



Provided by the author(s) and University College Dublin Library in accordance with publisher policies., Please cite the published version when available.

Title	Review of Liz Heffernan with Úna Ní Raifeartaigh: Evidence in Criminal Trials
Authors(s)	Mohr, Thomas
Publication date	2015-05
Publisher	Thomsons Round Hall
Link to online version	http://irishjurist.com/index.htm
Item record/more information	http://hdl.handle.net/10197/7286

Downloaded 2019-03-23T13:26:47Z

The UCD community has made this article openly available. Please share how this access benefits you. Your story matters! (@ucd_oa)



Some rights reserved. For more information, please see the item record link above.



Liz Heffernan with Úna Ní Raifeartaigh, *Evidence in Criminal Trials*. Bloomsbury Professional, Dublin, 2014. lviii+802pp. €175.00 (hardback). ISBN: 978-1-78043-420-9

It is interesting to compare this most recent publication on the Irish law of criminal evidence, written by Liz Heffernan with Úna Ní Raifeartaigh acting as consultant editor, with the very first book on this subject for the newly independent Irish State. The defining feature of R.L. Sandes' *Criminal Practice, Procedure and Evidence (Irish Free State)*, published in 1930, was its focus on Irish case law and legislation. This novel approach was justified as "the logical consequence of our detached national status". By contrast, Heffernan's twenty-first-century text takes an unashamedly comparative approach and makes extensive use of national and international sources and scholarship. In particular, the impact of decisions made at European level receive far more attention in this text than in any previous Irish publication on the law of evidence. The introductory chapter stresses "Developments within the European Union are... beginning to have an appreciable impact, with increased EU competence in the area of police and judicial cooperation in criminal matters and the enhanced status of the EU Charter of Fundamental Rights". The impact of the right to a fair trial guaranteed by art.6 of the European Convention on Human Rights has also had a profound impact on areas as diverse as informer privilege, the right to silence and the retention **by the State** of fingerprints and DNA samples. This illustrates that the Irish law of evidence can no longer be detached from developments outside this jurisdiction and that any comparative approach must now stretch beyond the traditional confines of the common law world.

Another major difference between the two texts concerns unlawfully obtained evidence. It is important to remember that this topic did not exist in 1930 and, consequently, is entirely absent from Sandes' textbook. By the late twentieth century such an omission would have been inconceivable. Yet at the dawn of the twenty-first century the Irish exclusionary rule faces accusations of being too strict. Proposals for its replacement by a balancing test, as used in other common law jurisdictions, have gained new currency. Heffernan's text examines this debate in some detail. It argues that the starting premise of any system should be predominantly exclusionary and that evidence that has been illegally obtained should be excluded in the great majority of cases. Not all readers will agree with this conclusion, but the authors note: "It is worth recalling in this regard that the vindication of personal rights and the preservation of the integrity of the administration of justice are mutually reinforcing values."

Heffernan's text contains a number of other interesting features that are not found in older texts. Of course, it includes analysis of the impact of recent legislation such as the Criminal Justice Acts 2006 and 2011 and the Criminal Procedure Act 2010. It also includes a section dedicated to analysis of the right to silence that has been substantially reformed by the Criminal Justice Act 2007. The text makes a brave effort to identify guiding principles from the confusing case law on the obligation to seek out and preserve evidence. It also includes a section on the new regime for DNA evidence that will come into force along with the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014.

The outstanding qualities of this text go beyond its novel features. The authors provide thought-provoking analysis and commentary at the conclusion of every chapter. They are not afraid to offer criticism of recent developments in the field when this is felt to be appropriate. These include recent measures diluting the right to

silence and a legal regime that presumes the indefinite retention of fingerprints. In addition, the authors are prepared to predict future trends in the Irish law of evidence. For example, they argue that the increased use of documentary evidence since the enactment of the Criminal Evidence Act 1992 may result in a long-term decline in the significance of refreshing the memory of witnesses in court, at least in civil cases.

Another interesting innovation in Heffernan's text is that it arranges its chapters by category of witness (e.g. children, spouses, accomplices and the mentally impaired) in place of traditional division by subject matter (e.g. competence and compellability, corroboration, doctrine of recent complaint). The practical nature of this arrangement is likely to appeal to practitioners. It is less certain whether this innovation will also be popular among students, a surprisingly conservative readership, who may be less inclined to part with established divisions of subject matter.

The greatest difference between this text and its predecessors is the depth of analysis. Sandes' 1930 treatment of the Irish law of criminal evidence could comfortably fit within a single chapter of Heffernan's text. Of course, this is an unfair comparison. Sandes' book was written before the enactment of the Offences against the State Act 1939, the key decisions in *People (Attorney General) v O'Brien* (1965) and *People (DPP) v Kenny* (1990), the increase in attention devoted to the reliability of confessions and identification evidence, the development of new forensic sciences and many other astonishing developments of the field of criminal evidence. Yet, Heffernan's work ensures that no future text on the Irish law of evidence can be based on a methodology focused on "our detached national status". It also reflects a relentless raising of the bar in terms of scholarship in this field. Subsequent texts may well exceed Heffernan and Ní Raifeartaigh's book in terms of length but they will find it difficult to match the freshness, ambition, lucidity and erudition of this work.

THOMAS MOHR
University College Dublin