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A Summary of Mirjan R. Damaska's Evidence Law Adrift

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A Summary of Mirjan R. Damaška's *Evidence Law Adrift*

by
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Inquiring into the foundations supporting common law rules of evidence, Professor Damaška points to three aspects of the Anglo-American institutional environment—the bifurcated trial court, the temporal concentration of proceedings, and the adversary system of adjudicatory fact-finding. He contends that these three "supporting pillars" constitute "a protective scaffolding" for the common law evidence rules "that began to crystallize in the late eighteenth and the nineteenth centuries."[1]

The bifurcated trial court, in which responsibilities are divided between judge and jury, facilitates and makes effective the enforcement of common law exclusionary rules. In Continental systems with unitary trial courts, strict enforcement of hearsay and other exclusionary rules is less practicable since the same individuals decide both admissibility and weight. Damaška believes that the jury by itself does not require technical evidence law, but a space for such rules opens up when the trial court is split into law and professional parts, and the more these two parts draw apart, the more favorable the climate for common law rules which exclude evidence or structure its analysis.

The temporal concentration of proceedings in which fact-finding is compressed into one-shot trials increases the need for rules which focus issues and avoid surprise. There is greater need to control the decision-makers' database in compressed proceedings because of the danger of information overload, as well as a greater need to avoid unfair surprise in light of lack of ability to continuously check foundational factors. In contrast, when hearsay is considered in Continental countries with informal episodic proceedings, there is enough time to seek out the declarant when available or to collect information regarding the declarant's credibility when unavailable. As a result of methodical and exhaustive preliminary investigations and subterranean influence of the case file, genuine surprise at trial is rare. Concentrated proceedings do not provide such opportunities. This problem, together with the inscrutability of jury verdicts and the minimal possibility of reconsidering factual issues on appeal, in-

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1. MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 3-4 (1997).

creases hearsay dangers and renders a presumptive ban on hearsay "a good prophylactic measure to counteract the defects of derivative informational sources."[2]

The adversary system in which the parties and their attorneys control evidence gathering and presentation, with the adjudicator remaining essentially passive, leads to polarization of means of proof and increased importance of testing evidence produced by the parties. Damaška contrasts Continental systems where pretrial evidence collection is primarily the job of the judge or another official. Although counsel for the parties are not prohibited from conducting investigations, their contact with prospective witnesses is disfavored. Preparing witnesses is strongly disapproved and may in some countries come dangerously close to tampering with evidence. For these reasons, lawyers conduct few factual inquiries on their own, and largely limit themselves to conveying leads to the official in charge of proof-taking. If the court accepts counsel's proof initiative, the means of proof becomes identified with the tribunal. Expert witnesses are appointed by the court and are viewed as assistants or aids to the judge. Thus, in Continental countries the lack of partisan preparation and presentation leads to viewing the inability of the opposing party to challenge evidence as less troubling.

But the more the means of proof is associated with the litigants, the greater the perceived danger of distorted or false evidence and the greater the need to provide the opposing party with means of challenge. The anxiety about potentially misleading information reaches its highest point in Anglo-American procedure where the ready identification of witnesses with parties renders derivative sources more problematic and "offers some support to the hearsay curse even in the context of juryless trials."[3]

The three pillars operate synergistically and together provide a "firm basis"[4] for Anglo-American fact-finding style and the common law of evidence. Erode any pillar and the rationale for the hearsay rule is seriously weakened. However, erosion has been "the central tendency of the twentieth century,"[5] and, if advanced much further, could threaten the stability of the entire edifice.

With the increased use of bench trials and other alternative forms of dispute resolution, the jury trial now is "more ornamental than functional."[6] Due to expansive discovery procedures and exten-

2. *Id.* at 65.
3. *Id.* at 80.
4. *Id.* at 125.
5. *Id.* at 126.
6. *Id.* at 129.

sive pre-trial proceedings, procedural compression has seriously deteriorated to the point of having been largely abandoned. While party control seems to have escaped unscathed, it too has been reduced through greater judicial involvement in fact-finding. Also, the sphere of lawsuits which involve only autonomous parties has diminished. "With jury trials marginalized, procedural concentration abandoned, and the adversary system somewhat weakened,"[7] common law doctrines of evidence often appear "deprived of a convincing theoretical basis."[8] For the future, Professor Damaška sees "the creeping scientization of factual inquiry"[9] as further straining the three foundations and predicts that "common law evidence as we now know it is likely to be confined to a narrower sphere, perhaps serious criminal cases, or even completely discarded."[10] However, he cautions against looking to Continental systems for solutions, and predicts that the "cracking pillars of common law evidence...will most likely be repaired—or replaced—by domestic masons and by indigenous building material."[11]

7. *Id.* at 142.
8. *Id.*
9. *Id.* at 143.
10. *Id.* at 149.
11. *Id.* at 152.