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A Comment on Gordon Van Kessel's *Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*

by
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When asked to offer a comment on Professor Van Kessel's paper on hearsay hazards in the American trial, I was somewhat daunted at first, as my knowledge of the intricacies of United States Evidence law is limited and my familiarity with the American trial is derived in large part from Hollywood and media coverage of high profile American trials such as the Simpson case. Attending a conference like this one will, I am sure, help to fill in gaps in my knowledge in both of these areas. I think it is an interesting point in itself that despite my education within the Anglo-American common law tradition, the American trial context at times appears a world removed from the proceedings to which we are accustomed on the other side of the Atlantic. In his paper Gordon Van Kessel displays an admirable awareness of the differing nuances of practice that exist within the adversarial tradition, just as he explores different strains of the inquisitorial culture which prevails in Continental jurisdictions.

I. The Key Strands of Debate

As my preliminary comments suggest, Professor Van Kessel's paper extends beyond the confines of its title and is much more than a discussion of the impact of the hearsay rule on the American trial process. In fact, the paper contributes to at least two important strands of debate, and in my comment I would first like to identify these strands and then to pose several questions prompted by Professor Van Kessel's thesis.

First, on a purely instrumental level, Professor Van Kessel charts a path for the development of the hearsay doctrine in the future and lays down a preliminary blueprint for hearsay reform. As he comments, "adjusting our rules with a fresh focus on hearsay's primary

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foundations would be both possible and productive."[1] Those foundations lie in the essence of the American adversary system with its high degree of party control and its decision-making structures which take the form of a "single proceeding with limited pretrial discovery in which a largely unreviewable decision is given without a reason."[2]

Secondly, on a somewhat broader level, Professor Van Kessel's thesis arguably could have ramifications for the entire spectrum of evidential rules in the criminal sphere. It is not only hearsay evidence which is susceptible to dangers stemming from the adversary system—indeed, for example, all fruits of police investigation could be said to be potentially susceptible to "adversary created" dangers—and one might seek to apply what Professor Van Kessel terms the "adversary-oriented danger spectrum" to other evidential genres as well as hearsay.

Inherent in Professor Van Kessel's argument is a resignation to the dictates of the adversary system and the adversary culture generally, to which American lawyers seem to be indefinitely married. Professor Van Kessel's practical prescription for reform of the hearsay rule is the natural consequence of this resignation. To put the argument crudely (and I apologize for doing so): we have been landed with adversarial procedures; the development of the hearsay rule is largely attributable to weaknesses inherent in those procedures; if we want to reform the hearsay rule (which we do, because too often it operates as an embarrassment to our legal process), then we must look towards its adversarial bedrock to guide us.

II. Procedures Driving Goals?

This leads me to the first of three important questions to which I think Professor Van Kessel's paper gives rise and which I will now address in turn. If it can properly be argued that procedures drive goals, a pertinent question is whether we ought to permit them to do so. On this basis I would have some reservations about the fundamental premise of Professor Van Kessel's paper. Specifically, if we accept that the adversary system is susceptible to excesses, is it prudent to permit those excesses to dictate the reform agenda? To take a couple of examples, there are several references in the paper to the high degree of control which lawyers enjoy in the States over the way in which evidence is shaped for presentation at trial[3] and to the utility

1. Gordon Van Kessel, *Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*, 49 HASTINGS L.J. 528 (1998).

2. *Id.* at 484.

3. *See id.* at 506-08.

of the hearsay rule as a mechanism for keeping lawyers in check[4]. Rather than looking towards the hearsay rule to curb lawyers' adversarial excesses, would it not be more profitable to concentrate on improving procedural controls over lawyers' pre-trial activities with a view to creating an environment in which the incentives to produce false or distorted testimony would no longer exist?

Consider also the aspects of the adversarial jury trial which Professor Van Kessel perceives as presenting particular threats to verdict integrity, namely the passive judge, the lack of accountability on the part of the factfinder, and the limited pre-trial and post-trial checks on the reliability of evidence.[5] It could be argued that all of these threats are reversible even within an adversarial context, and that a procedural environment could be developed in which the justification for a blanket ban on hearsay would be considerably reduced. I do not have time to enter a discussion on the merits of encouraging greater judicial activism during trials and the growing trend of broadening mutual pre-trial disclosure responsibilities in the criminal context, but I think that it is worth paying just as much attention to the possibilities of procedural reform as to the methods whereby the hearsay rule can be best accommodated within the existing procedural framework.

III. Questioning the Reform Strategy: The Three Reservations

So much for the foundations of Professor Van Kessel's approach. My second general question relates to the actual strategy which he would adopt to steer the course of future reform of the hearsay rule. He advocates the employment of an adversary-oriented danger spectrum, which would focus most serious concern on hearsay evidence which was, first, adversary-created, secondly, adversary-motivated or manipulated and, thirdly, not recorded or adequately verified as the statement of the declarant.[6] The first two factors, he suggests, ought to engender the greatest caution: "[I]t is in the context of statements induced or elicited by the parties or their agents that the threat of party-manipulation or contamination is greatest and the deterrent rationale strongest, particularly with respect to prosecution-created hearsay."[7] I am attracted to the use of the criteria proposed as guidelines for assessing the weight of hearsay evidence, but whether they would prove useful as foundational criteria governing the admissibility of hearsay evidence is a matter of which I

4. *See id.* at 512-14.
5. *See id.* at 516-19.
6. *See id.* at 528-29.
7. *Id.* at 530.

have yet to be convinced. I have three basic reservations.

A. Perpetuating Technical Distinctions

The first is a concern that the effect of concentrating on whether a statement was adversary-produced or nonadversary-produced may be to perpetuate the kind of technical distinction which has for so long run hand in hand with the history of the hearsay rule. One of the examples given by Professor Van Kessel of a nonadversary-created statement can be used to illustrate my concern. One advantage of the proposed approach would be, he argues, that greater concentration on the genesis of the statement would obviate the need to distinguish between statements looking to the past and statements looking to the future. Rather, it is the adversary or nonadversary origin of the statement which would be of primary significance. "Thus", argues Professor Van Kessel, "the fact that a statement is accusatory should not alone lead to exclusion of nonadversary-created statements."[8] The example given is of the poisoning victim who makes a statement to her roommate between the time at which she began to feel ill and the time of her death, to the effect that she is feeling ill and that she believes her partner at dinner the day before has poisoned her ("I'm feeling sick. I believe that Frank has poisoned me."). According to Professor Van Kessel, such a statement was not adversary-created, and if verified, should be considered for admission under a residual exception, but one can imagine the intellectual energy which would be expended by lawyers in arguing that in fact such a statement may indeed suffer adversary defects and should therefore be excluded (and I think their argument might be a pretty strong one).

B. The Danger of Sacrificing Reliable Evidence

The second concern is directly related to the first. On its face, the distinction appears designed to further the goal of accuracy: adversary pressures may occasion a distortion of the truth and we must take care to guard against hearsay products of such pressures. The problem, however, put at its most basic, is that much adversary-created hearsay will be reliable evidence and much nonadversary-created hearsay unreliable evidence. For example, Professor Van Kessel is partly critical of the "Simpson exception" to the hearsay rule in California, which admits near contemporaneous statements of unavailable victims of physical injury, made under circumstances in-

8. *Id.* at 536.

dicating untrustworthiness, and made in writing, electronically recorded, or to a law enforcement official.[9] I do not want to fall into the trap which I hinted at earlier of getting too entangled in the intricacies of the American rules when not properly equipped to deal with them, but one point occurs to me about Professor Van Kessel's reaction to the new law. He appears to welcome the concern with witness-based dangers in the need for proper verification, but to disapprove the failure of the legislature to take on board adversary-based concerns in allowing statements made to law enforcement officials. My view is that the requirement of proper verification of the statements is more significant than their adversary-related origin. The reality is that people do make reliable statements to law enforcement officials and, returning to an earlier point, maybe greater emphasis needs to be placed on improving the procedural context in which such statements are taken than on the assumption that such statements are to be viewed with suspicion. In making this observation, I am not overlooking the potential for abuse of police power vis-à-vis defendants which exists within the adversarial process, but merely asking whether the hearsay rule is the best tool for curbing such abuse.

C. Aiming at too Narrow a Target?

This reference to the hearsay rule as an instrument of behavioural modification leads to my third reservation about the Van Kessel strategy. This is that by relying too strongly on the hearsay rule to exert a disciplinary function, we risk hitting only a very restricted target. In his conclusion, Professor Van Kessel makes the valid point that "[i]n a system that allocates broad powers to the adversaries and to the factfinder, hearsay rules operate as a check on both and compensate for the lack of significant neutral oversight of the pre-trial, trial, and post-trial processes."[10] The very definition of the hearsay rule embraces a limited sphere of evidence and can only exert meaningful control on the parties and offer protection to the factfinder in relation to that limited sphere. At one point in the paper, for example, reference is made to the broad latitude which American lawyers have in preparing or "coaching" witnesses for trial.[11] It is not the hearsay rule which will reduce the dangers of such a practice—in fact, the coached witness might ironically be trained to avoid hearsay pitfalls—but the imposition of stricter ethical standards on trial lawyers. The point has often been made that the classification of an item of

9. *See id.* at 538-39.
10. *Id.* at 544.
11. *See id.* at 506-08.

evidence as non-hearsay can on occasions have the misleading effect of endowing it with the stamp of reliability. Professor Van Kessel's strategy is unlikely to avert this particular danger.

IV. The General Question: The Grip of Hearsay Doctrine on Evidence Thinking

This leads to my third and final question, prompted by Professor Van Kessel's paper but not intended as a criticism of it: why does the hearsay rule continue to exert such a grip on evidence thinking, or more specifically, evidence thinking in the United States? The recent electronic symposium on hearsay evidence and implied assertions in the wake of the House of Lords' decision in *Kearley*, published in the *Mississippi College Law Review*, exhibited a fascination for the study of the rule which is certainly not matched in that decision's home jurisdiction.[12] The historical patterns and comparative insights which Professor Van Kessel's paper reveals inform us of the origins and development of the hearsay rule, but I am not sure if they explain fully the enduring force of the rule in the modern setting. There will always be concerns about the use of second-hand information in litigation, just as there will always be concerns about the use of other inferior forms of evidence, but there are serious questions to be asked about whether the hearsay rule is the most rational vehicle for the expression of such concerns in the future. As Professor Van Kessel has demonstrated in his paper, the rule has lost some of its former strength in the civil context, and in keeping with the theme of Professor Friedman's paper, perhaps the primary focus of attention in the future will be on the best method of securing protection for the criminal defendant rather than on reform of the hearsay rule.[13]

For the present, however, the hearsay rule retains a dominant position in the field of evidence thinking and, before concluding, I would make the observation that its durability remains all the more remarkable when we consider the empirical void in which the hearsay debate has been conducted. Professor Van Kessel refers to a number of mock jury studies which cast doubt on the conventional wisdom that juries are unduly swayed by hearsay evidence.[14] As for the actual impact of the hearsay rule on lawyers' practices, and on the conduct of trials, there is not a great deal of hard information, although there appears to be a pretty strong measure of consensus among practitio-

12. *Symposium on Hearsay and Implied Assertions: How Would (or Should) the Supreme Court Decide the* Kearley *Case?*, 16 MISS. C. L. REV. 1 (1995).

13. *See* Richard D. Friedman, *Truth and Its Rivals in the Law of Hearsay and Confrontation*, 49 HASTINGS L.J.545, 545 (1998).

14. *See* Van Kessel, *supra* note 1, at 495.

ners in favour of retention of the rule (itself of course an important factor in the debate over the rule's retention). In a survey of jury and nonjury trials which John Jackson and I conducted in Northern Ireland a few years ago, the admission of evidence was regulated more frequently on the general grounds of fairness, lack of clarity or lack of relevance than through the application of specific rules of evidence.[15] Judicial objections to evidence on the basis of specific rules accounted for only a quarter of all judicial objections to evidence and the hearsay rule accounted in turn for less than half of these.[16]

The general point, however, is simply that the impact of the rule in practice has not been fully documented and, in addition, not enough is known about the relative strengths of judges and lay fact-finders in assessing hearsay. It may be, for example, that if more evidence were available that juries can in fact be trusted with hearsay, there would be a case for broader admissibility coupled with greater responsibility on judges to offer guidance on the potential pitfalls of hearsay. I am aware of Professor Park's concern that jurors, even if generally capable of evaluating untested statements, are generally not aware of the inherent weaknesses of the adversary system.[17] As Professor Van Kessel indicates, however, one possible solution to this problem might lie in specifically apprising jurors of these weaknesses and allowing them to assess the evidence accordingly.[18]

Conclusion

These ideas, however, would require much fuller investigation than is possible in the course of the present comment. To conclude, Professor Van Kessel has added a fresh dimension to the hearsay reform agenda, but my general query is whether a more fundamental reappraisal of the rule itself is actually required. The relationship between the rule and the adversary system is, as Professor Van Kessel has demonstrated, a complex one. It reminds me somewhat of a passage from a novel by the great Irish comic writer Flann O'Brien, titled *The Third Policeman*.[19] The hero of the novel finds himself in a bizarre afterlife in which discussion of surreal, pseudo-scientific theories are the norm of everyday conversation. One such is the Atomic Theory, which rests on the notion that when humans and objects interact with each other over a period of time, their atomic particles are

15. JOHN JACKSON & SEAN DORAN, JUDGE WITHOUT JURY: DIPLOCK TRIALS IN THE ADVERSARY SYSTEM 111-25 (Oxford University Press 1995).

16. *Id.* at 119-22.

17. Roger Park, *A Subject MatterApproach to Hearsay Reform*, 86 MICH. L. REV. 51, 60-62 (1987).

18. *See* Van Kessel, *supra* note 1, at 500-01.

19. FLANN O'BRIEN, THE THIRD POLICEMAN (1967).

gradually exchanged, with the result that a bicycle can become a certain percentage person and a person a certain percentage bicycle. Thus "[w]hen a man lets things go so far that he is half or more than half a bicycle, you will not see [him] so much because he spends a lot of his time leaning with one elbow on walls or standing propped by one foot at kerbstones," and "the man-charged bicycle is a phenomenon of great charm and intensity and a very dangerous article."[20] The hearsay-charged adversary system might also be a dangerous article, with the hearsay doctrine exerting a hold on reform initiatives that is out of proportion to the actual contribution that it is capable of making to the system's goals.

20. *Id.* at 87.