

Justice Committee

Criminal Justice (Scotland) Bill

**Written submission from Professor Pamela R Ferguson, University of Dundee
and Fraser P Davidson, University of Stirling**

The proposed abolition of the corroboration requirement

Summary

We are not satisfied that the case for abolition of corroboration has been made.

- Arguments to the effect that it is an ancient rule and out of keeping with developments in evidence in the 21st century do not make the case for abolition. If anything, improvements in CCTV techniques, DNA analysis, etc suggest that it may be easier to acquire corroboration than hitherto.
- The argument that other jurisdictions do not have corroboration, and therefore Scotland is 'out of line', also adds little; there is no corroboration requirement as such in England, but it is our understanding that prosecutors routinely look for corroboration and do not generally prosecute without it.
- Fact-finders (whether judges or jurors) will in practice seek some further piece of evidence which confirms or supports a complainer's version of events. Abolishing the corroboration requirement is likely to raise false hope in victims of sexual assaults that their cases will result in conviction.
- We have had piecemeal tinkering: once it was recognised that those being detained and interviewed by the police had a right to legal advice, the period of detention was doubled and the abolition of corroboration proposed. To offset this, it is now proposed that the jury majority be changed. The Law Commission, or other specially appointed body, should be asked to evaluate the criminal process as a whole (trial and pre-trial; laws of procedure and of evidence), and to consider whether it strikes an appropriate balance between the rights of accused persons, and the wider public interest in preventing crime and securing that those guilty of breaking the criminal law are convicted and punished.
- If corroboration is to be abolished as a general requirement, an exception should be made for certain forms of visual identification evidence, and for confession evidence. Dock identification should no longer be permitted unless the witness has made a positive identification of the accused on an earlier occasion. Legislation should provide that evidence may be led from experts in the field of identification, in appropriate cases.

We can supply papers we have co-authored on some of these points, if this would be of assistance to the Committee:

1. P. R Ferguson and F.E. Raitt, "A Clear and Coherent Package of Reforms? The Scottish Government consultation paper on the Carloway Report" 2012 *Criminal Law Review*, 909-926
2. F.P. Davidson and P.R. Ferguson, "The corroboration requirement in Scottish criminal trials: Should it be retained for some forms of problematic evidence?" 2014 *International Journal of Evidence and Proof* (forthcoming).

Since it seems likely that corroboration will be abolished as a general requirement, we focus in this note on the argument that it should continue to be a requirement for two types of particularly problematic evidence, namely for visual identification and confession evidence.

(a) Eyewitness identification evidence: Identification may not be an issue at trial, for example, where an accused is pleading self-defence to an assault or homicide charge, or consent in a rape trial, but where it is at issue, a distinction may be made between cases in which the accused is well-known to the victim, and the circumstances are such that there was ample opportunity for the witness to see the perpetrator, and those cases in which identification rests on less solid foundations. In the former case, the veracity of the witness may still be in doubt – a witness who states categorically that her husband punched her; that she saw her neighbour trampling her prize roses; or that her boss forced her to have sexual intercourse may be lying, but if she is telling the truth then it is unlikely that her identification of the perpetrator is mistaken. In contrast to this, where a witness and perpetrator were not acquainted before the incident, then it is far more likely that even an honest complainer may be mistaken. In such cases, miscarriages of justice can and do occur. Likewise, where the witness caught but a 'fleeting glance' of the perpetrator, misidentification may occur, even when the accused is someone to whom the witness is well known. The Scottish courts have recognised the problematic nature of such evidence, indeed it has been stated that where a prosecution depends on eyewitness identification, 'the risk of a miscarriage of justice is notorious.'¹ This echoes the view of the Criminal Law Revision Committee in England, who regarded 'mistaken identification as by far the greatest cause of actual or possible wrong convictions'.² Research from the USA similarly suggests that that mistaken identifications account for more miscarriages of justice than all other causes combined.³

Wrongful convictions may result from two types of eye-witness identification errors. Even when observers have a perfect view of an event or person, they interpret rather than straightforwardly record what they are seeing,⁴ while their memory of what they have seen is unconsciously adapted over time.⁵ Thus there may, for example, be a tendency to persuade oneself that a person one sees is actually someone whom one knows, while in one's memory of that event the individual perceived becomes more and more like that person.⁶ Moreover, while it is commonly supposed that an individual is more likely to recall an event vividly and accurately if it is especially traumatic, the reverse is actually true.⁷ It is also the case that the prejudices of the witness may significantly distort perception,⁸ and, even when not prejudiced, observers are much less accurate when identifying members of racial groups different to their own.⁹ A second error may occur when the fact-finder, particularly if this is a jury, assesses the identification evidence and affords it more weight than it merits, since juries tend to place great weight on identification evidence.¹⁰ Their faith

in such evidence may often be misplaced, but it is usually difficult to assess whether the confidence of a witness in making a positive identification is well founded,¹¹ and since such witnesses tend to be absolutely certain of the truth of what they are saying, cross-examination is rarely an effective means of testing the value of such evidence.

The problems of identification evidence are compounded in Scotland since we still permit dock identification of the accused as the perpetrator of a crime. Sometimes the purpose of this is simply to confirm that the person in the dock is indeed the person whom the witness has previously identified. However, dock identification can take a different form, where a witness has not previously been asked to make an identification at an identification parade. The appeal court has recognised that this type of dock identification is open to criticism¹² and has stressed that trial judges should normally instruct juries on its dangers.¹³ These can include the fact that the witness is identifying someone they saw only once, perhaps some considerable time previously, that dock identification lacks the safeguards inherent in an identification parade, and that the accused is indeed sitting in the dock. (As a former prosecutor, one of us has had the experience of witnesses identifying the accused as the perpetrator solely on the basis that they assume the person in the dock must be the person who 'did it'.) If a trial judge omits to warn a jury of these dangers, this will not necessarily lead to a conviction being overturned. Some years ago the Departmental Committee on Criminal Procedure in Scotland in its Second Report suggested that identification parades should replace dock identification, and that the latter should not be competent where the witness had failed to identify the accused at a parade.¹⁴ This was not acted upon, and the appeal court has rejected the argument that it is unfair to allow a witness to identify the person in the dock as the perpetrator, even where there was effectively only one person who could be identified, the court having been cleared.¹⁵ Several other appeal court decisions have upheld the acceptability of dock identification. This is a practice which ought to cease.

Given the risk of miscarriages of justice, trial judges should direct juries on the problematic nature of identification evidence, generally. However, precisely what a trial judge says in this connection is a matter for his or her discretion. In England, where a case rests on disputed identification evidence, the trial judge has to warn the jury of the need for caution before convicting on the basis of such evidence, explaining how it can be inaccurate, and making reference to its strengths and weaknesses in the case in question.¹⁶ Similar views have been expressed in other Commonwealth jurisdictions.¹⁷

Moreover, the Scottish jury will not have the benefit of expert evidence on the dangers of mis-identification. The High Court has ruled against the admissibility of such evidence. This lack of expert assistance, coupled with the tendency, noted above, of juries to set particular store by such evidence, makes it doubtful how much impact judicial warnings have.¹⁸ In this context, the fact that juries tend to be convinced by such evidence means that the requirement of a two-thirds majority in favour of a guilty verdict – as proposed in the current Bill – is unlikely to represent much of a safeguard. Indeed the studies regarding the dangers of this type of evidence have all occurred in jurisdictions where similar safeguards are already in place.

An example of how reliance on such evidence can lead to miscarriages of justice is found in an American case where a man served 14 years' imprisonment for a crime

he did not commit, ultimately being acquitted on the basis of DNA evidence:
 ‘Though ... the rape victim ... spent more than forty-five minutes with her attacker in her brightly lit home, spoke to him face-to-face, and took special care during the attack to make careful observations and notes in her mind of all the attacker’s identifying characteristics, ... [she] identified the wrong man in a photographic identification, in a line-up, and at trial. She claimed to be “100% certain” of her identifications on all three occasions.’¹⁹

It has been suggested that corroboration of eyewitness identification ought to be required in the USA.²⁰ It would be ironic if Scotland were to dismantle this important safeguard at a time when other jurisdictions are considering its reintroduction.

As it currently operates, however, corroboration offers little safeguard in cases involving visual identification evidence. Lord Justice-General Emslie summarised the approach of the Scottish Courts: ‘where one starts with an emphatic positive identification by one witness then very little else is required. That little else must of course be evidence which is consistent in all respects with the positive identification evidence’.²¹ In other words, it is not necessary that at least two witnesses *positively identify* the accused as the perpetrator. If one witness does so, the requirements of corroboration are met if another witness testifies that the accused has the same build as the perpetrator,²² or is the same height and has the same hair colour as the perpetrator.²³ It was enough in one case that the corroborating witness indicated that the accused resembled the perpetrator in terms of basic looks.²⁴ In one case the corroborating witnesses picked out the accused at an identification parade as resembling the man she had seen in terms of build, hair colour and hair length. She had also picked out another individual as resembling the man she had seen, yet the court saw this as no barrier to her evidence having corroborative effect.²⁵

There is also the issue of how positive the primary identification evidence, which is corroborated by the ‘weak’ identification evidence, has to be. It is clear that the witness does not have to be entirely certain that the accused is the perpetrator. It amounts to a positive identification if a witness says that the accused is ‘very like’ the person they saw.²⁶ The same is true if one witness testifies to being ‘80%’, and another to being ‘75%’ sure that the accused is the person they saw.²⁷ It can be appreciated then that the retention of the corroboration requirement as it currently operates would not offer much of a safeguard in quite a number of cases. The central problem with visual identification evidence is related to its very nature. No doubt in broad terms the more witnesses who can identify an accused, the more likely it is that the identification will prove to be accurate, but given that such evidence is often inherently suspect because of the factors mentioned above, the mere extent of visual identification evidence is no guarantee of accuracy. It may therefore be necessary to concentrate on improving the quality of identification evidence through such devices as the guidelines provided for the authorities under Code D of the Police and Criminal Evidence Act 1984 in England. The Bill represents an opportunity to strengthen aspects of the law of evidence. In 2004, Parliament recognised the legitimacy of admitting expert psychological or psychiatric testimony. It is suggested that a similar provision could be enacted which would allow evidence to be led from experts in the field of identification, in appropriate cases. Rather than trial judges merely warning of the dangers of accepting uncorroborated identification

evidence, such testimony could explain the inherent unreliability of the human memory in certain types of situations.

(b) Confession evidence: The second area where consideration might be given to the retention of a corroboration requirement relates to evidence of an extra-judicial confession. While Scotland is unique in retaining a general corroboration requirement, it is not the only jurisdiction to have a requirement in relation to confessions. Most US states maintain such a requirement. According to the US Supreme Court, the foundation of this

'lies in a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused. Confessions may be unreliable because they are coerced or induced, and although separate doctrines exclude involuntary confessions from consideration by the jury, ... further caution is warranted because the accused may be unable to establish the involuntary nature of his statement. Moreover, though a statement may not be "involuntary" within the meaning of this exclusionary rule, still its reliability may be suspect if it is extracted from one who is under the pressure of a police investigation – whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past.'²⁸

It is impossible to assess how frequently false confessions are made,²⁹ but there is ample evidence that they do occur,³⁰ and one study has found that almost a quarter of all wrongful convictions in the USA may be attributable to false confessions.³¹ Quite apart from the situation where the suggested confession was never in fact made,³² individuals do make false confessions for all manner of reasons.³³ As the *Royal Commission on Criminal Justice* observed,³⁴

- (i) people may make false confessions entirely voluntarily as a result for a morbid desire for publicity or notoriety,³⁵ or to relieve feelings of guilt about a real or imagined previous transgression;³⁶ or because they cannot distinguish between reality and fantasy;
- (ii) a suspect may confess from a desire to protect someone else from interrogation and prosecution;
- (iii) people may see a prospect of immediate advantage from confessing³⁷ (e.g. an end to questioning or release from the police station³⁸) . . . and
- (iv) people may be persuaded temporarily by the interrogators that they really have done the act in question...³⁹

In our view, Scotland ought to retain the requirement of corroboration in relation to confessions.

In practice, a confession can almost corroborate itself, in the sense that corroboration can be found in the fact that the circumstances of the crime coincide with the

confession. This approach might be seen to make perfect sense in cases like *Manuel v HM Advocate*⁴⁰ where the confession revealed details which only the perpetrator could know: where the victim's body and certain items of her clothing could be found. He then led the police to the body itself. In such a case, the concern that the confession might be fabricated is largely absent. However, the approach also seems to prevail when there is no such safeguard; it is no bar to conviction that the coincidence of the details of a confession with those of the crime providing corroboration are largely in the public domain,⁴¹ nor that while some of its points coincide with the details of the crime, others are actually at odds with those details.⁴²

It is apparent, then that the safeguard provided by the insistence that a confession must be corroborated has been significantly weakened, in practice. Special knowledge confessions can corroborate when the knowledge revealed is not so special, in that it is shared by many or could have been acquired other than by being the perpetrator of the crime. Indeed, a special knowledge confession can still corroborate even if parts of it are entirely inaccurate. To say that such matters are capable of being weighed by the jury is especially problematic, since it seems that juries are particularly impressed by confessions,⁴³ thus the chances of being acquitted in such circumstances are very low,⁴⁴ especially as judges in Scotland do not routinely warn juries of the dangers of relying on uncorroborated confessions, as happens in certain other jurisdictions.⁴⁵ In contrast to identification evidence, the courts are more open to the admissibility of expert evidence in relation to the reliability of confessions. Thus experts can be heard on such matters as an accused's peculiar susceptibility to pressure when questioned by the police,⁴⁶ and the likelihood that several people who heard a confession being made would be able to recall it in almost identical terms.⁴⁷ However, special circumstances must be present before expert evidence may be admitted.

It is recommended that Parliament should signal the continuing importance of corroboration in this area by retaining the requirement. For example, legislation could provide that:

'A confession requires to be corroborated by evidence independent of the confession, except where the confession reveals special knowledge of the crime, the only reasonable explanation of which is that the accused was the perpetrator.'

Provision could also be made for expert testimony to be admitted, to explain to jurors that not all 'confessions' are genuine. Without such expert evidence to guide them, juries will struggle to fathom why an innocent person would confess to a crime. Simply requiring a two-thirds majority in favour of a guilty verdict is unlikely to provide any real safeguard, and certainly nowhere near as secure a safeguard as a proper corroboration requirement.

References

- 1 *Gage v HM Advocate* [2011] HCJAC 40 at para [29] per LJ-C Gill.
- 2 11th Report, 1972, Cmnd 4991, para 196. See to similar effect the *Report of the Departmental Committee on Evidence of Identification in Criminal Cases* (1976) para 8.1.
- 3 G. L. Wells, 'Eyewitness Identification: Systemic Reforms' (2006) *Wisconsin L Rev* 615.
- 4 G. M. Davies, 'Mistaken Identification: Where Law Meets Psychology Head On' (1996) *Howard J of Crim Juris* 232.
- 5 K. L. Scheppele, 'The Ground Zero Theory of Evidence' (1998) 49 *Hastings L J* 321.
- 6 E. F. Loftus, *Eyewitness Testimony* (Harvard University Press, 1979) 40.
- 7 B. L. Cutler and S. D. Penrod, *Mistaken Identity: The Eyewitness, Psychology and the Law* (Cambridge University Press, 1995) 103-104.
- 8 Loftus, above n. 6, at 39; J. W. Shepherd, J. B. Deregowski and H .D. Ellis, 'A Cross Cultural Study of Recognition Memory for Faces' (1974) 9 *International J of Psychology* 205; R. Lindsay and G. Wells, 'What Do We Really Know About Cross Race Identification Evidence?' in S. M. Lloyd-Bostock and B. R. Clifford (eds.), *Evaluating Witness Evidence* (Wiley & Sons, 1983).
- 9 See generally Cutler and Penrod, n. 7 above, at 104.
- 10 B. L. Cutler, 'Juror Sensitivity to Eyewitness Identification Evidence' (1990) 14 *Law and Human Behavior* 185; K. A. Deffenbacher and E. F. Loftus, 'Do Jurors Share A Common Understanding Concerning Eyewitness Behavior?' (1982) 6 *Law and Human Behavior* 15.
- 11 J. C. Brigham and R. K. Bothwell, 'The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications' (1983) 7 *Law and Human Behavior* 19; G. Wells and R. Lindsay, 'How Do People Infer the Accuracy of Eyewitness Testimony?' in S. M. Lloyd-Bostock and B. R. Clifford (eds.), *Evaluating Witness Evidence* (Wiley & Sons, 1983); and G. Wells and L Murray, 'Eyewitness Confidence' in G. Wells and E. F. Loftus, *Eyewitness Testimony* (Cambridge University Press, 1984).
- 12 *C v HM Advocate* [2012] HCJAC 39 at para 12.
- 13 *Brodie v HM Advocate* [2012] HCJAC 147.
- 14 1975, Cmnd 6218, paras 46.10 and 46.13.
- 15 *Dudley v HM Advocate* 1995 SCCR 52.
- 16 *Read v R* [1990] 1 AC 363.
- 17 *Mezzo v R* [1986] 1 SCR 802; *Auckland City Council v Bradley* [1988] 1 NZLR 103; *Domican v R* (1992) 173 CLR 555; *People v Casey* [1963] IR 33.
- 18 Cutler and Penrod, n. 7 above, at 263 suggest the impact is minimal. See also R. C. Lindsay, G. L. Wells and C. M. Rumpel, 'Can People Detect Eyewitness and Identification Accuracy Within and Across Situations?' (1981) 66 *Journal of Applied Psychology* 79.
- 19 D. A. Sonenshein and R. Nilon, 'Eyewitness Errors and Wrongful Convictions: Let's Give Science a Chance' (2010-11) 89 *Oregon L Rev* 263, 264.
- 20 S. G. Thompson, 'Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony' (2007-8) 41 *University of California at Davis Law Review* 1487.
- 21 *Ralston v HM Advocate* 1987 SCCR 467at 472.

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- 22 *Nelson v HM Advocate* 1988 SCCR 536.
- 23 *Murphy v HM Advocate* 1995 SCCR 55.
- 24 *Adams v HM Advocate* 1999 JC 139.
- 25 *Kelly v HM Advocate* 1998 JC 35.
- 26 *Gracie v Allan* 1987 SCCR 364.
- 27 *Nolan v McLeod* 1987 SCCR 558.
- 28 *Smith v United States* 348 US 147 at 153 (1954).
- 29 See M. McConville and J. Baldwin, 'The Role of Interrogation in Crime Discovery and Conviction' (1982) 22 *Brit J Criminol* 165.
- 30 R. Pattenden, 'Should Confessions be Corroborated?' (1991) 107 LQR 317.
- 31 K. A. Findley, 'Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions' (2002) 38 *California Western L Rev* 333.
- 32 M. McConville and J. Baldwin, *Courts, Prosecution and Conviction* (Oxford University Press, 1981) 166-167.
- 33 See T. Reik, *The Compulsion to Confess* (Farrar, Straus, and Cudahy; 1959).
- 34 *Royal Commission on Criminal Justice* (1993, Cm 2263).
- 35 *R v Sykes* (1913) 8 Cr App Rep 233 at 237.
- 36 S. M. Kassin and L. Wrightsman, 'Confessions' in Kassin and Wrightsman (eds.) *The Psychology of Evidence and Trial Procedure* (Sage, 1985).
- 37 As in *Boyle v HM Advocate* 1976 JC 32; where a soldier who had gone AWOL confessed to a bank robbery, because he preferred a civilian to a military prison.
- 38 S. M. Kassin, S. A. Drizin, T. Grisso et al, 'Police-Induced Confessions: Risk Factors and Recommendations' (2010) 34 *Law and Human Behavior* 3.
- 39 Perhaps because of vulnerability or simply an exaggerated deference towards authority See D. J. Bem, 'Inducing Belief in False Confessions' (1966) 3 *Journal of Personality and Social Psychology* 707; G. H. Gudjonsson and K. K. Singh, 'Interrogative Suggestibility and Delinquent Boys: An Empirical Evaluation Study' (1984) 5 *Personality and Individual Differences* 425; G. H. Gudjonsson and B. Lebegue, 'Psychological and Psychiatric Aspects of Coerced-Internalized False Confessions' (1989) 29 *Journal of the Forensic Science Society* 261.
- 40 1958 JC 41.
- 41 *McAvoy v HM Advocate* 1983 SLT 16; *Wilson v HM Advocate* 1987 JC 50.
- 42 *Gilmour v HM Advocate* 1982 SCCR 590.
- 43 A. P. Sealy and A. McKew, 'The Effect of Confession and Retraction on Simulated Juries' in S. M. Lloyd-Bostock, *Psychology in Legal Contexts: Applications and Limitations* (Oxford: Palgrave Macmillan 1981); S. M. Kassin and K. Neumann, 'On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis' (1997) 21 *Law and Human Behavior* 469.
- 44 M. McConville and J. Baldwin, *Courts, Prosecution and Conviction* (Oxford University Press, 1981) at 159.

⁴⁵ See A. Choo, 'Confessions and Corroboration: A Comparative Perspective' [1991] *Crim LR* 867.

⁴⁶ *Gilmour v HM Advocate* 1982 SCCR 590.

⁴⁷ *Campbell v HM Advocate* 2004 SLT 397.