1 Relevance and admissibility of evidence

But at the far end of the cart, with its back to him, sat a little yellow dog with a little pointed nose over which it was gazing, with an indescribably solemn and meditative expression, back along the way it had come. It was an exquisite and highly amusing little dog, worth its weight in gold; unfortunately however it is irrelevant in the present context, and we must therefore ignore it.

(Thomas Mann, *The Road to the Churchyard*, 1900)

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1.1 The law of evidence is concerned to regulate what evidence may be admitted at trial and under what conditions such admissible proofs are to be admitted. Before it can be admitted, evidence has to clear two hurdles. The foundational requirement is that evidence can be admitted only if it is relevant. From the outset, it is therefore necessary to have an understanding of what the law means by 'relevant'. However, even if legally relevant, the admission of evidence at trial may still be problematic. In the first place, relevant evidence may be excluded altogether because it falls foul of one of English law's exclusionary rules of evidence. These exclusionary rules—which notably include the hearsay rule, the opinion rule, and the rules concerning the accused's bad character—will be considered separately in later chapters. At this stage, it can be pointed out that some rules of evidence apply to both civil and criminal cases with equal force; some apply exclusively in criminal proceedings; others again, like the hearsay rule, apply more rigorously in criminal cases than in civil proceedings—and even operate under different notions of what actually constitutes hearsay. In addition to the settled exclusionary rules, predominantly in criminal cases the courts also enjoy discretion to exclude technically admissible evidence in a variety of circumstances (see paras **1.54–1.63**). However, even if evidence is technically admissible, having cleared all of these hurdles, notably in criminal cases its admission may be subject to a requirement that the court issues a particular form of direction, either restricting or affording guidance on the way in which the evidence is to be employed. As we shall see in this chapter, such directions may be demanded for instance in cases in which prosecutions are brought after substantial delay or those in which the Crown relies upon the testimony of a witness whose evidence, for some reason, is considered to be of suspect quality (see paras **1.76 ff**). Further examples of such mandatory directions occur throughout this book.

The respective functions of judge and jury

1.2 The English mode of trial has evolved from trial by jury. This fact has served to shape many aspects of procedure. In particular, it has necessitated a division of functions between judge and jury. Basically, matters of law fall within the province of the judge and matters of fact are the exclusive preserve of the jury. Thus the judge is responsible for determining questions of admissibility of evidence. In cases that are being tried with a jury, the judge determines these questions in the absence of the jurors. Obviously, if there is a possibility that the judge will exclude a contested item of evidence, it is preferable that the jury should not even be aware of its existence. While matters of admissibility are the judge's concern, the jury—or 'tribunal of fact', as it is often known—has the task of evaluating the weight of the admissible evidence and of deciding whether or not the party who bears the burden of proving its case has actually done so. Although the majority of criminal and civil cases today are heard without juries, this historical division of labour between judge and jury has still left its mark on the English form of trial.

1.3 The law–fact dichotomy is not always easy to operate. On the one hand, some matters of law are treated as though they were matters of fact. Thus English law traditionally treats rules of foreign law not as questions of law for the judge, but as matters of fact on which evidence must be called. Indeed, it was only in 1920 that, in jury cases, the task of determining questions of foreign law was taken from the jury by the Administration of Justice Act, s 15. These matters are now decided by judge alone, after hearing evidence. The rule regarding proof of foreign law does not admit of exceptions. Thus, in *Okolie* (2000) The Times, 16 June, a handling conviction was quashed because the trial judge had accepted, without proof, that the four luxury cars in the case were stolen goods in terms of German law. A similar requirement, it might be noted, applies to questions affecting the meaning or effect of treaties under the European Communities Act 1972, s 3(1). On the other hand, judges sitting with or without juries are sometimes required to entertain questions of fact when determining the admissibility of evidence. One example will perhaps suffice. If the admissibility of an accused's confession is contested under s 76 of the Police and Criminal Evidence Act 1984 (PACE) (see **Chapter 10**), before admitting the confession in evidence the judge must conduct a trial within a trial (also known as a 'voir dire'). The trial within a trial is conducted in the absence of the jury. After hearing the evidence presented by the prosecution and by the defence, the judge will be required to deliver a ruling on the mixed question of law and fact as to whether the Crown has established beyond reasonable doubt that the confession was not obtained in ways that infringe s 76. This proceeding can occasionally make for a complex division of functions. As the opinion in the Privy Council case of *Timothy v R* [2000] 1 WLR 485 makes clear, if a defendant claims *both* that he did not make a particular confession to the police *and* that he was ill-treated by the police, two issues are raised: the first is a question of fact; the second, a mixed question of law and fact. In such a case, the judge must initially resolve, in the absence of the jury, whether or not the confession was extracted from the defendant by unlawful means. If it cannot be shown that the confession was not obtained unlawfully, the confession must not be admitted. If it passes this test, the confession is admitted and it is then left to the jury to resolve the further question of pure fact, whether or not the confession was actually made at all.

1.4 A judge can exert control over the jury in a number of ways. Most dramatically, the judge may form the view that there is insufficient proof of a particular matter to justify leaving a question to the jury. Hence, in the nineteenth-century civil case *Metropolitan Railway Co v Jackson* (1877) 3 App Cas 193, the House of Lords held that the trial judge ought not to have left a question of negligence to the jury at all, since it could see no evidence to support the contention that the claimant's injuries were ascribable to the defendant's fault. This procedure still obtains when civil claims are tried by judge and jury. The vast majority of civil cases today, however, are tried by judge alone. In these cases, a party may submit that he has no case to answer, but the judge may deliver a ruling on the submission only if the party making it elects not to call evidence. In criminal cases, although a judge may remove a case from the jury of his own motion, it is more usual for the defendant to submit at the close of the prosecution case that there is no case to answer. Under the test laid down by the Court of Appeal in *Galbraith* [1981] 2 All ER 1060, if the judge feels that, taking the evidence adduced by the prosecution at its highest, a properly directed jury could not reasonably convict, the judge must withdraw the case from the jury (see para **2.27**).

1.5 Removing a case from the jury is an extreme measure, only applicable in situations in which the prosecution's or a claimant's case is seriously deficient. A subtler pressure is exerted on the jury by the rules of evidence, which variously exclude certain categories of evidence from the jury's consideration altogether or seek to restrict the use that the jury makes of it. Subtler still is the summing-up, which the judge delivers to the jury at the close of the case, immediately

before the jurors retire to deliberate on their verdict. The summing-up is an event of great importance, because the Court of Appeal is apt to scrutinise what a judge has said to the jury with considerable particularity. Owing to the increasing complexity of the directions that judges are required to deliver to juries, the Judicial Studies Board (JSB), the body responsible for the training of English judges, at one time issued a set of 'specimen directions', which was updated from time to time, setting out recommended forms of jury directions (but see now *Crown Court Bench Book: Directing the Jury*, March 2010). The efficacy of jury directions has frequently been questioned. The US Supreme Court Justice, Jackson J, famously declared in *Krulewich v US*, 336 US 440, 453 (1949): 'The naive assumption that prejudicial effects can be overcome by instructions to the jury … any practising lawyer knows to be unmitigated fiction.' This slashing comment is surely an exaggeration. More recently, it has been suggested that juries do attend to judicial instructions and that the instructions probably do work, albeit imperfectly—and better under some conditions than others. Nor is there any need to proceed under the illusion that jury directions require to work flawlessly (see David Alan Sklansky, 'Evidentiary Instructions and the Jury as Other' (2013) 65 Stan L (forthcoming)).

1.6 Some of the directions that judges are called upon to deliver—such as the direction on joint enterprise in criminal law—concern such complex areas of law that the modern approach is for judges to record their oral directions on the law in writing and, before they retire, present those written directions to the jury. In one case, whilst upholding the convictions, the Court of Appeal made clear that the fact that the judge had directed the jury orally, at a slow dictation speed, which would have given the jury an opportunity to make full notes, was not a satisfactory alternative to presenting jurors with a text (*Smith* [2006] EWCA Crim 495). Judicial attempts to assist jurors meaningfully can be carried even further than mere written directions, whether or not amplified by further oral directions in the summing-up. Consider *Fury* [2006] EWCA Crim 1258, a case of affray and murder involving multiple defendants, which gave rise to knotty issues of joint enterprise and manslaughter. In this particular case, Hooper LJ felt that even written directions were inadequate to the task:

> *In our respectful view the jury would have been much assisted by a question and answer flowchart personalised for each defendant. This is often referred to in the criminal courts as 'The Steps to Verdict'. The jury could then have used the appropriate flowchart/Steps to Verdict when considering each defendant's case. …[T]he jury would simply have had a series of questions to answer, questions which would have incorporated the relevant principles.*
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> (*Fury* [2006] EWCA Crim 1258, [24])

In a recent study published by the Ministry of Justice, it was maintained that jurors greatly benefit from written instructions and that the judiciary should reconsider implementing Sir Robin Auld's recommendation for issuing jurors with written aide-memoires on the law in all cases (Thomas, *Are Juries Fair?*, February 2010, pp 38–9).

1.7 Rose LJ explained what a trial judge is required to do in his summing-up in *Curtin* [1996] Crim LR 831:

> *It is a judge's duty, in summing up to a jury, to give directions about the relevant law, to refer to the salient pieces of evidence, to identify and focus attention upon the issues, and in each of those respects to do so as succinctly as the case permits. It follows that as part of this duty the judge must identify the defence.*

The judge is therefore required to put to the jury in a fair and balanced manner the respective contentions that have been presented. Strong expressions of personal opinion are now discouraged (*Culpepper v Trinidad and Tobago* (2000) 20 December, PC Appeal no 68 of 1999 *per* Lord Bingham of Cornhill), although a judge is not forbidden to comment, even quite robustly, upon the evidence if such comment is truly justified. In the words of Lord Clyde, it is the judge's responsibility:

> *. . . to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them.*
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> (*Von Starck v R* [2000] 1 WLR 1270, 1275)

Should a judge deliver an unfair or unbalanced summing-up, the Court of Appeal may quash the conviction on the ground that it is 'unsafe' within the terms of the Criminal Appeal Act 1968, s 2(1) (see, for example, *Winn-Pope* [1996] Crim LR 521).

The concept of relevance

1.8 The concept of relevance is deceptively simple. 'Relevance' simply refers to any item of proof that renders more probable or less probable the existence of a fact in issue in the case. James Fitzjames Stephen, the great Victorian jurist and judge, explained 'relevance' in the following terms:

> *Any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.*
>
> (*Digest of the Law of Evidence*, 1936, London, 12th edn, p 3)

In broadly similar vein, Lord Simon of Glaisdale declared, in *DPP v Kilbourne* [1973] AC 729, 756: 'Evidence is relevant if it is logically probative or disprobative of some matter which requires proof.' Significantly, his Lordship added: 'I do not pause to analyse what is involved in "logical probativeness", except to note that the term does not of itself express the element of experience which is so significant of its operation in law, and possibly elsewhere.' Lord Steyn possibly expressed the matter in a more practical way when he stated:

> *A judge ruling on a point of admissibility involving an issue of relevance has to decide whether the evidence is capable of increasing or diminishing the probability of the existence of a fact in issue. The question of relevance is typically a matter of degree to be determined, for the most part, by common sense and experience.*
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> (*Randall* [2004] 1 WLR 56, [20])

1.9 Relevance is by no means an exact science. Consider *Wilson* [2008] EWCA Crim 1754, [2009] Crim LR 193, for example. W was charged with seven counts of robbery and one of unlawful

wounding. W, who denied these offences, had been apprehended by the police in possession of a kitchen knife and a telephone, and property was found at his home belonging to three of the complainants. At trial, evidence was given by a witness responsible for monitoring crime in Islington, who testified that she had performed various computer searches in her database and had concluded that between the date of the last offence (W was arrested just three days later) and 31 May 2007 (approximately the date of W's trial), no similar offences had been committed in the Islington area. Was this evidence sufficiently relevant? Did it contribute meaningfully to showing that W was the culprit? Alternatively, in the words of the defence, was the evidence irrelevant being too 'nebulous and prejudicial' (at [7])? Whilst the Court of Appeal adjudged that this information could have been 'helpful if the jury were speculating as to whether robberies might have continued after [W's] arrest' (at [9]) and upheld the trial judge's ruling, one can see that the absence of similar crimes committed by a young, lone, white male robber wearing a mask and carrying a knife could be attributable to several causes: the perpetrator might have been hospitalised, detained, or imprisoned on other charges or died; victims might not have reported subsequent offences; or indeed the true culprit might have diverted to nearby Hornsey, as the appellant tried vainly to show (at [12]). No calibrated scale exists telling courts at what exact point the utility of a piece of evidence becomes too speculative to justify its admission. Experience and common sense may provide the key.

1.10 Experience does indeed play an important role in differentiating what is from what is not evidentially relevant. Nevertheless, from time to time the courts also attempt to provide guidance on what sort of evidence is to be treated as relevant and admissible in particular contexts. These decisions underline the difficulty encountered when one tries to pin down exactly what is meant by 'relevant' evidence. Two examples will perhaps suffice: the admission of evidence relating to a defendant's general lifestyle in prosecutions for drugs offences; and the Court of Appeal guidelines setting out the criteria that finger-print evidence must satisfy in order to be admitted.

Lifestyle evidence and drugs charges

1.11 A veritable blizzard of decisions has considered the admissibility of cash and lifestyle evidence in criminal cases in which the defendant is charged with possession of drugs, with or without intent to supply. Indeed, so vexed did this particular question become that the JSB took the step of issuing a specimen direction to assist judges when directing juries on how to use such evidence. *Guney* [1998] 2 Cr App R 242 is an instructive authority on this topic. G was charged with possession of almost 5 kilos of heroin, with intent to supply. Although G maintained that the drugs were not his and had been planted, one question that the Court of Appeal addressed was the relevance, and hence the admissibility, of G's having also been found in possession of a substantial sum of cash. The police had found £24,815 had under some towels in the self-same wardrobe in G's bedroom in which they had also found the drugs and a firearm. Substantial holdings of cash tend to go hand-in-hand with drug-dealing, as do unexplained trappings of wealth. Two points, however, need to be considered, as follows.

- *First*, there may be other plausible explanations both for possession of substantial amounts of cash and for high living. Thus the relevance of lifestyle evidence may be questionable.
- *Secondly*, evidence that a defendant is in possession of money that may be the proceeds of previous drug-dealing could be prejudicial, because it tends to show the commission of other offences not charged in the current proceedings.

1.12 In *Guney*, the Court of Appeal noted that previous case law drew a broad distinction between two types of drug charge. On the one hand, where a defendant is charged with simple possession or where the only issue in the case is whether he possessed the drugs, it is most unlikely that cash and lifestyle evidence will be relevant. While it cannot be said that such evidence will never be relevant, it is most improbable that one could deduce from the circumstance that an accused possesses a substantial bundle of money that he must therefore have possessed drugs. In the words of Judge LJ:

> *Evidence of possession of cash will often lack any probative value. The defendant's possession of a large sum of cash, or enjoyment of a wealthy lifestyle, does not, on its own, prove anything very much, and certainly not possession of drugs.*
>
> (*Guney* [1998] 2 Cr App R 242, 266)

In contrast, this species of circumstantial evidence is more likely to be relevant in cases in which the issue is whether the defendant had *intent* to supply. Here, Judge LJ considered at 267, that:

> *[t]here are numerous sets of circumstances in which cash and lifestyle evidence may be relevant and admissible to the issue of possession itself, not least to the issue of knowledge as an ingredient of possession.*

However, as *Guney* itself shows, it is dangerous to separate these two issues artificially: in all cases, 'the question whether evidence is relevant depends not on abstract legal theory but on the individual circumstances of each particular case'. In *Guney*, G claimed not to know about the drugs and the gun, which, he asserted, had been planted in the wardrobe by his enemies. Realistically, there could be no issue so far as intent to supply was concerned. Defence counsel conceded that, in view of the large quantity of heroin discovered, if G were to be found to have possessed the drug, then it would have to be assumed that G had possessed it with intent to supply. G, however, denied possession. As Judge LJ pointed out, the fact that a large sum of cash, ill-concealed like the drugs and the gun, was found in the same place 'was … relevant to how the drugs and the firearms both remained undiscovered when the cash was placed in the wardrobe on the evening before the arrest'. The coincidence that G's cash was physically close to firearms and drugs, which G claimed belonged to someone else, was obviously a relevant factor for the jury to take into account in deciding whether G knowingly had possession of the drugs. Thus, in this case, most unusually the possession of a large sum of money was found to be relevant to the issue of whether G consciously had possession of the drugs. (Significantly, G's conviction has since been quashed, following a reference from the Criminal Cases Review Commission—see [2003] EWCA Crim 1502. For more on G's rocambolesque brushes with the law, see <http://erkinguney.com/>)

1.13 Regarding the potential prejudice that admission of lifestyle evidence can arouse, it has been argued that if the Crown reveals that the accused possesses a lot of cash, this may constitute evidence of criminal propensity that could induce the jury to infer that D has dealt in drugs in the past and that he currently possesses drugs with intent to supply. In principle, evidence suggestive of other misconduct by an accused—indicating a propensity to deal in drugs—is admissible only if it satisfies rules laid down in the Criminal Justice Act 2003 (see **Chapter 7**). The courts do not always overcome this objection convincingly. They have sometimes argued that because this form of evidence was admissible prior to the advent of the 2003 Act (see, for example, *Morris* [1992] 2 Cr App R 69) and 'the distinction between treating [other misconduct] (a) as evidence that [D] is a drug dealer, or (b) as evidence that [D] has dealt in drugs and has a propensity to do so, is fine', it would be 'highly artificial' to treat lifestyle evidence as evidence

of bad character under the 2003 Act (*Graham* [2007] EWCA Crim 1499, [25]; see also *Green* [2009] EWCA Crim 1688). In contrast, Judge LJ, in *Guney*, signalled that, provided that the evidence indicative of previous drug-dealing was admissible under other misconduct evidence principles, the prejudice generated would not entail the exclusion of the lifestyle evidence. The latter, it is suggested, is the more orthodox response.

To summarise, the following propositions, accepted by Clarke LJ in *Wright* [2004] EWCA Crim 1546, [24], succinctly encapsulate the relevant principles.

(i) Evidence of cash or lifestyle is admissible in cases of drug trafficking only to prove an issue in the case—that is, possession or intent to supply (*Gordon* [1995] 2 Cr App Rep 61).

(ii) Such evidence will frequently lack probative value in proving possession (*Guney*).

(iii) To be admissible to prove an intention to supply, the evidence has to be relevant, meaning that it must be logically probative of that intention (*Gordon*).

(iv) The judge must direct the jury as to the precise relevance and probative force of such evidence (*Gordon*).

(v) Evidence that may lead a jury to conclude that the defendant has been, or has propensity to be, a drug dealer and that he is therefore more likely to be guilty of the instant offence is objectionable and involves an inadmissible chain of reasoning (*Guney*), unless it satisfies the rules governing the admission of evidence of bad character (see **Chapter 7**).

Fingerprint evidence

1.14 Even in the realm of scientific evidence, one finds the courts wrestling with the question of at what point on the scale circumstantial evidence purportedly identifying the defendant as the culprit becomes sufficiently relevant to be admitted. Fingerprint evidence provides a case in point. Following a series of cases in which the Court of Appeal appeared to have operated different criteria of admissibility, Rose LJ comprehensively reviewed this important species of evidence in *Buckley* (1999) 163 JP 561. The central question is: given that, at present, there exists no agreed criterion other than the numerical test, how many ridge characteristics must coincide between the accused's print and that found at the scene of crime to justify the admission of this form of evidence, and to allow the fingerprint expert to testify that, in his opinion, the scene-of-crime print belongs to the accused? At one time, a minimum of sixteen similarities was required. Although it made their opinions unassailable, experts for long felt that this number was too high. In more recent times, courts behaved inconsistently, sometimes admitting prints with as few as eight similar characteristics. In *Buckley*, therefore, Rose LJ proffered general guidance. Looking to best practice for inspiration, his Lordship suggested the following criteria.

- If there are fewer than eight similar ridge characteristics, it would be most exceptional for a judge to admit fingerprint evidence.
- If there are eight or more, exercise of the judge's discretion to admit such evidence will depend on all of the circumstances of the case. These should include:
  - the witness's experience and expertise;
  - the number of similar ridge characteristics;

- the size of the print relied upon, bearing in mind that the smaller the fragment, the more significant the number of characteristics will be; and
- the quality and clarity of the print, taking into account such factors as smearing and contamination.

Although the Court has set out guidelines, on close examination it can be seen that, as in the case of lifestyle evidence, inevitably a lot is left to judicial appreciation. The judge is left to assess what is the appropriate minimum requirement in each individual case. Relevance, then, is by no means a cut-and-dried concept.

1.15 Fingerprint evidence is not infallible; it is only as good as the experts who interpret it. In February 2006, without admitting liability for negligence or malicious prosecution, the Scottish Executive entered into an out-of-court settlement with Shirley McKie, a former Strathclyde police officer, who, in 1999, had been unsuccessfully prosecuted for perjury for truthfully asserting that a fingerprint, found at a murder scene in 1997—and identified as hers by the Scottish Criminal Records Office in its finest hour—belonged to someone else. Subsequently, the Fingerprint Inquiry, set up in the wake of this fiasco, recommended in December 2011 that fingerprint evidence be treated as a form of opinion evidence rather than evidence of fact (§ 35.132; see **Chapter 8**) and that fingerprint witnesses desist from reporting their conclusions on identity with a claim of 100 per cent certainty or suggesting that fingerprint evidence is infallible (§ 38.77). Interestingly, in *Buckley*, for good measure Rose LJ recommended:

> *In every case where fingerprint evidence is admitted it will generally be necessary, as in relation to all expert evidence, for the judge to warn the jury that it is evidence [of] opinion only, that the expert's opinion is not conclusive and that it is for the jury to determine whether guilt is proved in the light of all the evidence.*
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> (*Buckley* (1999) 163 JP 561)

1.16 Fingerprint evidence has also been vigorously criticised by the English Court of Appeal in *Smith (Peter Kenneth)* [2011] 2 Cr App R 16. The police were censured for running a closed shop, with no one outside the Fingerprint Bureau able to obtain recognised qualifications, and for presenting evidence in an antiquated, laborious manner—notably refusing to resort to digital imagery:

> *It is not unsurprising that the points we have raised identify practices which differ so markedly … from modern forensic science practice in other areas of forensic science. …[T]here is a real need for the ACPO, the Forensic Science Regulator and the recently established Fingerprint Quality Standards Specialist Group to examine as expeditiously as possible the issues we have identified, to assess the position and to ensure that there are common quality standards enforced through a robust and accountable system.*
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> (*Smith (Peter Kenneth)* [2011] 2 Cr App R 16, per Thomas LJ at [61] and [62])

The so-called 'best evidence principle'

1.17 In addition to being relevant, it sometimes used to be claimed that evidence could be admitted by a court only if it was 'the best that the nature of the case will permit' (*Omychund v Barker* (1745) 1 Atk 21, *per* Lord Hardwicke at 49). Although a number of older authorities do make

reference to a 'best evidence principle', as Jonathan Parker LJ observed in *Springsteen v Masquerade Music Ltd* [2001] EMLR 654 at [64], 'even in its heyday, the best evidence rule was not an absolute rule'. In the twentieth century, its influence waned perceptibly. In *Garton v Hunter* [1969] 2 QB 37, 44, Lord Denning MR dismissed the principle out of hand with the words, 'That old rule has gone by the board long ago … Nowadays we do not confine ourselves to the best evidence', while in *R v Pentonville Prison, ex p Osman* [1990] 1 WLR 277, the Divisional Court declared itself 'more than happy to say goodbye to the … rule', noting that 'the little loved best evidence rule has been dying for some time'. Ackner LJ, it should be said, had claimed that one vestige of the rule survived:

> *The old rule, that a party must produce the best evidence that the nature of the case will allow, and that any less good evidence is to be excluded, has gone by the board long ago. The only remaining instance of it is that, if the original document is available in one's hands, one must produce it.*
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> (*Kajala v Noble* (1982) 75 Cr App R 149, 152)

In *Springsteen v Masquerade Music Ltd*, however, the Court of Appeal extinguished even this final flicker of the rule:

> *The authorities … establish that by the mid-nineteenth century, if not earlier, the so-called 'best evidence rule' was recognized by the courts as no more than a rule of practice to the effect that the court would attach no weight to secondary evidence of the contents of a document unless the party seeking to adduce such evidence had first accounted to the satisfaction of the court for the non-production of the document itself. … For my part, I would not even recognize the continuing existence of that 'remaining instance' of the application of the old rule'.*
>
> (*Springsteen v Masquerade Music Ltd* [2001] EMLR 654, [76] and [79])

This judgment seems finally to have dispelled any lingering notion that it is a condition of admissibility that evidence proffered must be the best that the nature of the case will admit. Nevertheless, judges continue to employ the expression 'best evidence' from time to time, if only to signify that there may have existed more immediate or compelling means of establishing a particular fact than the evidence actually adduced (see, for example, *JF* [2002] EWCA Crim 2936 *per* Bell J at [32]). Generally speaking, therefore, the position is well expressed by a Scots judge, who declared that 'the "best evidence rule" is not a general exclusionary rule of evidence but a counsel of prudence' (*Haddow v Glasgow City Council*, 2005 SLT 1219 *per* Lord Macphail at [14]).

Matters of which proof is unnecessary

1.18 Although courts will not normally find a matter proven in the absence of positive evidence, in some situations they do dispense with the need for evidence. Some facts are considered so self-evident that it would be pointless to insist upon the adduction of evidence and thus judicial notice is taken of them. Alternatively, it is open to parties in both civil and criminal cases to make formal admissions, which, again, absolve the opposing side from the duty of adducing evidence in support of whatever fact or facts have been conceded in the formal admission.

Judicial notice

1.19 To the delight of the press, the judiciary sometimes displays a baffling unworldliness. Harman J once famously asked 'Who is Gazza?', while Popplewell J required instruction in the significance of 'Linford Christie's lunchbox'. A magistrate, trying a case of ticket touting in 2000, requested positive evidence that Arsenal is a premier league football club, remarking that he always discarded the sports section of the newspaper. According to *The Daily Mirror* (16 April 1975), when trying a case arising out of the cancellation of a Frank Zappa concert in the Albert Hall, Mocatta J had to be enlightened on the meanings of the expressions 'groupies' and 'underground rock band', and a judge at St Albans, puzzled by the concept of a sofa bed, asked 'How can a bed be turned into a sofa?' (*The Times*, 13 December 2005). A judge at Carlisle Crown Court in 1999, however, took the biscuit, affecting total ignorance of those icons of our national culture, the Bafta-winning *Teletubbies*. Judicial notice, thankfully, is concerned with the opposite end of the spectrum. It allows the court to employ its general knowledge of the world. As Coleridge J said in *Lumley v Gye* (1853) 2 E & B 216, 267:

> *Judges are not necessarily to be ignorant in court of what everybody else, and they themselves out of court, are familiar with; nor was that unreal ignorance considered to be an attribute of the bench in early and strict times. We find in the Year Books the judges reasoning about the ability of knights, esquires, and gentlemen to maintain themselves without wages; distinguishing between private chaplains and parochial chaplains from the nature of their employments; and in later days we have ventured to take judicial cognisance of the moral qualities of Robinson Crusoe's Man Friday.*

Buxton LJ was therefore confident that a court was entitled judicially to notice that 'when corporal punishment was in general use in English schools, direct involvement of the parents was not the general practice' (*R (Williamson) v Secretary of State for Education and Employment* [2003] 3 WLR 482, 490). In like vein, in *Morris v KLM Royal Dutch Airlines* [2001] 3 WLR 351, 359, a case in which a 15-year-old girl travelling unaccompanied sought compensation for 'bodily injury' suffered when she was groped by another passenger on a flight from Kuala Lumpur to Amsterdam, Lord Phillips MR declared at [29]: 'Judges do not travel exclusively in first-class seats and can take judicial notice of the fact that those who travel in economy have to accept relatively cramped conditions which bring them into close proximity with their neighbours. ' Similarly resorting to his personal experience, Rimer J explained why he was rejecting a witness's evidence, saying, 'I propose to take judicial notice, based on my own experience of wheelchair users, of the fact that the occupation of a wheelchair provides no obstacle to writing' (*Reynolds v Reynolds* [2005] EWHC 6 (Ch), [122]).

1.20 The doctrine of judicial notice allows the court to dispense with the need to prove notorious facts. Some facts are simply so well known that it would both be wasteful of court time and bring the law into ridicule were parties put to proof of them. A party does not therefore have to prove that: rain falls (*Fay v Prentice* (1845) 14 LJCP 298); cats are kept for domestic purposes (*Nye v Niblett* [1918] 1 KB 23); a goldfinch is a British bird (*Hughes v DPP* (2003) 167 JP 589); steamrollers and traction engines are made mainly of iron and steel (*McKenna* (1956) 40 Cr App R 65); telephone calls made from prison are recorded (*Fagan* [2012] EWCA Crim 2248 *per* Rafferty LJ at [46]); Elvis Presley 'must be counted amongst the most well known, popular musicians this century' (*Re Elvis Presley Trade Marks* [1997] RPC 543 *per* Laddie J); butterfly

knives are offensive weapons made or adapted for use for causing injury (*DPP v Hynde* [1998] 1 All ER 649); Thailand and Jamaica are areas of drug-dealing and supply (*R v Crown Court at Isleworth, ex p Marland* (1997) 162 JP 251) and 'Amsterdam, unfortunately, has an international reputation as a centre for drug trafficking' (*Butt v Customs and Excise Comrs* (2002) 166 JP 173, [33]); the postal system is not infallible (*Sloan Electronics Ltd v Customs and Excise Comrs*, 7 May 1999, unreported); 'banks do not do anything for nothing' (*IRC v Mallender* [2001] STC 514); or the second-hand car market follows a seasonal pattern (*Poole v Smith's Car Sales (Balham) Ltd* [1962] 2 All ER 482). Although a dyed-in-the-wool Cambridge man might prefer to reserve his position, Coleridge J even judicially noticed that Oxford University was 'a national institution created for a great national purpose, the advancement, namely, of religion and learning through the nation' (*The Case of the Oxford Poor Rate* (1857) 8 E & B 184).

1.21 The facts judicially noticed may sometimes assume some complexity. In *R v Z (Att Gen for N I's Reference)* [2005] 2 AC 645, [13], Lord Bingham of Cornhill reported:

> *The Court of Appeal took judicial notice of certain facts which [counsel] for the acquitted person, did not challenge as inaccurate. (1) Until 1969 an organisation calling itself the IRA existed as a cohesive unit dedicated to unification of the 32 counties of Ireland, to which end it resorted to occasional violence … (2) In about 1969 a major split occurred in the ranks of the IRA. Some members, claiming to be the true inheritors of the mantle of the IRA, in effect declared a ceasefire in 1972. They became known as the Official IRA. Other members (becoming known as the Provisional IRA) continued to assert their right and intention to use violence for the purpose of achieving unification. The two organisations existed independently of each other thereafter … (3) In 1994 and again in 1997 the Provisional IRA declared a ceasefire. Dissident groups within the Provisional IRA opposed these moves, and in late 1997 one group (calling itself the Real IRA) dissociated itself from the leadership of the Provisional IRA and declared that the ceasefire was over … (4) The Real IRA claimed responsibility for a number of acts of violence, most notably the bombing of Omagh in August 1998 … (5) When the 2000 Act was passed, Parliament was well aware of the existence and activities of the Real IRA …*

1.22 What is notorious, however, will vary over time. It is improbable in the extreme that a court today could assume that a jury in a libel case would be so familiar with Aesop's fables as to appreciate the sting of a reference to a 'frozen snake' (cf *Hoare v Silverlock* (1848) 12 QB 624, the moral of Aesop's tale being that the greatest kindness will not bind the ungrateful). Similarly, Slesser LJ's views in the libel case *Youssoupoff v MGM Pictures Ltd* (1934) 50 TLR 581, 587, would hold not true today—namely that:

> *One may … take judicial notice of the fact that a lady of whom it has been said that she has been ravished, albeit against her will, has suffered in social reputation and in opportunities of receiving respectable consideration from the world.*

Omnia mutantur, nos et mutamur in illis

1.23 The courts sometimes employ the concept of judicial notice more speculatively. Thus in *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, 1070, Lord Diplock said:

> *It is common knowledge, of which judicial notice may be taken, that borstal training fails to achieve its purpose of reformation, and that trainees when they have ceased to*

> *be detained in custody revert to crime and commit tortious damage to the person and property of others.*

Meanwhile, in *Burns v Edman* [1970] 2 QB 541, the court took notice that the life of a criminal is not a happy one, whilst the Court of Appeal in *Yap Chuan Ching* (1976) 63 Cr App Rep 7 judicially noticed that most jurors are generally familiar with televised reconstructions of trials, and know something of the burden and standard of proof before they go into the jury box. Not everyone would instinctively consider these to be propositions beyond dispute.

1.24 Possibly reflecting Scrutton LJ's complaint that 'it is difficult to know what judges are allowed to know, though they are ridiculed if they pretend not to know' (*Tolley v JS Fry & Sons Ltd* [1930] 1 KB 467, 475), the courts are often cautious to treat comparatively well-known facts as proven in the absence of evidence. In *Westminster City Council v Croyalgrange Ltd* [1986] 2 All ER 353, for instance, Lord Bridge doubted whether he could take judicial notice that typical sex establishments are managed by front men, while the parties really running these businesses remain concealed, and in *Miliangos v George Frank (Textiles) Ltd (No 2)* [1976] 3 All ER 599, 603, Bristow J declined to take judicial notice of the cost of borrowing Swiss francs in Zurich. In *North Yorkshire County Council v Laws*, 2 February 1996, unreported, the Employment Appeal Tribunal refused to notice judicially that teachers 'do in fact do actual work during the summer holiday'. More extraordinarily, in *Rackstraw v Douglas* 1917 SC 284, a Scottish court even refused to take judicial notice of the fact that women aged 81 and 78 were past childbearing.

1.25 The courts are right to display caution. Occasionally, they have been overeager to employ judicial notice. In *McQuaker v Goddard* [1940] 1 KB 687, for example, the Court accepted that camels are domestic animals, a fact that was anything but beyond dispute. Yet even if the ruling in *McQuaker v Goddard* may be questionable, the Court of Appeal's approval of a passage from Stephen's *Digest of the Law of Evidence* (1936, London) setting out the procedure that the court follows when judicially noticing a notorious fact is important:

> *No evidence of any fact of which the court will take judicial notice need be given by the party alleging its existence, but the judge, upon being called upon to take judicial notice thereof, may, if he is unacquainted with such fact, refer to any person or any document or book of reference for his satisfaction in relation thereto, or may refuse to take judicial notice thereof unless and until the party calling upon him to take such notice produces any such document or book of reference.*

1.26 Although the doctrine of judicial notice undoubtedly sounds like common sense, not every commonsensical conclusion is to be treated as the application of judicial notice. Hence in *Police v Kristnamah* (1993) 12 July, Privy Council Appeal No 55 of 1992, in which K appealed against a drugs conviction, arguing that his 180-line 'confession' could not possibly have been taken down 'in a painstaking handwriting' and read over to him in 50 minutes, as the police claimed, Lord Slynn said: '[T]his is not a matter … of judicial notice in a formal sense. It was a matter of common sense which the court was not required to abandon when deciding on credibility.'

1.27 Courts can be said to notice judicially a number of other matters after enquiry. Thus, when so informed by the Secretary of State, a court is duty-bound to accept the Secretary's statement regarding the sovereignty of a foreign state (*Duff Development Co v Government of Kelantan* [1924] AC 797). If they have been regularly recognised in the past in judicial decisions, there comes a point at which the courts can notice judicially the existence of particular customs. And

when it comes to the meaning of words, courts regularly refer to dictionaries to elucidate what is meant, just as recourse is also had to standard works of history and so on in order that the court can inform itself about facts of a public nature. *McQuaker v Goddard* (see para **1.25**) was such a case, in which the trial judge informed himself by means of both books and witnesses in order to determine whether camels are tame or wild animals. Here, judicial notice served in lieu of evidence because, as the Court of Appeal put it, the judge was entitled to take judicial notice having 'form(ed) his view as to what the ordinary course of nature in this regard in fact is, a matter of which he is supposed to have complete knowledge'. Similarly, the judge in *United Biscuits (UK) Ltd v Asda Stores Ltd* [1997] RPC 513, a case in which the claimant, which manufactured 'Penguin' biscuits, sought to prevent the defendant from marketing a rival 'Puffin' biscuit, displayed a prodigious knowledge of the family *Spheniscidae* and species *Fratercula arctica*, thanks to an assortment of reference books, which enabled the court to take ' judicial notice of relevant ornithology'.

1.28 Statutes also make provision for the taking of judicial notice on a range of matters. In this way, public Acts of Parliament are to be noticed judicially (Interpretation Act 1978, s 3), as are European Communities treaties, the Official Journal of the Communities, and the decisions of the European Court of Justice (European Communities Act 1972, s 3(2)).

1.29 While the courts may dispense with proof in what might be loosely termed matters of general public knowledge, in principle courts may not make use of their personal knowledge. Distinguishing between these two types of knowledge is not always easy, not least because facts that are notorious within a given locality may be the subject of judicial notice. This problem often arises in magistrates' courts, where justices will be familiar with their own local area. Thus, in *Paul v DPP* (1989) 90 Cr App R 173, a kerb-crawling case, although there was no evidence that P's activities had caused a nuisance to residents, as required by the Criminal Justice Act 1985, the justices used their local knowledge of this heavily populated, residential area of Luton to supply the missing element in the prosecution case. The courts occasionally take this principle too far. In *Ingram v Percival* [1969] 1 QB 548, for instance, justices were held to have been entitled to use their personal knowledge of where tidal waters ebbed and flowed in a case involving unlawful netting of salmon and migratory trout. It is doubtful whether this fact was generally notorious within the locality; it does look suspiciously like private and personal knowledge, and the defendant could feel justly aggrieved that his conviction rested in part upon the magistrates having acted as silent witnesses for the Crown.

1.30 An allied problem is that magistrates will sometimes possess personal professional knowledge that has a bearing on the case they are trying. In *Wetherall v Harrison* [1976] QB 773, one justice, who was a doctor, gave his colleagues the benefit of his professional opinion on the likely genuineness of the defendant's claim that he suffered from 'needle phobia' as a reason why he had failed to supply a specimen in a drink-driving case. The court held that a justice, unlike a professional judge, could draw on his specialised knowledge in evaluating evidence in the case and that, *if asked to do so*, he was entitled to tell his fellow justices how his specialised knowledge had caused him to look at the evidence.

1.31 When employing local knowledge, the courts enjoin magistrates to display restraint. In *Waite v Taylor* (1985) 149 JP 551, justices, trying on a charge of obstruction of the highway a busker who had been juggling with fire sticks, had employed their local knowledge. The Divisional Court suggested that justices should disclose whenever they proposed to take judicial notice of local conditions to enable the parties to comment and/or call evidence on the matters in question. That

magistrates ought not to make use of their personal knowledge and experience of the world in place of evidence was illustrated in *Carter v Eastbourne Borough Council* (2000) 164 JP 273. C had been convicted of uprooting five trees, which, it was claimed, were protected by a preservation order. The Crown had not called evidence to show that the trees were at least four years old and thus in existence when the order had been made. The justices, however, viewed photographs of the uprooted trees (which included a yew, one of the slowest-growing trees on the planet) and, 'from our own experience in our own gardens and woodlands', concluded that the trees must have been at least four years of age. Lord Bingham CJ held that they had not been entitled to do this. Alluding to *Preston-Jones v Preston-Jones* [1951] AC 391, a case in which the House of Lords had held that a court could not assume in the absence of proof that a child born 360 days after husband and wife had last indulged in coitus was not the child of the husband, Lord Bingham observed 'how cautious the courts are in treating a factual conclusion as obvious, even though the man in the street would unhesitatingly hold it to be so'. The age of the trees should therefore have been the subject of evidence and not of personal undisclosed belief on the part of the justices.

Formal admissions

1.32 Largely in order to save time, in both civil and criminal cases parties may make formal admissions in which they concede certain facts to be the case, thereby sparing their adversary the need to prove them. To this end, in criminal cases, the Criminal Justice Act 1967, s 10, sets out a procedure that allows a party to make a formal admission in writing either before or during the proceedings regarding 'any fact of which oral evidence may be given'. Any such admission 'shall as against that party be conclusive evidence in those proceedings'.

1.33 Parties may make similar formal admissions in civil cases. Under Pt 14 of the Civil Procedure Rules, 'A party may admit the truth of the whole or any part of another party's case' (r 14.1). Such an admission may be made in writing either in the party's statement of claim or in a letter, thereby dispensing with the need to produce evidence to establish the issue in question—unless the court accedes to a party's request to amend or retract that admission (r 14.5).

Judicial findings as evidence

1.34 Where a matter has been previously litigated, in order to maintain consistency and to prevent issues from being forever reopened, rules of evidence may require subsequent courts to treat earlier judicial findings as binding. Two contexts in which this issue regularly arises are estoppel, on the one hand, and the proof of previous convictions under PACE, s 74, on the other.

Estoppel

1.35 Although detailed treatment of this subject is beyond the scope of an introductory work, it is important to be aware that the law sometimes ordains that parties in both civil and criminal cases may not even seek to prove or disprove certain things, but are bound to accept them as established. These situations can generally be referred to as estoppels. The underlying idea is that issues ought not to be continually reopened and that disputes ought not to be litigated more than once. The civil and criminal rules must be treated separately.

1.36 Estoppels come in two forms: estoppels *in rem* and estoppels *in personam*. An estoppel *in rem* has been authoritatively defined as '[a] judgment of a court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing (as distinct from a particular interest in it of a party to the litigation)' (*Lazarus-Barlow v Regent Estates Co Ltd* [1949] 2 KB 465 *per* Evershed LJ at 475). Judgments giving rise to estoppels *in rem* are conclusive against all parties. For this reason, if a court issues a decree pronouncing a couple divorced, unless someone is seeking to have the judgment set aside on the ground that it was procured by fraud or suchlike, its status must be treated as settled and no one may reopen the question in any subsequent litigation. Estoppels *in personam*, on the other hand, refer to all other estoppels.

1.37 In civil cases, estoppels, so far as they are relevant to the law of evidence, can be divided into two types: cause-of-action estoppels and issue estoppels. Cause-of-action estoppel, perhaps more properly known as 'estoppel *per rem judicatam*', simply signifies that no one may sue twice on the same cause of action. Once a claimant has litigated a particular set of facts, he may not do so again. In the leading case, *Conquer v Boot* [1928] 2 KB 336, C successfully sued B for £24 for breach of contract in failing to build a bungalow 'in a good and workmanlike manner'. Less than a year later, C brought a fresh claim virtually identical in its terms against B for £81, once again for failing to build a bungalow 'in a good and workmanlike manner'. The court held that the cause of action was the same in both claims and that, since the question had been decided in the first action, the matter was *res judicata* and the claimant could not recover further damages. This form of estoppel produces a situation in which it can be justifiably claimed that '[i]t is a fundamental rule of our procedure, sometimes known as the rule in *Conquer v Boot*, that parties to litigation must, in all ordinary circumstances, bring forward the whole of their case at one and the same time' (*Gardiner v Michael Sallis & Co Ltd*, 8 May 1991, unreported, *per* Lloyd LJ). Issue estoppel, in contrast, was broadly defined by Lord Diplock in *Mills v Cooper* [1967] 2 QB 459, 469, as follows:

> *A party to civil proceedings is not entitled to make, as against the other party, an assertion … the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties … and was found by a court of competent jurisdiction in such previous proceedings to be incorrect …*

As Lord Diplock went on to explain, the effect of issue estoppel is that there is no issue left to be decided in the subsequent proceedings to which the evidence would be relevant. The doctrine is 'a particular application of the general rule of public policy that there should be finality in litigation'.

1.38 Do the forms of estoppel that operate in civil cases possess obvious counterparts in the criminal law? The principle of finality, as we shall see, does resemble a rule of criminal procedure laying down that no one may be tried twice for the same offence. The rule against double jeopardy, as it is known, could be described as a counterpart to cause-of-action estoppel such as operates in civil cases. But what of issue estoppel? In *DPP v Humphrys* [1977] AC 1, although the facts of the case did not necessarily require it to do so, the House of Lords considered whether issue estoppel had a role to play in English criminal law. The case concerned a charge of perjury. At his first trial on a charge of driving a motorcycle while disqualified, H had testified that, although he had been disqualified at the relevant time, he had not in fact been the driver seen by the police officer. H went on to claim that S, a third party, had actually been driving the motorcycle on that occasion. The justices acquitted H. Subsequent police enquiries, however, suggested that H had in fact been the driver of the motorcycle. H was therefore prosecuted for perjury and the

police officer who had testified at the first trial repeated his evidence that he had observed H driving the motorcycle while disqualified. H argued that since the sole issue at the first trial had been whether H had been the driver and he had been acquitted, this question had been finally determined at the first trial and could not therefore be reopened at the subsequent perjury hearing. The House of Lords rejected this contention.

1.39 One question that the House of Lords considered was whether the civil doctrine of issue estoppel has any role to play in the criminal law. The House acknowledged that, even if it did, it could not be used to prevent prosecutions for perjury being brought against defendants who lied on oath at their trials. Given that the prosecution must prove its case to the high standard of 'beyond reasonable doubt' and also given that the verdicts of criminal courts are handed down without reasons in the form of inscrutable dooms, it is impossible to maintain that a verdict (other than that rarely used procedure of 'special verdict', in which the jury is called upon to pronounce upon a specific factual question) settles any particular point of fact other than guilt. In consequence, criminal law recognises only the more restricted doctrine, the formal pleas in bar of *autrefois convict* and *autrefois acquit*.

1.40 The *autrefois* pleas are intended to protect defendants against double jeopardy. Double jeopardy means that if an accused has once been convicted or acquitted of a particular offence, he cannot subsequently be retried for that offence or, indeed, for any lesser offence that forms part of the offence originally charged and in respect of which he was at risk on his original trial (an 'included offence'). Hence if the defendant has been tried and acquitted of murder, he cannot later be reindicted either for that murder or for attempted murder or manslaughter. Attempted murder and manslaughter are lesser included offences, in the sense of being offences in respect of which the jury could have returned a verdict at the defendant's first trial. The protection afforded against double jeopardy in fact extends beyond the technical limits of the *autrefois* pleas, because the House of Lords recognised in *Connelly* [1964] AC 1254 that the trial judge has discretion to stay proceedings when they would constitute an abuse of the process of the court. Therefore, even if the charge does not technically amount to a lesser included offence, the court is entitled to hold a second prosecution brought against the defendant on substantially the same facts as the first indictment to be oppressive and an abuse of process. Proceedings in such cases will therefore be stayed.

1.41 The double jeopardy principle, it might be noted, is not absolute in criminal cases. Recent statutes have made limited inroads on the principle. Under the Criminal Procedure and Investigations Act 1996, ss 54–57, it is possible to apply to the High Court to quash an acquittal tainted by intimidation and then to bring fresh proceedings. Provided that someone has subsequently been convicted of an administration-of-justice offence involving interference or intimidation of a witness or juror, and provided that the convicting court is also satisfied that there is 'a real possibility' that the defendant in the earlier proceeding would not have been acquitted but for that interference or intimidation, the convicting court may issue a certificate to that effect. The certificate is then laid before the High Court, which in turn must determine whether or not to quash the acquittal and thereby permit fresh proceedings to be brought against the acquitted defendant. These provisions will obviously apply only in a very restricted class of cases. Part 10 of the Criminal Justice Act 2003 contains a reform that punctures the double jeopardy principle to a more meaningful degree. By virtue of s 75 of that Act, with the consent in writing of the Director of Public Prosecutions, the Crown may now apply to the Court of Appeal in cases in which there is 'new and compelling evidence' against an acquitted person in relation to a qualifying offence (as defined in s 78) to have the acquittal quashed and a retrial ordered. The court may make such an order provided that it considers both that:

(i) there is new and compelling evidence, meaning, evidence that appears to be reliable, substantial, and, in the context of the outstanding issues, highly probative of the case against the acquitted person (s 78), although such new evidence does not need to be direct evidence (*Andrews* [2009] 1 WLR 1947) and may even take the form of evidence excluded at trial, but later ruled admissible on appeal (*B* [2013] 1 WLR 320); and

(ii) it is in the interests of justice to make such an order (s 79), in determining which the appellate court must have particular regard to:

(a) whether existing circumstances make a fair trial unlikely;

(b) . . . the length of time since the qualifying offence was allegedly committed;

(c) whether it is likely that the new evidence would have been adduced in the earlier proceedings against the acquitted person but for a failure by an officer or by a prosecutor to act with due diligence or expedition;

whether, since those proceedings . . . any officer or prosecutor has failed to act with due diligence or expedition.

(Criminal Justice Act 2003, s 79(2))

These are demanding criteria (*G(G) and B(S)* [2009] EWCA Crim 1207). Nevertheless, in September 2006, William Dunlop pleaded guilty to a murder committed in 1989 for which he had been acquitted in 1991. Two convictions in 2000 for perjury, relating to evidence that he had given at trial in 1991, provided the new and compelling evidence that sealed his fate. More recently, in May 2009, Mario Celaire, a Maidstone United footballer who had originally been acquitted of the homicide of a former girlfriend in 2002, was convicted of her manslaughter following a confession made to a later victim. The most celebrated example of resort to these provisions is *Dobson* [2011] 1 WLR 3230, in which, upon consideration of new forensic evidence, it was decided that two co-defendants, one of whom had already been acquitted of the offence in 1996 having been privately prosecuted at the Old Bailey by the victim's parents, might be prosecuted afresh for the murder of Stephen Lawrence.

Defence evidence of previous acquittals

1.42 The retreat of the double jeopardy principle is also evident in criminal case law. Sometimes, an accused will wish to adduce evidence of a previous acquittal as part of his case. At one time, there were suggestions that such evidence could operate as conclusive evidence of the defendant's innocence, for all purposes. By way of example, in *Hay* (1983) 77 Cr App R 70, H had confessed in writing to two unconnected offences: arson and burglary. H was tried separately on each count. At his first trial for arson, H's confession was admitted in evidence, but all references to the burglary were edited out. H adduced evidence of alibi and also claimed that the police had fabricated his statement. He was acquitted of the arson. Having subsequently been convicted of burglary, it was held that H had been wrongly prevented by the trial judge from introducing into evidence his entire confessional statement and the fact of his previous acquittal. As O'Connor LJ observed:

The jury ought to have been told of the acquittal and directed that it was conclusive evidence *that the appellant was not guilty of arson, and that his confession to that offence was untrue. The jury should have been directed that in deciding the contest between the*

> *appellant and the police officers as to the part of the statement referring to the burglary, they should keep in mind that the first part must be regarded as untrue.*
>
> (*Hay* (1983) 77 Cr App R 70, 75)

The notion that a previous acquittal might constitute 'conclusive evidence' of innocence was reinforced by the famous declaration of Lord Macdermott in *Sambasivam v Public Prosecutor, Federation of Malaya* [1950] AC 458, 479, that:

> *The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that must be added that* the verdict is binding and conclusive *in all subsequent proceedings between the parties to the adjudication.*

1.43 The House of Lords' decision in *Z* [2000] 2 AC 483, however, has since dispatched the latter assertion in relation to acquittal evidence adduced by the prosecution. The reason for this is that Lord Macdermott's proposition confuses the rule against double jeopardy (that is, the foundational principle that a defendant ought not to be put more than once at risk of conviction for the same offence) with the separate question of the admissibility and treatment of evidence, which was relevant to a charge of which an accused has been acquitted and which also has relevance to another charge for which the accused is subsequently being tried (see paras **7.34–7.38**). Does similar reasoning apply to acquittal evidence adduced by the defence? The Court of Appeal considered this question in *Terry* [2005] 3 WLR 379.

1.44 In *Terry*, T appealed against conviction on assorted counts of burglary, handling, and theft. At trial, T had been formally acquitted on four charges because, in the absence of other evidence confirming his presence at the relevance location, a voice recognition expert was not prepared to identify T's voice with certainty as the one that she had heard on certain police audio recordings. On appeal, the question was whether the trial judge had been correct to refuse to direct the jury that these four acquittals had to be employed as conclusive evidence that T was not in the relevant spot at the operative time. Auld LJ was visibly unimpressed with the argument that an acquittal amounted to a declaration of positive innocence. The preferred general principle was to be derived from Lord Lowry's opinion in *Hui Chi-Ming* [1992] 1 AC 34 that 'some exceptional feature is needed before it will be considered relevant (and therefore admissible) to give evidence of what happened in earlier cases arising out of the same transaction'. In most cases, therefore, 'the verdict reached by a different jury (whether on the same or different evidence) in the earlier trial was irrelevant and amounted to no more than evidence of the opinion of that jury'. Auld LJ considered that the expression 'conclusive evidence' in O'Connor LJ's judgment in *Hay* could no longer stand (*Terry* [2005] 3 WLR 379, [15]). Three principal points can be made.

- *First*, as in the case of acquittal evidence adduced by the Crown following *Z* [2000] 2 AC 483 (see para **7.35**), 'an acquittal is not conclusive evidence of innocence unless by that word it is meant "not guilty in law of the alleged offence to which it relates"; nor does it mean that all relevant issues have been resolved in favour of a defendant' (at [16]).
- *Secondly*, because the reasoning of the House of Lords in *Z* is equally applicable to acquittal evidence adduced by the defence, it is important to distinguish the double jeopardy rule from the issue of the admissibility of evidence of facts alleged in respect of another charge, notwithstanding that that charge resulted in an acquittal (at [18]): 'Finality of a verdict of acquittal does not necessarily prevent the institution of proceedings or the tender of evidence, which

might have the incidental effect of casting doubt upon, or even demonstrating the error of, an earlier decision.'

- *Thirdly*, the issue of fairness needs to be considered too. As Lord Hobhouse stressed:

> *Fairness requires that the jury hear all relevant evidence … Any prejudice to the defendant arising from having to deal a second time with evidence proving facts which were in issue at an earlier trial is simply another factor to be put into the balance. The fact that the previous trial ended in an acquittal is a relevant factor in striking this balance but it is no more than that.*
>
> (*Z* [2000] 2 AC 483, 510)

Plainly, it would be wrong to compel a jury to reach a conclusion that did not accord with the merits of the evidence. In *Terry*, it would have made no sense had the judge been obliged to direct the jury that T could not have been at the relevant location when the incriminating statements were made simply because there was no evidence other than that of the voice recognition expert directly locating him there at those times. It would also have been unfair had T been allowed to suggest to the jury the conclusiveness of his innocence on the counts on which he had been acquitted because of the expert's unsupported evidence on those charges, so as to unseat her supported evidence on the remaining charges.

Convictions of non-defendants as evidence of commission of offences: Police and Criminal Evidence Act 1984, s 74

1.45 ***Demise of the rule in* Hollington v Hawthorn** The so-called rule in *Hollington v Hewthorn* [1943] KB 587 used to hold that a conviction in former proceedings was inadmissible as proof of guilt in subsequent criminal proceedings. This gave rise to the absurd situation that if D was charged with handing stolen goods, proof that X had been convicted of the theft of those goods was not admissible to show that the goods were in fact stolen goods; this had to be proven afresh at the subsequent handling trial. To remedy this situation, Parliament passed PACE, s 74(1). That section (as amended) provides:

> *(1) In any proceedings the fact that a person other than the accused has been convicted of an offence by or before any court in the United Kingdom … shall be admissible in evidence for the purpose of proving that that person committed the offence, where evidence of his having done so is admissible, whether or not any other evidence of his having committed that offence is given.*

1.46 Section 74 successfully reversed the rule in *Hollington v Hewthorn* and, to consider the handling example, the Crown can now introduce into evidence X's conviction for theft of the goods and, under the terms of s 74(2), at D's trial for handling, X 'shall be taken to have committed that offence unless the contrary is proved (by D)'. Moreover, s 75 renders admissible:

> *. . . without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based—*
>
> *(a) the contents of any document which is admissible as evidence of the conviction; and*
>
> *(b) the contents of the information, complaint, indictment or charge-sheet on which the person in question was convicted.*

This legislation greatly eases the Crown's task, in particular because s 74(2) reverses the burden of proof, providing:

> *In any proceedings in which by virtue of this section a person other than the accused is proved to have been convicted of an offence … he shall be taken to have committed that offence unless the contrary is proved.*

1.47 ***Section 74 and evidence of non-defendants' bad character*** In the case of non-defendants, however, because it constitutes proof of 'bad character', evidence will be admissible under s 74 only if specifically sanctioned by a statute or, more generally, if it is admissible under the restrictive terms of s 100 of the Criminal Justice Act 2003. In essence, that will mean that, in the absence of the agreement of all of the parties to the proceedings, a non-defendant's convictions must either constitute 'important explanatory evidence' within the meaning of the 2003 Act or must have substantial probative value in relation to a matter that is in issue in the proceedings and is of substantial importance in the context of the case as a whole, as required by s 100(1). In the former case, this will signify that, without the evidence, the court or jury would find it impossible or difficult to understand other evidence in the case properly and its value for understanding the case as a whole is substantial. In the latter case, s 100 lays down a number of factors restricting the admissibility of such evidence (see paras **4.24–4.43**).

1.48 ***Scope of PACE, s 74*** Soon after its enactment, it became apparent that, owing to the inclusion of the words (now repealed) 'relevant to *any* issue in those proceedings' (emphasis added), s 74 was of much wider significance than only cases of handling—which were the only cases to which government ministers and members of Parliament referred during the Bill's original passage through Parliament. In *Robertson* (1987) 85 Cr App R 304, 311, Lord Lane CJ noted that 'the word "issue" … is apt to cover not only an issue which is an essential ingredient in the offence charged … but also less fundamental issues, for instance evidential issues arising during the course of the proceedings'. It is essential, nevertheless, that the evidence of non-defendants' convictions is actually relevant to an issue in the case. In *Downer* [2009] EWCA Crim 1361, for example, D was charged with aggravated burglary on the basis that, in company with others, he was already armed when he entered the relevant premises. His co-accuseds' guilty pleas, founded on their having acquired the weapons inside the premises, were therefore of no probative value and ought not to have been admitted in evidence against D.

1.49 Although the wording of PACE, s 74, is now different and s 100 of the 2003 Act will additionally control the admissibility of such evidence, it is plain that s 74 operates in many circumstances to permit the admission of evidence of a non-defendant's conviction without the need to call the non-defendant as a witness. Let us consider a pair of cases decided under the old formulation of s 74. In *Gummerson and Steadman* [1999] Crim LR 680, four co-accused were charged jointly with robbery and grievous bodily harm. The Crown case rested to a significant degree on voice identification evidence. One of the four defendants, D1, had pleaded guilty, but the others denied guilt and contested the witness's ability to recognise them by their voices. The judge was held to have correctly admitted in evidence D1's conviction, because it was relevant to an issue in the case—namely, the rebuttal of the other co-defendants' contention that the witness could not identify anyone by voice alone. Provided that the jury is told that (in this case) D1's conviction has been admitted solely for this restricted purpose, it is unobjectionable that s 74 now allows for the admission of previous convictions of third parties in a wide variety of contexts. This evidence would, in all likelihood, still be admissible today under s 100 as evidence having substantial probative value in relation to a matter that is in issue in the

proceedings and which is of substantial importance in the context of the case as a whole (s 100(1)(b)). Similarly, the case of *Dixon* (2000) 164 JP 721, in which D had been jointly charged along with two other parties, J and C, on counts of attempted burglary, would almost certainly produce the same result under the new law. The police claimed to have seen three people, including D, near a door that someone had tried to kick open. J and C pleaded guilty. It was D's contention that, throughout the attempted burglary, she had been in the company of J and that they had been nowhere near the relevant door. It was held that the trial judge had been perfectly entitled to allow the prosecution to prove J's conviction because, if accepted at face value, it demonstrated that D's account of what had happened was untrue.

1.50 ***Potential for unfairness*** In *Dixon*, in the course of his judgment, Mantell LJ remarked that courts have indicated many times before that 'the discretion to allow in evidence of this sort should be used sparingly'. To put it more accurately, it used to be that only on rare occasions would the courts not exercise discretion under PACE, s 78 (see paras **1.60–1.63**) to exclude s 74 conviction evidence on account of the unfairness that it is prone to engender. The fact is that the use to which the Crown seeks to put s 74 is not always unobjectionable. Most frequently, a problem arises in cases in which the prosecution is alleging a conspiracy. In *Robertson*, the Court of Appeal pondered the difficulties. R was charged in two counts with conspiring with P and L to burgle premises. P and L entered pleas of guilty to sixteen counts of burglary. At R's trial on the two counts of conspiracy, evidence of the guilty pleas of P and L was admitted because it tended to establish the existence of a conspiracy to burgle. Provided that the existence of a conspiracy can be kept distinct from the question of whether (in this case) R was a party to that conspiracy, the admission of this evidence is unobjectionable. In *Robertson* itself, Lord Lane CJ held that evidence of the guilty pleas had been properly admitted, because there was no danger that the jury would conclude from P's and L's confessions that they had committed the burglaries and that R was therefore a party to the conspiracy. However, he did warn that, owing to the danger of jurors conflating the two issues in such cases, s 74 should be 'sparingly used' (*Robertson* (1987) 85 Cr App R 304, 312). Farquharson J reinforced this warning in *Curry* [1988] Crim LR 527, stating that 'where the evidence expressly or by necessary inference imports the complicity of the person on trial it should not be used'.

1.51 In *Kempster* [1989] 1 WLR 1125, the Court of Appeal took these counsels of prudence to heart. There was ambivalent evidence connecting K with various robberies and burglaries, and, in particular, only sketchy identification evidence of the four suspects. K's three co-accused entered guilty pleas. Having admitted evidence of these convictions under s 74, the trial judge's summing-up left it open to the jury to use the convictions to assist them generally in determining K's guilt. The Court of Appeal allowed K's appeal on the ground that the judge's failure to consider the adverse effects that admission of this evidence might have exerted on the fairness of the proceedings constituted a material irregularity. In this and in many other cases, the court's discretion to exclude unfair evidence under PACE, s 78, has been stressed. In *O'Connor* (1986) 85 Cr App R 298, for example, in which two accused were jointly indicted of conspiring together, the Court of Appeal deemed it unfair to have admitted evidence of one defendant's guilty plea, because this may have suggested to the jury that the other must therefore also necessarily have been party to that conspiracy. Similarly, in *Clarke*, case no 9803390/W2, 11 February 1999, the guilty plea of one of two co-accused charged with conspiracy to pervert the course of justice was held to have been wrongly admitted: this evidence, by express or necessary inference, imported the complicity of the second defendant and, although technically admissible under the terms of s 74, should have been excluded by the judge under s 78 of PACE.

1.52 There are two reasons for thinking that Lord Lane's warning in *Robertson* offers a wise counsel.

- *First*, as has already been argued, unless the judge can clearly circumscribe the use to which evidence of a third party's convictions is put and there is no serious risk of the jury concluding guilt simply by association, counsels of prudence ought to prevail and evidence of doubtful value ought always to be excluded under s 78. For this reason, it is vital that, in the summing-up, the trial judge identifies the precise relevance of the conviction (see, for example, *Girma* [2009] EWCA Crim 912, *per* Goldring J at [62]).
- *Secondly*, given that s 74(2) reverses the burden of proof and that, in practice, a defendant will often have no opportunity to cross-examine the non-defendant whose conviction is being employed against him, the unfairness that s 74 potentially can occasion is all the more acute.

Consider *Mattison* [1990] Crim LR 117. M appealed successfully against his conviction for gross indecency with D. Having previously pleaded guilty, D's conviction was led at M's trial, supposedly to give the jury the background to the case. As Saville J observed, the problem here is that 'if A commits an act of gross indecency with B, it is a strong inference that the converse is also true in the absence of special circumstances to indicate otherwise'. The unfairness is obvious. The simple fact is that s 74 can all too easily jeopardise a defendant's entitlement to a fair trial.

1.53 ***Reversal of the burden of proof in cases in which defendant's convictions are adduced: s 74(3)***
The position in regard to non-defendants' convictions may be contrasted with cases in which the defendant's convictions are proved. In such cases, s 74(3) once again reverses the burden of proof, providing:

> *[W]here evidence is admissible of the fact that the accused has committed an offence, … if the accused is proved to have been convicted of the offence … he shall be taken to have committed the offence unless the contrary is proved.*

In such cases, the Court of Appeal rejects the contention that such evidence should normally be excluded. In *Clift and Harrison* [2013] 1 Cr App R 15, evidence was admitted of two defendants' earlier convictions for wounding with intent to inflict grievous bodily harm (GBH), and for GBH at their respective trials for murder when their victims later died. C and H each appealed against their convictions for murder, vainly arguing that their previous convictions ought not to have been admitted, principally because the effect of reversal of the burden of proof under s 74(3) was to render the defence's task at the murder trials impossible. As Lord Judge CJ pointed out, although s 74(3) does permit the 'presumption … that the earlier conviction truthfully reflects the fact that the defendant has committed the offence' (*C* [2010] EWCA Crim 2971, [9]):

(i) the defendant is still entitled to advance the very defence that was disbelieved at his earlier trial; and

(ii) PACE, s 78, allows the judge to exclude the evidence if it would be unfair to admit it.

Fairness, the Court added, is not the exclusive preserve of the defence:

> *Without seeking to curtail the valuable judicial weapon against unfairness in the criminal justice system embodied in and exemplified by s.78, it would be something of a novel*

> *proposition for the exercise of this discretion to enable the court to exclude evidence when its admissibility stems from the enactment of a statutory provision deliberately designed to permit the evidence to be adduced. Accordingly, the evidence of the earlier convictions cannot be excluded on the basis of some nebulous sense of unfairness. If s 78 were used to circumvent a clear statutory provision for no better reason than judicial or academic distaste for it, the discretion would be improperly exercised.*
>
> (*C* [2010] EWCA Crim 2971, [36])

Prejudicial evidence, unfairly obtained evidence, and suspect witnesses

Judicial discretion to exclude relevant evidence

1.54 The mere fact that evidence is relevant and does not fall foul of any of the great exclusionary rules does not guarantee its admissibility. In both criminal and civil cases, the court possesses residual discretion to exclude otherwise admissible evidence. In each category of case, exercise of this discretion is intended to reinforce overriding notions of fairness. However, because completely distinct factors govern these respective notions of fairness, judicial discretion to exclude evidence in criminal and civil cases will be considered separately.

Discretion to exclude evidence in criminal cases

Common law discretion

1.55 At common law, it has long been recognised that trial judges enjoy a general discretion to order the exclusion of technically admissible evidence if they feel that its prejudicial effect exceeds its probative value (see *Christie* [1914] AC 545). Indeed, in *Sang* [1980] AC 402, the House of Lords unanimously held that, in order to fulfil the overarching duty to ensure that an accused receives a fair trial, a trial judge may refuse to admit technically relevant evidence. This discretion, which applies in virtually all situations, prevents the tribunal of fact from hearing evidence either that is so prejudicial that it could cloud the tribunal's judgment or which might deceive the tribunal into attributing to the evidence more weight than it merits. By way of example, in cases in which the prosecution has succeeded in showing beyond reasonable doubt at a trial within a trial that a confession has not been extracted from a defendant by illicit means, contrary to PACE, s 76, the judge may still decide that the prejudicial weight of the evidence exceeds its probative value and may therefore exclude that technically admissible confessional evidence.

1.56 A court would similarly be within its rights to exclude gratuitously gruesome or distasteful evidence on the ground of its extreme prejudicial effect if, in the words of one American court, 'the minute peg of relevance' is 'entirely obscured by the quantity of dirty linen hung upon it' (*State v Bucanis* 138 A 3d 739 (NJ 1958). (See, for example, Pill LJ's judgment in *Shankly* [2004] EWCA Crim 1224, [20]ff.) One type of case in which, with justification, there is concern that the judgment of jurors might be skewed were the full horror of the evidence to be revealed to

them is the possession of extreme pornographic images in child sexual abuse cases. As Hughes LJ said in *D, P and U* (2012) 176 JP 11, [11]:

> *It is unnecessary that the jury should see the photographs and it would carry the risk, if they did, that some at least might find it difficult to avoid the effects of distaste. … [I]n most cases a suitable description of the general contents of the photographs which had in fact been found can be agreed and presented to the jury. Care should be taken that that description should be as neutral and dispassionate as possible.*

On occasion, this has been done employing the COPINE scale, a typology initially developed by the Combating Paedophile Information Networks in Europe (COPINE) project for therapeutic purposes, which splits child abuse images into ten categories of increasing severity. The Court of Appeal, however, expressed a preference that 'what the jury is told by agreement [should] be linked to the photographs actually found, rather than to a more generalised description of categories'.

1.57 Prior to the enactment of PACE, it was unclear whether, under the common law discretion, a judge was entitled to exclude evidence on the ground that it had been obtained by unfair means. While some Court of Appeal dicta did suggest that this was permissible if prosecution evidence had been obtained by means of a trick, by misleading the defendant, or by employing oppressive or unfair means (such as in *Jeffrey v Black* [1978] QB 490), in *Sang* [1980] AC 402 the House of Lords gave less-than-clear guidance on whether the common law discretion extends to such situations. The advent of PACE, s 78, however, has thankfully disposed of much of this controversy.

1.58 Although, in practice, almost entirely superseded by the statutory discretion now conferred on courts by s 78, s 82(3) of PACE expressly preserves the common law discretion. The relationship between these two discretions to exclude evidence that the court considers prejudicial is somewhat mysterious. However, the courts do still employ their common law discretion from time to time. Ognall J, for instance, relied on common law discretion as well as PACE, s 78, to exclude evidence obtained by an undercover policewoman in provocative circumstances at the trial of Colin Stagg. 'A careful appraisal of the material', the judge observed at the conclusion of the pretrial submissions, 'demonstrates a skilful and sustained enterprise to manipulate the accused, sometimes subtly, sometimes blatantly' (*The Times*, 15 September 1994, p 1). (See Stagg and Kessler, *Who Really Killed Rachel?*, 1999, London, ch 14, for the full text of Ognall J's impeccable ruling.) The House of Lords, too, developed a taste for referring to both forms of discretion in its judgments in leading cases such as *H* [1995] 2 AC 596, *Z* [2000] 2 AC 483, and *Hasan* [2005] UKHL 22.

1.59 Although it raises complex issues, one further aspect of the common law discretion will be briefly mentioned. It is sometimes asked whether or not, in trials involving co-defendants, a judge possesses discretion at common law to exclude defence evidence. Evans LJ canvassed this question in *Thompson, Sinclair and Maver* [1995] 2 Cr App R 589, arguing that a discretion that permitted the judge to disallow evidence that D1 seeks to adduce against D2, where its probative value is slight but its likely prejudicial effect to D2 is substantial, might prove a useful alternative to the more costly existing option of ordering separate trials. Although he admitted that there was no authority to support its existence, Evans LJ said that he would not like to be thought of as suggesting that such discretion could never exist. Two comments might be made.

- *First*, given that the statutory discretion to exclude prejudicial evidence conferred by s 78 of PACE (see paras **1.60–1.63**) relates only to evidence upon which the prosecution intends to rely, any discretion to exclude defence evidence must found in common law.
- *Secondly*, the problem with such a discretion would be that its exercise would be likely to convey the impression that the judge was taking sides.

It is a serious matter to exclude evidence that D1 wishes to call. The judicial role is not to hamper and embarrass defendants in the conduct of their defence. By intervening, the judge could convey the appearance of tipping the scales in favour of one of the two co-defendants. Inevitably, in cases in which co-accused are running cut-throat defences, what is of advantage to D2 will be of disadvantage to D1. A discretion to exclude a co-defendant's evidence could create the impression that the judge, no matter how well intentioned, is stepping into the arena. This is undesirable (cf *Lawson* [2007] 1 WLR 1191, *per* Hughes LJ at [31]).

Police and Criminal Evidence Act 1984, s 78

1.60 Section 78 of PACE now provides:

> *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.*

This provision, which confers upon the judge a broader discretion to exclude prosecution evidence than previously existed at common law (*Cooke* [1995] Crim LR 497), is often invoked. It is commonly used in cases in which evidence has been obtained in breach of the PACE Codes of Practice, which notably regulate the way in which the police question suspects, conduct identification parades, and so on. If the court concludes that breaches of these rules have been 'significant and substantial' (*Keenan* [1990] 2 QB 54)—and this does not necessarily mean that there must have been police impropriety—then it will exclude the evidence if it is considers that its admission would reflect adversely on the fairness of the proceedings.

1.61 What is meant by 'fairness' in this context? Traditionally, it signifies fairness to the accused, which normally means that, in deciding whether or not to exclude particular evidence, the court primarily will consider whether serious procedural breaches of rule have occurred that deprive an accused of important rights (as in *Nathaniel* (1995) 159 JP 419, in which DNA evidence obtained in breach of PACE Code C was excluded by Lord Taylor CJ). Alternatively, however, 'the fairness of the proceedings' is stated to mean 'both fairness to the accused person and fairness to the public good, as represented by the Crown' (as in *Cooke* [1995] Crim LR 497 *per* Glidewell LJ, in which DNA evidence obtained in breach of Code C was admitted primarily on grounds of its inherent reliability). When taken in this wider sense, in exercising its discretion the court naturally inclines to treat the reliability of the evidence as the determining factor. The latter interpretation of 'fairness' received a fillip from the Criminal Procedure Rules, the overriding objective of which—that is, of dealing with cases justly—imposes the judicial requirement of 'dealing with the prosecution and the defence fairly' (Pt 1.1(2)(b)).

1.62 There is strong reason to think that, unlike its common law counterpart, the statutory discretion permits a court to exclude improperly obtained evidence. Not only does s 78 expressly invite the court to consider 'the circumstances in which the evidence was obtained' when assessing whether the evidence would reflect adversely on the fairness of the proceedings, but such an approach is also buttressed by the Human Rights Act 1998. Case law from the European Court of Human Rights (ECtHR) holds that the right to a fair trial, guaranteed by Art 6 of the European Convention on Human Rights, extends not merely to the trial itself, but also to the pretrial phase of proceedings (see, for example, *Edwards v UK* (1992) 15 EHRR 417). Since s 3 of the 1998 Act requires courts to interpret English legislation so far as possible in a manner compatible with the Convention, this means that, in determining whether evidence ought to be excluded on grounds of unfairness, courts will have to take into account the fact that it may have been obtained in breach of the accused's Convention rights.

This aspect of the judicial discretion to exclude admissible evidence was considered by the Court of Appeal in *Shannon* [2001] 1 WLR 51, a case involving entrapment. S, a television actor, appealed against a conviction for drug-dealing, on the ground that he had been induced to commit the offence by an agent provocateur, an undercover reporter from the *News of the World*, who had lured him to the Savoy Hotel by posing as an Arab sheikh with a craving for drugs. (This intrepid reporter also succeeded in entrapping the Earl of Hardwicke with the same ploy and with identical legal consequences—*Hardwicke* [2000] All ER (D) 1776—but he met his nemesis in March 2006, in the person of George Galloway MP.) The Court of Appeal reaffirmed that there is no general defence of entrapment in English law. Nevertheless, Potter LJ did acknowledge that, in cases in which a party applies to have evidence excluded under s 78 on the ground that he was entrapped, although the principal focus of the court will be the procedural fairness of the proceedings, the opportunity that the defendant has had to deal with the prosecution evidence, and the reliability of the Crown evidence, the court will also take into account the facts and circumstances of the entrapment. Indeed, in an appropriate case, Potter LJ said, such facts and circumstances might prove decisive. Thus if there were good reason to doubt the credibility of the agent provocateur and these doubts were not susceptible to being properly or fairly resolved in the course of the proceedings from available admissible, untainted evidence, the judge would in likelihood feel impelled to exclude the agent's evidence. Merely feeling that it was unfair that the evidence had been obtained by the particular method adopted by the investigators, however, would not be sufficient on its own to justify exclusion under s 78.

1.63 In the context of s 78, the term 'discretion' bears a distinctive meaning. As the Court of Appeal observed in *Chalkley* [1998] 2 Cr App R 79, 105, once a judge determines that admission of an item of evidence would reflect adversely on the fairness of proceedings, the evidence must be excluded. It is 'discretion', but in a peculiar sense.

Abuse of process and the discretion to exclude evidence

1.64 Alongside the discretion to exclude otherwise admissible evidence, a court also has the power to stay proceedings on the ground of abuse of process. Abuse of process arises where the circumstances in which a prosecution has come to be brought are such as to amount to what Lord Steyn in *Latif* [1996] 1 WLR 104, 112 designated 'an affront to the public conscience', or what Lord Bingham in *Nottingham City Council v Amin* [2000] 1 WLR 1071, 1076 called matters 'deeply offensive to ordinary notions of fairness'.

1.65 As Sir John Dyson JSC pointed out in *Maxwell* [2011] 1 WLR 1837, [13]:

> *It is well established that the court has the power to stay proceedings in two categories of case, namely*
>
> *(i) where it will be impossible to give the accused a fair trial, and*
>
> *(ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case.*

In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without further ado. Fairness to the accused, then, is the focus in this first category of cases. Although the courts resist this argument, it is quite frequently contended that pretrial publicity would render a defendant's fair trial impossible (see, for example, *B* [2001] HRLR 1; *Abu Hamza* [2007] 1 Cr App r 27; *Ali (Ahmed)* [2011] 2 Cr App R 22). In the second category of case, however, the court is concerned to protect the integrity of the criminal justice system. Here, a stay will be granted only where the court, having balanced the competing interests, concludes that in all of the circumstances a trial will either 'offend the court's sense of justice and propriety' (*Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42 *per* Lord Lowry at 74G) or will 'undermine public confidence in the criminal justice system and bring it into disrepute' (*Latif* [1996] 1 WLR 104 *per* Lord Steyn at 112F). The second category is not founded on the imperative of avoiding unfairness to the accused; what counts is whether the court's sense of justice and propriety is offended or public confidence in the criminal justice system would be undermined by the trial. The two categories are distinct (*Warren v Att Gen for Jersey* [2012] AC 22, *per* Lord Dyson JSC [35] at [35]).

1.66 ***Cases in which the court's sense of justice and propriety is offended*** In regard to the second category, it is not sufficient to show that *but for* the misconduct no trial would have taken place. In *Maxwell*, therefore, the majority of the Supreme Court held that the fact that the confessions on which the prosecution would rely heavily at the retrial would not have been made but for extreme prosecutorial misconduct—the misconduct included financial benefits, as well as visits to brothels and permission to consume drugs in police company—was not determinative of the question of whether there should be a retrial; it was no more than a relevant factor.

1.67 This approach was subsequently applied in *Warren v Att Gen for Jersey* [2012] 1 AC 22. In *Warren*, evidence obtained from an unauthorised listening device as a suspect passed through a number of foreign countries was held to have been correctly admitted at the defendants' trial for drug-smuggling. The police's investigative strategy was agreed to have been calculated to ignore the laws of Jersey and other foreign states, to mislead the Attorney General, the Crown Advocate, and the Chief of Jersey Police, and to deceive foreign police authorities (*per* Lord Hope at [61]). But for the unlawful and misleading misconduct of the Jersey police in installing and using an audio device, the Crown could not have succeeded and there would have been no trial unless the police had been able to obtain the necessary evidence by other means. Whilst the police had acted quite improperly in *Warren*, there were countervailing circumstances: the charge was very serious and was being laid against a gang, whose ringleader, 'Cocky' Warren' (described in the *Daily Mail* as 'Britain's most successful gangster'), had just completed a sixteen-year sentence in Holland for drug-smuggling and manslaughter. No attempt had been made to deceive the Jersey court as to the circumstances in which the evidence had been obtained; the police misconduct had been fuelled by the urgency of the case—it had been a 'fast-moving situation', and the police were said, at [50], to

be 'dealing with experienced and sophisticated criminals, who could be expected to second-guess the police tactics. It was in these circumstances that the police cut corners and acted unlawfully'. Whilst the majority of the Board upheld the Jersey court's decision to admit the evidence, Lord Hope, in a concurring judgment at [63], took a sterner line, pointing out that whilst it was true that *Warren* did not involve evidence procured by torture, coercion, procurement, or entrapment, 'this was not just a minor infringement of the law, resorted to in a situation of acute emergency. It was a sustained, deliberate and, one might say, cynical act of law-breaking'. Lords Hope, Rodger, and Kerr also made clear that the Board's decision to uphold the Jersey court's ruling was not to be taken as an indication that a future court would do so again in like circumstances.

1.68 ***Entrapment*** Entrapment exemplifies one important situation in which abuse of process may come into play. Although the concept remains somewhat ill-defined, entrapment involves agents of the state luring or enticing persons to commit offences, or otherwise instigating crime. As Lord Nicholls explained in *Looseley* [2001] 1 WLR 2060, [11], a case in which the House of Lords helpfully reviewed the law governing abuse of process and the relationship between this concept and the discretion to exclude evidence, '[i]t is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so'. Therefore, if a court finds that there has been an abuse of process, rather than simply excluding individual items of otherwise admissible evidence, it will actually stay the entire proceedings against the defendant. This is because, in cases in which a defendant complains that he has been lured into committing an offence, he is not arguing only that particular evidence ought not to be admitted at trial, but rather that he should not be tried at all. 'Different tests are applicable to these two decisions', declared Lord Nicholls (at [18]). In the majority of cases in which entrapment is alleged, the appropriate course will be for the accused to apply for a stay of proceedings on the ground of abuse of process rather than merely to seek the exclusion of certain evidence by exercise of the judicial discretion conferred by PACE, s 78. However, as Lord Hutton explained:

> *If [the defendant's] application is refused, it will still be open to him to seek to exclude the evidence under s 78 … But … if a later application to exclude evidence under s 78 is, in substance, an application to stay on the ground of entrapment, a court should apply the principles applicable to the grant of a stay.*
>
> (*Looseley* [2001] 1 WLR 2060, [104])

1.69 The House of Lords, in *Looseley*, additionally measured the question of entrapment against the yardstick of European human rights law. Notably, the House referred to the leading ECtHR decision of *Teixeira de Castro v Portugal* (1998) 28 EHRR 101. Apart from repeating its oft-heard message that rules regulating the admissibility of evidence are essentially matters for individual national jurisdictions, therefore falling within the margin of appreciation (*Schenck v Switzerland* (1988) 13 EHRR 242), the ECtHR in *Teixeira de Castro* drew a broad distinction between the covert investigation of crime and the positive instigation of offences. The former is permissible; the latter cannot be countenanced. Therefore, as Lord Hoffmann explained in *Looseley*, the ECtHR concluded that the evidence of two police officers who had not merely operated undercover, but had actually instigated serious crime, without following the procedure, customary in Portugal, of conducting their investigations under judicial or police supervision, ought not to have been admitted because it violated de Castro's right to a fair trial.

1.70 From this, it will be seen that the mere fact that evidence has been obtained by what is sometimes termed 'proactive policing' will not automatically mean that, under the European Convention, evidence ought to be excluded or proceedings stayed. Broadly speaking, the appropriate test for entrapment is whether or not the police's law enforcement methods were part of a bona fide investigation, as opposed to being merely a means of 'preying on the weakness of human nature to create crime for an improper purpose' (*per* Lord Hoffmann at [58]). This approach appears to be consistent with ECtHR rulings in other domains. If one takes the broadly analogous case of illegally obtained evidence in *Khan v UK* (2000) 8 BHRC 310, it is notable that the Strasbourg Court held that the fact that a listening device had been unlawfully applied to the wall of a suspect's house in breach of Art 8, violating K's right of privacy, did not of itself render K's trial unfair under Art 6. As the House of Lords later explained in *P* [2001] 2 WLR 463, 475,

> *[T]he direct operation of arts 8 [right of privacy] and 6 [fair trial] does not … alter the vital role of s 78 as the means by which questions of the use of evidence obtained in breach of art 8 are to be resolved at a criminal trial. The criterion to be applied is the criterion of fairness in art 6 which is likewise the criterion to be applied by the judge under s 78.*

1.71 Applying these principles, in *Rosenberg* [2006] EWCA Crim 6, in which R faced charges involving Class A drugs, a trial judge was held to have properly admitted film taken by a surveillance camera 'of the most ostentatious type' mounted on top of a pole on R's neighbours' property. The camera had been directed into R's home. The police were aware of its existence and had even warned the neighbours that their actions amounted to a violation of R's right to privacy. Having reviewed and balanced the circumstances of the case, which 'included intrusion, but intrusion which was openly practiced, the complicity of the police in the surveillance, and the seriousness of the crime involved', Pill LJ concluded that admission of the evidence did not render R's trial unfair. Similarly, in *Harmes and Crane* [2006] EWCA Crim 928, H and C appealed against a trial judge's decision not to stay proceedings brought against them for conspiracy to supply cocaine. They claimed that they had been entrapped by undercover police officers. The police had initially supplied the accused with soft drinks in exchange for an ounce of cocaine. Following this modest transaction, H boasted of his ability to import cocaine in bulk and the undercover officers ordered a large quantity. The Court accepted that the police had committed criminal acts, notably by suggesting that they be supplied with cocaine in exchange for soft drinks, but considered that this was not so seriously improper as to require the Court to intervene to stay the prosecution for conspiracy. As the House had held in *Looseley*, 'undercover officers, seeking to expose drug dealers, must show enthusiasm and a degree of persistence to provide protection for their undercover activities':

> *[T]he conduct of the police officers was not exceptional and did not go beyond that which was necessary to show their willingness to deal in drugs. An exchange of a small amount of cocaine triggered the revelation that these defendants were not only happy to import very substantial quantities of cocaine but had the ability to do so. The officers' activities pale into insignificance in comparison to the offers made by H to import, on their behalf, large amounts of cocaine of a high value.*
>
> (*Harmes and Crane* [2006] EWCA Crim 928, per Moses LJ at [52])

More recently, in *Moore and Burrows* [2013] EWCA Crim 85, Rix LJ adopted, and applied (at [68]–[74]), Ormerod's analysis in 'Recent Developments in Entrapment' [2006] Covert

Policing Review 65, which identified five principal factors that may justify a proactive police intervention:

(i) An initial reasonable suspicion of criminal activity. This provides a legitimate trigger for the police operation. More particularly, it is not for the police to engage in 'random virtue testing' or to entice people into committing crimes that otherwise they would not have committed;

(ii) A legitimate control mechanism in the form of proper authorisation and supervision of the police operation;

(iii) The demonstrated necessity and proportionality of the means employed to police particular types of offence;

(iv) The concepts of the 'unexceptional opportunity' and causation; and

(v) The authentication of the evidence.

1.72 Some indication of what will qualify as entrapment can be gleaned from the House of Lords' view of the Court of Appeal's decision in *Att Gen's Reference (No 3 of 2000)* [2001] 1 WLR 2060. In this case, the Court of Appeal had determined that the trial judge had wrongly stayed proceedings against a drug dealer with a previous record of dealing in soft drugs, who had twice obtained and supplied heroin at the insistent request of undercover police officers. The Court emphasised that, when deciding whether an abuse of process has occurred, the judge must bear in mind that there exists a spectrum of possibilities: at one end, there is the defendant who has simply been offered the market price for drugs—who can hardly argue that he has been entrapped; towards the other extreme, a judge might view in a different light the perspective of police officers dangling large sums of cash under the nose of someone in urgent need of money, thereby persuading that person to do something that he might not otherwise have done. *Texeira de Castro*, it was urged, has to be considered in the context of its particular facts and of Portuguese criminal procedure. In *Att Gen's Reference (No 3 of 2000)*, the Court of Appeal had concluded that the police had done no more than give the accused an opportunity to breach the law, of which he had freely availed himself. In the view of the House of Lords, however, the trial judge had been entitled to stay proceedings in that case: the accused had never before dealt in heroin and he had been induced to procure heroin by the prospect of a profitable trade in smuggled cigarettes—something not normally associated with the commission of this offence. The judge could therefore justifiably take the view that the police had caused the accused to commit an offence that he would not otherwise have committed (cf *Looseley per* Lords Hoffmann and Hutton at [81] and [116]). Similarly, in *Moon* [2004] EWCA Crim 2872, an addict with no previous history of dealing in drugs was approached on four separate occasions by an undercover police officer posing as someone suffering from withdrawal symptoms. The officer eventually pressurised M into acquiring and selling to her some heroin. The Court of Appeal held that the police had caused M to commit the offence rather than simply provided her with an opportunity to act in a way in which she would have acted anyway had the business been proposed to her by another purchaser.

1.73 ***Appeals*** Cases in which s 78 is invoked are distinguishable from abuse-of-process cases in one further important respect. Trial judges' decisions on whether or not particular evidence reflects adversely on the fairness of proceedings under s 78 are largely unreviewable. In essence, an appellate court will intervene only if the trial judge's exercise of discretion can be characterised as *Wednesbury* unreasonable. When it is argued on appeal that proceedings ought to have been stayed as an abuse of process, however, the appellate court will exercise its own judgment as to

whether the prosecution ought to be stayed. It is not simply for the appellate court to review exercise of the trial judge's discretion; its duty is to determine whether the prosecution ought to have been allowed to go ahead at all (*Harmes and Crane* [2006] EWCA Crim 928).

The discretion to exclude evidence in civil cases

1.74 It used to be widely accepted that civil courts do not enjoy discretion to exclude relevant evidence on account of its potential prejudicial effect. Thus it was said that a judge in a civil proceeding could not decline to receive evidence proffered by a party on the ground that it had been obtained unlawfully (*Helliwell v Piggott-Sims* [1980] FSR 356, 357). The Civil Procedure Rules (CPR), however, have altered the position and Pt 32 now expressly provides:

> *(1) The court may control the evidence by giving directions as to—*
>
> *(a) the issues on which it requires evidence;*
>
> *(b) the nature of the evidence which it requires to decide those issues; and*
>
> *(c) the way in which the evidence is to be placed before the court.*
>
> *(2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.*

On the face of it, the new discretion appears to be an unfettered 'case management power designed to allow the court to stop cases getting out of hand and hearings becoming interminable because more and more admissible evidence, especially hearsay evidence, is sought to be adduced' (*Post Office Counters Ltd v Mahida* [2003] EWCA Civ 1583 *per* Hale LJ at [24]). However, as Potter LJ pointed out in *Grobbelaar v Sun Newspapers Ltd* (1999) The Times, 12 August, in exercising this discretion courts must not lose from sight that the stated 'overriding objective' of the CPR is to enable cases to be dealt with justly. This means that, so far as is practicable, courts must ensure that the parties are on an equal footing, that expense is spared, and that cases are handled proportionately to the amount of money involved, their importance, their complexity, and the financial positions of the parties. Courts must also deal with cases expeditiously and fairly, allotting to them an appropriate share of court time (CPR, r 1.1). Clearly, it would not be open to courts to employ their discretion, say, to prevent litigants from putting forward allegations central to their defence, but they can now use Pt 32 to control the manner in which cases are presented—notably preventing prolixity, and the waste of court time and costs (see Lord Woolf's lucid account of the CPR's aims in *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775, especially at 793–4).

1.75 In fact, CPR, Pt 32, can now give rise to complex issues, particularly when a party to civil litigation wishes to introduce evidence obtained by improper means. This is vividly illustrated in Lord Woolf MR's judgment in *Jones v University of Warwick* [2003] 1 WLR 954, especially at [28]–[30]. The defendant employer had been permitted at trial to contest the bona fides of J's claim for damages following an injury suffered at work by adducing in evidence two video recordings, secretly filmed by an enquiry agent who had gained entry to J's home by posing as a market researcher. In the course of reviewing the trial court's decision to receive the tapes, Lord Woolf observed that, in deciding whether or not to admit evidence obtained, in this instance in violation of Art 8 of the Convention (that is, J's right to a private life):

> *The court must try to give effect to what are here … two conflicting public interests. The weight to be attached to each will vary according to the circumstances. The significance*

> *of the evidence will differ as will the gravity of the breach, according to the facts of the particular case. The decision will depend on all the circumstances.*

On the one hand, it would often look ridiculous for a civil court deliberately to close its eyes to relevant evidence:

> *Here, the court cannot ignore the reality of the situation. This is not a case where the conduct of the defendant's insurers is so outrageous that the defence should be struck out. The case, therefore, has to be tried. It would be artificial and undesirable for the actual evidence, which is relevant and admissible, not to be placed before the judge who has the task of trying the case.*

On the other hand, plainly uncomfortable with the idea that a court should, without more ado, receive evidence obtained by questionable or unlawful means, thereby endorsing or even encouraging such underhand tactics, Lord Woolf went on to say that, irrespective of whether the evidence in this case could have been obtained by other means, 'the fact that the insurers may have been motivated by a desire to achieve what they considered would be a just result does not justify either the commission of trespass or the contravention of the claimant's privacy which took place'. On balance, the court nevertheless held the evidence to have been properly admitted. However, Lord Woolf did add that a judge must still consider the impact of his rulings on litigation generally, and, indeed, should mark his disapproval and seek to discourage similar inappropriate conduct in the future. 'Excluding the evidence', Lord Woolf explained, 'is not … the only weapon in the court's armoury. The court has other steps it can take … In particular it can reflect its disapproval in the orders for costs which it makes', for example by declining in its discretion to allow recovery of the costs of the enquiry agent.

The judicial discretion in criminal cases to warn of the dangers of relying on the evidence of suspect witnesses: *Makanjuola* directions and cell confessions

1.76 In a criminal case, even if the judge does not feel it necessary to go so far as to exclude evidence because its admission would reflect adversely on the fairness of the proceedings, an obligation to deliver a warning to the jury may nevertheless arise. Sometimes, a witness may appear unreliable. The witness, for instance, may bear the defendant a grudge or may have admitted to having previously told a pack of lies. Alternatively, the supposed victim of an offence may have made false complaints of a similar type in the past. In such a case, following Lord Taylor CJ's ruling in *Makanjuola* [1995] 1 WLR 1348, the trial judge may be required to deliver to the jury a warning, the intensity of which will vary according to the extent of the risk, cautioning the jury against relying too readily upon the evidence of that suspect witness.

1.77 At one time, the law imposed rigid corroboration rules. In some cases, the law demanded that, in order to secure a conviction, the evidence of a particular class of witness (such as a child giving unsworn evidence) actually had to be corroborated. In other situations, the law merely required the judge to warn the jury to view the evidence of a certain class of witness with caution and to recommend that the jury look for corroboration—that is, other evidence, independent of the suspect witness, confirming the latter's evidence in a material particular. The three classes of witness who fell into this latter category were complainants in sexual cases, accomplices, and children who gave sworn testimony. The corroboration rules attracted widespread

criticism for their artificiality and inflexibility. As Lord Hobhouse has observed in relation to sexual complainants, the rule of practice that formerly obtained 'had led to inappropriate and discriminatory directions being given which confused juries and created unfairness as between the prosecution and the defence and undermined rather than supported the safety of the juries' verdicts' (*Gilbert* [2002] 2 WLR 1498, [14]). The rules of practice were eventually abolished by statute, notably by the Criminal Justice and Public Order Act 1994, s 32(1).

1.78 The result is that, but for a few exceptional legislative provisions, English law today has no general principle that a defendant cannot be convicted on a single piece of uncorroborated evidence. Figuring amongst the best-known exceptions to that principle, however, are the Perjury Act 1911, s 13 (which forbids conviction for perjury offences 'solely upon the evidence of one witness as to the falsity of any statement alleged to be false'—as in *Cooper* (2010) 174 JP 265) and the Road Traffic Regulation Act 1984, s 89 (which prevents a person charged with speeding offences from being 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 the speed limit').

Makanjuola directions

1.79 Although the regimented corroboration requirements may well have been consigned to the past, the Court of Appeal in *Makanjuola* did recognise that trial judges still enjoy discretion whether or not to deliver warnings in a wide range of situations. Lord Taylor CJ, however, made clear that any attempt to reimpose the straitjacket of the old corroboration rules or to resurrect the old categories of suspect witness would be strongly deprecated. Moreover, whenever a question arises at trial as to whether a *Makanjuola* warning is appropriate, it is desirable that the matter first be discussed between judge and counsel in the absence of the jury. Otherwise, the Court of Appeal has left the question very much at large:

> *Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, … the judge may suggest that it may be wise to look for some supporting material before acting on the impugned witness's evidence …. [J]udges are not required to conform to any formula and this court will be slow to interfere with the exercise of discretion by a trial judge.*
>
> (*Makanjuola* [1995] 1 WLR 1348, 1351)

1.80 *Walker* [1996] Crim LR 742 supplies a good example of a case in which a strongly worded warning was warranted. A girl complained to the police that her mother's boyfriend had for two years been having intercourse with the daughter. The daughter later retracted this story, but subsequently retracted her retraction. No reference was made to these circumstances in the judge's summing-up. Not surprisingly, Ebsworth J felt that this situation 'cried out' for application of the *Makanjuola* principles. As Lord Taylor CJ made clear, it is in the discretion of the judge to determine in each individual case whether a warning ought to be given and, if so, how strong that warning should be. The Court of Appeal will interfere with exercise of this discretion only if the judge's decision is wholly unreasonable. Appellate interventions will therefore be rare. In *W (Dennis)* [2002] EWCA Crim 1732, the Court, however, did unusually intervene. W had been convicted of indecent assaults committed on three boys. Although medical evidence had been given by an expert witness called by the Crown, which indicated that W suffered from a medical

condition that probably rendered him physically incapable of engaging in the type of sexual activity described by one of the boys, no warning had been delivered putting the jury on their guard to view this boy's evidence with particular care. Kennedy LJ held that a *Makanjuola* warning ought to have been delivered in these circumstances and quashed the relevant convictions.

'Cell confessions'

1.81 In like manner, a pair of cases before the Privy Council highlights another context in which judicial warnings may be especially desirable: cases involving what are known as 'cell confessions'—that is, admissions that are claimed to have been made by one prisoner to another during their joint detention. In *Pringle v R* [2003] UKPC 9, [31], although the Board declined to set down any fixed rules requiring judges to deliver a particular form of warning in such cases, Lord Hope was anxious that trial judges should be particularly vigilant 'where an untried prisoner claims that a fellow untried prisoner confessed to him that he was guilty of the crime for which he was then being held in custody'. This situation 'raises an acute problem which will always call for special attention in view of the danger that it may lead to a miscarriage of justice'. A prisoner awaiting trial might all too easily have a strong interest of his own to serve in testifying against a defendant.

> *The indications that the evidence may be tainted by an improper motive must be found in the evidence …. Where such indications are present, the judge should draw the jury's attention to these indications and their possible significance. He should then advise them to be cautious before accepting the prisoner's evidence.*
>
> (*Pringle v R* [2003] UKPC 9, [31])

Lord Hope reiterated the points that he had made in *Pringle* with, if anything, greater force in *Benedetto v R* [2003] 1 WLR 1545, especially at [27]–[37]. Similar issues arose in *Stone (Michael)* [2005] EWCA Crim 105, in which S's convictions for murder and attempted murder rested substantially on a cell confession that S was alleged to have made to a drug-addicted prison inmate with whom he had shared a cell. The Court of Appeal repeated that, where there is a cell confession, the judge is 'not trammelled by fixed rules':

> *[T]here will generally be a need for the judge to point out to the jury that such confessions are often easy to concoct and difficult to prove and that experience has shown that prisoners may have many motives to lie. If the prison informant has a significant criminal record or a history of lying then usually the judge should point this out to the jury and explain that it gives rise to a need for great care and why. The trial judge will be best placed to decide the strength of such warnings and the necessary extent of the accompanying analysis. But not every case requires such a warning … If an alleged confession, for whatever reason, would not have been easy to invent, it would be absurd to require the judge to tell the jury that confessions are often easy to concoct.*
>
> (*Stone (Michael)* [2005] EWCA Crim 105, [83]–[84])

Prosecutions brought after substantial delay

1.82 Offences are now regularly prosecuted many years after their commission. Increasingly, stale offences—and, in particular, sexual offences committed many years in the past—are now being pursued. By way of example, in *E* [2012] EWCA Crim 791, charges of sexual abuse of children stretching back up to thirty-six years before trial were successfully brought. Defendants prosecuted after the elapse of many years will invariably argue that they can no longer receive

a fair trial. How ought the courts to deal with such cases? The Court of Appeal's judgment in *Attorney-General's Reference (No 1) of 1990* [1992] QB 630, having reviewed earlier case law, set out the principles to be followed in such cases.

- A stay for delay was to be imposed only in exceptional circumstances—even if the delay could be said to be unjustifiable. A stay would be even more unusual in the absence of fault on the part of the complainant or the prosecution, and should never be contemplated where the delay was a result merely of the complexity of the case or was contributed to by the defendant's actions.
- It was for a defendant to establish on a balance of probabilities that, owing to the delay, he would suffer serious prejudice to the extent that no fair trial could be held. In determining whether a defendant had satisfied this burden, the court must weigh in the balance:

(i) the trial judge's power at common law and under PACE, s 78, to regulate the admissibility of evidence;

(ii) the trial process itself, which should ensure that all relevant factual issues arising from delay would be placed before the jury as part of the evidence for their consideration; and

(iii) the judge's powers to give appropriate directions before the jury considered their verdict.

1.83 Trials conducted many years after the alleged offences present the courts with the 'familiar but intractable problem' of having to afford protection to both victims and defendants (*TBF* [2011] 2 Cr App R 13 *per* Jackson LJ at [3]). As Holland J explained in *Percival*, 19 June 1998, case no 9706746/X4:

> *A developing concern with, and understanding of, sexual abuse is reflected in a growing experience of cases featuring delays that at one time would been regarded as intolerable. That experience and the underlying problem of unreported abuse has encouraged experienced judges to be more liberal in their concept of what is possible by way of a fair trial in the face of delay.*

Holland J acknowledged that 'there is a price, namely safeguarding the defendant from unacceptable resultant prejudice by a proactive approach in terms of directions'. All the same, judicial directions in the summing-up delivered in such circumstances need not be wholly favourable to the defendant.

1.84 ***The judicial direction*** As Toulson LJ noted in *Breeze* [2009] EWCA Crim 255, [23]:

> *Cases involving allegations of historical sexual abuse are always difficult …. It is proper for the judge to remind the jury … that there may be understandable reasons why child abuse does not come to light until many years afterwards, and the fact that a complaint is unsupported by other evidence is not of itself an indication that the evidence is untrue.… [B]alance has to be preserved.*

Thus, as well as pointing out why complaint may not have been brought promptly, the judge may also need to alert jurors to the danger of real prejudice to the defendant when trials explore events that occurred many years ago. Jurors must ask themselves through whose fault matters did not come to light sooner, take into account the fact that memories fade over time, consider how a defendant may find it harder to meet a charge long after the event, and even give

greater weight to the defendant's good character if years have gone by and there has been no repetition of the offence (on good character directions, see paras **6.18–6.38**). The judicial direction on delay is meant to counteract the disadvantages under which a defendant may labour whenever considerable time has elapsed between the alleged offending and the date of trial. The fact, say, that a defendant of otherwise good character is not even questioned about allegations of sexual misconduct until between twenty-eight and thirty-seven years after the events complained of does not mean that it will be deemed unfair to try him on those counts, provided that a suitably worded warning is delivered to the jury (see, for example, *Ely* [2005] EWCA Crim 3248).

1.85 Lord Bingham CJ, in *Lloyd*, 30 November 1998, case no 9802447/Z5, considered that it would be 'unduly prescriptive' to require judges to deliver warnings in every case of long-delayed prosecution. Indeed, as his predecessor Lord Taylor CJ noted in *E (John)* [1996] 1 Cr App R 88, 92–3:

> *We are not saying that as a matter of law or as a matter of invariable practice whenever there has been some delay in the case coming to trial the judge must give the jury direction as to the difficulties in which the defence find themselves. Much must depend upon the length of the delay, the cogency of the evidence and the circumstances of the case.*

Although this matter is within the appreciation of the trial judge, in practice a warning will usually be desirable, imposing a 'clear, unequivocal stamp of the court's authority on the issue of delay' (*GY* [1999] Crim LR 825).

1.86 ***Abuse of process*** In addition to requiring the delivery of a warning to the jury, extreme delay may create a situation in which a defendant can claim that the proceedings against him ought to be stayed on the ground of abuse of process (see paras **1.64–1.73**). However, the mere fact that delay—even culpable delay—has occurred somewhere along the line will not automatically mean that an abuse of process has occurred. In *Massey* [2001] EWCA Crim 2580, for example, although there were long delays before the police got around to taking statements from the three minors who claimed that M had sexually assaulted them, the Court of Appeal declined to hold that proceedings against M ought to have been stayed on grounds of abuse of process. Even if criticism could justifiably be levelled at the police for omitting to prosecute the enquiry with proper dispatch, M had still failed to show that he had suffered such a degree of prejudice as to render his trial on sixteen counts of indecent assault unfair. In any case, as Lord Woolf CJ noted in *Att Gen's Reference (No 2 of 2001)* [2001] EWCA Crim 1568, if the accused has suffered no specific prejudice, other remedies—such as a reduction in sentence or even compensation—will be more appropriate.

1.87 In *S (Stephen Paul)* [2006] 2 Cr App R 23, [20], Rose LJ stressed that, in determining whether or not to stay proceedings, 'the discretionary decision whether or not to grant a stay as an abuse of process, because of delay, is an exercise in judicial assessment dependent on judgment'. Rose LJ laid down five principles to guide judges in such cases.

- Even where delay in bringing proceedings is unjustifiable, a permanent stay should be the exception rather than the rule.
- A stay will rarely be granted in the absence of fault on the part of the complainant or the prosecution (as Jackson LJ noted in *TBF* [2011] 2 Cr App R 13, [38], although true, this statement 'of limited help in any individual case').
- No stay should be granted in the absence of serious prejudice to the defence such that no fair trial can be held.

- When assessing possible serious prejudice, judges should bear in mind their power to regulate the admissibility of evidence and the fact that the trial process itself should ensure that all relevant factual issues arising from delay will be placed before the jury for their consideration in accordance with appropriate judicial directions.
- If, having considered all of these factors, a judge's assessment is that a fair trial will be possible, a stay should not be granted.

1.88 Claims of abuse of process in cases of delay have grown so common that, in *Smolinski* [2004] 2 Cr App R 40, Lord Woolf CJ questioned the wisdom of counsel routinely resorting to abuse of process, particularly before any evidence had been called in the case. Because the Crown can normally be relied upon to have considered carefully whether or not to proceed with stale charges:

> *In the normal way we would suggest that it is better not to make an application based on abuse of process. It will take up the court's time unnecessarily. Unless the case is exceptional, the application will be unsuccessful … If an application is to be made to a judge, the best time for doing so is after any evidence has been called.*
>
> (*Smolinski* [2004] 2 Cr App R 40, [8]–[9])

The Court was anxious to make two not always easily reconcilable points: *first*, that it wished to discourage applications based on abuse in delay cases; and *secondly*, that whenever evidence was given after a long period of years, it still urged the trial court to scrutinise the circumstances with great care at the end of the evidence to see whether or not the case was safe to be left to jury:

> *We are certainly not indicating that it is not right to bring prosecutions in the appropriate circumstances merely because of the period that has elapsed.… Justice must be done of course to a defendant, but the court must also be mindful of the position of the alleged victims.*
>
> (*Smolinski* [2004] 2 Cr App R 40, [13])

1.89 Applications to stay proceedings are often accompanied by a submission of 'no case to answer' brought under the principles set out in *Galbraith* [1981] 1WLR 1089 (see para **2.27**). The volume of decisions involving claims of abuse of process, each turning on their particular facts, coupled with submissions of no case has become so great that, in *CPS v F* [2011] EWCA Crim 1844, [47], Lord Judge CJ, presiding over a five-man Court of Appeal, sought to restrict the quantity of case law that might be cited before the courts:

> *[I]t will no longer be necessary or appropriate for reference to be made to any of the decisions of this court except* S (Stephen Paul) *and the present decision. These … authorities contain all the necessary discussion about the applicable principles. Their application . . . is fact-specific, and is to be regarded, unless this court in any subsequent judgment expressly indicates the contrary, as a fact-specific decision rather than an elaboration of or amendment to the governing principles.*

The Court, at [49], summarised the proper approach to such applications in a five punchy propositions.

• An application to stay for abuse of process on grounds of delay and a submission of 'no case to answer' are two distinct matters. They must receive distinct and separate consideration.

• An application to stay for abuse of process on the grounds of delay must be determined in accordance with *Att Gen's Reference (No 1) of 1990* [1992] QB 630. It cannot succeed unless, exceptionally, a fair trial is no longer possible owing to prejudice to the defendant occasioned by the delay that cannot fairly be addressed in the normal trial process. The presence or absence of explanation or justification for the delay is relevant only in so far as it bears on that question.

• An application to stop the case on the grounds that there is no case to answer must be determined in accordance with *Galbraith*. For the reasons explained in that case, it is dangerous to ask the question in terms of whether a conviction would be safe, or the jury can safely convict, because that invites the judge to evaluate the weight and reliability of the evidence, which is the task of the jury. The question is whether the evidence, viewed overall, is such that the jury could properly convict.

• There is no different *Galbraith* test for offences that are alleged to have been committed some years ago, whether or not they are sexual offences.

• An application to stay for abuse of process ought ordinarily to be heard and determined at the outset of the case, and before the evidence is heard, unless there is a specific reason to defer it because the question of prejudice and fair trial can better be determined at a later stage.

Evidence excluded as a matter of public policy

Intercepted communications: Regulation of Investigatory Powers Act 2000

1.90 Generally speaking, English law holds logically probative evidence admissible. Leaving to one side evidence excluded under s 78 of PACE (see paras **1.60–1.63**), along with the law governing confessions (which, regardless of their probative force, may be excluded under s 76 of PACE if the party seeking to rely upon them cannot establish that they were obtained lawfully—see **Chapter 10**), the Regulation of Investigatory Powers Act 2000 (RIPA), which is the successor to the Interception of Communications Act 1985, affords a notable exception to English law's general principle of admissibility. The 1985 Act was passed hot upon the heels of *Malone v UK* (1984) 7 EHRR 14, a case in which the ECtHR had criticised the inaccessibility, imprecision, and lack of formal safeguards in the area of communications intercepts in the UK. Although the 1985 White Paper that preceded that Act stated its objects clearly enough, the House of Lords settled the meaning of the Interception of Communications Act only at the third attempt in *Morgans v DPP* [2001] 1 AC 315.

1.91 Briefly, s 1(1) of RIPA declares that it is an offence for anyone:

> *. . . intentionally and without lawful authority to intercept, at any place in the United Kingdom, any communication in the course of its transmission by means of:*
>
> *(a) a public postal service; or*
>
> *(b) a public telecommunication system.*

Section 1(2) also makes it an offence to intercept communications transmitted via private telecommunication systems. However, the Act then states that an offence is not committed in

certain situations: for example, if the interception was effected under warrant from the Home Secretary (s 5); or if the interceptor had reasonable grounds to believe that the sender and the intended recipient of the communication had consented to the interception of the communication (s 3). Section 5 enumerates the circumstances in which a warrant may issue. In particular, it permits the Home Secretary to issue such a warrant 'for the purpose of preventing or detecting serious crime' (s 5(3)(b)). There are further exemptions from criminal liability, not relevant for present purposes. Section 17(1) provides:

> *[N]o evidence shall be adduced, question asked, assertion or disclosure made or other thing done, for the purposes of or in connection with any legal proceedings which (in any manner)–*
>
> *(a) discloses, in circumstances from which its origin in anything falling within subs (2) may be inferred, any of the contents of an intercepted communication or any related communication data; or*
>
> *(b) tends (apart from any such disclosure) to suggest that anything falling within subs (2) has or may have occurred or be going to occur.*

Section 17(2) lists five categories of information about the provenance of communications that may not be revealed. Essentially, these relate to the fact that offences of unlawful interception may have been committed, that a warrant to intercept has been issued, or that such a warrant may have been applied for. Although the effect is to exclude a great deal of otherwise relevant evidence from criminal trials, strictly speaking the 2000 Act does not render intercept evidence inadmissible; technically, it only forbids its disclosure (see, for example, *Scotting* [2004] EWCA Crim 197 *per* Latham LJ at [14]). The consequences, however, are to all intents indistinguishable.

1.92 It perhaps needs to be emphasised that not all police monitoring of suspects that reveals the contents of telephone conversations will necessarily fall foul of the Act's restrictive evidentiary provisions. In *E* [2004] 1 WLR 3279, for example, in the course of a drugs enquiry, the police placed a listening device in X's car. As well as conversations that X conducted with other occupants of the car, the listening device picked up what X said to other people in calls that he made over his mobile telephone. The listening device, however, did not register the replies and conversation of the people whom X was telephoning. The Court of Appeal rejected the argument that evidence of what X had had to say on these occasions was inadmissible on the ground that it fell within the restrictions imposed by the 2000 Act. Rix LJ observed in particular that, in defining what constitutes an 'interception' in s 17(2) and s 17(8) of RIPA, the legislation variously refers to communications 'in the course of transmission' or 'whilst being transmitted':

> *. . . the natural meaning of the expression 'interception' denotes some [interference] or abstraction of the signal, whether it is passing along wires or by wireless telegraphy, during the process of transmission. The recording of a person's voice, independently of the fact that at that time he is using a telephone, does not become interception simply because what he says goes not only … into the recorder, but, by separate process, is transmitted by a telecommunications system.*
>
> (*E* [2004] 1 WLR 3279, [20])

The Court concluded that what was being recorded was not the transmission, but the words of X taken from the sound waves in the car. The evidence was therefore admissible evidence for the Crown.

1.93 Although the 1985 Act has been replaced, Lord Mustill's explanation of the purpose behind this general prohibition on disclosure of materials obtained via an intercept, delivered in *Preston* [1994] 2 AC 130, still holds good:

> *The purpose of [s 17] can be seen as the protection, not of the fruits of the intercepts, but of information as to the manner in which they were authorised and carried out …*
>
> *[T]he defendant was not to have the opportunity to muddy the waters at a trial by cross-examination designed to elicit the Secretary of State's sources of knowledge or the surveillance authorities' confidential methods of work. Evidently, the proscription of questioning on the existence of warrants was seen as an economical means of achieving this result.*
>
> (*Preston* [1994] 2 AC 130, 167)

The policy of the statute is to protect the methods and sources of information of bodies engaged in surveillance by excluding all reference to them in proceedings. In the words of Lord Bingham of Cornhill, in *A-G's Reference (No 5 of 2002)* [2004] 3 WLR 957, [6]: 'The obvious purpose of this prohibition was to preserve the secrecy of what had, to be effective, to be a covert operation.'

1.94 Given the counter-intuitive quality of this area of the law, students coming fresh to the topic will be bemused by the wholesale exclusion of telecommunications intercept evidence in the supposed interests of methodological secrecy. True, a few provisions expressly exempt proceedings from the ambit of this prohibition. Section 18(1)(c) of the Anti-terrorism, Crime and Security Act 2001, for instance, under which the Special Immigration Appeals Commission hears appeals against decisions to certify and detain suspected international terrorists, has 'disapplied' s 17 of RIPA and allows the tribunal to receive evidence of intercepted communications. But more significantly, with growing concern at the difficulties encountered in convicting major criminals and terrorists, this 'policy choice' on the part of the Home Office to conceal details of the extent and methods of police surveillance of criminals, even at the cost of excluding valuable prosecution evidence, has come under intense scrutiny. In July 2003, a review was conducted (the fifth such review in the space of ten years), studying the benefits and risks of using intercepted communications as evidence to secure more convictions of organised criminals and terrorists. The Home Secretary delivered a written report in January 2005, concluding that the risks that would be incurred in allowing the use of intercept evidence remained too great to permit removal of the prohibition, but promising that the matter would be kept under review. In October 2005, Lord Lloyd of Berwick introduced a Bill into the House of Lords allowing the Crown to apply to the court for permission to introduce intercept evidence for the purpose of conducting a criminal prosecution for serious crime or offences relating to terrorism. After its second reading, the Bill proceeded no further.

1.95 The 2000 Act is an intricate enactment by any standards. In *Att Gen's Reference (No 5 of 2002)*, Clarke LJ actually admitted that it is 'a particularly puzzling statute', adding for good measure that, like the 1985 Act before it, it is 'a difficult statute (if somewhat longer)' (at [98]). In the House of Lords, Lord Bingham, too, comparing RIPA with its predecessor, said that 'the 2000 Act is both longer and even more perplexing. The trial judge and the Court of Appeal found it difficult to construe the provisions of the Act with confidence, and the House has experienced the same difficulty' ([2004] 3 WLR 957, [9]). The confusing nature of RIPA is brought out by the question eventually posed before the House of Lords in *Att Gen's Reference (No 5 of 2002)*. Whilst all would have agreed that the contents of intercepts made from private telecommunications systems were admissible in evidence, it was seriously questioned whether it was open to a

criminal court actually to investigate whether intercept material relied upon by the Crown had in fact been obtained by tapping a private, as opposed to a public, telecommunications system. In short, if a dispute arose, it was suggested that any judicial enquiry into the question would infringe the general prohibition on disclosure imposed under this legislation. Lord Bingham commented that such a situation would be 'absurd' (at [20]) and Lord Nicholls of Birkenhead favoured the term 'bizarre' (at [28]), whereas Lord Steyn politely noted that 'the Act creates a linguistic difficulty' (at [31]). Thankfully, the House of Lords bulldozed through the statutory verbiage, concluding with disarming simplicity:

> *Given the obvious public interest in admitting probative evidence … and the absence of any public interest in excluding it, I am satisfied that a court may properly enquire whether the interception was of a public or private system and, if the latter, whether the interception was lawful. If the court concludes that it was public, that is the end of the enquiry. If the court concludes that it was private but unlawful, that also will be the end of the enquiry. If it was private but lawful, the court may (subject to any argument that there may be) admit the evidence.*
>
> (*AG's Reference (No 5 of 2002)* [2004] 3 WLR 957 *per* Lord Bingham at [20])

1.96 Although RIPA expressly forbids only the disclosure of information concerning the methods and sources of intercept information, this does not mean that the prosecution can rely upon the contents of intercepts provided that the sources are not alluded to. The Human Rights Act 1998 militates against the drawing of this distinction. As Lord Hope explained in *Morgans v DPP* [2001] 1 AC 315, even if the prosecution can introduce its evidence without alluding to the intercept, the defendant will almost certainly wish to explore this forbidden territory. By preventing him from testing the evidence, s 17 deprives the defendant of proper safeguards and, owing to a consequent inequality of arms, infringes his right to fair trial under Art 6 of the European Convention. Therefore the unsurprising conclusion drawn by Lord Hope was that:

> *Evidence of material obtained by the interception by the persons mentioned in [the legislation] of communications of the kind described in … that Act … will always be inadmissible. It is not possible to say that [s 17] of the Act provides for this in express language. But, in the context of the Act as a whole, the prohibitions which it contains lead inexorably to that result.*

1.97 It does perhaps need to be stressed that s 17 of the Act excludes only evidence of *intercepted* communications. As Rose LJ was at pains to emphasise in *Hardy and Hardy* [2003] 1 Cr App R 30, s 17 renders inadmissible only the product of interceptions properly so-called, whether authorised by the Home Secretary or effected illegally. Unlike its legislative predecessor, RIPA defines what is meant by 'interception'. Section 2(2) specifies:

> *A person intercepts a communication in the course of its transmission by means of a telecommunications system if, and only if, he—*
>
> *(a) so modifies or interferes with the system, or its operation,*
>
> *(b) so monitors transmissions made by means of the system, or*
>
> *(c) so monitors transmissions made by wireless telegraphy to or from apparatus comprised in the system,*
>
> *as to make some or all of the contents of communication available, while being transmitted, to a person other than the sender or intended recipient of the communication.*

This definition requires that the contents of the communication be made available to a third person 'while being transmitted'. Thus, in *Hardy and Hardy*, when an undercover police officer tape-recorded his conversation with one of the drug traffickers, this was not 'interception' within the meaning of RIPA and the tape recording was subsequently admissible at H's trial. Similarly, in *Allsopp et al* [2005] EWCA Crim 703, Gage LJ held that a face-to-face conversation between A and K, picked up by a telephone-like apparatus in A's car and transmitted to the police, was not a 'communication' between two individuals within the meaning of RIPA and therefore was not an intercepted communication. The conversation between the first and second defendants, quite simply, had not been drawn into the telecommunications system. In contrast:

> *[T]he position of a telephone conversation which is intercepted and overheard by a third party, unknown to either of the parties to it, is different. That is what is separately provided for as 'interception' for the purposes of the 2000 Act.*
>
> (*Hardy and Hardy* [2003] 1 Cr App R 30, [34])

1.98 More generally, if the communication falls outside the statute, intercept evidence is generally admissible. Thus, in *P* [2002] 1 AC 146, the House of Lords upheld a judge's ruling that telephone intercept evidence lawfully acquired by the authorities in a foreign jurisdiction could be used at the appellants' trial on serious drug charges in England. The English legislation is concerned only with intercepts effected within the UK. In similar fashion, in *Scotting* [2004] EWCA Crim 197, the Court of Appeal had no difficulty in holding that evidence of intercepted telephone calls made from a prison, in the first instance arranging the delivery of drugs to the prison and later endeavouring to set up a false defence of duress for the supplier, were admissible. Section 18(4) of the Act explicitly permits the disclosure of certain categories of intercept, including those effected under rules made under the Prison Act 1952.

1.99 Of course, even if disclosure of the evidence is not forbidden, a court might still exclude it under PACE, s 78, if its admission were felt to reflect adversely on the fairness of those proceedings (see paras **1.60–1.63**). In *P*, however, in which this question was considered, the House of Lords rejected P's claim that Art 8 of the Convention, which guarantees respect for private life, inevitably predicated the exclusion of intercept evidence not covered by RIPA. Deriving support from the ECtHR's decision in *Khan v UK* (2000) 8 BHRC 310 (see para **1.70**), Lord Hobhouse robustly declared:

> *Questions of the admissibility of evidence are not governed by art 8. The fair use of intercept evidence at a trial is not a breach of art 6 even if the evidence was unlawfully obtained. It is a cogent factor in favour of the admission of intercept evidence that one of the parties to the relevant conversation is going to be a witness at the trial and give evidence of what was said during it.*
>
> (*P* [2002] 1 AC 146, 472)

Moreover, the House expressly dismissed the notion that there is any principle requiring the exclusion of intercept evidence independent of the relevant legislation.

1.100 Given the generous breadth of the prohibition imposed by the Interception of Communications Act 1985, it was argued in *Sargent* [2003] 1 AC 347 that there was 'an implied statutory prohibition' against the use of transcripts of intercepts even by the police when they interviewed suspects. This was said to arise from the fact that the police's entitlement to withhold favourable intercept material from the defence on these occasions would contravene both the

common law's concept of fairness and the principle of 'equality of arms', guaranteed under the European Convention (see, for example, *Jasper v UK* (2000) 30 EHRR 441). In *Sargent*, S had been convicted of conspiring to commit arson with intent to endanger life. By chance, his victim, P, worked for a telephone company, a circumstance that enabled him to monitor and record telephone calls. Without his company's authorisation, P recorded one call made by S to P's former wife, in which S made incriminating statements. P made a transcript of this conversation, and passed both transcript and recording to the police. The police interviewed S, who, when told of the recording and the transcript, made admissions. Although the House of Lords found that, in light of *Morgans v DPP*, the trial judge had been wrong to allow the Crown to adduce the intercept evidence, Lord Hope went on to hold that there was no reason also to outlaw the use by the police of inadmissible intercept evidence at interview. Such an approach, first, would go against English law's tradition of admitting illegally obtained evidence provided that it is relevant. Secondly, any such rule would apply indiscriminately even to cases like *Sargent* itself in which, as it happened, the police had made full disclosure of the entire transcript to the defendant, thereby evading any accusation involving 'inequality of arms' or unfairness. Further, s 78 of PACE was felt to afford defendants ample protection against any unfairness that the use of intercept material might occasion. More generally, Lord Hope recalled the words of Lord Steyn in *A-G's Reference (No 3 of 1999)* [2001] 2 AC 91, 118, to the effect that the purpose of the criminal law is to permit everyone to go about their daily lives without fear or harm to person or property, and that crime should be effectively investigated and prosecuted.

FURTHER READING

Campbell, *The Report of the Fingerprint Inquiry: Scotland* (2011), online at <http://www.thefingerprintinquiryscotland.org.uk/inquiry/3127.html>

Carter, 'Judicial Notice: Related and Unrelated Matters', in Waller and Campbell (eds) Well and Truly Tried (1982, Sydney), pp 82ff

Cole and Roberts, 'Certainty, Individualisation and the Subjective Nature of Expert Fingerprint Evidence' [2012] Crim LR 824

Grevling, 'Fairness and the Exclusion of Evidence under s 78(1) of PACE' (1997) 113 LQR 667

Mirfield, 'Shedding a Tear for Issue Estoppel' [1980] Crim LR 336

Mirfield, 'Regulation of Investigatory Powers Act 2000: Evidential Aspects' [2001] Crim LR 91

Munday, 'Gruesome Photographs' (1990) 154 JP Jo 19

Munday, 'Proof of Guilt by Association under Section 74 of the Police and Criminal Evidence Act 1984' [1990] Crim LR 236

Munday, '*Exemplum habemus*: Reflections on the Judicial Studies Board's Specimen Directions' [2006] J Crim Law 27

Ormerod, 'Recent Developments in Entrapment' [2006] Covert Policing Review 65

Ormerod and Birch, 'The Evolution of the Discretionary Exclusion of Evidence' [2004] Crim LR 767

Ormerod and McKay, 'Telephone Intercepts and their Admissibility' [2004] Crim LR 15

Spencer, 'Intercept Evidence: The Case for Change' (2008) 172 JP Jo 651 and 671

SELF-TEST QUESTIONS

1. When, if ever, may the Crown adduce evidence of an accused's extravagant lifestyle when prosecuting offences involving the possession of drugs (a) with and (b) without intent to supply?
2. What rules, if any, govern the admissibility of fingerprint evidence?
3. To what extent does English law still respect a 'best evidence rule'?
4. What do you understand by the term 'judicial notice'? How does it differ from the situation in which justices make use of their personal knowledge?
5. What do you understand by the principle of 'double jeopardy'? Does issue estoppel have any role to play in the criminal law?
6. Despite the generous wording of PACE, s 74, when in practice do the courts allow the Crown to adduce evidence of a third party's convictions?
7. When ought a trial judge to exclude prosecution evidence under PACE, s 78, on the ground that the accused may have been induced to commit the offence charged?
8. When ought a trial judge to look to abuse of process rather than exercise his discretion to exclude evidence under PACE, s 78?
9. Explain why the prosecution is generally prevented from adducing evidence derived even from lawful intercepts under the Regulation of Investigatory Powers Act 2000. What use, if any, can be made of information acquired in this way?
10. What principles govern the admissibility of evidence in the case of prosecutions brought long after the date of commission of the relevant offences?