Book review: 'Electronic evidence: fourth edition'

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BOOK

Stephen Mason and Daniel Seng (eds), ***Electronic Evidence: Fourth Edition,*** **Institute of Advanced Legal Studies, SAS, University of London, 379 pp, ISBN: 978 1 911507 07 9**

Open access pdf: http://humanities-digital-library.sas.ac.uk/index.php/hdl/catalog/book/electronicevidence

REVIEW

A recent decision of the Irish Supreme Court, *DPP v McD* [2016] IESC 71, illustrates what makes electronic evidence a fascinating and complex subject. The issue was whether a digital CCTV recording showing a man alleged to be the accused leaving a burglary amounted to real evidence or hearsay. The trial judge, like the editors and principal authors of this book, took the view that it depended on whether or not the images were the product of human intervention. If they were not - if they were recorded automatically and had not been altered - then they were real evidence and admissible. If they were the products of human intervention they were hearsay and, under Irish law, inadmissible. It was for the prosecution to prove that they were real evidence and as they had failed to do so, the evidence was excluded. The Supreme Court overturned this decision on the ground that merely switching on a camera could not be classed as 'human intervention'; the contents would only be hearsay if they 'passed through a human mind', and it was clear that the images in this case had not.

It may seem odd that CCTV images can constitute hearsay, but in England and Wales the hearsay provisions of the Criminal Justice Act 2003 - examined in detail in a chapter by Chris Gallavin and Stephen Mason - produce a similar result (apart from the much wider discretion of the court to admit hearsay evidence). The images are hearsay if they are a 'representation of fact… made by a person' (s 115(2)) with the intention of causing another person to believe that the matters it is being used to prove are as stated. However, it is at least arguable - there is a surprising lack of case law - that when s 115(2) defines a statement as including 'a representation made in a sketch, photofit, or other pictorial form', the words 'other pictorial form' should be construed *ejusdem generis* with the more specific terms. By this route one can reach the same result as the Irish court: a pictorial representation is hearsay only when what it represents has 'passed through a human mind'. Somewhat surprisingly, considering how

thoroughly they dissect other aspects of English hearsay law, Gallavin and Mason do not discuss the interpretation of s 115(2).

This case illustrates two general points which show the value and importance of this book. Firstly, electronic evidence is not just evidence generated by a computer: it includes a huge and growing variety of evidence including texts, images and location data from mobile phones, and the images and sounds recorded by police body-worn cameras. Particularly in the criminal courts such evidence is likely to be crucial in a large proportion of trials, and courts and advocates must be able to deal with the technical issues it presents. Secondly, dealing with those issues requires an understanding both of complex legal doctrines which developed in a quite different context - we learn a surprising amount from Gallavin and Mason about the trial of Sir Walter Raleigh - and of technological matters such as the extent to which digital images may be enhanced or manipulated, legitimately or otherwise (discussed by Mason and Seng in Ch 3). In general, Mason and Seng, along with the other contributors to this book, do an excellent job of explaining both kinds of technicalities - and as readers who are much more familiar with the law than the technology, we particularly appreciate their explanation of the latter.

Readers of the previous three, well-received, editions of *Electronic Evidence* will find that the fourth edition has a significant change of emphasis. Previous editions had included chapters dealing with approaches to electronic evidence in a variety of other jurisdictions. For example, the third edition included specific chapters relating to the legal position in Australia, Canada, England and Wales, the European Union, Hong Kong, China, India, the Republic of Ireland, New Zealand, Scotland, Singapore and South Africa. The current edition, by contrast, is based on the law in England and Wales, though it is informed by relevant international jurisprudence. Mason explains this change (and the consequent but unfortunate loss of a number of international co-authors) on the basis that a continued international emphasis would have required a two volume book that no publisher would have been prepared to publish.

Another significant difference between the fourth edition and its predecessors is that whereas previous editions had dealt with electronic disclosure, the topic does not feature in the fourth edition. The rationale for this is that the subject is now sufficiently developed as to deserve distinct treatment. Indeed, it is now covered by Mason in his volume *Electronic Disclosure: A Casebook for Civil and Criminal Practitioners*, PP Publishing, 2015, published subsequent to the publication of the third edition of *Electronic Evidence*.

In earlier editions, the jurisdiction-specific chapters had been preceded by a number of thematic chapters. In the third edition, for example, these had encompassed the sources of digital evidence; the characteristics of electronic evidence in digital format; proof: the investigation, collection and examination of digital evidence; authenticating digital data; mechanical instruments: the presumption of being in order; encrypted data; and using graphical technology to present evidence. The current edition adopts a somewhat different, and expanded, thematic structure, as follows.

- The sources of electronic evidence (George R.S. Weir and Stephen Mason)
- The characteristics of electronic evidence (Burkhard Schafer and Stephen Mason)
- The foundations of evidence in electronic form (Stephen Mason and Daniel Seng)
- Hearsay (Chris Gallavin and Stephen Mason)
- Software code as the witness (Stephen Mason)
- The presumption that computers are 'reliable' (Stephen Mason)

- Authenticating electronic evidence (Stephen Mason and Allison Stanfield)
- Encrypted data (Stephen Mason and Alisdair Gillespie)
- Proof: the technical collection and examination of electronic evidence (Stephen Mason, Andrew Sheldon and Hein Dries)
- Competence of witnesses (Stephen Mason)

A further difference between the fourth edition and its predecessors is that whilst it is available for purchase in hardback, paperback ePub and Kindle versions (from the Institute of Advanced Legal Studies) it is also available as an open access pdf under a Creative Commons Licence. The rationale for this decision is the desire of the authors both "to promote a better understanding of electronic evidence" and "to facilitate the greater accessibility and availability of [their] combined scholarship".

The fourth edition of Electronic Evidence continues to be a valuable resource for practitioners and academics. As Mason recognises in his preface, however, the consequence of the need to keep the size of the volume within reasonable bounds is that the opportunity for the book to become "a potentially significant international text" has been lost.

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