Scottish Criminal Evidence Law: Current Developments and Future Trends
Peter R. Duff and Pamela R. Ferguson (eds)
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As an academic scholar of criminal evidence in England, I often feel somewhat uneasy about my ignorance of Scots law in my area. Unless some pertinent development in Scots law has been aired in journal articles in England and Wales—such as in the pages of this *Review*—then I would probably remain unaware of it. The tendency when seeking comparative insights is somehow to assume that there is more to be gained (and with greater ease) from searching further afield than from looking north of the border. I have therefore welcomed the opportunity to review, and in doing so to learn from, this collection of essays on Scottish criminal evidence law.

In a detailed introduction which sets the scene well, the editors of the collection, Peter R. Duff and Pamela R. Ferguson, note that the development of Scottish criminal evidence law can be characterised as neither "a logical 'evolution', pursued as part of any coherent framework, nor a 'revolution' being driven by a particular ideological approach" (p. 1). Much the same can be said, I suspect, of the experience of England and Wales.

Chapter 1, by Claire McDiarmid, considers a well-known topic: the implications of *Cadder v Her Majesty's Advocate* [2010] UKSC 43, [2010] 1 WLR 2601, in which a violation of articles 6(3)(c) and 6(1) of the ECHR was found on account of the use in evidence of admissions made by a detainee in the course of being interviewed by the police without access to legal advice. While, to a reader in England and Wales, the context of *Cadder* might seem uniquely Scottish, there is also something familiar about the nature of the response to the decision: the immediate passing of "emergency legislation" in the shape of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, which culminated later in the relevant provisions of the Criminal Justice (Scotland) Act 2016. This is reminiscent of the passing of "emergency legislation" in England and Wales in the aftermath of the decision on anonymous witnesses in *Davis* [2008] UKHL 36, [2008] 1 AC 1128. McDiarmid believes that the provisions in the Criminal Justice (Scotland) Act 2016 for legal advice for suspects are to be "cautiously welcomed" (p. 40).

In Chapter 2, Ilona Cairns considers another uniquely Scottish phenomenon: the requirement that the "essential" or "crucial" facts of a crime (that is, that a crime was committed and that it was the accused who committed it) be corroborated. The ultimately unsuccessful—at least for the moment—attempts to abolish this are analysed. Cairns is especially scathing of the "access to justice" justification deployed by the Scottish Government in its attempts to bring about abolition: "the Government's vague, under-explained and one-dimensional 'access to justice' rhetoric masked the complexities about what justice constitutes for complainers in sexual offence and domestic abuse cases. … [V]ictims' rights language [is deployed] strategically to advance a particular political agenda, … precluding broader and more progressive discussion about what justice really means to complainers in sexual offence and domestic abuse cases" (p. 64).

In Chapter 3, Liz Campbell and Sharon Cowan present, first, a critique of the admissibility of sexual history evidence, with reference to sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995, which regulate such evidence. Campbell and Cowan note that, worryingly, the very relevance of such evidence may be far too readily assumed (p. 76). This parallels similar concern in England and Wales, precipitated by decisions such as *Mukadi*

[2003] EWCA Crim 3765. The chapter then moves on to a discussion of special measures for "vulnerable" witnesses. Here the authors caution that "an overly narrow focus of our energy on refining provisions that deal only with the way in which a complainer's evidence is presented in court can distract us from addressing questions about the deep-seated vulnerabilities that lead certain complainers to be both more vulnerable to sexual assault and yet less likely to have access to criminal justice redress, or indeed to be re-traumatised by the adversarial process, for example through cross-examination" (p. 94).

Fraser P. Davidson tackles "similar fact" evidence and associated matters in Chapter 4. In line with the old approach outlined in *Makin v Attorney-General for New South Wales* [1894] AC 57, Scots law appears to take the view "that it is open to the prosecution to prove any facts relevant to the charge, notwithstanding that they may show or tend to show the commission of another crime, if they show or tend to show that the act charged was done of design and did not arise by accident, or if they tend to rebut a defence of innocence": *His Majesty's Advocate v Joseph* 1929 JC 55, 56–7, quoted at p. 98. Davidson is critical of the Scottish Law Commission's recommendations for reform, as well as of suggestions by commentators such as Mike Redmayne (see especially *Character in the Criminal Trial* (Oxford: OUP, 2015)) for the freer admissibility of such evidence.

In Chapter 5, Gerry Maher QC considers another major topic that, like evidence of bad character, is regulated in England and Wales by the Criminal Justice Act 2003. This is the law of criminal hearsay, the subject of sections 259 to 262 of the Criminal Procedure (Scotland) Act 1995. Finding the possible justifications for the retention of any prima facie ban on hearsay evidence unpersuasive, Maher concludes his chapter with the radical suggestion that "the law of criminal evidence should follow the approach in civil law and provide that in criminal proceedings evidence [that is otherwise admissible] should not be excluded solely on the ground that it is hearsay" (p. 138).

Pamela R. Ferguson considers eyewitness identification evidence in Chapter 6, tracing the evolution from reliance on the (non-binding) *Guidelines on the Conduct of Visual Identification Procedures* to the requirement for the promulgation of a statutory code akin to Code D of PACE in England and Wales. The fact that "[d]ock identification … constitute[s] a primary means of identifying the accused in Scottish trials" (p. 143) is also discussed and criticised, and, more generally, a comprehensive list of specific reform options is presented.

Gage v Her Majesty's Advocate [2011] HCJAC 40, 2011 SCL 645, in which particular expert evidence relating to witness credibility and reliability was held to be inadmissible, provides the theme for Chapter 7. Here, Donald Nicolson and Derek P. Auchie "argue that the categorical rejection of all expert evidence on the credibility and reliability of witness testimony is not justified, but nor is an approach which admits all such evidence. Instead, admissibility should depend on weighing up a variety of contextual and legal factors relating to the content, function, value and reliability of expert evidence" (p. 163).

The discussion by James Chalmers, Fiona Leverick and Shona W. Stark in Chapter 8 of the advantages and disadvantages of different methods of achieving reform of criminal evidence law has considerable resonance for the reader in England and Wales. The authors conclude that, "[a]s a general model for law reform, … the [Scottish Law Commission] project method can perhaps be regarded as the gold standard" (p. 216). A useful Appendix to this chapter provides a chronological list of criminal evidence and procedure law reform projects in Scotland, including details of any implementation.

While all the first eight chapters can be read in isolation, they should also be pondered as a whole in the context of a consideration of Chapter 9, which may be regarded as a concluding chapter to the book. Here Peter R. Duff asks whether the Scottish law of evidence has lost its moorings in traditional adversarial ideology in the way that Mirjan R. Damaska claims (in his influential book, *Evidence Law Adrift* (New Haven: Yale University Press, 1997)) has happened with Anglo-American evidence law. Duff believes that, while this may well be the case, two further factors have emerged in recent years which have made the future shape of Scottish criminal evidence law difficult to predict: politicisation and managerialism. Again, a similar observation could well be made of England and Wales.

As the above survey of its chapters makes clear, the book under review covers an impressively wide range of topics, even if understandably there may be some novel aspects of Scottish criminal evidence law that are not examined. One of these, mentioned in passing in Chapter 5, is the "balancing test" endorsed in *Lawrie v Muir* 1950 JC 19, 1950 SLT 37 for determining the admissibility of illegally obtained evidence. The nine chapters work well together, but Chapter 7, the lengthiest, might have benefited from slightly tighter editing. The book is well produced and typographical errors appear to be very rare, although I noticed by chance that "Freiberg" is misspelt as "Frieberg" both in the body of the book and in the bibliography, while "Damaska" is misspelt as "Damaksa" in the "books" section of the bibliography (but not in the "journal articles" section).

Scottish Criminal Evidence Law: Current Developments and Future Trends is, in sum, an informative and thought-provoking collection. It teaches us that, despite some obvious differences between the Scottish and English laws of criminal evidence, there are also some unexpected parallels, and valuable insights can be derived from looking north of the border. The book deserves to gain the attention of scholars and practitioners in England and Wales, and well beyond.

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