

# Reflections on Judicial Development of the Criminal Law: A History of Retreat and Resistance?

This is the text of a lecture delivered by Lady Scott, Senator of the College of Justice, in the Kelvin Gallery of the University of Glasgow on Thursday 7 June 2018. The lecture followed on from the tenth annual [Gerald Gordon Seminar on Criminal Law](#).

## Introduction

It is a great privilege and pleasure for me to have this opportunity to pay tribute to the unique and enormous contribution to the development of our criminal law made by Sir Gerald Gordon. This lecture – as any lecture looking at the development of the criminal law – covers ground well-trodden on and shaped by him.

Today, reform and proposals for the reform of the criminal law – at least in respect of evidence and procedure – dominate the legal landscape. The impetus for these reforms has come from post-devolution government – in part in response to policy objectives but also by obligations arising from EU directives and Convention obligations. This has brought about reform in sexual offences and vulnerable witnesses legislation which has resulted in new changes in practice which transform the role of the judge and the taking of evidence in sexual offences cases. There is much more to come with the Evidence and Procedure Review which is developing further proposals, which suggests the final destination of these reforms could result in the end of the adversarial trial, at least as we now know it.<sup>1</sup>

The other main proposals consist of, firstly, the proposals from the Carloway Review,<sup>2</sup> which includes the proposal to abolish corroboration (provoking uproar) and those of the Post Corroboration Safeguards Review which followed it.<sup>3</sup>

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<sup>1</sup> Scottish Court Service, Evidence and Procedure Review: Report (2015); Scottish Courts and Tribunals Service, Evidence and Procedure Review: Next Steps (2016); Scottish Courts and Tribunals Service, Evidence and Procedure Review Proposition Paper: A New Model for Summary Criminal Court Procedure (2017).

<sup>2</sup> Carloway Review, Report and Recommendations (2011).

<sup>3</sup> Lord Bonomy, The Post-Corroboration Safeguards Review: Final Report (2015).

All this activity has stimulated discussion on criminal law reform and how it is to be achieved. This itself is a significant change. The development of our criminal law, outwith academia – even in the most active areas of evidence and procedure – carries a long held air of disinterest. The Law Commission largely limits itself in respect of the criminal law to government references and it has often been absent specialised and experienced criminal law practitioners. Recently review and reform has been undertaken by the government using different models of law reform – including a remit to an individual judge alone, or ‘in house’ review.

There is a problem here – about the scope of reform needed and how best we achieve it and what model should be used. I don’t propose to repeat recent well-made academic observations.<sup>4</sup> I thought I might contribute to this discussion by looking at aspects of the judicial development of Scots criminal law and lessons that may be learnt from this history. In particular, by way of illustration, I want to look at judicial development of the admissibility of statements by an accused under police interrogation.

### **The Road From *Chalmers***

I want to start with the road from *Chalmers v HM Advocate*<sup>5</sup> which, of course, was well travelled at the time by Sir Gerald.<sup>6</sup> The privilege against self-incrimination is long rooted in Scots law in the Claim of Right and by the institutional writers, although asserted only in respect of ‘capitall crymes’. So too, there was recognition this right extended to the right to legal advice – seen in the provisions of the 1887 Act.<sup>7</sup>

In the first half of the nineteenth century it was well established that objections in law including objections as to the admissibility of evidence were determined by the trial judge and there was nothing unusual in the presiding judges at a criminal trial hearing evidence on questions of fact in

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<sup>4</sup> See for example J Chalmers, “Developing Scots criminal law: a shift in responsibility?” 2017 JR 33; J Chalmers, “Criminal law reform in Scotland” (2015) 19 Edin LR 399; SW Stark, “Promoting law reform: by means of draft Bills or otherwise”, in Dyson et al (eds), *Fifty Years of the Law Commissions* (2016) 139.

<sup>5</sup> 1954 JC 66.

<sup>6</sup> G Gordon, “The admissibility of answers to police questioning in Scotland”, in PR Glazebrook (ed), *Reshaping the Criminal Law: Essays in Honour of Glanville Williams* (1978).

<sup>7</sup> Criminal Procedure (Scotland) Act 1887 s 17 and see for example Lord Moncrieff in *Fox v HM Advocate* 1947 JC 30.

order to determine whether a witness was admissible in law.<sup>8</sup> So in itself *Chalmers* was no surprise. It is so important because of the deliberate emphasis it gave to existing principles and perhaps because of the wholesale sale retreat that followed it. It is worth noting at the outset the circumstances. The case concerned a 16 year old boy who was under suspicion and who attended the police station. He was put in a cell for about 30 minutes. He was not advised of his right to legal advice. The inspector admitted he cross-examined the appellant and made suggestions to him which were contradictory of his previous statement. After about five minutes the appellant burst into tears. There were no threats or force used. His subsequent statement was deemed inadmissible. Emphasis was placed on the circumstances of his being held in the hostile environment of the police station and his status as a suspect when questioned.

The key features of the decision are:

1. It asserted the importance of the right against self-incrimination and sought to anchor and protect that right by prohibiting, as a matter of law, the admission of evidence of incriminatory statements by a suspect unless they were truly voluntary or spontaneous. It put the question not simply 'was what happened fair to the accused?' - but 'was what was said truly voluntary'?

2. It re-emphasised that the admission of such evidence was a legal question for the judge. In the words of Lord Justice Clerk Thomson:<sup>9</sup>

In the interests of fair trial the law has laid down certain rules as to the circumstances under which statements made by an accused are admissible, and it is for the Judge to say if these have been transgressed.

3. It introduced the procedure we know as the 'trial within a trial' in order to allow admissibility as a legal question to be judicially determined outwith the presence of the jury.

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<sup>8</sup> See rehearsal of this by Lord Rodger in *Thompson v Crowe* 1999 JC 173 at 176-185.

<sup>9</sup> *Chalmers* (n 5) at 82.

That this decision was anchored to the right against self- incrimination, explains the opinion of Lord Cooper that:<sup>10</sup>

It is not the function of the police when investigating crime to direct their endeavours to obtaining a confession from the suspect to be used... against him... by our law self-incriminating statements... are always jealously examined from the standpoint of being assured as to their spontaneity[.]

In hindsight this is a case which illustrates classic judicial law making in developing and strengthening existing legal principles. Its strength is seen by the way this decision sits easily with current thinking, comparative common law and indeed with Strasbourg jurisprudence.

This is a case every criminal law student used to know and ought to know. Unfortunately it is perhaps best known today by the way it was swiftly swept aside, roundly dismissed and – in the words of Sir Gerald – left behind as a “disembodied ghost”.<sup>11</sup>

### **The Retreat From *Chalmers***

The retreat from *Chalmers* did not take long. It started with and was led, with characteristic vigour, by Lord Wheatley, firstly in the very different circumstances of *Miln v Cullen*<sup>12</sup> and then in the decision in *Balloch v HM Advocate*.<sup>13</sup>

In *Miln v Cullen* his Lordship set out to clear up “certain misapprehensions”<sup>14</sup> about *Chalmers*. The clarity introduced was to emphasise that “the basic and ultimate test is fairness”.<sup>15</sup> Importantly, fairness involves not just fairness to the accused but a balancing exercise and I quote:<sup>16</sup>

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<sup>10</sup> *Chalmers* (n 5) at 78.

<sup>11</sup> Gordon (n 6) at 332.

<sup>12</sup> 1967 JC 21.

<sup>13</sup> 1977 JC 23.

<sup>14</sup> *Miln v Cullen* (n 13) at 27 per Lord Wheatley.

<sup>15</sup> *Ibid* at 29.

<sup>16</sup> *Ibid* at 29-30.

[I]t is the function of the Court to seek to provide a proper balance to secure that the rights of individuals are properly preserved, while not hamstringing the police in their investigation of crime with a series of academic vetoes which ignore the realities and practicalities of the situation and discount completely the public interest.

This approach was simply put by Lord Grieve as “fairness also to those who investigate crime on behalf of the public”.<sup>17</sup>

In addition, in *Balloch* Lord Wheatley conducted what Sir Gerald so accurately described as “a coup d’etat”.<sup>18</sup> The seeds of revolt had been sown by the Lord Justice General Clyde in *Thompson v HM Advocate* in 1968,<sup>19</sup> who suggested early on that the trial within a trial procedure “may have to be reconsidered”<sup>20</sup> and he complained that the procedure was effectively a nuisance and that to lead evidence absent the jury was somehow unfair, in that it placed the judge who heard that evidence at an advantage. So yet again it was suggested *Chalmers* may have to be reconsidered.

In *Balloch*, Lord Wheatley sought to establish that a Judge would only be justified in withholding evidence in the very particular and narrow circumstances, where he is satisfied on the undisputed relevant evidence that no reasonable jury could hold that the statement had been voluntarily made or had not been extracted by unfair or improper means. Otherwise the judge would be usurping the function of the jury in what was a matter of fact.

Lord Justice General Rodger later agreed this approach constituted the judicial abdication to the jury of what was in truth the historic and peculiar duty of the court – to determine issues of the competence and admissibility of evidence. In particular, the duty to determine the admissibility of the evidence of extrajudicial confessions.<sup>21</sup>

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<sup>17</sup> In *Hartley v HM Advocate* 1979 SLT 26 at 31.

<sup>18</sup> See commentary by Sir Gerald Gordon to *Thompson v Crowe* 1999 SCCR 1003.

<sup>19</sup> *Thompson v HM Advocate* 1968 JC 61.

<sup>20</sup> At 66.

<sup>21</sup> *Thompson v Crowe* (n 8) at 191 per Lord Justice General (Rodger).

*Balloch* was an about turn in direction which quickly took hold. Lord Cameron exemplified the confusion in the law typical of this approach by Lord Wheatley when he wrote:<sup>22</sup>

since the case of *Chalmers* there has been growing a feeling that it is both the right and duty of the jury to hear and pass judgment on all the relevant evidence.

This decision deliberately and dramatically circumscribed the role of the judge and the application of the law. The result was to render the procedure practically ineffective with the obvious result that the trial within a trial process soon fell away.<sup>23</sup> Notwithstanding that this approach was in fact a radical departure from existing principles and a rejection of *Chalmers*, without seeking to overrule the full bench decision, this retreat set the path taken by the cases that followed throughout the 1970s and beyond, as best described at the time by Sir Gerald in his essay in 1978.<sup>24</sup> There was the occasional assertion of *Chalmers*, but this faded over time into the ghost-like apparition.<sup>25</sup>

The context at this time was one of the developing professionalization of the police and their influence, as well as the professionalization of the criminal defence bar. The approach became more deeply rooted as concerns grew about rising crime – largely related to the misuse of drugs. One commentator described the *Chalmers* era as ‘anti-police’ and there was a suggestion that the balancing exercise of fairness was seen as tipping too far in the direction of the accused.<sup>26</sup>

### **The Thomson Committee**

This context and this confusion over admissibility is reflected in the Thomson Committee’s Second Report in 1975.<sup>27</sup> The committee – which of course included Sir Gerald – sought to regulate the procedure and the position of the accused with the introduction of detention with time limits, whereby the detainee could be questioned within that time. It recognised that there needed to be

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<sup>22</sup> J Cameron, “Scottish practice in relation to admissions and confessions of persons suspected or accused of crime” 1975 SLT (News) 265 at 267 and see *HM Advocate v Whitelaw* 1980 SLT (Notes) 25 at 26.

<sup>23</sup> See “A question of fairness” 1977 SLT (News) 141 at 142.

<sup>24</sup> Gordon (n 8).

<sup>25</sup> For example Lord Hunter in *HM Advocate v Mair* 1982 SLT 471.

<sup>26</sup> DB Griffiths, *Confessions* (1994) para 1.08.

<sup>27</sup> Thomson Committee, *Criminal Procedure in Scotland* (Second Report) Cmnd 6218 (1975).

exclusionary rules as “the only effective weapon possessed by the courts to control police interrogation”.<sup>28</sup>

But essentially the perspective was shaped by the Wheatley approach – as seen where it stated “Scots law on this matter has proceeded not so much as on any fundamental constitutional or philosophic basis, such as the privilege against self-incrimination, as on a conception of fairness”.<sup>29</sup>

Fairness was viewed as a balancing act where the rights of the ‘individual’ required to be balanced in a way which prevented the situation where:<sup>30</sup>

... criminals can render the investigation of their crimes difficult or even impossible merely by standing on their rights. It must recognise the realities of the situation, and take account of those police practices which are accepted as fair by the public including criminals although they may be technically illegal or at least of doubtful legality.

This view of the balancing exercise, in so far as it applied to access to legal advice, was described by Lord Hope as a clear signal that, in the Committee's view, the public interest in the detection and suppression of crime outweighed any disadvantage to the detainee in being subjected to police questioning in the absence of his solicitor. That could be said of the weight given to the balancing assessment of fairness as a whole.<sup>31</sup>

It explains the recommendation by the Thomson Committee that a solicitor should not be entitled to intervene in police investigations before charge<sup>32</sup> – an extraordinary recommendation in hindsight, especially given the contrary history pre-*Chalmers*. Thomson resulted in section 3 of the Criminal Procedure (Scotland) Act 1980 (and later section 15 of the Criminal Procedure (Scotland) Act 1995) which was designed to deny an individual, who was already reasonably suspected of committing the crime, a right to obtain legal advice when he was to be questioned.

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<sup>28</sup> Ibid para 7.02.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid para 2.03.

<sup>31</sup> Lord Hope in *Cadder v HM Advocate* [2010] UKSC 43 at para 23.

<sup>32</sup> Thomson Committee (n 27) para 7.16.

I should also say there were other recommendations made by the Thomson Committee which sought to introduce significant procedural protections – such as the legal requirement for recording of police interviews and the exclusion of dock identification. These were ignored.

## **The Wilderness Years**

The result of this retreat is what was described by Lord Rodger as follows:<sup>33</sup>

The transformation in our law which *Thompson* and *Balloch* effected is remarkable by any standard. Particularly remarkable is the fact that it occurred without *Chalmers* or any of the long line of cases which preceded it ever being overruled. The result has been to create a somewhat strange legal landscape.

The result of this transformation, that I see, is that of Scots criminal law being route marched into the wilderness. This approach removed from judicial scrutiny or legal challenge all but the most extreme instances of police interrogation. The accused's pre-existing right against self-incrimination was obscured. It greatly diminishes the power of the judge to ensure that the accused has a fair trial. Nor can any damage readily be put right by the appeal court since it cannot intervene unless it can be said that no reasonable jury could have held the admission of such a statement was fair. There was no law to be discerned or developed.

The approach extended beyond issues of interrogation – for example in 1981 in *Low v HM Advocate* the question whether a statement in that case was a precognition and hence inadmissible was, in the view of the appeal court, correctly left to the jury to decide.<sup>34</sup>

There were also however occasional, 'spooky' flashes of the ghostly *Chalmers*. Notably for example by Lord Hunter in *Mair v HM Advocate* in 1982 where, before observing the overriding test of admissibility was fairness, his starting point was that any statement must be truly spontaneous and voluntary.<sup>35</sup>

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<sup>33</sup> *Thompson v Crowe* (n 8) at 188 per Lord Justice General (Rodger).

<sup>34</sup> 1988 SLT 97.

<sup>35</sup> 1982 SLT 471 at 472.



Viewed today, the *Balloch* approach constitutes a quite extraordinary abdication of judicial responsibility by the judges which fettered their own judicial powers to develop the common law. This perhaps explains – at least in part – our muted history of judicial development of the criminal law. Further, the route taken significantly contributed to our criminal law being out of step with many comparable jurisdictions. Out of step in the sense of the development of regulation or procedural rules designed to protect the rights of accused and to secure a fair trial. The right to a fair trial recognises the need for safeguards and the role of the trial judge in their protection.

This is seen, for example, in the contrasting developments of procedural protections and regularisation that have taken place in England<sup>36</sup> and in Canada.<sup>37</sup> The contrast is starkly demonstrated in the approach of the Thomson Committee disavowing the right against self-incrimination and in positively recommending there should be no solicitor access, as against the recommendations of the Royal Commission on Criminal Procedure in 1981 in England which *inter alia* concluded that all suspects should have an unrestricted right to a solicitor; and later in the codification of police procedures in the Police and Criminal Evidence Act in 1984.

### ***Thompson v Crowe* 1999**

The much needed rescue to this – at least in part – came with the full bench decision in *Thompson v Crowe* in 1999.<sup>38</sup> This was the decision made by Lord Justice General (Rodger) which overruled *Balloch*. And he did so with, what felt at the time, a degree of fury. The aim of this decision to overrule *Balloch* was clearly stated where he said:<sup>39</sup>

In doing so, Scots law will once more accord to the judiciary in full measure the power to exclude statements obtained by improper methods, a power which has been regarded as a necessary hallmark of any civilised system of criminal jurisprudence.

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<sup>36</sup> Judges Rules and Administrative Directions Cmnd 8092 (1981); Royal Commission on Criminal Procedure (the Philips Commission), Report, Cmnd 8092 (1981) which *inter alia* concluded that all suspects should have an unrestricted right to a solicitor; Police and Criminal Evidence Act 1984 and s 78 of same. See A Ashworth, “Excluding evidence as protecting rights” [1977] Crim LR 723.

<sup>37</sup> Canadian Charter of Rights and Freedoms s 10.

<sup>38</sup> *Thompson v Crowe* 2000 JC 173.

<sup>39</sup> At 191.

I am not sure this reinstatement of power has yet to be fully recognised, or has always been readily embraced. The length of the gap, before this restoration of judicial power, has contributed to a reluctance which lingers on.

*Thompson v Crowe* clearly addressed admissibility as a matter of law for judges to rule upon. But the concept of fairness as a balancing act remains the rather nebulous test – albeit a legal test to be applied by the judge. There is still confusion as to whether the test to be applied by the judge is simply ‘was what happened fair?’, or that ‘no reasonable jury could find it was fairly obtained’. An approach of ‘leaving it to the jury’ remains as a culture which is seen as attractive – and arguably again gaining strength.

A relatively recent and significant example is the statutory removal of the common law power of the trial judge to uphold a submission that the quality of the evidence was such that no reasonable jury could convict. This was removed by section 73 of the Criminal Justice and Licensing (Scotland) Act 2010<sup>40</sup> contrary to the Scottish Law Commission’s recommendations<sup>41</sup> and it deprives the trial judge of power to protect against a conviction based upon dubious evidence.

I must pause to observe here that *Thompson v Crowe* was the first of a number of significant decisions by Lord Rodger and his period as Lord Justice General provides an exceptional example of active and positive judicial development of the criminal law. Examples include *Galbraith v HM Advocate* (redefining the law on diminished responsibility),<sup>42</sup> *Drury v HM Advocate* (on the definition of murder)<sup>43</sup> and *King v HM Advocate* (reinforcing the no reasonable jury test to be applied by the appeal court).<sup>44</sup>

## **Convention Rights**

The decision in *Thompson v Crowe* was made at the beginning of the sea change which has been brought about by the introduction of Convention rights in the Scotland Act 1998 and Human Rights

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<sup>40</sup> Inserting s 97D into the Criminal Procedure (Scotland) Act 1995.

<sup>41</sup> See Report on Crown Appeals (Scot Law Com No 212, 2008).

<sup>42</sup> 2002 JC 1.

<sup>43</sup> 2001 SLT 1013.

<sup>44</sup> 1999 JC 226 (which established the test in a common law submission that no reasonable jury could convict).

Act 1998. Convention rights of course emphasise procedural guarantees of the right to a fair trial. Lord Rodger as Lord Justice General from the outset spoke of the future whereby Convention rights would permeate Scots law. But following his departure to the Supreme Court there developed, what I think can be fairly described, as a culture of judicial resistance to this change. This is seen for example, in the number of refusals of appeals and requests for leave to the UK Supreme Court. The realisation and understanding of the positive rights introduced by the incorporation of the Convention has taken some time. Much more than the 3-5 year transition period envisaged at the time.

The pinnacle of this resistance was the decision of the full bench of seven judges in *HM Advocate v McLean*,<sup>45</sup> which concerned the interrogation of the suspect in the police station. The decision in *McLean* reflects both the long retreat from *Chalmers*, as well as the degree of resistance to change arising from Strasbourg jurisprudence. In *McLean* the bench expressly relied upon the approach of the Thomson Committee in regard both to the balancing exercise to be undertaken and to the exclusion of a right to legal assistance.

When the inevitable decision of the Supreme Court came in *Cadder v HM Advocate*,<sup>46</sup> the opinions of Lord Hope and Lord Rodger brought home how far out of step the retreat from *Chalmers* had taken Scots criminal law.

Strasbourg jurisprudence has firmly established that the importance of the principle against self-incrimination as a fundamental aspect of the right to a fair trial. In so doing the European Court of Human Rights made reference to the particularly vulnerable position that the accused finds himself in the police station at the investigation stage of the proceedings,<sup>47</sup> an observation which mirrors that made by Lord Cooper in *Chalmers*.

Early access to a lawyer is said to be part of the minimum procedural safeguards to which the European Court will have particular regard, when examining whether a procedure has, or has not, extinguished the very essence of the law against self-incrimination. The Court observed that the privilege against self-incrimination is commonly understood in the contracting states and elsewhere

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<sup>45</sup> 2010 SLT 73.

<sup>46</sup> [2010] UKSC 43.

<sup>47</sup> *Salduz v Turkey* (2009) 49 EHRR 19 at para 54.

to be primarily concerned with respecting the will of the accused to remain silent in the face of questioning and not to be compelled to provide a statement.

Decisions based upon this principle establish that in order for the right to a fair trial to remain sufficiently 'practical and effective' article 6(1) requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police.<sup>48</sup>

Lord Hope observed it was remarkable that countless cases have gone through the Scottish courts, and decades have passed, without any challenge having been made to the basis that admissions made by a detainee without access to legal advice during his detention were admissible. In his observations on the approach of the Thomson Committee being out of keeping with current thinking in the rest of the United Kingdom. He went to say:<sup>49</sup>

But, by preferring to go their own way, those who were promoting the legislation that gave effect to the Thomson committee's recommendations were shutting their eyes to the way thinking elsewhere was developing. Now, sadly, 30 years on the Scottish criminal justice system must reap the consequences.

Lord Rodger anticipated the recognition of a right for the suspect to consult a solicitor before being questioned would be seen as a tilt in the balance against the police and prosecution. He anticipated the decision may be seen by many as "unpalatable".<sup>50</sup> Indeed that appears to have been the perception of the Crown Office at the time.<sup>51</sup>

### **Where Are We Now Post-Cadder?**

Well where are we now? Does *Cadder* take us full circle back to *Chalmers*?<sup>52</sup> Has the disembodied ghost been brought back to life? Not quite.

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<sup>48</sup> *Saunders v United Kingdom* (1997) 23 EHRR 313 at para 68; *Murray v United Kingdom* (1996) 22 EHRR 29 at para 66; *Salduz v Turkey* (n 47) at para 55.

<sup>49</sup> *Cadder* (n 31) at para 51 per Lord Justice General (Hope).

<sup>50</sup> *Cadder* (n 31) at para 97 per Lord Justice General (Rodger).

<sup>51</sup> See Lord Drummond Young, "Scotland and the Supreme Court" (2013) 2 Cambridge Journal of International and Comparative Law 67 at 72.

<sup>52</sup> See P Duff, "*Chalmers to Cadder: full circle on police interrogation?*" (2015) 19 Edin LR 186.

Despite *Cadder* being hailed as a decision which has “overturned Scottish jurisprudence”<sup>53</sup> it is has only done so in respect of the jurisprudence following the approach of Lord Wheatley in the retreat from *Chalmers*. And it only has a limited effect namely establishing the requirement of access to legal advice. It does not address the test of admissibility of statements obtained.

As I have explained, the principles upon which it is based are not new and underpin *Chalmers*, but it is yet to be seen as to whether the same emphasis on the right to self-incrimination is re-established and further judicially developed. The signs are not promising.

### **The Carloway Report**

*Cadder* prompted cries for a re-balancing of the system in a familiar perception that things had gone too far in favour of the accused – as anticipated by Lord Rodger.

The resulting remit to Lord Carloway by the Scottish Government for a review was widely stated and it included the proposed re-examination of the “core principles underlying the procedures of detention, police questioning, charge and arrest” and “the law and practice of questioning suspects”.<sup>54</sup> Some 78 recommendations were made, but the focus of the review was the proposal of the removal of corroboration. This proposal in turn caused widespread professional resistance and was dropped from what became the Criminal Justice (Scotland) Act 2016.<sup>55</sup>

What is of interest here, is the key theme running throughout the *Carloway Report*, which is said to be the need to have a “simplified” and “modernised” criminal justice system.

This theme lies behind the proposals made for arrest and detention. The recommendation that the current distinction between “arrest” and “detention” be abolished, with the only general power on the part of the police to take a suspect into custody being that of arrest, is introduced in section 1 of

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<sup>53</sup> Carloway Review (n 2) para 1.07.

<sup>54</sup> Carloway Review (n 2) para 1.07.

<sup>55</sup> Seen in the responses to the consultation from professional bodies and see PR Ferguson and FE Raitt, “A clear and coherent package of reforms? The Scottish Government consultation paper on the Carloway Report” [2012] Crim LR 909.

the Criminal Justice (Scotland) Act 2016. The right to legal assistance is triggered by police custody which is defined as arrest. Notably the 2016 Act also extends that right to those attending for police interview on a voluntary basis – which chimes with *Chalmers*.<sup>56</sup> At the same time it also extends the power to question those accused i.e. charged with offences if authorised by the court as being in the interests of justice.<sup>57</sup>

The development of this theme of modernisation and simplicity however went much further in the Review in respect of the approach to the admission of evidence generally. This is seen in the following statements made:<sup>58</sup>

The Review has been concerned to cut through some of the complexities that surround the admission of evidence at trial. In the modern world, the courts, including juries, must be trusted to be sufficiently sophisticated to be able to assess the quality and significance of testimony without the need for intricate exclusionary rules. It is the Review's conclusion that the modern approach, that is required, involves the de-construction of some of the more elaborate rules of evidence.

And:<sup>59</sup>

... judges and juries should be free to consider all relevant evidence and to answer the single question of whether they are satisfied beyond reasonable doubt that the accused person committed the offence libelled.

Surely this suggestion of 'trusting the jury' and of hearing evidence free from legal exclusionary rules has been heard before? Do I hear the echo of Lord Wheatley and Lord Cameron asserting the right and duty of the jury to hear and pass judgment on all the relevant evidence? Are we going forwards by going backwards?

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<sup>56</sup> 2016 Act, s 32(1)(b).

<sup>57</sup> 2016 Act, ss 35-37.

<sup>58</sup> Carloway Review (n 2) para 7.0.10.

<sup>59</sup> Carloway Review (n 2) para 7.2.55.

In the event, this theme in the Report was not put in the proposals for consultation. The only result that can be said to be related is section 109 in the Criminal Justice (Scotland) Act 2016, which makes any prior statement to by an accused – including an exculpatory one – admissible as evidence in the trial. Otherwise, “the use, in evidence, of any answers given by a person during questioning is subject to the laws on admissibility. In general terms, this means that any questioning must be fair.”<sup>60</sup>

This suggests the test for admissibility remains a matter of fairness – presumably of the balancing of competing interests. What the test means and its application remains unclear or confused. According to the current edition of Renton and Brown’s Criminal Procedure, what constitutes unfairness is “almost impossible to answer”.<sup>61</sup> Recent post-*Cadder* decisions apply the same test. For example, in one appeal in 2011 the court relied upon the reasoning of Lord Wheatley in *Miln v Cullen*.<sup>62</sup>

*Cadder* should tell us so much more than has been taken from it. The protection of legal access underpins the underlying principle, the right against self -incrimination. The importance of that right to the fairness of a trial which admits statements by an accused in police custody, is writ large in the decision and by Strasbourg. As yet the voluntariness of such a statement and its underpinning of the principle of the right against self -incrimination remains out of view. *Chalmers*, it would appear, needs further resuscitation.

### **Where Are We Now In Practice?**

It is always worthwhile to consider whether there has been real change effected in practice – on the ground as it were.

Early signs from the evidence being gathered<sup>63</sup> suggests the post-*Cadder* right of legal access is having far less impact than anticipated, or feared by some. There is an unspecified increase in no comment interviews.<sup>64</sup> There are ongoing concerns as to the effectiveness of legal access in practice

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<sup>60</sup> Explanatory Notes to the Criminal Justice (Scotland) Bill (SP Bill 35, Session 4 (2013)), para 71.

<sup>61</sup> See for example the description of the law in Renton and Brown at paras 24-39 and 24-240.

<sup>62</sup> *Ambrose v Harris* [2011] UKSC 43 at paras 119-120 per Lord Matthew Clarke.

<sup>63</sup> See for example Post-Corroborations Safeguards Review (n 3) chapter 5; JUSTICE Scotland, Legal Assistance in the Police Station (2018).

<sup>64</sup> Post-Corroborations Safeguards Review (n 3) para 5.2.

– for example the high numbers of suspects who waive their right to legal advice;<sup>65</sup> of those who do exercise it, the low numbers who receive the attendance of the lawyer at the interview;<sup>66</sup> and in my experience the few solicitors in attendance at interview who intervene.

It is also worth noting that despite the importance of the recommended safeguard of recording of interviews made by the Thomson Committee I mentioned earlier, there is still no legal requirement for recording – despite the failures in practice of the police to do so. A failure which is ongoing. The Post Corroboration Safeguards Review reveals the up to date position and recommends the introduction of a Police Code of Practice.<sup>67</sup>

### **Police Practice**

Police practice in respect of questioning suspects appears to have changed in practice – at least in respect of sexual offences cases, whereby a new and an apparently standardised *pro forma* interview plan has been introduced. These interviews appear to be designed to obtain statements from the suspect and are characterised by the following features:

- (i) After caution putting at the outset what is called an “impact question”. This asks the suspect what he knows about the rape/sexual offence of X that took place at Y location on Z date. The word ‘allegation’ is not and is never used.
- (ii) This is followed up -depending on the response by the suspect - with either a series of questions about the allegation, or a series of unchallenging questions about personal details – such as lifestyle sexuality social media use and the like. This leads to questions as to the circumstances of the event. It appears to be designed to generate statements about the event.

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<sup>65</sup> JUSTICE Scotland (n 63) para 2.7-2.11.

<sup>66</sup> Ibid para 2.16.

<sup>67</sup> Post-Corroboration Safeguards Review (n 3) para 5.18 shows that 17% of police interviews are digitally recorded and 83% are only noted – this reflects the distinction between practice in cases likely to be prosecuted under summary/solemn procedure.



- (iii) If the suspect maintains a no comment answer the challenges are still made. In a recent example the accused was 213 questions bearing on the allegation, to which he replied no comment. He eventually gave in.<sup>68</sup>
- (iv) Finally the interview proceeds to the finish with what is apparently called the final impact stage. This involves direct challenges on information which it is thought could be incriminatory. Challenge is made by assertion of facts – for example, rather than saying X told us you held her down, the questioning is framed as “we know you held her down” and ignores the response by repeated questions.

I wonder what Lord Cooper would make of this? Or for that matter Lord Hunter?

## Conclusion

Let me conclude.

I chose to rehearse the history regarding admissibility of statements under police interrogation as an illustration of judicial development of the criminal law. I could just as easily have taken other illustrations – for example a history of the judicial resistance to the exclusion of dock identification or eye witness identification. That too would show failure to develop the law and a resistance to doing so – as exemplified in the contrast between the Bryden Report<sup>69</sup> as against the English Devlin Report.<sup>70</sup> The latter resulted in the introduction of significant safeguards and reforms. Notwithstanding some piecemeal judicial reform stemming from London, our law on dock identification remains out of step to comparable jurisdictions.<sup>71</sup>

Both illustrations are about subjects which are well recognised causes of miscarriages of justice They matter.

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<sup>68</sup> *HM Advocate v Hawkins* [2017] HCJ 79.

<sup>69</sup> Identification Procedure under Scottish Criminal Law: Report by the Working Group Appointed by the Secretary of State for Scotland and the Lord Advocate (Bryden Report) Cmnd 7096 (1978).

<sup>70</sup> Criminal Law Revision Committee 11th Report, Evidence (General), Cmnd 4991 (1976).

<sup>71</sup> See P Ferguson, “Eyewitness identification evidence”, in J Chalmers, F Leverick and A Shaw (eds), Post-Corroborator Safeguards Review: Report of the Academic Expert Group (2014) at 45-46 and 50-53.

## **What Lessons Are To Be Learned Here?**

We have been led astray for a long period where there was no significant judicial development of the law. The law having been abandoned to the jury, it didn't feature much in a criminal trial. The protection of and development of basic pre-existing principles got lost or have been left behind. We need to recognise this problematic history and realise we have some catching up to do. We need to need to go back to basic principles and understand and learn from other comparative jurisdictions.

In addition, this illustration shows the potential dangers in judicial development of the criminal law. Development or reform of the criminal law needs to be undertaken by all of those concerned, in a joint approach and on a regular basis. The Thomson Committee in 1975 recommended the appointment of a Standing Committee on criminal procedure, which would meet regularly and to keep under continuous review emerging problems and suggest improvements – surely this history shows us the sense of this.

I believe now is the opportunity for progress. The silver lining in all the recent activity has been the stand out example of the Post-Corroboration Safeguards Review led by Lord Bonyon – where among the many skilled participants, was again Sir Gerald. This impressive piece of work has shone a torch on the various existing weaknesses in our procedural protections and has also provided a model for how to undertake legal reform. As present the Report appears to be on hold with the government. It answers much in the current debate. This is because it started with quality academic research; it comprised of a team of highly experienced practitioners as well as academics, it has involved consultation with judges and it has worked on building a consensus for change.

A key lesson to be learnt for future reform, is to combine the skills of criminal practice and those of criminal law academics. Sir Gerald is the living proof that this combination is invaluable.

Thank you.

Lady Scott