfied. This, in effect, meant deciding whether the evidence carried sufficient probative value to outweigh any prejudice to the defendant. In the circumstances of this case, the trial judge had been right to admit the evidence because it had sufficient probative value. *Per* Lord Mackay LC:

> I would deduce the essential feature of evidence which is to be admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime. Such probative force may be derived from striking similarities in the evidence about the manner in which the crime was committed and the authorities provide illustrations of that…

Note

The reference to 'striking similarities' will be further discussed below, 11.2.3.

### 11.2.1 Where similar fact evidence is relevant, it is necessary to ensure that the defendant is not unduly prejudiced by its admission

**R v P (1991) HL**

See 11.2.

*Per* Lord Mackay:

> Once the principle is recognised that what has to be assessed is the probative force of the evidence in question, the infinite variety of circumstances in which the question arises demonstrates that there is no single manner in which this can be achieved. Whether the evidence has sufficient probative value to outweigh its prejudicial effect must in each case be a question of degree.

**Noor Mohamed v R (1949) PC**

The defendant was convicted of the murder of a woman with whom he had been living. The evidence indicated that she had died from cyanide poisoning, but there was no evidence to prove that he had poisoned her. He was lawfully in possession of cyanide for the purposes of his business as a goldsmith and there was a suggestion that she had committed suicide. The prosecution had adduced evidence that he had been responsible for the death of his wife a number of years before. The question on appeal was whether this evidence was rightly admitted.

*Held* After considering the facts, the Privy Council held that, at its highest, the evidence merely gave rise to a likelihood that the defendant may have administered the poison. Although the prosecution sought to argue that the circumstances surrounding the death of the two women followed a similar pattern, the similarity was insufficient to outweigh the prejudice to the defendant caused by the admission of the evidence.

**R v Johnson (1995) CA**

The defendant was charged with a number of offences including burglary and attempted rape. It was alleged that the defendant had entered a flat

shared by the victim and her boyfriend while they were asleep. The boyfriend was tied up and gagged and the victim assaulted. In order to identify the defendant, a voice identification procedure was held. This was the only evidence against the defendant and the prosecution sought to adduce evidence from two other women who gave evidence that they had been awakened by the defendant who had entered the premises and had then run away. The defendant had been convicted in 1986 as a result.

*Held* Even if the evidence regarding the two previous convictions had been admissible as similar fact evidence, the trial judge should have excluded it under s 78 of the Police and Criminal Evidence Act 1984 on the grounds of its prejudicial effect. This was especially the case, since the only other evidence which the prosecution could adduce related to the voice identification evidence which was not completely reliable. *Per* Ognall J:

> The introduction of the evidence of the appellant's admitted misconduct in 1986 must have had a devastating effect upon the appellant's defence, and one out of all proportion to its probative value…Weighing those considerations in the balance, we have concluded that in the interests of a fair trial, and in the particular circumstances of the case, the evidence as a matter of discretion, ought to have been excluded.

### 11.2.2 Evidence of disposition or propensity should not be admitted as similar fact evidence

**Thompson v R (1918) HL**

The defendant was charged with a number of counts of gross indecency with boys. The prosecution alleged that the man who committed the offences had made an appointment to meet the boys and adduced evidence that the defendant had met the boys at the appointed time and place. Further, a number of indecent photographs of boys were found in his possession. The prosecution sought to adduce this evidence as similar facts.

*Held* In the case of certain categories of offences, similar fact evidence may be admitted to identify the defendant as the perpetrator by showing that both possess a similar propensity or disposition. Here, the possession of the indecent photographs showed an abnormal propensity which would also be shared by the man who perpetrated the offences of gross indecency. Accordingly, the evidence had been rightly admitted.

> Note
>
> This decision provided authority for a long line of cases which suggested that crimes involving homosexuality were a special type of offence where evidence of disposition would be allowed. This view was dispelled in *DPP v Boardman* (1975), below.

**DPP v Boardman (1975) HL**

The defendant, the headmaster of a boarding school, was charged with a number of sexual offences involving two of his pupils. The trial judge ruled that the evidence of the second boy was admissible on the charge against the first boy and vice versa, as the facts in both cases were of a similar kind.

*Held* The House of Lords ruled that, on the facts of the case, there was an undoubted similarity which made the evidence admissible, but went on to consider the general principles that had to be applied. *Per* Lord Wilberforce:

> We can dispose at once of the suggestion that there is a special rule or principle applicable to sexual, or to homosexual offences. This suggestion had support at one time…, but is now certainly obsolete…Evidence that an offence of a sexual character was committed by A against B cannot be supported by evidence that an offence of a sexual character was committed by A against C, or against C, D and E.

*Per* Lord Hailsham:

> Whilst it would certainly not be enough to identify the culprit in a series of burglaries that he climbed in through a ground floor window, the fact that he left the same humorous limerick on the walls of the sitting room, or an esoteric symbol written in lipstick on the mirror, might well be enough. In a sex case, to adopt an example…whilst a repeated homosexual act by itself might be quite insufficient to admit the evidence as confirmatory of identity or design, the fact that it was alleged to have been performed wearing the ceremonial head dress of a Red Indian chief or other eccentric garb might well in appropriate circumstances suffice.

*Per* Lord Salmon:

> The test must be—is the evidence capable of tending to persuade a reasonable jury of the accused's guilt on some ground other than his bad character and disposition to commit the sort of crime with which he is charged?…evidence which proves merely that the accused has committed crimes in the past and, is therefore, disposed to commit the crime charged is clearly inadmissible. It has, however, never been doubted that, if the crime charged is committed in a uniquely or strikingly similar manner to other crimes committed by the accused, the manner in which the other crimes were committed may be evidence upon which a jury could reasonably conclude that the accused was guilty of the crime charged. The similarity would have to be so unique or striking that common sense makes it inexplicable on the basis of coincidence.

Note

See 11.2.3 for the discussion of striking similarity

**R v Burrage (1997) CA**

The defendant was charged with a number of counts of indecent assaults on his two grandsons. He denied the offences. During police interviews, he was questioned about pornographic magazines of a homosexual nature which had been found in his possession and about his sexual propensities. The trial judge permitted this evidence to be put before the jury. He was convicted and appealed on the basis that this evidence was wrongly admitted as it went only to propensity.

*Held* Evidence which went only to propensity should not be admitted. The defendant had denied any indecency during police interviews and, consequently, the answers in interview and the magazines were not probative of anything except propensity.

### 11.2.3 There is no longer a general requirement that the evidence of similar facts must display a striking similarity in significant features

**DPP v Boardman (1975) HL**

See 11.2.2.

**R v P (1991) HL**

See 11.2.

*Held* The requirement laid down in previous cases, such as DPP *v Boardman* (1975), that similar fact evidence would only be admissible if the evidence showed a striking similarity in significant features was no longer to be followed as a general principle. The real test is whether the evidence has probative force which outweighs any prejudicial effect. *Per* Lord Mackay LC:

> It is apparent that the particular difficulty which arose in this case is the development of the authorities in this area of the law requiring some features of similarity beyond what has been described as the pederast's or the incestuous father's stock in trade before one victim's evidence can be properly admitted upon the trial of another that inhibited the Court of Appeal from deciding as otherwise it would have done. The question in this appeal, therefore, is whether this development is a sound one or not…As this matter has been left in *Boardman v DPP*, I am of opinion that it is not appropriate to single out 'striking similarity' as an essential element in every case in allowing evidence of an offence against one victim to be heard in connection with an allegation against another.

**R v H (1995) HL**

The defendant was charged with sexual offences against his adopted daughter and stepdaughter. The two girls had discussed the matter between themselves and confided in the defendant's wife. The defence alleged that there was a possibility of collusion and that their evidence

had become contaminated since they had discussed the matter. Accordingly, there could not be any corroboration of the allegations made against the defendant.

*Held* The test to be applied was whether the evidence adduced had probative value, not whether the evidence displayed a striking similarity in significant features. *Per* Lord Lloyd:

> Rather than choose a particular formulation, it therefore seems better to say that, where a risk of collusion or contamination is apparent on the face of the documents, it will always be an element and, exceptionally, a decisive element in deciding whether the probative force of the similar fact evidence is sufficiently strong to justify admitting the evidence, notwithstanding its prejudicial effect. It will no doubt be said that this leaves the test somewhat vague. It may be so. But, at least, it is flexible and it is a natural and logical development of the approach adopted by the House in *R v P* (1991).

Note

(a) The House of Lords also ruled, that where an allegation is made that the evidence tendered as similar fact evidence is tainted by collusion, the judge should approach the question of admissibility on the basis that the alleged similar facts are true and apply the test set out in *R v P* (1991) above, (b) It was only in exceptional cases that a *voir dire* should be held.

### 11.2.4 In cases where the identity of the defendant is in dispute, the more stringent test of a striking similarity in significant features must be satisfied

**R v Straffen (1952) CCA**

The defendant had previously been charged with the murder of two young girls. He had been found unfit to plead due to insanity and had been committed to Broadmoor Institution. He escaped and was at liberty for about four hours. It was later discovered that another young girl had been murdered at about the time the defendant was at large. At the trial for this murder, the prosecution sought to adduce evidence of the previous murders in order to prove identity. The similarities, *inter alia,* were that: all the victims were young girls; each Was strangled; there was no sexual interference; there were no signs of a struggle; and no attempt was made to hide their bodies.

*Held* The issue which arose concerned the identity of the murderer. Here, the facts showed a striking similarity in significant features which made it possible to conclude that the person who had committed the first two murders was also the person who had committed the third murder.

**R v P (1991) HL**

See 11.2.

*Held* Although there is no general requirement that the evidence must display a striking similarity in significant features in order to it to be admissible, an exception would arise where the issue before the court is one of identity. *Per* Lord Mackay LC:

> Where the identity of the perpetrator is in issue and evidence of this kind is important in that connection, obviously something in the nature of what has been called in the course of argument a signature or other special feature will be necessary.

## 11.3 Similar fact evidence may also be adduced in civil cases

**Mood Music Publishing Co Ltd v De Wolfe Publishing Ltd (1976) CA**

Both parties were music publishers. The plaintiffs brought an action for infringement of copyright. The defendants admitted that a work published by them had a similarity with a work in which the plaintiffs held the copyright, but alleged that this was coincidence. To rebut this, the trial judge allowed the plaintiffs to adduce evidence that the defendants had published other works which bore similarities in breach of copyright held by other persons.

*Held* The evidence was admissible; while it may have been coincidence in one case, it was very unlikely that there would be coincidences in four cases. *Per* Lord Denning MR:

> The criminal courts have been very careful not to admit such evidence unless its probative value is so strong that it should be received in the interests of justice; and its admission will not operate unfairly to the accused. In civil cases, the courts will admit evidence of similar facts if it is logically probative, that is, if it is logically relevant in determining the matter which is in issue; provided that it is not oppressive or unfair to the other side; and also that the other side has fair notice of it and is able to deal with it.

Note

This is consistent with the lower standard of proof required in civil cases as opposed to criminal cases.

**West Midlands Passenger Executive v Singh (1988) CA**

The respondent complained of racial discrimination by the appellants in rejecting his application for promotion. He sought discovery of information relating to the ethnic origins of applicants for, and appointees to, certain

posts. The issue which arose was whether discovery ought to be allowed of this information.

*Held* Evidence that an employer has or has not appointed any or many applicants from the ethnic minorities is material to the question as to whether that employer has discriminated against the respondent. The order for discovery was, therefore, perfectly proper.

# 12 Character

## 12.1 The general rule is that evidence of good character is admissible

### R v Bryant and Oxley (1979) CA

The defendants were jointly charged for robbery. One defendant appealed against his conviction on the ground that the trial judge had not given a proper direction to the jury in stating that evidence tendered of the defendant's good character went to credibility and, thus, had little relevance to the issue of whether he had committed the offence.

*Held* The trial judge's view of the effect of evidence of good character was too restrictive. It was true that evidence of good character goes primarily to the issue of credibility, but it is capable of a wider significance. It may be evidence upon which the jury might decide it unlikely that a person with his character would have committed the offence.

### R v Berrada (1990) CA

The defendant was convicted of attempted rape. He appealed on the grounds of a misdirection by the trial judge concerning the evidence that had been adduced about his good character.

*Held* There had been a misdirection regarding the evidential value of the evidence of good character. This was especially the case, since there was a decisive conflict between the complainant and the defendant and between the defendant and the police. *Per* Waterhouse J:

> The appellant was entitled to have put to the jury from the judge herself a correct direction about the relevance of his previous good character to his credibility. That is a conventional direction and it is regrettable that it did not appear in the summing-up in this case. It would have been proper also (but not obligatory) for the judge to refer to the fact that the previous good character of the appellant might be thought by them to be one relevant factor when they were considering whether he was the kind of man who was likely to have behaved in the way that the prosecution alleged.

### R v Vye; R v Wise; R v Stephenson (1993) CA

Vye was convicted of rape; Wise was convicted of handling stolen goods and obtaining property by deception; Stephenson was convicted of conspiracy to supply drugs. All three appealed on the grounds of

misdirections as to evidence of good character and the appeals were heard together by consent.

*Held* The earlier cases indicated that whether or not a direction on the defendant's good character was given was entirely dependant on the discretion of the trial judge; there was no obligation to give such a direction. However, since about 1989, there had been a dramatic change. It was now, *per* Lord Taylor:

> …an established principle that, where the defendant of good character has given evidence, it is no longer sufficient for the judge to comment in general terms. He is required to direct the jury about the relevance of good character to the credibility of the defendant. Conventionally, this has come to be described as the 'first limb' of a character direction'.

After the 'first limb' direction is given, the next question is whether there should a 'second limb' direction. This relates to the issue whether, given the good character of the defendant, he was likely to behave as alleged by the prosecution, that is, a 'propensity' direction. After a consideration of the cases, the Court of Appeal held that, where the defendant is of good character, such a direction should be given and it is immaterial whether the defendant has given evidence or not. Per Lord Taylor:

> Having stated the general rule, however, we recognise it must be for the trial judge in each case to decide how he tailors his direction to the particular circumstances…Provided that the judge indicates to the jury the two respects in which good character may be relevant, that is, credibility and propensity, this court will be slow to criticise any qualifying remarks he may make based on the facts of the individual case.

The convictions of Vye and Wise were quashed and the conviction of Stephenson was upheld.

### R v Aziz and Others (1995) HL

The defendants were charged with a number of revenue offences. The first defendant had made a number of statements in the course of interviews conducted by Customs and Excise. These were mixed statements as parts of the statements were exculpatory while parts were admissions. The second and third defendants gave evidence in which they admitted making a number of false declarations. All three relied on the absence of relevant previous convictions. In the case of the first defendant, the trial judge gave a propensity direction as to the relevance of his good character to his lack of propensity and, in the case of the second and third defendants, gave a credibility direction. On appeal, the Court of Appeal quashed the convictions on the grounds that the trial judge had failed to give a credibility direction in the case of the first defendant and a propensity direction in the case of the second and third defendants. The Crown appealed to the House of Lords.

*Held* The decision in *R v Vye, R v Wise* and *R v Stephenson* (1993) was to be followed, that is, both a 'first limb' direction (on good character as going to credibility) and a 'second limb' direction (on propensity) had to be given. As far as a defendant who does not testify, but who relies on a mixed statement is concerned, the submissions of the prosecution that both character and propensity directions are unnecessary could not be accepted. Both character and propensity directions are matters of evidential significance to be considered by the jury. However, the trial judge has a residual discretion to decline to give any character directions in the case of a defendant who had no previous convictions if it was shown beyond reasonable doubt that the defendant was guilty of serious criminal behaviour similar to the offence charged. On the facts, all three defendants were entitled to both the first and second limb directions.

**Q** Do the decisions in the above cases indicate that first and second limb directions should be given in all cases where evidence of good character is raised?

**R v Miah; R v Akhbar (1996) CA**

The defendants were convicted of a number of charges, including murder. One of the grounds of appeal related to the trial judge's direction in relation to good character. The trial judge had directed the jury that they were 'entitled' to take into account the defendant's good character. The appeal was based on the argument that this direction indicated that the jury had a discretion as to whether to take it into account instead of being bound to take it into account.

*Held* What was mandatory was to give both limbs of a good character direction (see *R v Vye; R v Wise; R v Stephenson*, above). It was not mandatory to use a particular form of words. However, it would be advisable for trial judges to avoid using the form of words used here.

**Q** Is good character something the jury is 'bound' to take into account, or something they are 'entitled' to take into account? If it is a matter to be left to the jury, then would this be better expressed by 'entitled to take into account'?

### 12.1.1 It is not possible for the defendant to put only his good character in issue; character is indivisible

**Stirland v DPP (1944) HL**

The defendant, on trial for forgery, put his character in issue and said, in examination-in-chief, that he had never before been charged with any offence. He was asked in cross-examination questions which suggested that, on a previous occasion, he had been questioned about a suspected forgery. He was convicted and appealed on the basis that the questions should not have been put.

*Held* A defendant may be cross-examined about any of the evidence he has given in chief, including statements concerning his good character. *Per* Viscount Simon LC:

> An accused who puts his character in issue must be regarded as putting the whole of his past record in issue. He cannot assert his good character in certain respects without exposing himself to inquiry as to the rest of his record so far as this tends to disprove a claim for good character.

**R v Winfield (1939) CCA**

The defendant was convicted of indecent assault. At his trial, he had called a witness and asked her questions designed to show his good character with regard to sexual morality. The prosecution had then been allowed to cross-examine the witness on the defendant's previous convictions for dishonesty.

*Held* The cross-examination was proper. *Per* Humphreys J:

> There is no such thing known to our procedure as putting half a prisoner's character in issue and leaving out the other half. A prisoner, who has a bad character for dishonesty, is not entitled to say that he has never acted indecently towards women and claim that he has not put the rest of his character in issue.

Note

The conviction was quashed on other grounds.

**Q** Do you agree with this decision? On the one hand, it is right that the court should not be misled by claims that the defendant has a good character. But what positive probative value is there in telling the jury that the defendant has a conviction for dishonesty when the charge before them is one of indecent assault?

## 12.2 The general rule is that evidence of bad character is inadmissible, unless it comes within one of the exceptions

### 12.2.1 Character evidence may be admissible to attack the credibility of a witness, including the parties to a civil action

**Toohey v Commissioner of Police of the Metropolis (1965) HL**

See 5.7.4.

**R v Viola (1982) CA**

See 5.7.5.

### 12.2.2 Character evidence is admissible if it is a fact in issue

#### Section 13 of the Civil Evidence Act 1968

(1) In an action for libel or slander in which the question whether a person did or did not commit a criminal offence is relevant to an issue arising in the action, proof that, at the time when that issue falls to be determined, that person stands convicted of that offence shall be conclusive evidence that he committed that offence; and his conviction thereof shall be admissible in evidence accordingly.

Note

The same principle would apply in cases of defamation where the defendant relies upon the defence of justification and seeks to adduce evidence of character in order to prove the defence.

#### Section 1 of the Street Offences Act 1959

(1) It shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution.

Note

Character evidence is admissible in order to prove an essential fact in issue, that is, that the defendant is 'a common prostitute'.

#### Section 21 of the Theft Act 1968

(3) Where a person is being proceeded against for handling stolen goods…the following evidence shall be admissible for the purpose of proving that he knew or believed the goods to be stolen goods—
(b) …evidence that he was, within the five years preceding the date of the offence charged, convicted of theft or of handling stolen goods.

## 12.3 Character evidence of the defendant in criminal trials may be admissible under the terms of the Criminal Evidence Act 1898

#### Section 1 of the Criminal Evidence Act 1898

(e) A person charged and called as a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged;
(f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or the deceased victim of the alleged crime; or

(iii) he has given evidence against any other person charged in the same proceedings.

### R v Butterwasser (1947) CCA

The defendant was charged with wounding with intent to cause grievous bodily harm. Prosecution witnesses were cross-examined as to their bad record and the prosecution was then allowed to adduce evidence of the defendant's bad character and his previous convictions. The defendant himself elected not to testify. He was convicted and appealed on the ground that this evidence should not have been allowed.

*Held* The conviction should be quashed. Although the defence had made imputations against the character of witnesses for the prosecution, the defendant had not lost his 'shield'. *Per* Lord Goddard CJ:

> I do not see on what principle it could be said, that, if a man does not go into the box and put his own character in issue, he can have evidence given against him of previous bad character when all that he has done is to attack the witnesses for the prosecution. The reason is that, by attacking the witnesses for the prosecution and suggesting they are unreliable, he is not putting his character in issue; he is putting their character in issue.

### Jones v DPP (1962) HL

The defendant was charged with the murder of a young girl. He had previously been convicted of raping another girl. The defendant gave an alibi which was false. Subsequently, he admitted this and explained that he had done so because he had previously been in trouble with the police and put forward a second alibi. This was almost identical to the alibi he had used at the earlier trial. He was cross-examined about this suspicious similarity. He was convicted and appealed on the grounds that this crossexamination should not have been allowed.

*Held* The House of Lords took the opportunity to deal with a number of issues that had previously caused confusion. These included: (a) that the 1898 Act applied only to the accused who had elected to testify; and (b) that s 1(f) deals only with cross-examination and not with examinationin-chief. *Per* Lord Reid:

> The words 'shall not be required to answer' are quite inappropriate for examination-in-chief. The proviso is obviously intended to protect the accused. It does not prevent him from volunteering evidence and does not, in my view, prevent his counsel from asking questions leading to disclosure of a previous conviction or bad character if such disclosure is thought to assist in his defence.

(c) the House of Lords also considered if there was any conflict between s 1(e) and s 1(f). It was held that there was no conflict, as s 1(e) dealt with questions which might incriminate the defendant directly because it related to the offence he was actually charged with, while s 1(f) dealt with questions which 'tended to show' that he has previously committed, convicted or charged with other offences or that he has a bad character. *Per* Lord Morris:

> There is a contrast between proviso (e) and proviso (f). Proviso (e) shows that an accused person who avails himself of his opportunity to give evidence 'may be asked' questions in cross-examination although they would tend 'to criminate him as to the offence charged'. That denoted questions on matters directly relevant to the charge. Then proviso (f) gives the accused person a 'shield'. He 'shall not be asked' certain questions unless certain conditions apply. Proviso (e) permits questions to be asked: the corollary is that they must be answered. Proviso (f) does not say that certain questions may be asked; it says that certain questions may not be asked. This means that, even if the questions are relevant and have to do with the issue before the court, they cannot be asked unless covered by the permitting provisions of proviso (f).

**Maxwell v DPP (1935) HL**

The defendant was charged with manslaughter by performing an illegal abortion. He gave evidence of his own good character and was crossexamined as to a previous case where one of his patients had died and he had been charged but acquitted. The question on appeal concerned the admissibility of this line of cross-examination.

*Held* Even though the 1898 Act applied and he had given evidence of his good character, the Act was still subject to the common law rules of relevance. The fact that he had been charged and acquitted of another offence was not relevant to his guilt on this charge, nor did it impeach his credibility as a witness. *Per* Viscount Sankey LC:

> These instances all involve the crucial test of relevance. And, in general, no question as to whether a prisoner has been convicted or charged or acquitted should be asked or, if asked, allowed by the Judge, who has a discretion under proviso (f), unless it helps to elucidate the particular issue which the jury is investigating, or goes to credibility, that is, tends to show that he is not to be believed on his oath; indeed, the question whether a man has been convicted, charged or acquitted, even if it goes to credibility, ought not to be admitted, if there is any risk of the jury being misled into thinking that it goes

not to credibility but to the probability of his having committed the offence with which he is charged.

Note

The effect of this and other similar decisions is that the words 'any question tending to show that he has committed or been convicted of or been charged with any offence', in s 1(f), must be taken to refer only to situations where the defendant has been charged and convicted of that other offence.

**R v Carter (1996) CA**

The defendant was convicted on a number of counts of obtaining property by deception. During the trial, he was cross-examined in order to show his discreditable behaviour in relation to a civil claim. This related to a claim for money received by the defendant for investment purposes. Leave was not sought before cross-examination on this point.

*Held* The appeal would be allowed. The following points arise from the judgment: (a) it was not only an accusation of criminality that came within the terms of s 1(f) of the 1898 Act; the prohibition extended to questions which tended to show that he was of bad character, as well as questions showing that he had a criminal record. Character encompasses both reputation and disposition; (b) any cross-examination of an accused designed to show that he is unworthy of belief, which does not arise from the evidence on the indictment, relates to character in the sense of disposition; (c) no such cross-examination is possible without leave; (d) even when leave is granted, both the judge, as well as the prosecution, have a discretion to avoid unfair suggestions of propensity or an unnecessary inquiry into matters which have marginal relevance.

**Q** Is it, then, the effect of this case that any question in cross-examination to a defendant which has the effect of showing that he is unworthy of credit is caught by the prohibition in s 1(f)?

**R v Chinn (1996) CA**

The defendant was charged with assault. The defence was that he had acted in self-defence. During cross-examination of the victim by the defence, it was put to him that he had been the first to use violence against the defendant. The trial judge at this point warned defence counsel that this line of cross-examination could invoke s 1(f)(ii) of the 1898 Act. The defendant then gave evidence, apparently on the basis of an indication from prosecuting counsel that there would not be an attempt to crossexamine on previous convictions. However, at the end of the crossexamination the trial judge told counsel, in the presence of the jury, that she had a duty to put the defendant's previous record to him. After hearing defence submissions, the trial judge repeated

this. Prosecuting counsel then applied for leave to put the convictions to the defendant on the basis that it would be better to avoid jury speculation. The defendant was convicted.

*Held* It was not wrong for the trial judge to initiate the discussion about putting a defendant's conviction to him if prosecuting counsel failed to do so.

**Q** Do you consider that the above ruling is correct? Would you agree that if it is the duty of counsel to raise previous convictions then the necessity of obtaining leave before this is done becomes meaningless? Should not the conduct of the case be left to counsel without interference of the trial judge, especially, as here, it was apparent that prosecuting counsel was reluctant to adduce evidence of the previous convictions?

### 12.3.1 Character evidence is admissible where the defendant has himself given evidence of his bad character

#### Jones v DPP (1962) HL

See 12.3.

*Held* The words in s 1(f) 'tending to show' must be read as 'tending to show for the first time'. Here, the defendant had himself tendered evidence that he had previously been in trouble with the police. The prosecution was not telling the jury anything they did not already know.

#### R v Anderson (1988) CA

The defendant was charged with a conspiracy to plant bombs as part of the IRA campaign. The defendant denied that she was involved. In an attempt to explain the prosecution evidence in relation to the bombing offences, she testified that she had been involved in attempting to smuggle members of the IRA out of the country. To rebut her evidence, the prosecution obtained leave to question her in order to show that she was wanted by the police prior to her arrest. She admitted this.

*Held* The question was properly put. There was no contravention of the 1898 Act in that s 1(f) did not protect the defendant since she had herself revealed that she had committed other offences. The prosecution crossexamination, therefore, did not tend to show, as revealing for the first time, her involvement.

### 12.3.2 Character evidence is admissible under s 1(f)(i) if it is a fact in issue or is admissible as similar fact evidence

See 12.2.2 for character evidence as a fact in issue.

See Chapter 11 for similar fact evidence.

**R v Pommell (1998) CA**

The defendant was arrested on suspicion of drugs offences. Whilst in custody, he admitted possessing a gun. His explanation was that he had disarmed someone who had tried to shoot him and had been intending to hand the gun to his brother who would hand it in to the police. He was now charged with a number of firearms offences. At the trial, the prosecution was granted leave of court to cross-examine the defendant about a previous charge against him of possessing a prohibited weapon, but of which he had been acquitted. He was now convicted of the present offences. He appealed on the grounds that there was no basis under s 1(f)(i) of the 1898 Act that justified the trial judge in allowing the crossexamination in relation to the previous charges, since he had been acquitted on those charges.

*Held* Under s 1(f)(i) of the 1898 Act, cross-examination was only permitted where the proof that the defendant had committed or been convicted of another evidence was admissible evidence. Here, the fact that the defendant had previously been acquitted had no possible relevance. Moreover, the rule was that cross-examination would not be permitted in respect of a previous charge of which a defendant had been acquitted.

Note

Section 1(f)(i) deals with a defendant who 'has committed or been convicted of a previous offence. No reference is made to a situation where a defendant 'has been charged with' an offence.

### 12.3.3 Character evidence is admissible under the first part of s 1(f)(ii) if the defendant has sought to establish his good character by cross-examining witnesses for the prosecution

**R v Douglass (1989) CA**

Two defendants were jointly charged with causing death by reckless driving. The prosecution case was that they had been vying and racing together. The first defendant cross-examined a prosecution witness in order to elicit evidence that he had never drunk alcohol in the past two years in order to draw a contrast with the second defendant who, it was suggested, had been drinking shortly before the accident. The second defendant now sought to re-call a police witness in order to obtain evidence that the first defendant had a number of previous convictions which included motoring offences and offences involving drink, dishonesty and violence. The trial judge refused to allow this.

*Held* By eliciting evidence that he had not drunk alcohol in the last two years, the first defendant was putting his good character in issue. Accordingly, he had lost his shield under s 1(f) and the questions should have been

permitted. However, this was a case where the Court of Appeal applied the proviso to s 2(1) of the Criminal Appeal Act 1968 and upheld the conviction.

### 12.3.4 Character evidence is admissible under the second part of s 1(f)(ii) where the defence has involved imputations on the character of the prosecutor, witnesses for the prosecution or the deceased victim of the crime

**Selvey v DPP (1968) HL**

The defendant was charged with committing buggery with the complainant. The complainant was cross-examined by the defence about the fact that he carried with him indecent photographs, that he had committed buggery with another person on the same afternoon and that he had offered to commit buggery with the defendant for a sum of money. The imputation was that the complainant had been annoyed at the rejection of this offer and had planted indecent photographs on the defendant. The trial judge ruled that the defendant had lost his shield under s 1(f)(ii) and allowed the prosecution to cross-examine the defendant about previous convictions for homosexual offences. The defendant appealed against his conviction on the grounds, *inter alia*, that the nature of the defence necessarily involved the imputation against the complainant and the trial judge should have used his discretion and not allowed questioning about his previous convictions.

*Held* Since the defendant had lost his shield under s 1(f)(ii), the questions were perfectly proper. The House of Lords took the opportunity to lay down the following propositions: (a) the words of the statute must be given their ordinary meaning; (b) the section permits cross-examination of the defendant as to character when imputations are made of the character of the prosecution witnesses to show their unreliability, as well as when the imputations are necessary to enable the defendant to establish his defence; (c) in rape cases, the defendant can allege that the complainant has consented without losing his shield; this is either because rape is *sui generis* or because consent is an issue raised by the prosecution; and (d) if what is said amounts, in reality, to no more than a mere denial of the charge, even though expressed in emphatic language, it should not be regarded as coming within the section. As far as judicial discretion is concerned, there was a general agreement that such a discretion did exist, but that, on the facts of this case, the trial judge had acted properly.

**Q** Is it justifiable to create an exception only for cases of rape? See the case of *R v Turner* (1944), below.

**R v Turner (1944) CCA**

The defendant was charged with rape. He alleged that the complainant had consented and had also voluntarily committed an act of gross indecency

with him. It was contended that this cast an imputation on a witness for the prosecution within the terms of s 1(f)(ii) which made admissible evidence of his previous convictions.

*Held* Although imputations had in fact been made, this did not necessarily mean that the defendant lost his shield under s 1(f). Even though the Act did not make any exception for rape cases, such an exception would be applied. *Per* Humphreys J: 'Some limitation must be placed on the words of the section since, to decide otherwise, would be to do grave injustice never intended by Parliament.'

**R v Britzmann and Hall (1983) CA**

The defendants were charged with burglary. At the trial, police officers gave evidence of what Britzmann had said during interviews after his arrest and also what he had shouted to Hall while they were both in police cells. Britzmann's evidence was that these conversations had not taken place and that the police officers must have been mistaken. The trial judge granted the prosecution leave to cross-examine Brtizmann upon his previous convictions under s 1(f)(ii).

*Held* By denying that the conversations had taken place, the defendants were implying that the police had given false evidence; this was necessarily the sort of imputation that came within the terms of s 1(f)(ii). *Per* Lawton LJ:

> A defence to a criminal charge which suggests that prosecution witnesses have deliberately made up false evidence in order to secure a conviction must involve imputations on the characters of those witnesses with the consequence that the trial judge may, in the exercise of his discretion, allow prosecuting counsel to cross-examine the defendant about offences of which he has been convicted. In our judgment, this is what Parliament intended should happen in most cases. When allegations of the fabrication of evidence are made against prosecution witnesses, as they often are these days, juries are entitled to know about the characters of those making them.

As far as the exercise of discretion was concerned, Lawton LJ went on to lay down guidelines as to when the discretion might be exercised in favour of defendants:

> First, it should be used if there is nothing more than a mere denial, however emphatic or offensively made…Secondly, cross-examination should only be allowed if the judge is sure that there is no possibility of mistake, misunderstanding or confusion and that the jury will inevitably have to decide whether the prosecution witnesses have fabricated evidence. Defendants sometimes make wild allegations when giving evidence. Allowance should be made for the strain of being in the witness box and the exaggerated use of language which sometimes results from such strain or lack of education or mental instability. Particular care should be used when a defendant is led into

making allegations during cross-examination. The defendant who, during cross-examination, is driven to explaining away the evidence by saying it has been made up or planted on him usually convicts himself without having his previous convictions brought out. Finally, there is no need for the prosecution to rely upon s 1(f)(ii) if the evidence against a defendant is overwhelming.

**Q** (1) Is it justifiable for the defendant to make imputations against the witnesses for the prosecution, even to the extent of alleging that they have fabricated evidence, and nevertheless avoid the consequences under s 1(f)(ii) by not testifying?

**Q** 2) On the other hand, is it fair that a defendant should lose his shield under s 1(f)(ii) where the making of these imputations are in fact a necessary and essential part of the defence?

### R v McLeod (1994) CA

The defendant was charged with robbery. At the trial, he claimed that he had nothing to do with the robbery and that the police had fabricated the evidence against him. The prosecution obtained leave to cross-examine him on his previous convictions for robbery. He was convicted and appealed on the grounds, *inter alia,* that the questions put by the prosecution were unduly prejudicial in that they revealed facts which were similar to the present offence and, therefore, indicated that he had a propensity to commit crimes of this sort.

*Held* The Court of Appeal laid down a number of guidelines which included the following: (a) the primary purpose of the cross-examination as to previous convictions and bad character of the defendant was to show that he was not worthy of belief. It was not, and should not be, to show that he had a disposition to commit the type of crime for which he is currently charged. However, the mere fact that the offences are of a similar type and have the incidental effect of suggesting a tendency or disposition to commit the crime charged does not make them improper; (b) it was not desirable for there to be prolonged or extensive cross-examination in relation to previous offences and emphasis should not be placed on any similarities between the previous convictions and the instant offence; (c) the judge must carefully balance the gravity of the attack on the prosecution with the degree of prejudice to the defendant which will result from the disclosure of the previous convictions; (d) although it is the duty of the judge to keep cross-examination within proper limits, if no objection is made at the time it will be difficult to later contend that the judge did not exercise his discretion properly. This is especially so as the Court of Appeal will only rarely interfere with the exercise of judicial discretion; and (e) in all cases where the defendant has been cross-examined as to his character and previous offences, the judge must in summing up tell the jury that the purpose of the questioning goes only to credit and that they should not consider that it shows a propensity to commit the sort of offence they are considering.

### 12.3.5 Character evidence is admissible under s 1(f)(iii) where the defendant has given evidence against any other person charged in the same proceedings

**Murdoch v Taylor (1965) HL**
The defendant was jointly charged with a second defendant with receiving stolen property. He gave evidence that his co-defendant had been in sole control and possession of a box containing the stolen property. The trial judge ruled that counsel for the co-defendant was entitled to crossexamine the defendant about his previous convictions as he had lost his shield under s 1(f)(iii).

*Held* The trial judge had no discretion whether or not to allow a defendant to be cross-examined once he had given evidence against a codefendant. In other words, once s 1(f)(iii) had come into play, the codefendant had a right to cross-examine with regard to character evidence. The test to be applied when considering whether evidence had been given 'against' a co-defendant was, *per* Lord Donovan, 'that "evidence against" means evidence which supports the prosecution's case in a material respect or which undermines the defence of the co-accused'.

> Note
>
> The 1898 Act originally referred to cases in which evidence was given against any other person 'charged with the same offence'; these words were unduly restrictive and the Criminal Evidence Act 1979 substituted the words 'charged in the same proceedings'.

**R v Bruce (1975) CA**
The two defendants were jointly charged with robbery. The first defendant testified that there had been a plan to rob, but that he had not been a party to it. Bruce testified to the effect that there had not been a plan at all. The trial judge ruled that s 1(f)(iii) had come into play and allowed crossexamination of Bruce on his criminal record.

*Held* This should not have been allowed, as Bruce had not 'given evidence against' his co-defendant. *Per* Stephenson LJ:

> The fact that Bruce's evidence undermined [the co-defendant's] defence by supplying him with another does not make it evidence against him. If and only if such evidence undermines a [co-defendant's] defence so as to make his acquittal less likely, is it given against him.

**R v Varley (1982) CA**
Varley and Dibble were jointly charged with robbery. At the trial, Dibble admitted that they had both participated in the robbery, but that he had only done so under duress from Varley. Varley denied that he had taken any

part in the robbery and asserted that Dibble's evidence was untrue. On the basis that Varley had given evidence against Dibble, counsel for Dibble cross-examined Varley about his previous convictions. Varley appealed.

*Held Per* Kilner Brown J:

> (1) If it is established that a person, jointly charged, has given evidence against the co-defendant, that defendant has a right to cross-examine the other as to previous convictions and the trial judge has no discretion to refuse an application. (2) Such evidence may be given either in chief or during crossexamination. (3) It has to be objectively decided whether the evidence either supports the prosecution case in a material respect or undermines the defence of the co-accused. A hostile intent is irrelevant. (4) If consideration has to be given to the undermining of the other's defence, care must be taken to see that the evidence clearly undermines the defence. Inconvenience to or inconsistency with the other's defence is not of itself sufficient. (5) Mere denial of participation in a joint venture is not of itself sufficient to rank as evidence against the co-defendant. For the proviso to apply, such denial must lead to the conclusion that, if the witness did not participate, then it must have been the other who did. (6) Where the one defendant asserts or in due course would assert one view of the joint venture which is directly contradicted by the other, such contradiction may be evidence against the co-defendant.

**R v Crawford (1997) CA**

The appellant, C, and her co-defendant, A, were jointly charged with robbery. The prosecution case was that the victim had been robbed, while in the lavatory, by A and C and a third woman (who was never caught). C's case was that she had gone to the lavatory first on her own and that when she returned to the table, A and the other woman went to the lavatory. As they came out, she heard the victim shouting that her purse had been stolen. A's evidence was that she had been present in the lavatory when the robbery occurred but had taken no part in it. C testified first and counsel for A then asked leave pursuant to s 1(f)(iii) to crossexamine her about her previous convictions, one of which was a recent conviction for robbery. The trial judge gave leave for this evidence to be adduced. C was convicted and appealed on the basis that s 1(f)(iii) only applied when a denial of participation in a joint venture *must* have the effect of leading to the conclusion that it *must* have been the co-defendant who was responsible. It could not apply when it only had the effect of indicating that it *may* have been the co-defendant.

*Held* The judgment in *Varley*, above, was not a statutory provision. It was not necessary that the fifth proposition identified in that case (see above) had to be put in mandatory terms. On the facts of this case, the evidence of C that she was not in the lavatory at all when the robbery occurred, if accepted by the jury, would be damaging to the credibility of A

and it made it much less likely that A simply stood by while the third woman committed the robbery.

**Q** Is it the effect of this case that is now virtually impossible for one codefendant to advance a defence of non-participation without invoking s 1(f)(iii)?

# 13 Corroboration

## 13.1 Corroborative evidence is evidence that supports or confirms other evidence that has been adduced in a particular case

### DPP v Hester (1972) HL

The defendant was charged with indecent assault on a 12 year old girl. The appeal raised the question of whether the evidence of the victim herself (who had given sworn testimony) and that of her sister, aged nine (who had given unsworn testimony), needed to be corroborated.

*Held* In the circumstances of this case, the evidence of each child could corroborate that of the other. *Per* Lord Morris:

> The essence of corroborative evidence is that one credit worthy witness confirms what another credit-worthy witness has said. Any risk of the conviction of an innocent person is lessened if the conviction is based upon the testimony of more than one acceptable witness. Corroboration evidence, in the sense of some other material evidence in support, implicating the accused, furnishes a safeguard which makes a conclusion more sure that it would be without such evidence…. the purpose of Corroboration is not to give validity or credence to evidence which is deficient or incredible, but to confirm and support that which as evidence is sufficient and satisfactory and credible; and corroborative evidence will only fill its role if it itself is completely credible evidence.

Note

(a) This case is no longer good law due to the legislative changes that have taken place regarding children's evidence, in particular s 34 of the Criminal Justice Act 1988. However, the definition of Corroboration laid down by Lord Morris is still valid, (b) The rules requiring Corroboration have been severely curtailed by statute (see below); it is only in very rare instances that Corroboration is now required, (c) In the rare instances that a rule requires Corroboration, this applies only to the prosecution and not to the defence.

## 13.2 Corroboration is always advisable as a matter of weight or of good practice

### DPP v Kilbourne (1973) HL

The defendant was convicted of the offences of buggery and indecent assault against groups of boys. The issue on appeal concerned the question of corroboration among the victims. The trial judge had directed the jury that they were entitled to act on the uncorroborated evidence provided they were satisfied that the boys were telling the truth.

*Held* It was sufficient that the trial judge had given a warning to the jury of the danger of acting on uncorroborated evidence. Leaving aside the question as to whether such a warning was mandatory, it was held that corroboration is advisable, where available, as a matter of weight. If evidence that is tendered in court can be supported by other evidence from other sources, the case or allegation will be strengthened. *Per* Lord Reid:

> When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular; the better it fits in, the more one is inclined to believe it.

Note

There is no longer any mandatory requirement for a warning to the jury on cases involving the testimony of children, accomplices or complainants in sexual offences, see 13.5.1.

## 13.3 In exceptional situations, corroboration may be required as a matter of law prescribed by statute

### Section 13 of the Perjury Act 1911

A person shall not be liable to be convicted of any offence against this Act, or of any offence declared by any other Act to be perjury or subornation of perjury, or to be punishable as perjury or subornation of perjury solely upon the evidence of one witness as to the falsity of any statement alleged to be false.

### Section 168 of the Representation of the People Act 1983

(5) …a person charged with personation shall not be convicted…except on the evidence of not less than two credible witnesses.

### Section 89 of the Road Traffic Regulation Act 1984

(1) A person who drives a motor vehicle on a road at a speed exceeding a limit imposed by or under any enactment to which this section applies shall be guilty of an offence.

(2) A person prosecuted for such an offence shall not be liable to be convicted solely on the evidence of one witness to the effect that, in the opinion of the witness, the person prosecuted was driving the vehicle at a speed exceeding a specified limit.

## 13.4 In certain exceptional situations, there must be a mandatory warning to the jury of the danger of acting on evidence that has not been corroborated

### Section 77 of the Police and Criminal Evidence Act 1984

(1) Without prejudice to the general duty of the court, at a trial on indictment, to direct the jury on any matter on which it appears to the court appropriate to do so, where at such a trial—

(a) the case against the accused depends wholly or substantially on a confession by him; and

(b) the court is satisfied—

(i) that he is mentally handicapped; and

(ii) that the confession was not made in the presence of an independent person,

the court shall warn the jury that there is special need for caution before convicting the accused in reliance on the confession, and shall explain that the need arises because of the circumstances mentioned in paras (a) and (b) above.

Note

Here, it is not necessary that there must be corroboration of the confession provided that the jury is warned of the dangers of relying on such a confession. The use of the phrase 'the court shall warn the jury' indicates the mandatory nature of the requirement.

## 13.5 The rules requiring either corroboration or a mandatory warning in the case of certain 'suspect' categories of witnesses have been abolished

### 13.5.1 There is no longer a requirement that the evidence of children must be corroborated

### Section 34 of the Criminal Justice Act 1988

(1) The proviso to sub-s (1) of s 38 of the Children and Young Persons Act 1933 (under which, where the unsworn evidence of a child of tender

years admitted by virtue of that section is given on behalf of the prosecution, the accused is not liable to be convicted unless that evidence is corroborated by some other material evidence in support thereof implicating him) shall cease to have effect.

(2) Any requirement whereby, at a trial on indictment, it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a child is abrogated.

Note

It used to be the rule under the Children and Young Persons Act 1933 that: (a) that corroboration was necessary in the case of an unsworn child witness; and (b) that even the sworn evidence of a child necessitated a full mandatory warning to the jury. The present position, that there is no corroboration requirement nor any need for a mandatory warning to the jury is a result of the legislative changes introduced by the Criminal Justice Acts 1988 and 1991 and the Criminal Justice and Public Order Act 1994.

### 13.5.2 The requirement that there must be a mandatory warning to the jury with regard to the testimony of accomplices or complainants in sexual cases has been abrogated

#### Criminal Justice and Public Order Act 1994

32(1) Any requirement whereby, at a trial on indictment, it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a person merely because that person is—

(a) an alleged accomplice of the accused; or

(b) where the offence charged is a sexual offence, the person in respect of whom it is alleged to have been committed,

is hereby abrogated.

33(1) The following provisions of the Sexual Offences Act 1956 (which provide that a person shall not be convicted of the offence concerned on the evidence of one witness only unless the witness is corroborated) are hereby repealed—

(a) s 2(2) (procurement of Woman by threats);

(b) s 3(2) (procurement of woman by false pretences);

(c) s 4(2) (administering drugs to obtain or facilitate intercourse);

(d) s 22(2) (causing prostitution of women); and

(e) s 23(2) (procuration of girl under 21).

**R v Makanjuola; R v Easton (1995) CA**

Both defendants were convicted of indecent assault before the coming into force of s 32 of the Criminal Justice and Public Order Act 1994. Both appealed on the basis that the trial judge had failed to give the jury a corroboration warning and that the 1994 Act was being applied retrospectively.

*Held* (a) There was no substance in the argument based on retrospective application of s 32 of the 1994 Act. The change brought about by the provision was procedural and was not, therefore, caught by the usual principle which banned retrospectivity. (b) As a result of the legislative changes, whether or not a warning was given by the trial judge as to the dangers of relying on uncorroborated evidence was entirely a matter for the trial judge's discretion. As such, the applications for leave to appeal were refused.

See 13.6.

## 13.6 In all other cases, it is a matter for judicial discretion as to whether a warning should be given to the jury of the dangers of acting without corroborative evidence

**R v Spencer; R v Smalls (1986) HL**

The defendants, nursing staff at a special hospital, were charged with ill treating their patients. The prosecution relied wholly on uncorroborated evidence of patients who themselves had criminal convictions or were suffering from mental disorders. The trial judge, in both cases, directed the jury to treat the evidence with caution, but did not give them the 'full' warning, that is, that it would be dangerous to convict the defendants on the patients' uncorroborated evidence.

*Held* The witnesses, in these cases, were men who had been sent to the special hospital, rather than to prison because they were mentally unbalanced. *Per* Lord Ackner: That they were anti-authoritarian, prone to lie or exaggerate and could well have old scores which they were seeking to pay off, was not disputed.' However, such witnesses did not come within the category of 'suspect' witnesses where a mandatory warning had to be given. Accordingly, all that was necessary was for the trial judge to put the defence fairly and adequately. Here, the potential unreliability of the witnesses was obvious for all to see. More than that, the trial judge did tell the jury to treat their evidence with caution, went to explain why there was a danger in accepting their evidence and then gave details of the background of each of the witnesses, their past criminal records and the hospital psychiatrist's view of the personality defects. The trial judge's directions had, therefore, been adequate and fair and the appeals on this point were dismissed. *Per* Lord Hailsham:

> The modern cases, quite correctly in my view, are reluctant to insist on any magic formula or incantation and stress, instead, the need that each summing up should be tailor made to suit the requirements of the individual case.

Note

(a) The conviction in *Spencer* was quashed on other grounds, (b) The categories of 'suspect' witnesses referred to by the House of Lords, where there was a requirement of a mandatory warning, included complainants in sexual cases and accomplices. There is no longer such a requirement: see 13.5.

**R v Causley (1998) CA**

The defendant was charged with murder. The prosecution alleged that he had confessed to the murder to three fellow prisoners. All three gave evidence and were cross-examined. The defendant was convicted, but appealed on the ground that the trial judge had not given the jury a sufficiently strong warning of the dangers of relying on confessions made to convicts. He relied on *Spencer,* above, to the effect that the witnesses here came within the category of 'suspect' witnesses where a corroboration warning was necessary.

*Held* There was no merit in the appeal. The summing up was appropriate when read as a whole. The trial judge had warned the jury to exercise caution and it would have been apparent from their evidence and the cross-examination of them that they were witnesses whose evidence should be approached with caution.

**R v Turnbull (1976) CA**

The Court of Appeal considered four separate appeals where the defendants had been convicted on various grounds of conspiracy to burgle, robbery and unlawful wounding. The main issue of the appeals concerned identification evidence.

*Held* There was no mandatory requirement for a corroboration warning to be given to the jury on the dangers involved when receiving identification evidence. However, in cases where the defence alleges that there has been a mis-identification and the quality of the prosecution evidence is poor, the trial judge should consider whether the case should be withdrawn from the jury. Mistaken identification, *per* Lord Widgery CJ, 'can bring about miscarriages of justice and has done so in a few cases in recent years'. In considering the issue, Lord Widgery laid down special guidelines that must be followed:

> First, whenever the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused…In addition, he should

> instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken… Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made…Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence…All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but, the poorer the quality, the greater the danger…When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as, for example, when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should, then, withdraw the case from the jury and direct an acquittal, unless there is other evidence which goes to support the correctness of the identification.

Lord Widgery was keen to emphasise that the Court of Appeal was not imposing a need for mandatory corroboration or even a need for a mandatory warning. The learned Chief Justice went on to say:

> This may be corroboration in the sense lawyers use that word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification…

The Court of Appeal made clear that these guidelines were a matter of 'practice' not of law, but that, nonetheless, a failure to follow the guidelines was likely to result in convictions being quashed.

### R v Makanjuola; R v Easton (1995) CA

See 13.5.2.

*Held* Whether a trial judge chooses to give a warning and in what terms he does so will depend on the circumstances of the case, the issues raised, the content and quality of the witness's evidence and whether there is any basis for suggesting that the evidence may be unreliable. In the application of these principles to evidence tendered by an accomplice or the complainant of a sexual offence, the following points must be kept in mind:

(1) s 32(1) abrogates the requirement to give a corroboration warning in respect of these two categories of witnesses;

(2) it is a matter for the trial judge to decide what warning, if any, to be given and the precise content of such a warning. This will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence;

(3) in some cases, it may be appropriate to warn the jury to exercise caution before acting on unsupported evidence. *Per* Lord Taylor CJ:

This will not be so simply because the witness is a complainant of a sexual offence nor will it be necessarily so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable.

(4) any question as to whether a warning should be given should be resolved by discussion with counsel in the absence of the jury before final speeches;

(5) if a warning is to be given, this should be a part of the trial judge's review of the evidence and the manner in which the jury is to evaluate it;

(6) it is for the judge to decide the strength and terms of the warning. *Per* Lord Taylor: 'It does not have to be invested with the whole florid regime of the old corroboration rules';

(7) there should not be any attempt to re-impose the 'straitjacket' of the old corroboration rules;

(8) the Court of Appeal will only interfere with the trial judge's exercise of his discretion if that exercise was unreasonable.

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