Volume 2 | Number 2 | June 2014

scottish justice matters

HEALTH AND (IN)JUSTICE

Edited by Andrew Fraser and Maggie Mellon

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ISSN 2052-7950
9 772052 795005

THE GREAT CORROBORATION DEBATE

John Blackie

THE DEBATE about the Scottish Government's proposal to make a criminal conviction possible without corroborative evidence is unprecedented: the law of evidence typically attracts the attention only of academics, lawyers and judges. A Scottish Law Commission proposal to change the rules excluding evidence of bad character would very possibly have a much greater impact on the criminal process than abolition of the corroboration rule, but there has been almost no media comment.

So, why is corroboration different from reforms about what types of evidence can be used?

Corroboration is one of a small number of rules of criminal evidence, including for instance the 'beyond reasonable doubt' standard, that are about something fundamental: how judges and juries are to go about decision-making on the facts. Even if the outcome of the present debate is the abolition of the requirement, the big issue will remain: what is the optimum set of rules and practical measures to promote good decision-making on facts in the criminal process?

The immediate background to the proposal to abolish the requirement of corroboration obscured this question. As a result of the human rights decision in Cadder v HMA (applying article 6 ECHR "fair trial"), the law changed so that a confession to the police became inadmissible evidence if the accused had not been given the right to have a solicitor present. That was not a change to a rule regulating decision-making. It was about a particular type of evidence. The only thing that was unusual was, that it made inadmissible, evidence that had been previously admissible. Changes have usually been to the opposite effect, to make admissible types of evidence that had not previously been so.

This would have been seen as unremarkable by anyone working in criminal justice outside Scotland: whatever the legal arguments, Scotland was in practice non-standard. Of course it did affect police practice, raised questions about resources, including, obviously, how to ensure that there were lawyers available to perform the role, and whether the current police powers of detention needed adjustment. These matters for practical reasons needed to be dealt with relatively quickly. In autumn 2010 the Minister of Justice asked the Lord President to set up a Review to be carried out "expeditiously". Lord Carloway was appointed with wide terms of reference: "To consider the criminal law of evidence, insofar as there are implications arising from [the new right to have a lawyer present]" and "in particular the requirement for corroboration and the suspect's right to silence". The need for speed and the specific mention of corroboration meant it would not have been possible to consider the bigger issue of good decision-making on the facts. So the debate was narrowed unsatisfactorily before it began.

> The trouble is that this form of dispute cannot provide the answer as both sides are inevitably right

The corroboration rule is relatively complex. It is perhaps impossible to conduct a true political debate about a complex idea, so debate simplified it to the easily understood paradigm of a requirement for two witnesses. But that is just one possibility: obviously it can be one witness and a confession.

This was possibly the paradigm the Minister had in mind in specifying it in the terms of reference for the Review. Perhaps there would now be fewer confessions because of the right to have a lawyer? However, corroboration can also be one witness or confession and circumstantial evidence, including scientific evidence; it can be two sources of circumstantial evidence.

There are two further complexities. Corroboration does not apply to every fact, only to identity, and to the facts that constitute the elements of the crime or offence in question. Secondly, the requirement is modified by a number of what one commentator has memorably described as fiddles and fudges. For example, if there is a pattern between two or more offences charged, corroboration is not required of each. The evidence of one or more can corroborate the other(s).

Our current debate has been reduced to simplifications. Abolitionists state that there would be more rightful convictions or wrongful acquittals, as there are cases which are not prosecuted, or fail in court, because of lack of corroboration. Those opposed state that there will be more wrongful convictions. The trouble is that this form of dispute cannot provide the answer as both sides are inevitably right. Attempts have been made at a statistical assessment of the effect of the corroboration rule on the level of wrongful acquittals, including the criticised Crown Office data in the Carloway Review, but it may be impossible to be definitive. Comparisons with systems, such as England and Wales, that do not have the corroboration requirement come up against the problem that lots of relevant variables are different, such as a different approach to the obtaining of confession evidence. Even looking at Scotland, assessing the numerous variables and making predictions may be unreal.

A real problem in Scotland is the lack of research on the impact of the rules of evidence including at the investigatory stage

The one indisputable statistic is the low conviction rate for sexual offences. In the debate the police, the Lord Advocate, and the Solicitor General have concentrated on the problem of getting convictions in these cases. These offences often take place with no one other than the perpetrator and the victim present, and turn often on whether the victim consented (which is not in the nature of things likely to be the subject of circumstantial evidence). The low prosecution and conviction rate is manifestly a serious issue for the justice system and society. However, even here it is not possible to show with any confidence what the effect of the corroboration rule is.

The Minister of Justice has now moved the whole question to a reference group chaired by Lord Bonomy. This gives a real possibility of addressing my earlier question: what is the optimum set of rules and practical measures to promote good decision-making on facts in the criminal process? It is more than just about "safeguards", if it should recommend removing the corroboration requirement, whether generally or for some types of fact, or possibly, though unlikely, for some types of crime. The Bonomy review provides an opportunity for real consideration of the issue of unreliability of evidence and the promotion of good factual decision making, on both of which topics there is a vast amount of empirical and theoretical research outside Scotland. (None of this was considered in the Carloway Report, and, except in contributions by academics, has not figured in the debate). Lord Bonomy has now recruited expertise from that wider world, going beyond the English speaking jurisdictions, to advise.

A real problem in Scotland is the lack of research on the impact of the rules of evidence including at the investigatory stage. Even on confession evidence, the subject of hundreds of research projects round the world, there are only a couple of studies. Whatever the final outcome of the Bonomy review it is crucial that in the future studies are funded to assess the impact of the new law.

It would not be useful or sensible to predict the outcome of Bonomy but certain specific topics have emerged in the course of the debate. The problem of sexual offences is clearly one. The worry is though, that abolishing the corroboration requirement may raise false hopes of change. Conviction rates may remain the same. In particular juries may not like convicting on one person's word against another. If so, the psychological impact on the victim of not being believed may be even worse than where the case is not prosecuted, or fails for lack of corroboration. Another question is that of evidence of identity (in all types of cases). Others have appeared off and on in the debate, including the education of judges and juries in the handling of evidence and its pitfalls, whether experts can assist effectively in this, and in jury cases, the roles of judge and jury with respect to evidence.

Any system is going to come up with a compromise. In the 19th century the continental European systems, with predominantly inquisitorial procedure, moved to 'free proof'. Any type of evidence can be used, but there are limits to ensure the right to fair trial such as that the standard of proof is 'beyond reasonable doubt', and the burden of proof is on the prosecutor. Other instances include rules requiring disclosure of prosecution evidence, and that hearsay evidence is not enough for conviction if it is the sole or decisive evidence. Scotland, and the English speaking world generally, with adversarial procedure, have lots of rules, but the abolition of many inadmissibility rules has been in the direction of more free proof. Somewhere in the middle must lie the optimum, but what that is may well reasonably differ from one jurisdiction to another.

Cadder v HM Advocate [2010] UKSC 43

Papers and background to the Carloway Review are available on http://www.scotland.gov.uk/About/Review/CarlowayReview

For more on the Post-corroboration Safeguards Review (Bonomy) see http://www.scotland.gov.uk/About/Review/post-corroboration-safeguards

A useful database of links to the politics of the debate, essential papers and so on is http://www.cjscotland.co.uk - search 'corroboration'.

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