against the risk of blighting the career of a person who may well be innocent.

On 29 July the Court of Appeal discussed the issues debated in this note in *Hayes* v. *Chief Constable of Merseyside* [2011] EWCA Civ 911. In this case, the police were held to be justified in arresting a person who was prepared to give a voluntary interview, inter alia because they needed to be able to seize his mobile phone and because they wanted to impose bail conditions on his release in order to protect the person whom they believed he was intimidating. But in so holding, the Court recognised that in other situations it might be "quite unnecessary to arrest a suspect who will voluntarily attend an interview, as it was with the schoolteacher in *Richardson*".

J.R. SPENCER

KILLA WALKS FREE

ONCE upon a time it used to be said that, to find out what the law of evidence prescribes, you simply ask what common sense suggests and turn it on its head. The rules of criminal evidence seemed to be a maze of technical irrationality, shutting out material that is logically cogent, and admitting material that is logically weak, more or less in equal measure. Central to this perverse structure was the celebrated "hearsay rule", and conscious of this, in Part 11 of the Criminal Justice Act 2003 Parliament sought, with the aid of the Law Commission's Report No. 245, to inject some rationality into it. But the decision in *Ford* [2010] EWCA Crim 2250 suggests (alas!) that the attempt has at least partly failed – and the ancient recipe for determining whether evidence is legally admissible is still to be relied on.

Shortly after his release from prison, Ford (who liked to be called "Killa") started threatening to kill a woman called CW, reinforcing the threats by firing shots through her front window. This led to his return to prison. While he was behind bars, a second gunman came and shot CW's front window out again. When the police arrived a woman who claimed to have seen the shooting gave them a note she had made of the registration number of the attackers' car, and then vanished. Having found the car in question the police arrested the four young men inside, whose mobile phones revealed not only that they had been in discussion with the incarcerated Ford, but also that they were in the area of the second shooting at the relevant time. Deducing they were Ford's associates who had carried out the shooting at his instigation, the police charged Ford with conspiring with them to commit it.

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At his trial on the conspiracy counts a key piece of evidence was the passer-by's note of the registration number of the car – a vital link connecting Ford's associates, and hence Ford, with the second shooting. This, in law, was hearsay; but the trial judge held that, under the reformed law, it was admissible. Under the new law, hearsay evidence, if relevant – though still generally inadmissible – goes in if any of a list of specific exceptions set out in the Act applies; and failing those, it can also be admitted under a general "inclusionary discretion" set out in section 114(1)(d), which lets in hearsay otherwise inadmissible if the judge decides, having examined a list of factors set out in section 114(2), that the interests of justice so require. It was under this provision that H.H. Judge Karu admitted it.

In a judgment delivered by Laws L.J. the Court of Appeal ruled that the note was wrongly admitted, in the light of the following dictum of Lord Chief Justice Judge, first uttered in *Mayers* [2008] EWCA Crim 2989, [2009] 1 W.L.R. 1915 (at [113]), and then repeated in *Horncastle* [2009] UKSC 14, [2010] 2 A.C. 373 (at [13]).

> … we are being invited to re-write the [Criminal Evidence (Anonymity) Act 2008] by extending anonymous witness orders to permit anonymous hearsay evidence to be read to the jury. We cannot do so. Neither the common law, nor the 2003 Act, nor the 2008 Act permits it.

Accordingly they quashed the conspiracy convictions, and with them, that part of Ford's sentence that related to them.

I believe the Court of Appeal's decision to be wrong, for at least four reasons.

First, the Court in Ford took Lord Judge's dictum out of context. His resounding condemnation of "anonymous hearsay" was spoken in the general context of the Criminal Procedure (Anonymity of Witnesses) Act, a statute that permits, subject to stringent limitations, a judge to allow a witness to give *oral testimony* in court anonymously, i.e. without identifying himself to the defendant; and in the specific context of a case where the prosecution had tried to go one further, and serve up what their anonymous witness had to say in the form of a written statement, so saving him from being cross-examined as well as having to explain who he was. That is a very different issue from the one in the present case, which was whether the prosecution could put in evidence a piece of information received from a member of the public whose identity they did not know, with no question of their trying to avoid calling her as a witness.

Secondly, imposing on the hearsay provisions of the Criminal Justice Act a general gloss that they can never be used to admit hearsay

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from an unidentified source does violence to the wording of the statute. In the suite of sections setting out the terms of the exceptions to the hearsay rule there is one – section 116 – that explicitly provides that the original maker of the statement must be identified. However, no such limiting words are present in the other sections. Normal principles of statutory construction therefore suggest that, in those other sections, hearsay from unidentified sources can be admitted. And indeed, this is what those who drafted the provisions undoubtedly intended. When explaining the scope of what is now section 114(1)(d), applied by Judge Karu in this case, the Law Commission (in §8.143 of their Report) said "The declarant need not even be identified".

Thirdly, imposing this gloss on the hearsay provisions of the Criminal Justice Act 2003 gravely disrupts the reform. It means, for example, that section 117, which renders admissible hearsay contained in "records", can only now be used if the person who originally fed the information into the record can be identified. The practical effect of this would be to make the new law of hearsay even more restrictive than the old law it was meant to modernise. (It would, for example, resurrect the deplorable decision in *Myers* v. *DPP* [1965] A.C. 1001, which older readers familiar with the law of evidence will remember with a shudder; which held that, to establish which engine was originally fitted in which now-ageing car, you cannot use the records routinely made by the unidentified factory workers who were on the assembly line that day.)

Finally, the practical result is disastrous. It means that, for purely technical reasons, a piece of highly cogent evidence is excluded, so preventing the court from reaching an outcome in accordance with the truth. The result here was the acquittal of a guilty person. But next time it could equally well be the conviction of someone who was innocent.

Ford, surely, is an aberration: a rogue decision, in an unreserved judgment, given by an overworked court which, on this occasion, made an uncharacteristic blunder. Let us hope that later courts recognise it as such and disavow it.

J.R. SPENCER

NEGLIGENCE, REMOTENESS AND ECONOMIC LOSS – STAYING ON TRACK

IF D negligently damages C's property and a third party, X, suffers financial loss as a result, the law has been clear since *Cattle* v. *Stockton Waterworks Co* (1875) L.R. 10 that, in general, X has no cause of action in negligence against D. But what if C and X have a contract permitting X to use C's property, under which C is obliged to make

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