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Introductory Remarks and the Law of Evidence

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LENNIE (aka Lord Hoffmann) was good enough to provide a foreword for my own Festschrift¹ and it is pleasing to be allowed the opportunity of helping to introduce this Festschrift for him. I did not come to know Lennie until some time after we had both been students here in Oxford. We were however born in the same year, and studied law in Oxford at much the same time. I propose in these remarks, first, to describe the state of legal education in Oxford at that period and, second, to say something of Lennie's work in Evidence, which was the subject of his one academic monograph² and is not otherwise represented in this book.

I shall start in the year of our birth, 1934. At about that time legal education in Oxford was at an extremely low ebb.³ The subject was widely regarded as lacking academic respectability. Corpus Christi College surrendered the Chair of Jurisprudence to University College for that reason, many Colleges had no Law Fellow and none more than one. Not that having such a Fellow represented any certain guarantee of academic quality since many such Fellows were either unqualified or incompetent. Nor were these categories identical since some of the qualified were incompetent and a very few of the unqualified were competent. My own college, Magdalen, provides an example. The Law Fellow hoped to become Bursar and avoided teaching law to the extent of actually hiding away from students. In Christ Church the relevant Student was regarded as so incompetent by a particularly forceful undergraduate, one JHC Morris, as to provoke a demand to be transferred for tuition to Balliol, where the Fellow, Theo Tyler, was both

* This is a written version of an oral address and differs from what was said in minor respects.

¹ P Mirfield and R Smith (eds), *Essays for Colin Tapper* (Oxford, Oxford University Press, 2003).

² LH Hoffmann, *South African Law of Evidence* (1st edn, Durban, Butterworths, 1962).

³ For a fuller account upon which I have drawn, see AW Brian Simpson, *Reflections on the Concept of Law* (Oxford, Oxford University Press, 2011).

qualified and competent, despite being blind. These two examples became linked when Magdalen cast off its incompetent and unenthusiastic Fellow, appointing John Morris in his place. Things began to change. Morris was extremely efficient; for example, he is reputed to have been the first tutor to use typed reading lists. He was also a very good judge of academic talent, as proved by his first two appointments to Fellowships in Law at Magdalen, Rupert Cross and Guenter Treitel, each in turn later elected Vinerian Professor.⁴ Academic respectability in the faculty more generally was further enhanced by the appointment of a number of first-rate teachers after the war, including Tony Honoré.

There remained problems with consistency in the quality of students. In most colleges there were avenues to admission for what have recently been dubbed the 'thick and rich'. Heads of House had places in their gift irrespective of admissions tutors, and some Law Fellows were not themselves averse to such admissions. Simpson recounts the practice of one Law Fellow who encouraged oarsmen to apply and then regularly invited the members of the Eton first eight to a lavish party in June to which examiners in Law Moderations were invited in the hope that they would be lenient to some of the budding oarsmen.⁵ This side of the problem of respectability was tackled by increasing the rigour of University examinations. One of the newly appointed Law Fellows, Peter Carter at Wadham College, was particularly fierce. In his second year as an examiner in the Final Honours School of Jurisprudence, only four candidates of a field of about 200 were awarded first class honours, and three of those already had other degrees. Yet in his first year, despite a huge increase in failures, 11 firsts were awarded. That was Lennie's year, and that same cadre of students secured seven firsts in the examination for the degree of Bachelor of Civil Law in the following year. It was an *annus mirabilis*, six of those seven became Law Fellows of Oxford Colleges and the other became Head of a Law School elsewhere, Vice-Chancellor of that University and an Honorary Bencher of Gray's Inn. In both of these years Lennie was pre-eminent. There was then no formal recognition of the best candidate in the undergraduate examination, but it seems clear from informal sources that it was Lennie, and in the BCL where the best candidate was, and still is, awarded the Vinerian Scholarship, Lennie secured it. It is also worth mentioning that in those days when options were strictly limited, meaning that all the candidates took very nearly the same set of papers, such a ranking order was much more reliable than it is now, given the current proliferation of options. In my opinion, Lennie's year marked the final advent of complete academic respectability of law as a subject in this University.

⁴ John Morris was also himself offered the Chair, but declined it.

⁵ Above n 3, 66.

I now offer a few remarks about Lennie's scholarship in the law of evidence. Evidence was then a compulsory subject in the BCL and at the time was taught by Rupert Cross, who in Lennie's BCL year published the first edition of his textbook on evidence. Lennie, after his subsequent return to South Africa, was sufficiently impressed by it as to use it as a model for his own book on the South African law of evidence. When he came back to Oxford as a Fellow of University College, he joined Rupert Cross in the seminar in the law of evidence for the BCL. I became a third member of that seminar a year later and found the experience of working with two such marvellous colleagues as daunting as it was rewarding. Lennie had a great gift of clarity of thought and expression, and was sufficiently self-confident to reject the conventional wisdom in the subject without compunction or regret.

I can illustrate this by reference not to Lennie's work on the South African law, of which I know too little, but by reference to an article of his commenting on a decision of the House of Lords some years later.⁶ This was a decision on the admissibility of evidence of the accused's bad character, then invariably described as 'similar fact' evidence, and traced back to a decision of the Privy Council in *Makin v Attorney-General for New South Wales*.⁷ This case arose from the widespread incidence of the murder of infants, usually illegitimate, whose mothers, usually very poor, were desperate to find someone to care for a child. Advertisements to take in such infants for payments of a very small premium were common. For the advertisers it was much more profitable to murder the infants than to rear them. In most common law jurisdictions there were prosecutions in respect of such murders.⁸ The Makin family advertised for children in Sydney and became suspected of wrongdoing by their evasive surreptitious movements between houses, and eventually 13 bodies of children were found buried in four different houses which they had occupied. They were charged with the murder of one of the children they had taken in, although the paucity of evidence can be discerned from the fact that there were two counts in the indictment, one for the murder of a named child and the other for the murder of an unnamed child. In other words, it was impossible even to identify the child from its remains, still less to ascertain the cause of death. The evidential issue related to the admissibility of evidence of finding the other 12 bodies. At every stage the evidence was admitted, and in the Privy Council Lord Herschell, LC, delivered a Delphic judgment attempting to justify this result. This judgment came to be regarded as the epicentre of the rule relating to

⁶ LH Hoffmann, 'Similar Facts after Boardman' (1975) 91 *LQR* 193, commenting on *R v Boardman* [1975] AC 421 (HL).

⁷ *Makin v Attorney-General for New South Wales* [1894] AC 57 (PC).

⁸ In England one such case related to the most murders ever laid to the responsibility of a single defendant, exceeding the numbers in the relatively recent case of Dr Shipman.

the admissibility of ‘similar fact’ evidence. It failed to quell dispute about the application of the law, which Lord Hailsham described in *Boardman* as having become ‘a pitted battlefield’.⁹ It remained the case that in the most serious cases the evidence was always admitted.¹⁰ The classic illustration of the operation of the ‘similar fact’ rule occurred in *R v Straffen*,¹¹ where the accused had been confined to Broadmoor Hospital, having pleaded insanity in relation to the murder of two young girls whose dead, but not sexually molested, bodies had been left unconcealed at the side of the road. Straffen subsequently escaped from Broadmoor and, within a few hours, a dead, but sexually unmolested, body of a young child was found unconcealed by the roadside nearby. The evidence of the previous events was, obviously rightly, admitted.

Then came the case of *Boardman*. Boardman was a schoolmaster accused of homosexual relations with three¹² boys at his school. There were several incidents in relation to each boy and the issue related to the admissibility of other incidents as evidence to prove any one of them. Here, as in *Makin*, the evidence of each of them was extremely weak, but, as in *Makin*, the lower courts admitted the evidence. Lord Hailsham was anxious to clarify the law and to provide an authoritative gloss on Lord Herchell’s speech in *Makin*. To his consternation, he discovered on the day that the speeches were to be delivered that Lords Cross and Wilberforce had come with dissenting speeches. He told them that to dissent would send quite the wrong message and would cause the House of Lords to be deluged by similar appeals in unwholesome criminal cases. He further pointed out that, unlike the other members of the House, Lords Cross and Wilberforce had always practised in Chancery and ought to defer to the opinions of their brethren who were thoroughly experienced in the operation of the law of evidence in criminal cases. This failed to persuade Lords Cross and Wilberforce to abstain from delivering the speeches they had prepared, but did induce them to add a few grudging words at the end concurring in the result, if only as a matter of fact or of deference to the courts below, rather than as a matter of legal principle. There was an interesting sub-plot. Although Lord Hailsham was right in his assessment of the dissenters’ experience of criminal law, he also knew, or would have guessed, that Lord Cross’ speech would have been heavily influenced by the views of his brother Sir Rupert Cross, who was an acknowledged master of the law of criminal evidence. However, he also

⁹ *R v Boardman* (n 6) 445.

¹⁰ There seems to be no reported English case of murder where the evidence was ever excluded.

¹¹ *R v Straffen* [1952] 2 QB 911 (CCA).

¹² Reduced to two before the case reached the House of Lords.

knew that Lord Cross could not, with dignity or amour propre, admit as much. The outcome, from Lord Hailsham's point of view, then and thus became completely counter-productive. Once Lords Cross and Wilberforce were party to the decision but still delivered their contrasting reasons, and given that Lord Morris' speech was sufficiently equivocal to be claimed to support all possible views, commentators could claim to find the ratio decidendi not in the speeches of Lord Hailsham and Lord Salmond, but in those of Lords Cross and Wilberforce.

Lennie was one such commentator. The significance of his commentary lay not so much in its espousal of the reasoning of Lords Cross and Wilberforce as in the boldness of his demolition of the hitherto sacrosanct reasoning of Lord Herschell in *Makin*. He even went so far as to deny that *Makin* was a 'similar fact' case at all. His argument was that ever since that case, two quite different situations had been confused: first, there were cases like *Straffen* where there was clear evidence that the accused had acted in the past in a particular, and particularly unusual, way and was now accused of having repeated his conduct; and, second, there were cases like both *Makin* and *Boardman* where there was some rather weaker evidence to show that the accused may have done something rather similar on a number of occasions and by statistical arguments might be found to be guilty of the commission of all. This distinction later became orthodox, but when first articulated by Lennie was completely contrary to all of the accepted 'wisdom'. The penetration, clarity and originality of analysis so displayed continued to characterise his contributions to jurisprudence and legal scholarship, as the remainder of these chapters will show.