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Evidence Law in the Next Millennium

by
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Evidence is a unique area of law because over the last two centuries so many of its greatest scholars have taken what has been described as an abolitionist view toward the subject.¹ Jeremy Bentham started the tradition by attacking virtually the entire body of evidence law as it existed in nineteenth century England.² But other leading scholars have also favored abolition or abandonment of major portions of the law of evidence. Dean Wigmore called for rejection of many rules of exclusion³ and Professor Morgan advocated such radical reform that the Model Code of Evidence, of which he was principal draftsman, failed to be adopted by any jurisdiction. Sir Rupert Cross, one of the leading evidence scholars of this century, reportedly stated that "I am working for the day when my subject is abolished."⁴ Even Dean McCormick favored eviscerating two of evidence law's broadest doctrines of exclusion—the hearsay rule and the law of privileges—by supporting a simple reliability test as a sufficient basis for admitting hearsay⁵ and a balancing test that would allow most privileges to be overridden in cases where there was a strong need for the privileged evidence.⁶ He went so far as to predict the ultimate demise of all rules of exclusion.⁷

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1. Alex Stein, *The Refoundation of Evidence Law*, 11 CANADIAN J. OF L. & JURISPRUDENCE 279 (1996).

2. See JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* (J.S. Mill ed., London 1827) (five volumes); see also Laird C. Kirkpatrick, *Scholarly and Institutional Challenges to the Law of Evidence: From Bentham to the ADR Movement*, 25 LOY. L.A. L. REV. 837, 837 (1992).

3. 1 JOHN H. WIGMORE, *EVIDENCE* § 8c, at 630 (Tillers rev. 1983) ("A complete abolition of the rules in the future is at least arguable, not merely in theory but in realizable fact. . . . [It has been shown] that in the United States and today justice can be done without the orthodox rules of evidence.").

4. See WILLIAM L. TWINING, *RETHINKING EVIDENCE: EXPLORATORY ESSAYS* 1 (1990).

5. CHARLES T. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 305, at 634 (1954) ("I suggest this: a hearsay statement will be received if the judge finds that the need for and the probative value of the statement render it a fair means of proof under the circumstances.").

6. *Id.* § 81, at 166-67.

7. Charles T. McCormick, *Tomorrow's Law of Evidence*, 24 A.B.A. J. 507, 580-81 (1938) ("So we have said that the hard rules of exclusion will soften into standards of discretion to exclude. But evolution will not halt there. Manifestly, the next stage is to abandon the system of exclusion."); see also Kenneth Culp Davis, *An Approach to the Rules of Evidence for Nonjury Cases*, 50 A.B.A. J. 723, 726 (1964) ("Anglo-American ex-

There is probably no other area of law where the scholarly challenges to fundamental doctrines have been so extreme and where the leading writers take such a dim view of its future. Grant Gilmore wrote of the *Death of Contract*,⁸ but he was talking about something very different and never appeared to contemplate the demise of contracts as a viable and vital subspecialty of law. *Evidence Law Adrift* is a superb book, but it very much falls within the abolitionist tradition in evidence law scholarship. Professor Damaška is gentle in his title in describing evidence law as being only "adrift." After reading the book, one comes away with a clear impression that the great ship of evidence law is not merely adrift; instead, it is on the rocks and taking on water fast.

The central argument of *Evidence Law Adrift* is set forth as a relatively straightforward syllogism. The major premise is that evidence law is inextricably intertwined with the jury trial so that if the role of the jury declines, so will the importance of evidence law.⁹ The minor premise is that the jury trial is now in a period of decline. This leads to the inexorable conclusion that evidence law is also now in a downward spiral. To use Professor Damaška's more vivid and provocative imagery, the current rules of evidence are in danger of becoming "antiquated period pieces, intellectual curiosa confined in an oubliette in the castle of justice."¹⁰

The major premise seems generally sound and has strong historical support. The common law of evidence developed as a means to control juries, and countries without jury trials never developed rules of evidence even remotely resembling our own.¹¹ It is highly doubtful

clusionary rules of evidence are unique in the world. Lawyers of other lands are unable to understand why relevant evidence that has probative force should be barred from consideration. . . . Our sick body of evidence law will get well sooner if our American evidence doctors will consult with some European evidence doctors.").

8. GRANT GILMORE, *THE DEATH OF CONTRACT* (1974).

9. Professor Damaška posits "three pillars" supporting existing evidence doctrine: (1) jury trials, (2) temporal compression of adjudication, and (3) the adversary system. See MIRJAN DAMAŠKA, *EVIDENCE LAW ADRIFT* 4 (1997). But the second two "pillars" are interconnected with the first. It is the existence of the jury that causes temporal compression, because juries are expected to try the case at one sitting and seriatim proceedings are generally possible only in nonjury trials. Also, the adversary system and the jury trial are closely connected, and, as Damaška observes later in the book, any weakening of the adversary system is taking place primarily in nonjury trials. See *id.* at 126-29.

10. *Id.* at 142.

11. See WIGMORE, *supra* note 3, § 8a, at 621 ("The rules of evidence are mainly aimed at guarding the jury from the overweening effect of certain kinds of evidence. The whole fabric is kept together by that purpose, and the rules are supposed to enshrine that purpose."). For a history of the development of evidence law, see JAMES THAYER, *PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* (1898). For a contrasting view of the origin of evidence law, see John H. Langbein, *Historical Foundations of the Law of Evidence: A View From the Ryder Sources*, 96 COLUM. L. REV. 1168 (1996) (at-

that the current law of evidence could survive the abandonment of jury trials. The linkage between jury trials and evidence law also has empirical support. Those countries which have cut back on jury trials have subsequently liberalized their rules of admissibility. For example, after England abolished the right to a jury trial in most civil cases, it then significantly expanded the admissibility of hearsay.¹² Similar developments are taking place elsewhere.¹³

But the minor premise—that jury trials are in the process of decline—is subject to challenge, at least if the focus is on the United States. In the small fraction of cases that actually go to trial, the dominant form of trial in the United States remains the jury trial, at least in major cases. Approximately 80% of tort claims that go to trial are tried to a jury¹⁴ and approximately 60% of criminal trials are jury trials.¹⁵ For major felonies, such as crimes of violence, there are twice as many jury trials as bench trials.¹⁶ It is estimated that there are between 150,000 to 300,000 jury trials in the United States each year,¹⁷ constituting over 90% of all jury trials conducted in the world.¹⁸ Jury trials continue to have the strong support of the American public and are enshrined as a matter of right in both federal and state constitutions, and in both criminal and civil cases. Congress recently voted to extend the right to jury trial to an increasingly important category of civil cases—Title VII claims for employment discrimination—where previously such claims could only be tried to the court.¹⁹

Professor Damaška bases his contention that the importance of

tributing rise of evidence law to adversarial criminal trials).

12. Civil Evidence Act, 1968 (Eng.).

13. See Civil Evidence Act, 1988, § 2(I) (Scotland); see also NEW ZEALAND LAW COMMISSION, PRELIMINARY PAPER No. 15, EVIDENCE LAW: HEARSAY 11 (1991) (proposing significant narrowing of hearsay rule in civil cases).

14. BRIAN J. OSTROM & NEAL B. KAUDER, EXAMINING THE WORK OF STATE COURTS, 1995: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 30 (National Center for State Courts, 1996) (surveying state courts).

15. *Id.* at 57.

16. According to 1992 state court data of prosecutions for crimes of violence, 10% of prosecutions resulted in jury trials and 5% in bench trials. However, there were more bench trials than jury trials for offenses such as larceny and drug possession, making the overall percentage of jury and bench trials roughly comparable (4% jury trials, 4% bench trials, 92% guilty pleas). BUREAU OF JUSTICE STATISTICS BULLETIN, PUB. NO. NCJ-151167, FELONY SENTENCES IN STATE COURTS, 1992, tbl.10 (1995).

17. JEFFREY ABRAMSON, WE, THE JURY 251 (1994) (obtaining 150,000 estimate from researchers at National Center for State Courts); JAMES P. LEVINE, JURIES AND POLITICS 36 (1992) (providing 300,000 estimate).

18. Gerhard Casper & Hans Zeisel, *Lay Judges in the German Criminal Courts*, in JOHN HENRY MERRYMAN & DAVID S. CLARK, COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS 720, 721 (1978).

19. See 42 U.S.C. §1981a(c) (1991).

the jury is declining—and hence the need for evidence law—partly on the fact that the overwhelming majority of cases, both civil and criminal, settle or result in a plea bargain and only a small fraction actually go to trial. But it does not follow that because most cases settle, the rules of evidence play no role in the settlement process. On the contrary, both substantive law and evidence law play a vital role in shaping settlements. The settlement value of a case may go up or down dramatically depending on whether a contributory negligence defense will be allowed if the case proceeds to trial. Similarly, the settlement value of a case may rise or fall depending on whether certain evidence will be allowed, such as evidence of other accidents involving the same product or the implementation of remedial measures by the defendant after the accident. In criminal cases, nothing influences the plea bargaining process more than pretrial rulings by the trial judge on evidentiary matters, such as whether a defendant's confession or his criminal history will be admitted at trial.

Evidence law does appear to be in retreat in at least three areas. The first is character evidence. Federal Rules of Evidence 413 through 415 represent a significant breach in the dike. It seems likely that character evidence will be allowed to an increasing extent in criminal cases and that the character evidence rules may be liberalized in civil cases as well.²⁰

The second is hearsay. The clear trend of the law is in favor of expanding the admissibility of hearsay. The views of Ronald Allen,²¹ Roger Park,²² Eleanor Swift,²³ and other advocates of liberalization may ultimately be adopted at least in part.

The third is authentication, which is close to being eliminated as a discrete evidentiary doctrine, at least in civil cases, by Federal Rule of Civil Procedure 26(a)(3)(C). Under this rule, almost all disputes about the authenticity of exhibits are likely to be resolved prior to trial.

But the law of evidence is on the advance in other areas. Federal Rule of Evidence 412, the federal Rape Shield Law, was recently amended to apply in civil cases as well as criminal cases, and to crimes other than sexual assault. An amendment to Federal Rule of Evidence 407 that went into effect on December 1, 1997 expands the ban against evidence of subsequent remedial measures by expressly

20. See David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 COLO. L. REV. 1 (1987).

21. Ronald J. Allen, *The Evolution of the Hearsay Rule to a Rule of Admission*, 76 MINN. L. REV. 797 (1992).

22. Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51 (1987).

23. Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CAL. L. REV. 1339 (1987).

applying it to products liability cases, contrary to the views of two Circuits and many state courts which have given the rule a narrower interpretation.

The law of evidentiary privilege is as important as ever.²⁴ In *Upjohn Co. v. United States*,²⁵ the Supreme Court adopted a very broad attorney-client privilege for corporations that went beyond both the "control group" test recognized in prior case law and anything that the drafters of the Federal Rules of Evidence were willing to codify. In *Jaffee v. Redmond*,²⁶ the Supreme Court rejected the views of most lower federal courts and adopted a new federal psychotherapist-patient privilege. Moreover, the Supreme Court made the privilege absolute, rather than qualified, and extended it to social workers as well as to psychiatrists and psychologists. There are currently pressures to create even more privileges, and some courts and legislatures have responded favorably to such requests.²⁷

Finally, the rules of evidence most clearly on the advance are those rules, such as Federal Rule of Evidence 702, that govern the admissibility of expert and scientific evidence. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,²⁸ the Supreme Court made an extraordinary allocation of responsibility to federal trial judges to decide what scientific evidence is reliable. No longer can federal judges sit back and rely on the "consensus of the scientific community" as they could under *Frye v. United States*.²⁹ Judges have become the gatekeepers determining when and what types of science will be allowed in the courtroom, which means that they have enhanced power to decide what types of claims and defenses will be allowed to go forward.³⁰

Any rule of evidence with this much impact upon the course of litigation would seem to possess a fair amount of vitality. Moreover, the importance of the judicial gatekeeping function will undoubtedly grow in the coming years, as litigants attempt to bring more and

24. Arguably, one of the five most significant Supreme Court decisions in the last 25 years was a ruling on privilege law. See *United States v. Nixon*, 418 U.S. 683, 713 (1974) (denying a privilege claim for White House tapes, which led to resignation of United States President).

25. 449 U.S. 383 (1981).

26. 116 S. Ct. 1923 (1996).

27. See, e.g., *Reichhold Chems., Inc. v. Textron, Inc.*, 157 F.R.D. 522, 527 (N.D. Fla. 1994) (recognizing privilege for "self-critical analysis"); OR. REV. STAT. § 36.205 (1996) (establishing privilege for mediators).

28. 509 U.S. 579 (1993).

29. 293 F. 1013 (1923).

30. For example, a federal judge applying Federal Rule of Evidence 702 recently ruled that the plaintiffs' medical evidence in an action for damages resulting from breast implants was not scientifically valid, thereby preventing the claims of hundreds of plaintiffs from going forward to a jury trial. See *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387 (D. Or. 1996).

more new scientific discoveries into the courtroom. Thus, even if every rule of evidence were repealed other than the rules governing the admission of scientific evidence, evidence law might still play a pivotal role in the litigation process both now and in the future.

In conclusion, evidence law does not appear to be adrift, at least not as yet and at least not in the United States. It seems to be steaming ahead on course (but I suppose that is what the captain of the Titanic thought too). The situation is different in England and Commonwealth countries, such as Australia and New Zealand. There it may be more accurate to describe evidence law as somewhat loose from its moorings. With the cutback in the right of jury trial, there is ongoing examination in those countries of what role evidence law should play in the future. There we are seeing some of the predictions of Professor Damaška come true. In these countries, there is a significant divergence between criminal evidence law and civil evidence law, whereas in the United States we generally have unified evidence codes. In these countries there is also consideration of abandoning evidence as a free-standing subject and instead incorporating it as a component of procedure courses. Is this a harbinger of what may happen here in coming decades? Perhaps. Do those of us at this conference represent the last generation of pure evidence teachers? Possibly. Will most of the rules of evidence we now teach be repealed in twenty years? I do not believe so. In my view, even though significant liberalization is probable, rules governing the admissibility of evidence, and perhaps to an increasing extent the weight it should be given,³¹ are likely to be an integral part of any adjudicative system that seeks to foster a rational fact-finding process.

31. See Kirkpatrick, *supra* note 2, at 849 (suggesting that procedures relating to the evaluation of evidence "will assume increased importance as the rules of exclusion are relaxed").