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A Hong Kong Perspective and Book Review of
Declan McGrath, *Evidence*, Dublin: Thomson
Round Hall, 2005, 728pp, hb euro 350

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A Hong Kong Perspective and Book Review of Declan McGrath, Evidence, Dublin: Thomson Round Hall, 2005, 728pp, hb euro 350*

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Abstract

McGrath on Evidence is a new and impressive treatise on the law of evidence in Ireland. The use of a wide range of jurisprudence from across the common law world makes the book much more than a text on Irish law. There is a remarkable degree of similarity between the law in Ireland and Hong Kong. Practitioners in Hong Kong and beyond are sure to find useful examples and ideas within this book.

KEYWORDS: Ireland, Hong Kong, Law of Evidence, Book Review, Declan McGrath

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First published in 2005, McGrath on Evidence is destined to be a modern classic on the law of evidence. It has already been cited with approval by courts including the Irish Supreme Court.¹ The book readily fulfills its aim of providing “a comprehensive treatment of the main areas of the law of evidence” (p xix). It is far more than a book on the Irish law of evidence. While its treatment of Irish law is authoritative (at least to the eyes of this non-Irish lawyer), its scholarly achievement lies in its fruitful use of a rich body of law and law reform from a wide range of commonwealth countries. The book impressively draws examples and ideas from the case law in Canada, the United States, South Africa, New Zealand, Australia, and of course the United Kingdom to support general principles, to fill voids in Irish law, and to shine the light towards future development.

McGrath is even-handed in addressing the law of both criminal and civil evidence, a reflection of his mastery of the two areas. Where he does show bias is in his attention to the constitutional and human rights implications of evidence law. This of course is one of the virtues of the book. McGrath demonstrates a keen awareness and understanding of the ever-increasing body of comparative human rights jurisprudence impacting on evidence law at both the national and international level. One of the most interesting chapters in the book is the one concerned with improperly obtained evidence. From the author’s careful analysis and meticulous attention to detail, one learns about a jurisprudence that is highly technical and in great need of rationalization and simplification. McGrath tells us that there are four scenarios under the heading of ‘improperly obtained evidence’: unconstitutionally obtained evidence, illegally obtained evidence, unfairly obtained evidence, and evidence obtained in violation of the European Convention on Human Rights. He goes on to state and explain that different principles apply in each scenario. The chapter leaves the reader wondering why the four types of cases cannot be governed by a single set of general principles that balances the human rights interest of the accused, the societal interests in realizing accurate trial outcomes, and the judiciary’s interest in ensuring the integrity of the trial process. Although Hong Kong has had a Bill of Rights since 1991 and additional constitutional protections since 1997, it stands to gain more from Ireland than to contribute in this area.²

At many places, the author is critical of Irish and English jurisprudence. For example, he joins the chorus of criticisms of the implied assertion limb of hearsay. He is also critical of Irish authorities on the presumption of innocence

¹ See *McFarlane v DPP* [2006] IESC 11.

² The first appellate authority to consider the remedial power of the court to exclude evidence obtained in violation of the accused’s Basic Law rights was delivered only in January 2006, see *HKSAR v Chan Kau Tai* [2006] 1 HKLRD 400, CA. The Court of Final Appeal has yet to consider the question.

and reverse burdens of proof, and proposes adoption of the “sophisticated” Canadian jurisprudence under the Canadian Charter of Rights and Freedoms (p 25). On this point, reference can now also be made to two decisions by Sir Anthony Mason, sitting as a non-permanent judge of Hong Kong’s Court of Final Appeal, decided in the summer of 2006.³ McGrath’s critique of the corroboration rules for accomplices, which still exist in Ireland, are quite convincing. Here again, Ireland can look to the experience of Hong Kong which abolished these rules in 1994. There are areas however where the author could probably be more critical, such as in respect of the use of the analogy of important affairs to explain reasonable doubt to the jury (pp 47-48), the practice of allowing jurors to see the memory refreshing statement of the witness (p 96), and the *Rowton* restriction on the admissible forms of good character evidence (p 467).

With a few exceptions, the structure and organization of the book is familiar and logical. The first four chapters are concerned respectively with relevance and admissibility, the burden of proof, oral evidence, and unreliable evidence. A brief mention is made of the residual discretion in chapter 1; probably more could be said here on the concept of probative value as it is not until page 489 where it is discussed more fully in relation to character evidence. The oral evidence chapter discusses the many issues that can arise in the course of examining witnesses. The topic of sexual history shield, usually found and expected under ‘cross-examination’, is instead found much later in the character chapter. I suppose reasonable evidence scholars can disagree on where to locate this topic, but it is now probably ironic to locate it under character when the very policy of these shields holds that such evidence says nothing rationally about character. There are scattered references to the principle against bolstering credibility (pp 99 & 514); consideration might be given for the next edition to having a separate section on this topic. I particularly commend the sections on identification evidence and accomplice evidence in chapter 4. Much good-thinking has gone into them.

Chapters 5 and 6 are concerned with the companion topics of hearsay and opinion evidence. Like Hong Kong, Ireland has been slow to reform and liberalize the rule against hearsay evidence. The book makes the surprising observation that Irish courts have had very little opportunity to examine the law of hearsay in criminal proceedings. For example, the *Ratten* and *Andrews* approach to *res gestae* has yet to be adopted in Ireland. Nevertheless, the author dares to propose judicial reforms along the lines of principled developments in Canada and New Zealand. I disagree with the book’s suggestion that the New Zealand approach to discretionary admission of hearsay is “more conservative” than the Canadian one, although comments in the New Zealand case of *R v Manase* tends

³ See *HKSAR v Lam Kwong Wai* [2006] 3 HKLRD 808, CFA and *HKSAR v Hung Chan Wa* [2006] 3 HKLRD 841, CFA.

to suggest otherwise.⁴ The opinion evidence chapter is light but to the point. The United States inquiry into whether the expert evidence concerns a novel science might be an area for future discussion in this chapter.⁵

Chapters 7, 8 and 11 respectively concern the related topics of improperly obtained evidence, confessions, and self-incrimination. Things are amiss here. The concept of self-incrimination is so closely tied up with the confessions rule that one would have thought that the two chapters should lie side by side and with the former preceding the latter. The author tries to confine chapter 7 to the principles governing the exclusion of improperly obtained non-confession evidence, while chapter 8 is confined to improperly obtained confession evidence. This division of chapters on the basis of the form of the evidence has least two difficulties. First, there is an unnecessary repetition of the different scenarios of impropriety. For example, at para 7-02, there is the topic of unconstitutionally obtained evidence, and at para 8-04 we find again breach of constitutional rights in the confession context. The same is true for exclusion on grounds of fundamental fairness. This repetition gives rise to confusion and tedious cross-referencing. Secondly, dividing chapters according to the type of evidence (ie real evidence versus confession evidence) sends a misleading signal that different principles of exclusion apply to each type. This is the trap into which the Supreme Court of Canada had fallen before it clarified the law governing exclusion for trial fairness in *R v Stillman*.⁶ The major breakthrough realized in *Stillman* was that exclusion for trial fairness under the Canadian Charter should not be triggered by the nature of the evidence, but rather by the manner in which evidence was obtained and whether it could be said to be conscriptive of the accused. Such a distinction shrugs off formalism and brings doctrine more in line with the principle against self-incrimination.

Chapter 9 is an enlightened chapter on character evidence. The author promotes the modern notion that the test for the admission of similar fact evidence set down in *DPP v P* should be taken as a general test for the admission of all misconduct evidence.⁷ Irish law appears to have adopted an additional ‘necessity’ precondition to the admission of such evidence (p 485). According to McGrath, the criterion is whether the evidence is “really necessary for the determination of the issues in the case” (p 485), a test which sounds more like the one applied to expert opinion evidence. But where the probative value of the

⁴ See Peter Sankoff, “Gazing into the Hearsay Crystal Ball – Will New Zealand Adopt the Canadian Approach to the Residual Exception for Hearsay?” [2002] NZLJ 25, who argues that the necessity criteria in Canada and New Zealand are in fact much closer than what is suggested in *R v Manase* [2001] 2 NZLR 197, CA.

⁵ See *Daubert v Merrell Dow Pharmaceuticals Inc*, 509 US 579, 111 S Ct 2786 (1993).

⁶ See *R v Stillman* [1997] 1 SCR 607.

⁷ See *DPP v P* [1991] 2 AC 447, HL.

misconduct evidence outweighs its prejudicial effect to make it just to admit, one wonders why necessity as a further requirement is really necessary? Future editions will also need to include reference to *R v Randall* and the problem of one accused deploying the bad character of another accused in a cut-throat case.⁸

Chapter 10 on privilege is a delight to read. There is so much that is learned and useful in this chapter. It is comprehensive, addressing not only legal professional privilege, without prejudice privilege, public interest privilege, but also accepted or alleged privileges that apply to informers, journalists, communications with spiritual advisers, spouses, and parliamentarians. Given the author's views at page 572 on the "constitutional foundation" of legal professional privilege, he will no doubt be interested to know that in Hong Kong this privilege (at least legal advice privilege) is an expressly provided for constitutional right.⁹ The chapter also provides a reasonable answer to the question asked (but left unanswered) by the House of Lords in *Three Rivers* as to the underlying justification for litigation privilege.¹⁰ Here the author might also want to clarify whether the adversarial/non-adversarial distinction applies or should apply to litigation privilege.

The book concludes with two short and handy chapters respectively concerned with documentary, real and electronic evidence, and facts not requiring proof. The section on electronic evidence together with the discussion of live television links and video evidence elsewhere reflects the author's awareness of the impact of modern technology on the litigation process.

In Ronan Keane's Forward to the book, he describes it as a "scholarly but extremely practical work" (p xviii). I could not agree more. The latter quality is evident in all chapters. It is the kind of work that trial lawyers would like to have close to their side, especially in the courtroom. It has answers to esoteric questions of evidence law which on occasion (and usually when one least expects) arise in practice. Some examples of common and not so common practical issues addressed in the book include the consequences of the tribunal of fact having heard inadmissible evidence (pp 11-12), the status of the peculiar knowledge principle in allocating burdens of proof (pp 28 & 51), the necessary elements of a proper charge to the jury (pp 41-49), the timing of when evidence should be adduced (pp 74-76), whether evidence elicited by improper leading questions is regarded as inadmissible (p 77), the consequences of a witness being unavailable

⁸ See *R v Randall* [2004] 1 Cr App R 26, HL.

⁹ See Article 35 of the Basic Law which provides for the "right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies". The right was first considered by the Court of Final Appeal in *Solicitor v Law Society of Hong Kong* [2006] 2 HKLRD 116, CFA.

¹⁰ The question was raised by Lord Scott in *Three Rivers District Council v Bank of England* [2005] 1 AC 610, para 29.

for cross-examination after having given evidence in chief (pp 91-2), when wholly exculpatory statements of the accused might be admissible (p 111), the significance of the distinction between ‘ordinary accomplice’ and ‘supergrass’ witnesses (pp 161-162), the standard of review on appeal where the judge fails to give a warning in regards to the testimony of a sexual offence complainant (p 178), the pitfalls of photo lineup identification evidence (pp 196-7), miscellaneous common law and statutory exceptions to hearsay (pp 297-304), the requirement of State action to trigger the voluntariness rule (pp 406-408), the consequences of inadvertent disclosure of bad character evidence (pp 471-472), restrictions that still apply to cross-examination after the accused has lost his shield (pp 510-512), origins of legal advice privilege and litigation privilege (pp 523-524), whether privilege still applies where the client mistakenly believed he was consulting a qualified legal practitioner who in fact was not (p 532), the scope of work product privilege (pp 545-546), why informer privilege is distinct from public interest privilege (p 607), when can the privilege against self-incrimination can be invoked to avoid a penalty or forfeiture (p 667), and when can secondary evidence of the contents of a document be admitted (pp 681-688).

It is impressive to see just how much Irish and Hong Kong evidence law have in common. The main principles and rules that govern relevancy, admissibility, residual discretion, burden and standard of proof, the examination of witnesses, admissibility of statements, hearsay evidence, opinion evidence, the voluntariness rule, character evidence, and privilege in the two jurisdictions are essentially the same.¹¹ There appear to be a number of reasons for this high degree of similarity. For the most part, these topics remain part of the common law of Ireland and Hong Kong. The pace of statutory reform in the two jurisdictions has been slow and both have managed to avoid the radical reforms that have taken place in the United Kingdom in recent times. After 1997, the common law system in China’s Hong Kong has continued to flourish under the ‘one country, two systems’ principle protected in Hong Kong’s constitution, the Basic Law. The judiciary in Ireland and Hong Kong appear to share the common aspiration of developing the law in accordance with fundamental rights and values enshrined in the constitution of their respective jurisdiction. No longer shackled by English law, the judiciary in Hong Kong and Ireland are willing to look comparatively to the jurisprudence of other countries in developing the law. Even some statutory reforms have been similar, such as the spousal compellability rules, but note here that Hong Kong also enacted the exemption mechanism which McGrath favours (p 69).¹²

¹¹ See generally Simon NM Young, *Hong Kong Evidence Casebook* (Hong Kong: Sweet & Maxwell Asia, 2004).

¹² See Evidence Ordinance (Cap 8), ss 57 & 57A.

There are however some important differences in the law of the two jurisdictions. Hong Kong has managed to avoid the inference from silence reforms which the United Kingdom and Ireland have adopted. The author will be impressed by the manner in which the Hong Kong courts have upheld the common law right to silence during police questioning,¹³ but perhaps less impressed with authority that allows an accused's failure to testify to be taken as strengthening the prosecution's case.¹⁴ The Court of Final Appeal has also shown some innovation in according greater discretion in the good character direction,¹⁵ and recognizing new exceptions to the collateral finality rule.¹⁶ There are also many reforms in Ireland from which Hong Kong can learn, such as the regulations governing custody and electronic recording (p 423 & p 440), and the mandatory corroboration warning where confession evidence is given in cases tried on indictment (p 450).

Despite these differences, the overwhelming similarity in the law and legal process makes Ireland an ideal jurisdiction from which to conduct comparative evidence law research whether for litigation or law reform matters in Hong Kong. Indeed, I would say to Irish and Hong Kong practitioners that there is much that they can learn from each other's respective jurisdiction, and I certainly hope for future editions the author will look to Hong Kong for comparative insight and inspiration.

Finally, a work of such length as this one would have required significant effort and time in editing. For a first edition, the editorial work has been quite good, but from time to time, one comes across some obvious oversights and typos. It is enough to say that there remain enough "guilty reasons" (p 477) for author and publisher to make greater efforts at proof-reading for the second edition. None of this of course detracts at all from the excellent contribution Declan McGrath has made to the international scholarship on the law of evidence.

¹³ See *HKSAR v Lee Fuk Hing* [2005] 1 HKLRD 349, CFA; *HKSAR v Lam Sze Nga* [2006] 2 HKLRD 244, CFA.

¹⁴ See *Li Defan v HKSAR* (2002) 5 HKCFAR 320.

¹⁵ See *Tang Siu Man v HKSAR* (1997-98) 1 HKCFAR 107.

¹⁶ See *HKSAR v Wong Sau Ming* (2003) 6 HKCFAR 135.