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THE QUEST FOR FORENSIC TRUTH – SOME SIGNPOSTS TOWARDS REFORM OF THE LAW OF EVIDENCE*

INTRODUCTION

This lecture, as you may have guessed, is about evidence. It is not a lecture on the law of evidence as it is, but an inquiry as to whether it works efficiently, and if not, how it can be improved. It is not intended to be dogmatic, and where I venture an opinion, I do not expect it to be accepted without question. My suggestions for what appear to be necessary reforms in the law of evidence are open to argument, and some of the points are highly controversial.

What I am trying to do is to suggest some objective questions about the efficacy of the law of evidence as an instrument for ascertaining the truth. I have not attempted to offer a definitive answer to the questions. I do believe, however, that some of the rules of evidence are antiquated and inefficient and no longer serve any useful purpose.

I will confine myself to evidence in criminal cases, because that is where the rules are strictest.

I am much indebted to the Criminal Law Revision Committee appointed by the British Home Secretary in 1964. Their report, together with a draft Bill for implementing their recommendations, was presented to Parliament in 1972. It expresses, in language better than mine, thoughts on the law of evidence which have been going through my mind for many years. The Bill has not yet been introduced in Parliament. I have borrowed freely from the report, for which my indebtedness is covered by this general acknowledgment.

GENERAL

The *object of every trial* is to ascertain the truth. One might be forgiven for supposing that some of the rules of evidence are designed to obscure the truth. But only when it is certain that the truth has been established can the law operate fairly in its application to the facts of the case. A judgment based on untruth is an unjust judgment.

There are two cardinal features of the English law of evidence (which has been adopted practically *in toto* here) upon which many of the rules

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are based. One is the desire to protect a suspect or accused person from self-incrimination; the other is the insistence on only the best evidence being admitted. Under the Continental system, which is inquisitorial, not adversary as under the English-based law, virtually all the evidence that is relevant is admissible. Under the English-based system a good deal of evidence that is relevant is excluded because of the danger that it would be too prejudicial to the accused. We all know that judges are often obliged to reject evidence which would have been valuable for the ascertainment of truth because on the authorities by which they are bound it is inadmissible; and we know that appellate courts are compelled, often with expressed reluctance, to quash a conviction because of the evidence wrongly admitted. Section 167 of the Evidence Act, 1950 affords some relief from this predicament, but it does not give *carte blanche* for the reception of evidence which according to the rules has to be excluded.

The strict and formal rules of evidence, however illogical the results they may have produced, may have been necessary and useful in the past to protect the accused against injustice. But with changed conditions some of them may no longer serve any useful purpose and may even have become more of a hindrance than a help. Before the Trials for Felony Act, 1836, defending counsel could argue points of law only. He could not cross-examine witnesses or address the jury. Until the Criminal Evidence Act, 1898, the accused could not give evidence on his own behalf; nor could his wife, or husband if the accused was a woman, give evidence for the defence. After 1836 the accused had been permitted to make an unsworn statement, but this was not subject to cross-examination, so that judge and jury were deprived of the advantage of hearing the tested evidence of the person in the best position to tell them what had happened. Being able to give sworn evidence the accused now has the opportunity to explain away evidence which it might have been thought too dangerous to admit at that point in the development of the law, when he did not have that opportunity. When the rules of evidence were framed in their strictest form the accused suffered from such disabilities and disadvantages *vis-a-vis* the prosecution (and the Court, which was often unreasonably *biased* against him) that something had to be done to protect him.

FAIR TRIAL

This leads to the conception of a "fair" trial. Fairness in this context surely means that the law will be such as to ensure as far as possible that the result of the trial is right. The accused ought to be convicted if the evidence proves beyond reasonable doubt that he is guilty. He should be acquitted only if there is a reasonable doubt about his guilt. It has been said that it is better that 100 guilty persons should go free than that one innocent person should be convicted. But there is another way of looking

at it. If one innocent man is convicted, there is a miscarriage of justice, and if one guilty man is acquitted, there is an equal miscarriage of justice.

ADMISSIBILITY OF STATEMENTS TO THE POLICE

Allied to the question of admissibility is the question of what information the police are permitted to obtain from an accused person before his trial and how they are to obtain it. The law on this question in West Malaysia is probably unique. Section 112 of the Criminal Procedure Code of the former F.M.S. and the corresponding section 123 of the former Straits Settlements Criminal Procedure Code in force in Penang and Malacca require any person under police examination who is supposed to be acquainted with the facts and circumstances of the case (including, of course, the suspect who may in due course become the accused) to answer truthfully all questions put to him relating to the case, provided that he may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge or penalty or forfeiture. The Criminal Procedure Codes of Sabah and Sarawak do not contain this provision, and it is not the law in England. But the uniqueness of Peninsular Malaysia is carried a step further by section 113 (and the corresponding section 124 of the S.S. Code), which preclude evidence from being given of any statement made by the accused to a police officer in the course of a police investigation: that is, whether it amounts to a confession or not. Whatever the justification may be for excluding self-incriminatory statements it is difficult to see why statements which are relevant to, and throw light on, the facts and circumstances of the case, and which are not self-incriminatory, should be excluded. Indeed, it could easily be to the advantage of the accused if he could prove that he made some statement at the first opportunity when questioned by the police. No more effective stumbling-block to the ascertainment of the whole truth could have been devised by the ingenuity of lawyers than the provisions of this section.

But the exclusion of self-incriminatory statements has been much eroded. Section 15 of the Prevention of Corruption Act, 1961 (Act 57) and Section 75 of the Internal Security Act, 1960, under which cautioned statements are admissible, are examples of this trend. Section 75 of the Internal Security Act extends the admissibility of cautioned statements to prosecutions for offences against nine other laws listed in the Second Schedule; so that there are at least eleven laws under which, if a prosecution is brought, section 113 C.P.C. does not apply provided the police officer questioning the accused has properly cautioned him. The form of the caution is, of course, an exception to S. 112. The accused is not obliged to say anything or to answer any questions.

The thinking underlying S. 113 is that the police were not to be trusted: they might conceivably extort a statement by threats or other oppressive tactics, or even manufacture one. But if Parliament is willing to trust the police in the eleven instances I have mentioned, it is difficult to see why their trust could not be extended to all prosecutions. It is

completely illogical to put special powers of investigation in the hands of the police simply because the offence is exceptionally serious or because, as in the case of corruption, it is difficult to prove.

Assuming that one were to go over to the cautioned statement procedure for all criminal trials, another aspect of the matter at once arises. The accused, or suspect, is told that he is not obliged to say anything. If he says nothing, or if at his subsequent trial he gives evidence of something that he did not mention when he was being questioned by the police, no adverse inference is to be drawn from that fact. This is because of the so-called "right of silence" enjoyed by suspects when interrogated by the police.

Lord Diplock in *Hall* v. *R.* (1970) 55 Cr. App. R. 108 said:—

> "The caution merely serves to remind the accused of the right which he possess at common law."

The right is conferred by statute in Malaysia in the form of the caution expressed in the exceptions to S.113 C.P.C. which I mentioned earlier. The law gives the suspect the option of speaking or not speaking, and he is entitled, if he chooses, to refrain from speaking.

The philosophy behind this rule is that it is wrong in principle that an accused should be under any kind of pressure to reveal his defence before the trial, and that it is unfair that he should be forced to choose between telling a lie or incriminating himself. This stems from the idea of a criminal trial as a game played between the prosecution and the defence.

As footballers or boxers are not obliged to disclose their tactics to their opponents before a match or a fight, so the defence is to be left free to pursue whatever tactics it chooses without being compromised by a former statement.

Jeremy Bentham, in his *Treatise on Evidence,* wrote:

> "If all criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first which they would have established for their security? Innocence never takes advantage of it. Innocence claims the right of speaking, as guilt invokes the privilege of silence."

The Criminal Law Commission Committee in England took the view that it is wrong that it should not be permissible for the jury or a magistrate's court to draw whatever inferences are reasonable from the failure of the accused, when interrogated by the police, to mention a defence which he puts forward at his trial. To forbid it seemed to the Committee to be contrary to common sense and, without helping the innocent, to give an unnecessary disadvantage to the guilty.

The Committee has recommended, in its Report, that express statutory provision be made to authorize a court or jury to draw such inferences as it thinks proper from the accused's failure to mention in the police interrogation any fact relied on in his defence; and has given effect to this recommendation in the draft Bill. If the Bill becomes law, the position will

be that the accused, after being cautioned, need not say anything, but if in his defence at his trial he relies on something which he could have said but omitted to say to the police, inferences may, if the Court thinks fit, be drawn from that fact, and the accused's failure to mention the fact to the police may, on the basis of such inferences, be treated as, or as capable of being, corroboration of any evidence against the accused in relation to which the fact is material.

CONFESSIONS

The next topic for discussion is confessions.

In Peninsular Malaysia, a confession made to a police officer is inadmissible unless –

(a) it is part of a statement made after the statutory form of caution under a provision of law which makes cautioned statements admissible; or

(b) it is made to a police officer of the rank of Inspector or above and not in the course of a police investigation.

These restrictions on admissibility are additional to the rule that for a confession to be admissible it must be proved by the prosecution to have been made voluntarily, i.e. – that it was not made in consequence of any inducement, threat or promise proceeding from a person in authority. In recent years in England a further element has been added to this rule, i.e. that a confession is inadmissible if it was obtained by "oppression," that is oppressive treatment of the suspect by the police.

The first mention of this occurs in *Callis* v. *Gunn* [1964] 1 Q.B. 495, where Parker L.C.J. said that it was –

> "a fundamental principle of law that no answer to a question and no statement is admissible unless it is shown by the prosecution not to have been obtained in an oppressive manner but to have been voluntary in the sense that it has not been obtained by threats or inducements."

The expression "fundamental principle of law" suggests that this is not a new rule and that Parker L.C.J. was stating what he understood to be the existing law. It has since been adopted in the new Judges' Rules issued in January 1964 but the first judicial consideration of the meaning of "oppression" is in the judgment of Sachs J. in *Priestley* v. *R.* reported in 51 Cr. App. R. 1. He says that:

> "it imports something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary."

and he goes on to give examples –

> "the length of time of any individual period of questioning;
> the length of time intervening between periods of questioning;
> Whether the accused person has been given proper refreshment (which I would understand to include sleep);

and the characteristics of the person who makes the statement
(e.g. the will of a child, an invalid or an old person may be more easily sapped than that of a tough character and an experienced man of the world).

The Court of Appeal in *Prager* v. *R.* (1971) 56 Cr. App. R. 151 adopted this definition.

The Criminal Law Revision Committee considered the question whether there should be no restriction at all on the admissibility of confessions thus leaving it to the court to make due allowance for circumstances affecting the weight to be given to the confession; but they voted, by a majority, against recommending so drastic a change in the law, although as long ago as 1852 two distinguished justices of the Court of Crown Cases Reserved, Parke B. & Campbell L.C.J., had suggested in *Boldry* v. *R.* 3 Den. 430 that this might have been the better rule, though accepting that it was too late to adopt it.

What the Criminal Law Revision Committee have done, however, is to recommend that a confession should not be rendered inadmissible on account of a threat or inducement *per se*, but that the rule should be limited to threats or inducements of a kind likely to produce an unreliable confession; and a provision to this effect has been included in the draft Bill. But they have recommended the codification, by the Bill of the common law principle stated by Lord Parker in *Callis* v. *Gunn* (*supra*) about statements obtained in an oppressive manner.

Not every threat or inducement can reasonably be supposed to be likely so to affect the will of the person under interrogation as to cause him to confess to something which he has not done. If the Bill becomes law, the question whether to admit a confession made after a threat or inducement will be left to the court or, in jury trials, to the judge in the absence of the jury. But the defence will be free to cross-examine the witnesses for the prosecution, and to give evidence in order to show, if they can, that the circumstances in which the statement was taken were different from those described by the prosecution. So that in the end the court or jury will have to decide, on the whole of the evidence, whether it is safe to rely on the confession.

EVIDENCE OF OTHER OFFENCES

Let us turn now to the different question of how far evidence should be admissible to show that the accused has been guilty of misconduct other than the offence charged. Such evidence may clearly be highly relevant in the sense of making it more probable that he committed the offence charged, which is the sense in which relevance must be understood for the purpose of the law of evidence. One must be careful here to distinguish what is relevant and what is probative. A fact may be relevant but in a criminal trial it must be proved beyond reasonable doubt; but if it is relevant, ought it not to be admissible?

Evidence of other misconduct is of course ancillary to evidence connecting the accused with the offence charged. Obviously if there is no evidence to connect him with the offence the fact that he has a disposition to commit this kind of offence has no value. But if there is evidence to connect him with the offence then evidence of disposition must have some value, which will be greater or less according to the circumstances. A couple of examples will make this clear:

(a) A man in a crowd at a football match has his pocket picked. He identifies A, who was beside him at the time and is a total stranger to him as the thief. A has many convictions for pickpocketing at football matches.

(b) A child complains that he has been indecently assaulted by a man in some bushes in a public park and identifies B, a stranger to him, as the offender. B. admits that he took the child into the bushes, but says that it was only to show him a bird's nest and that nothing wrong happened. B has a number of convictions for indecent assaults on children, the offences all having been committed in the bushes in public parks.

Whether or not it is right that evidence of other offences should be admissible in these cases, there can be no doubt as to their relevance. It would be stretching human credulity too far to suppose that a confirmed pickpocket such as A would have been wrongly picked out as the thief, or that B with his history would not have been careful not to lay himself open to such obvious suspicion. Other examples of cases where a disposition to commit offences of the same kind is of particular relevance are those of rapists, arsonists, armed robbers, safe-blowers, confidence tricksters, drug traffickers and smugglers, where repetition of a certain *modus operandi* enhances the probability that the offences were committed by the same person, (though the court would have to be on its guard not to push this too far on account of the possibility of imitation, especially in certain kinds of professional crimes.)

There is nothing in the Malaysian Evidence Act which would allow evidence to be admitted for the purpose of establishing by reference to his history of similar offences the probability that the accused committed the offence charged. Section 15 makes such evidence admissible only on the question of whether an act was accidental or intentional, or done with a particular knowledge or intention, but not on the question whether the act charged was done by the accused. This, in effect, is the English law as stated by Lord Herschell, L.C. in *Makin* v. *The Attorney-General for New SouthWales* [1894] A.C. 57.

Two very well-known cases illustrate the sort of circumstances in which evidence has been admitted of the commission of similar offences by the accused. In *Smith* (1915) 11 Cr. App. R. 229 (the "Brides in the Bath" case) where the accused was convicted of murdering a woman in her bath

after going through a ceremony of marriage with her and insuring her life in his favour, evidence was admitted that two other "brides" of his had died in similar circumstances, but only for the purpose of rebutting his defence that her death was accidental. In *Straffen* [1952] 2 Q.B. 911 where the accused was convicted of murdering a small girl by strangling her, evidence was admitted that he had confessed to strangling two other small girls a year before in almost exactly similar circumstances. But in that case there were certain peculiar circumstances attending the killings, which rendered the evidence admissible to identify the accused as the killer to the exclusion of all others. Such evidence has been admitted in a number of cases involving sexual offences, but always on the ground of distinguishing circumstances. I will not go into the sordid details, but the principle is illustrated by the cases of *Ball* [1911] A.C. 47; *Thompson* [1918] A.C. 221; *Sims* [1946] K.B. 531; and *Twomey* (1971) Crim. L.R. 277.

It can be argued, and indeed has been argued, that a rule which says that evidence showing disposition, which is obviously relevant, is inadmissible, but that it is admissible if it is specially relevant, is illogical. The argument is that what is really important, as being of probative value, is the disposition itself. Therefore, it is said, that the law ought to have based itself on the essential proposition that the fact that the person committed a similar offence on another occasion is of probative value in proving that he committed the offence charged, instead of concentrating on special features such as similarity of method which are only particular aspects of the essential proposition.

In France, where the people are more logical and realistic than the English, the accused's convictions are read out at the commencement of the trial.

The Criminal Law Revision Committee voted, by a majority, against the disclosure, at the trial, of an accused person's previous convictions until he has been convicted of the offence charged. They have attempted a compromise by spelling out, and relaxing, the circumstances in which evidence of disposition may be given. What they have said, in effect, is that evidence should be admissible to prove — (a) a disposition to commit the kind of offence with which he is charged in a particular manner or according to a particular mode of operation resembling the manner or mode of operation of the offence charged, (e.g. the "Brides in the Bath" case);

(b) a disposition to commit that kind of offence in respect of the person in respect of whom he is alleged to have committed the offence charged; for example a disposition to strangle small girls (e.g. *Straffen*);

(c) a disposition to commit that kind of offence which tends to confirm the correctness of the identification of the accused by a witness for the prosecution (e.g. the pickpocket illustration mentioned earlier).

The Committee also proposes a relaxation of the existing rule to make

evidence of disposition admissible if the accused admits the conduct in respect of which he is charged (e.g. he admits wounding but his defence is that it was accidental or done in self-defence). In other words, where the accused admits the *actus reus* but not the *mens rea* necessary to establish guilt, evidence of other offences should be admissible to establish the state of mind of the accused at the time of the alleged offence, or to negative accident or lawful justification or excuse.

THE GIVING OF EVIDENCE BY THE ACCUSED

The next point is the giving of evidence by the accused. The right to make an unsworn statement derives from the time when the accused was not allowed to be legally represented. It might have been expected that when the Criminal Evidence Act 1898 allowed him to give evidence on oath, it would have abolished the right to make an unsworn statement as no longer serving any useful purpose.

Obviously it would be both wrong and ineffectual to compel the accused to give evidence. Since the burden lies on the prosecution of proving its case, he is entitled to rely, in effect even if he does not expressly say so, on there being no case to answer. But an unsworn statement is a kind of inferior evidence, in the sense that it cannot be tested by cross-examination and therefore does not carry the same weight as sworn testimony. It is popularly supposed to confer some sort of advantage on the accused, in that he can make his defence known to the court without being answerable for its truth or accuracy. It is surely an obstacle in the way of ascertaining the truth that facts are allowed to be stated by the accused which are not subject to the test of cross-examination.

The Criminal Law Revision Committee have made a strong unanimous recommendation that the right of the accused to make an unsworn statement should be abolished. Nearly every one of the persons and bodies consulted by them on this question was in agreement with that view.

After the passing of the Criminal Evidence Act, 1898 the prosecution could not comment, but the Judge could, on the failure of the accused to give evidence. The Judge's right of comment has been sparingly used, at least in recent times; though Goddard L.C.J. said in *Jackson* v. *R.* (1953) 37 Cr. App. Reports 43—

> "Whatever may have been the position very soon after the Criminal Evidence Act, 1898 came into operation . . . . everybody now knows that absence from the witness-box requires a very considerable amount of explanation".

But the comment must not go so far as to suggest that failure to give evidence is enough in itself to lead to an inference of guilt.

The Criminal Law Revision Committee have proposed drastic changes in the rule. The draft Bill provides that when the court holds that there is a

case to answer, before any evidence is called for the defence the court shall inform the accused that he will be called upon to give evidence and shall tell him what the effect will be if he refuses. If the Act becomes law, the effect of refusal will be the following somewhat startling innovation! The court or jury, in determining whether the accused is guilty of the offence charged, will be able to draw such inferences from the refusal as seem proper; and the refusal may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence given against the accused.

CORROBORATION

This leads naturally to the question of corroboration in general. There are a number of statutory provisions by which corroboration is required: but what we are concerned with here is the judge-made law about the need for corroboration. The cases where the courts have laid down that the judge must warn the jury, or himself, of the danger of convicting an uncorroborated evidence are those of –

(a) accomplices;
(b) complainants in sexual cases; and
(c) child witnesses.

Every lawyer and law student knows the case of *Baskerville* [1916] 2 K.B. 638; 12 Cr. App. R. 81, where Reading L.C.J. defined corroboration in the legal sense in terms which have never been improved upon or even varied. I refrain from quoting a passage which is so universally known.

One of the criticisms of the strictness of the present law is that it has often caused judges, out of caution, to over-emphasise in their summing up the "danger" of relying on accomplice evidence; and as a result the jury get the impression that the judge intends to convey to them that they should not convict.

Many critics of the present law believe that the rules of accomplice evidence are unnecessarily strict. I myself am of the view that they lead, more than any other rule of law or practice, to miscarriages of justice in that manifestly guilty persons escape punishment.

The Criminal Law Revision Committee has had the courage to open up new ground in the field of corroboration. The draft Bill provides

(a) that any rule of law or practice whereby in criminal proceedings the evidence of one witness is incapable of being corroborated by another witness is abrogated, (e.g. the evidence of an accomplice would become capable of being corroborated by a co-accomplice); and

(b) that in jury trials it shall be for the Court to decide in its discretion, having regard to the evidence given, whether the jury should be given a warning about convicting on uncorroborated evidence, and, accordingly, any rule of law or practice whereby at such a trial it is

in certain circumstances obligatory for the court to give such a warning is abrogated.

(Note the expression "a warning about convicting on uncorroborated evidence." Judges have always spoken of the "danger" of convicting on uncorroborated evidence, but the Committee consider that the word "danger" is itself dangerous in the sense that it is likely to produce miscarriages of justice by inducing in the minds of the jury a feeling that a finding of guilty would in the opinion of the judge be wrong. And when a judge, having warned the jury of the danger of convicting, goes on to direct them that they may still convict, this only serves to confuse them).

The Committee have made an exception for sexual offences, where they recommend that the judge should warn the jury, not of the danger of convicting, but of the special need for caution before convicting, on the uncorroborated evidence of an adult complainant; and they have recommended the retention of the rule requiring corroboration of the evidence of a child complainant in such cases. This is because the reason for the rule in sexual cases is quite different from that in the case of an accomplice. The complaint may have been falsely made for a number of reasons – neurosis, jealousy, fantasy, spite, or a girl's reluctance to admit that she consented to an act of which she is now ashamed. But the Committee have recommended that in cases not in this category their new proposals about corroboration should be the same for child witnesses as for adults.

HEARSAY

Finally, there is the question of hearsay evidence to be considered. The hearsay rule derives from insistence, in the law of England, on only the "best" evidence being adduced in court. But that is begging the question, because who can say that direct evidence given by a witness present in Court and subject to cross-examination is necessarily better than hearsay? It depends on the circumstances. Most witnesses suffer from the common human defects of inaccurate observation and fallible memory. Many witnesses confuse inference with fact, and, often quite unconsciously and innocently, construct a story not of what they saw and heard but of what they think they must have, or ought to have, seen or heard. And very many witnesses, unfortunately, suffer from another human failing: disregard for the truth when it suits them to lie.

Some of the absurdities of strict adherence to the hearsay rule are exposed in two recent cases, *Jones* v. *Metcalfe* [1967] 3 All E.R. 205 and *McLean* v. *R.* (1967) 52 Cr. App. R. 80. In both cases it was necessary to prove that the accused was driving a car at the time in question, and proof depended on the evidence of a witness who had observed the number of the car and given it to another person to write down. In each case the

other person wrote the number down but the eye-witness had forgotten the number and had not seen what the other person wrote. The person who wrote the number down gave evidence that he took it down from the eye-witness's dictation, but it was held that this was contrary to the rule against hearsay and the convictions were quashed. Now, would you say, as reasonable men (if the law recognises the existence of reasonable women I have never heard of it) that in those cases the truth was ascertained?

The rule can operate as much against the accused as against the prosecution. In *Sparks* v. *R.*, [1964] A.C. 964 an appeal to the Privy Council from Bermuda, the accused, a white man, was convicted of indecently assaulting a very young girl who was not called to give evidence. The trial judge held to be inadmissible, as being hearsay, evidence by the child's mother of a statement made to her, shortly after the assault, that "it was a coloured boy." The Privy Council held that this evidence was rightly rejected (but quashed the conviction on other grounds). If such other grounds had not existed, could anything have been more prejudicial to the accused than the obligation which bound the court to reject such exculpatory evidence? In the case of *Thorn* v. *R.* [1912] 3 K.B. 19, where the accused was charged with using an instrument with intent to procure abortion, it was held that the defence could not adduce evidence that the woman concerned (who had since died from another cause) had said (a) that she intended to procure her own miscarriage, and (b) that she had told another woman that she had done so. (Note that this evidence does not fall within the exceptions to the hearsay rule contained in section 32 of the Evidence Ordinance, 1950, which is practically a codification of the English Law.)

There are no less than thirty-one exceptions to the hearsay rule at common law, many of which are obscure and ill-defined. A majority of the House of Lords in *Myers* v. *R.* [1965] A.C. 1022, expressed the opinion that no more exceptions to the rule should be recognised by the Courts, and Lord Reid said, in that case,

> "The only satisfactory solution is by legislation following on a wide survey of the whole field, and I think that such a survey is overdue. A policy of make do and mend is no longer adequate."

Again, in *Jones* v. *Metcalfe* [1967] 1 W.L.R. 1290, Lord Diplock said that the law as to hearsay "is a branch of the law that has little to do with common sense."

The provisions about hearsay in the draft Bill are admitted by the Committee to be complicated, and they take up 13 pages of small print, so that they cannot be discussed here. The general principle on which the recommendations of the Committee proceeded was to admit all hearsay likely to be valuable to the greatest extent possible without undue complication or delay to the proceedings, subject of course to necessary safeguards. But essentially, the recommendations in the draft Bill do not

seem to go much further than codifying the common law exceptions to the hearsay rule which are already codified for us in sections 32 and 33 of the Evidence Ordinance, 1950. The Committee did not display the same reforming zeal as in their recommendations about accomplices, and I feel sure that they have not produced enough to satisfy those eminent critics of the hearsay rule, Lord Reid and Lord Diplock. They considered carefully the admissibility of hearsay at the discretion of the court, but rejected it on four grounds –

(a) that it would lead to inconsistency of practice between different courts;

(b) that there would be an almost inevitable tendency to admit hearsay evidence freely for the defence while restricting it on behalf of the prosecution;

(c) that it would make it more difficult for the prosecution and the defence to prepare their cases, because there would be no way of knowing in advance whether a court would allow a particular piece of hearsay; and

(d) in summary trials the court would ordinarily have to hear the statement in order to decide whether to exercise the discretion to admit it.

Of course, no one has ever suggested that hearsay evidence by itself should be sufficient to establish guilt. But there may be a case for admitting it, if it appears to be relevant and useful, in support of direct oral evidence. Where it appears to be vital to the interests of justice, so that the ascertainment of the truth will not be frustrated by a man-made rule which, after all, began its existence as a rule of prudence, surely there is a case for allowing the court to admit it. That question must remain unanswered for the time being, and will probably so remain for the foreseeable future.

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PRE-NATAL INJURY AND THE RIGHTS OF THE UNBORN CHILD

Pre-natal injury like nervous shock is an area in which the law remains unsettled. In the tortious context, it is one aspect of the specific application of the duty and remoteness of damage issues in negligence. English and Malaysian courts have so far declined to allow the recovery of damages for pre-natal injury and there are a number of policy considerations mitigating against such recovery. It is hoped, however, that like nervous shock and negligent mis-statement, which were once conceived to be non-recoverable, the courts will now begin to assess those considerations in terms of current notions of public policy in the law of tort. The object of this paper is to examine the areas where pre-natal injury may result and the application of ordinary principles of tort liability to determine the rights of the unborn child in those instances.

A. INSTANCES OF PRE-NATAL INJURY

In accidents, whether rail, air, sea or road accidents, which involve pregnant women the unborn child may be injured and may consequently be deformed at birth.[1] Abnormality may also arise from drugs, infections and hereditary disease. Few drugs have not been suspected, at some time, of causing foetal damage. The use of LSD was suspected of causing chromosonal breaks, while thalidomide is now clearly established as a causal factor in foetal-malformation.[2] Venereal disease and rubella are the classic examples of infections which are potentially dangerous to the foetus and hereditary factors with causal potency include radiation, haemophilia and mental illness.

The English Law Commission in a recent report, drew particular attention to the following situations:[3]

(a) Trauma experienced by the mother, with the result that the child is born with brain damage or as an epileptic or with physical deformity of some kind.

[1] *Watt* v. *Rama* [1972] A.L.J. 590 (child born with brain damage); *Montreal Tramways* v. *Leveille* [1933] S.C.R. 456 (child born with club feet); *Dural* v. *Seguin* (1972) 26 D.L.R. (3d) 418 (child born a spastic); *Walker* v. *G.N. Railway of Ireland* [1890] 28 L.R. (child born a cripple).

[2] S. v. *Distillers* [1970] 1 W.L.R. 114.

[3] *Injuries to Unborn Children*, English Law Commission Working Paper No. 47, ss. 6–14 (1973).