HEARSAY EVIDENCE IN CRIMINAL PROCEEDINGS

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HEARSAY EVIDENCE IN CRIMINAL PROCEEDINGS

The Criminal Justice Act 2003 re-wrote the hearsay evidence rule for the purpose of criminal proceedings, enacting the recommendations of the Law Commission together with some proposals from the Auld Review. Since the new provisions came into force a body of case-law has interpreted them and, in particular, given guidance as to how the new 'inclusionary discretion' should be exercised. Following the style of his earlier book about the new law on bad character evidence, the central part of Professor Spencer's book on hearsay evidence consists of section-by-section commentary on the relevant provisions of the Act. The commentary is preceded by chapters on the history of the hearsay rule, and the requirements of Article 6(3)(d) of the European Convention on Human Rights. It is followed by an appendix containing the text of the statutory provisions and a selection of the leading cases.

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PREFACE

In 1994, the Law Commission were kind enough to engage me as a consultant on their project on the hearsay rule in criminal proceedings, and a year later I saw my input reflected in the sections of the resulting Consultation Paper where the rule was examined, the justifications for it were analysed together with the problems that it causes, the Strasbourg case law was analysed, and where readers were shown how the underlying issues are handled by the courts in France and Germany. We did not see eye to eye about the way in which the law ought to be reformed, however, and at that point we parted company. For the rest of the project, which culminated in the publication of a Report in 1997, the role of academic consultant was taken by my friend and respected colleague Professor Di Birch, of the Law Faculty at Nottingham.

The government announced that it accepted the recommendations contained in the Law Commission's hearsay Report, but then failed to implement them. In 2000, I was invited by Lord Justice Auld to be one of his consultants on the project which led to his Review of the Criminal Courts the following year. In this capacity I helped him to formulate a number of his proposals, including those for reforming the hearsay rule. On this his ideas were much more radical than those of the Law Commission four years before, favouring the abolition of the existing hearsay rule and its system of exceptions in favour of a broader 'best evidence' approach.

In his Review Auld LJ argued for a revision of the hearsay rule in the context of a long-term overhaul of the whole law of criminal evidence. The Government, however, opted instead for an instant revision of parts of it: namely evidence of bad character, and the hearsay rule, major changes to both of which were made by Part 11 of the Criminal Justice Act 2003. The reforms to the hearsay rule were, in essence, the proposals of the Law Commission, but with some adaptations to incorporate some, but not all, of the proposals formulated by Auld LJ: a solution Professor Birch, in her commentary in the *Criminal Law Review*, described as 'dishing up the Law Commission's very traditional repast with a dollop of Auld's best evidence on top'.

To cope with this new Act, the Judicial Studies Board organised a period of intense training for the judges, which took place during the first three months of 2005. Together with a number of academic colleagues, I was recruited to help with this. My part was to prepare a commentary on the new rules relating to evidence of bad character. For the reforms of hearsay evidence, this task was undertaken by two academic colleagues, Professor Di Birch and Professor David Ormerod.

It was on the crest of a wave of enthusiasm generated by this training programme that I wrote a commentary on the new law on bad character evidence, which Hart Publishing produced in the spring of 2006. It was generally well received, and that encouraged me to write this companion volume on the new law on hearsay as well. As with the earlier book, much is owed to a group of friends and colleagues with whom I have discussed this area of the law, and from whose thoughts I have greatly profited. A particular word of thanks is owed to HH Judge David Radford and his brethren at Snaresbrook Crown Court, who invited me there to talk with them, and to HH Judge John Phillips, who was kind enough to read the last chapter in draft and offer many helpful comments.

The book on bad character evidence ended with an Appendix in which the leading cases interpreting the new law were reproduced. Though castigated by one academic reviewer as a waste of paper, reviewers who were practitioners said this feature made the book more useful, and so in this new book I have therefore done the same. As readers will see, the collection begins with the decision in *Sellick*. This was decided under the earlier law, but the statements of principle that it contains are highly relevant to the new law too, and for this reason (as well as the quality of the reasoning) I believe it deserves to stand at the head of the collection.

On the face of it, the new law on hearsay that results from Part 11 of the Criminal Justice Act 2003 is very conservative. Eight years earlier, the Civil Evidence Act 1995 completely abolished the hearsay rule for the purpose of civil proceedings. But the Criminal Justice Act 2003, by contrast, retains the rule excluding hearsay, together with its half-brother, the 'rule against narrative', and to each a list of detailed exceptions is prescribed. The Law Commission's reason for adopting this conservative approach rather than the sort of simple and radical reform later proposed by Auld LJ was, in part, 'the change of attitude that this option would require on the part of practitioners and judges'. However, the new scheme includes a general 'inclusionary discretion', which a court can invoke to admit any piece of hearsay evidence which falls outside the list of prescribed exceptions, if it is satisfied that the interests of justice so require. This discretionary power was envisaged by the Law Commission for use as a last resort: a 'safety-valve', as they described it. However, the emerging case law suggests that the courts are only too glad to use it; and in consequence the new law on hearsay is much more radical in practice than the narrow drafting of the main provisions might suggest. Paradoxically, it looks as if the main effect of the reform has been to produce the change of attitude which, 10 years ago, the Law Commission believed to be impossible.

JR Spencer
Cambridge, November 2007

ABBREVIATIONS

ACPO	Association of Chief Police Officers
CEA 1968	Civil Evidence Act 1968
CEA 1995	Civil Evidence Act 1995
CJA 1988	Criminal Justice Act 1988
CJA 2003	Criminal Justice Act 2003
CLRC	Criminal Law Revision Committee
CPIA 1996	Criminal Procedure and Investigations Act 1996
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (or European Convention on Human Rights)
PACE 1984	Police and Criminal Evidence Act 1984
PCMH	Plea and case management hearing
PNC	Police National Computer
StPO	Strafprozeßordunung (German Criminal Procedure Code)
YJCEA 1999	Youth Justice and Criminal Evidence Act 1999

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