



## Truth and the law

The Sir Maurice Byers Address was delivered by the Hon JJ Spigelman AC on 26 May 2011.

One of the great delights of my practice at the bar was the virtually daily interaction I had with Sir Maurice Byers over a period of some 14 years, when we were members of the same floor with chambers only a few metres apart. He was, as everyone who remembers him will attest, the consummate barrister's barrister.

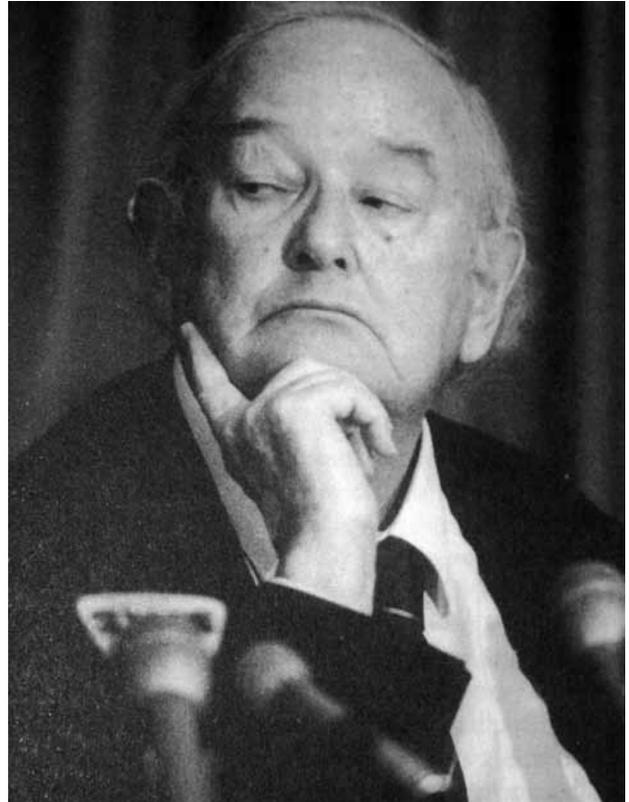
This personal contact occurred in the years after he retired as solicitor-general but still concentrated on appellate work. However, he could and did do it all. He had the full range of skills. Nevertheless, his capacity for careful analysis and the fashioning of a compelling argument, without wasted words but with unerring accuracy for the issues at hand, was unsurpassed.

Amongst his many attributes he was, without question, the foremost constitutional counsel of his era. His success in the High Court in constitutional cases when appearing as solicitor-general for the Commonwealth was extraordinary. That success was not only measured in the outcome of particular cases. Those were tactical victories, representing stages in a broader Commonwealth strategy, which he pursued with unerring consistency.

In terms of his personal relationships, perhaps the most extraordinary aspect of meeting Sir Maurice was that a man of such consummate ability would, without affected humility, invariably treat others with courtesy, even kindness. He exuded an entirely disarming charm. He was one of the few people I have ever met who apologised to me whenever I interrupted him.

His wit was sharp, but never descended to personal derogation. I remember a night in Canberra, at a then new restaurant called, I think, The Republic, which prided itself on its avant garde cuisine. Someone suggested that he may wish to select emu or kangaroo meat from the modish menu. Sir Maurice growled in reply: 'I refuse to eat the Coat of Arms'. I well recall the short, one sentence, handwritten note I received from Sir Maurice upon my appointment as chief justice. It read: 'Congratulations on starting at the top'.

I have taken as my theme for this address the relationship of truth and the law. I do this in recognition of the fact that the overwhelming majority, well over 90 percent, of all litigation is determined by findings of fact. I have done this consciously at the end of a judicial life when I sat only as an appellate judge, for whom it is all too easy to succumb to that intellectual snobbery of legal



practice which accords highest status to the capacity for technical analysis of legal points. In the practical operation of the law in our society, such points are of comparatively minor significance. What matters most are the facts.

### Dixon and Jestling Pilate

As an appellate judge, I am reminded of the riposte that Sir Owen Dixon once made to a woman at a dinner party, in response to her observation about how wonderful it was to dispense justice. Either cynically or in exasperation, Dixon said:

I do not have anything to do with justice, madam. I sit on a court of appeal, where none of the facts are known. One third of the facts are excluded by normal frailty and memory; one third by the negligence of the profession; and the remaining third by the archaic laws of evidence.<sup>1</sup>

In this address I will be particularly concerned with the first and third of Sir Owen's examples, i.e., 'normal frailty and memory' and 'the archaic laws of evidence'. It would be churlish, indeed ungrateful, in this, my final address to the New South Wales Bar Association, with

whose officers I have had a close and fruitful relationship throughout my period as chief justice, to canvass a subject such as 'negligence of the profession'.

When not subject to the intolerable burden of having to be polite at dinner, Sir Owen Dixon expressed the view that truth seeking was the objective pursued by the courts. In one address he said:

For some eighteen years I played my part as counsel at the bar, that is to say I was a humble auxiliary in the courts that seek day by day in case after case to come at the truth both of the law and the facts in the faith which we are all taught that that is justice.<sup>2</sup>

This passage occurred in the midst of a long, rather rambling set of reminiscences which Dixon delivered to the Royal Australian College of Surgeons and which he entitled 'Jesting Pilate'. He adopted that characterisation of Pontius Pilate's conduct from the opening sentence of Francis Bacon's essay 'Of Truth', being the first in Bacon's collection of Essays, one of those rare works of the human hand that is of enduring significance, even after four centuries.

Dixon concluded this address by quoting Bacon's first sentence: "What is truth?" said jesting Pilate, and would not stay for an answer.'

To which Dixon added an observation: 'I have not forgotten that when Pilate said this he was about to leave the judgment hall.'

This is a rather enigmatic remark and, I say with considerable regret in view of my admiration of Sir Owen Dixon's intellect which I have expressed on earlier occasions,<sup>3</sup> he was quite wrong. So, probably, was Bacon.

As reported in the Gospel of John, Pilate's question 'What is truth?' was in response to an assertion by Jesus that he had come into the world 'to testify to the truth'. It is by no means clear to me that Bacon was correct to say that Pilate was 'jesting'. I prefer the interpretation by the author of an innovative and inventive biography of Pilate, innovative and inventive because virtually nothing is known about the man, that:

Most probably Pilate thought Jesus was out of his depth and was simply tossing the subject back to him, as confident men do.<sup>4</sup>

With respect to Owen Dixon's additional remark, it



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was incorrect for him to state that this observation was made as Pilate 'was about to leave the judgment hall'. He did leave, but only to consult the people gathered outside, who in our legal terms constituted, in effect, the jury for the occasion. According to John, this occurred during the period that Pilate was asserting that he could 'find no case against' Jesus and was asking whether he should be released. After the consultation Pilate returned to the 'judgment hall' and, to use our terminology again, continued the trial.

For purposes of the topic of this address, the intriguing issue is what Dixon meant by his reference to time. Did he mean that the trial which, according to his version, had just concluded was not concerned with the identification of truth? Or, did he mean that the search for truth in the trial had concluded, but that there was always the possibility of doubt about the adequacy of the process by which the truth had been found? Both these quite distinct questions must be addressed by those of us engaged in the common law process of determining facts. They are the focus of this address.

### Truth and the adversarial system

The common law adversarial system of legal procedure is not, in terms, directed to the establishment of truth. There are three views about the relationship between truth and the adversarial system. They are:

- The adversarial system is not concerned with truth, but with 'procedural truth' or 'legal truth', as distinct from substantive fact.<sup>5</sup>
- The adversarial system is the most effective mechanism for the discovery of truth by the application of the Socratic dialogue.
- The adversarial system seeks truth, but that search is qualified when the pursuit of truth conflicts with other values.

The first position was cogently stated by Sir Frederick Pollock who said:

Perhaps the greatest of all the fallacies entertained by lay people about the law ... is that the business of a court of justice is to discover the truth. Its real business is to pronounce upon the justice of particular claims, and incidentally to test the truth of the assertions of fact made in support of the claim in law, provided that those assertions are relevant in law to the establishment of the desired conclusion; and this is by no means the same thing.<sup>6</sup>

To similar effect is the comment by Viscount Simon LC that: 'A court of law ... is not engaged in ascertaining ultimate verities: it is engaged in determining what is the proper result to be arrived at, having regard to the evidence before it.'<sup>7</sup>

The relationship between this first position and the adversary system arose directly for decision by the House of Lords in a case involving a claim for public interest immunity. The trial judge, the late Lord Bingham sitting at first instance, determined that he would inspect documents involving deliberations by ministers and civil servants at the highest level with respect to a Cabinet decision that was under challenge on the grounds of improper purpose. He did so on the basis that such inspection was necessary in the interests of the administration of justice, because those documents could give 'substantial assistance to the court in determining the facts upon which the decision in the cause will depend'.<sup>8</sup>

The proposition upon which Lord Bingham based this conclusion was:

The concern of the court must surely be to ensure that the truth is elicited, not caring whether the truth favours one party or the other but anxious that its final decision should be grounded on a sure foundation of fact. Justice is as greatly affronted where a plaintiff is wrongly awarded relief as where he is wrongly denied it.<sup>9</sup>

On appeal, the Court of Appeal said that this was the wrong test. The question was not whether the documents would assist the court in determining the facts but whether there was a likelihood that the documents would support the case of the party seeking discovery. The House of Lords agreed with the Court of Appeal.

Lord Wilberforce identified the relevant distinction in the following way:

In a contest purely between one litigant and another, such as the present, the task of the court is to do, and be seen to be doing, justice between the parties – a duty reflected by the word 'fairly' in the rule. There is no higher or additional duty to ascertain some independent truth. It often happens, from the imperfection of evidence, or the withholding of it, sometimes by the party in whose favour it would tell if presented, that an adjudication has to be made which is not, and is known not to be, the whole truth of the matter: yet if the decision has been in accordance with the available evidence and with the law, justice will have been fairly done. It is in aid of justice in this sense that discovery may be ordered, and it is so ordered upon the application of one of the parties who must make out his case for it. If he is not able to do so, that is an end of the matter. There is no independent power in the court to say that, nevertheless, it would like to inspect the documents, with a view to possible production, for its own assistance.<sup>10</sup>

The second position is often expressed in the succinct statement of Lord Eldon in 1822 that: 'Truth is best discovered by powerful statements on both sides of the question'.<sup>11</sup> This frequently cited<sup>12</sup> quotation, however, is taken out of context. Lord Eldon's full judgment is revealing. He said, in relation to a barrister appearing for a client:

The result of the cause is to him a matter of indifference. It is for the court to decide. It is for him to argue. He is ... merely an officer assisting in the administration of justice and acting under the impression, that truth is best discovered by powerful statements of both sides of the question.<sup>13</sup>



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The adversarial system was comparatively new in 1822. It is by no means clear that, as that system has developed in the course of the century, barristers remained 'indifferent' to the result of the cause. However, as Sir Gerard Brennan pointed out with reference to the full quotation from Lord Eldon: 'Counsel's duty is to assist the court in the doing of justice according to law'.<sup>14</sup>

In the address I gave on the occasion of my swearing-in as chief justice on 25 May 1998, I propounded this second position. I noted that the adversary system, as a manifestation of the power of Socratic dialogue, was one of the greatest mechanisms for identification of truth that had ever been devised.<sup>15</sup> This perspective reflected my then experience as a member of the bar. Judicial experience has provided a different perspective.<sup>16</sup>

I have come to realise that the Socratic dialogue works when both disputants are, as Lord Eldon understood, indifferent to the result. Seeking victory does not necessarily have the same salutary consequence of attaining the truth.<sup>17</sup>

The third and intermediate position reflects the recognition that the untrammelled search for truth may impinge upon other public values. It is sometimes referred to in terms of a tension between 'truth' and 'justice'.<sup>18</sup>

As long ago as 1846, in a judgment which Lord Chancellor Selborne would later describe as 'one of the ablest judgments of one of the ablest judges who ever sat in this court',<sup>19</sup> Vice Chancellor Knight Bruce said:

The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still for obtaining of those objects, which however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination ... Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much.<sup>20</sup>

The vice chancellor went on to refer to paying 'too great a price ... for truth'. This is the formulation which has subsequently been frequently invoked.<sup>21</sup>

I have become a supporter of the third position. It should now be accepted that the task of fact finding for the courts is to identify the truth, subject to the principles of a fair trial and to specific rules of law and discretions designed to protect other public values which, on occasions, are entitled to recognition in a way which constrains the fact finding process.

### **The significance of truth seeking**

The recognition that the principal purpose of legal proceedings is to identify the true factual circumstances of any matter in dispute is of fundamental significance for the administration of justice and the maintenance of public confidence in that system. If this recognition constitutes a modification of the adversary system, it is a modification that should be made. The search for

truth is a fundamental cultural value which, at least in Western civilisation, is a necessary component of social cohesion and of progress. The law must reflect that fundamental value and do so at the core of its processes.

The public will never accept that 'justice' can be attained by a forensic game. The public require a system dedicated to the search for truth, subject only to the fairness of the process and consistency with other public values.

We seem now to have passed through the convulsion in the humanities and social sciences academy of that conglomeration of doctrines often referred to as 'post modernism'. The only thing that was ever interesting about 'post modernism' was what it was 'pre'. The 'post modernist' form of relativism that drew on the difficulties of proving truth and the distortions that can arise in the truth finding process to conclude that the search for truth should be abandoned would, in the end, have destroyed the cloistered academy which generated this perversion.

*The public will never accept that 'justice' can be attained by a forensic game. The public require a system dedicated to the search for truth, subject only to the fairness of the process and consistency with other public values.*

It was, of course, comforting for such members of the academy to know that 'post modernism' implied that an external observer, such as an academic, was always in a better position to understand what was going on than any practitioner in the field under consideration. Such doctrines, for example, necessarily led to the conclusion, first identified by Gore Vidal, that works of literature were not written for the purpose of being read, but for the purpose of being taught. Insofar as the strand in our legal tradition which denied that fact finding in litigation was directed to the identification of true facts gave comfort to this transient ideology in other contexts, any such contribution, is no longer operative.

Once the central significance of truth in fact finding is acknowledged, certain corollary principles follow. First, any exception or qualification to achieving that goal must be clearly defined and narrowly confined. Secondly, those principles, rules and practices which have such an effect must be subject to regular review, in

order to determine whether their original justification is still valid and valid to the full extent of the qualification. Only if that is done, and done on a regular basis, can we confidently assert that the commitment to the pursuit of truth remains a core value.

The approach that should guide reform in this context to matters of this character is that expressed by the Supreme Court of the United States, in the case which overturned the longstanding principle that a wife was not a competent witness on behalf of her husband who was an accused in a criminal trial.

In *Funk v United States*, the court said: 'The fundamental basis upon which all rules of evidence must rest – if they are to rest upon reason – is their adaptation to the successful development of the truth. And since experience is of all teachers the most dependable, and since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule.'<sup>22</sup>

### **Restrictions on truth finding**

I turn to what Sir Owen Dixon called 'the archaic law of evidence.' The rules of practice and procedure and exclusionary rules of evidence which result in potentially relevant evidence not being taken into account as a matter of law are multifarious. In a lecture of this character I can only list them without pretending to be comprehensive.<sup>23</sup> They include:

- Legal professional privilege
- Public interest immunity
- Confessional privilege, where recognised
- Journalists' privilege, where recognised
- Exclusion of illegally obtained evidence
- The privilege against self-incrimination
- Limited (or, in criminal cases, the absence of) inferences from failure to testify or call evidence
- The principle of finality, preventing the reopening of a trial<sup>24</sup>

- The related double jeopardy principle in a criminal context
- Restrictions on the admissibility of fresh evidence on appeal
- The exclusion of involuntary or unknowing confessions
- Restrictions on the use of tendency or coincidence evidence
- The exclusion of hearsay evidence
- The exclusion of lay opinion evidence
- The exclusion of evidence after balancing prejudice and probative value
- The parole evidence rule
- The rule against splitting a case
- Exclusion of evidence of settlement offers

In addition to these evidentiary rules, there is a range of principles and practices that are designed to ensure a fair trial, particularly in criminal proceedings. The principle of a fair trial is manifest in numerous rules of evidence and aspects of practice and procedure. I have addressed this matter elsewhere.<sup>25</sup>

*...experience suggests that a systematic review of many practices and rules by reason of the demise of the civil jury would be justified.*

Many of these evidentiary rules and principles of a fair trial were developed at a time when a jury was the tribunal of fact in both civil and criminal cases. Some were adopted because of the susceptibility of juries to improper influence. Others because juries gave no reasons and it was not possible to detect or correct errors of fact.

Many of these rules remain applicable, long after the civil jury has disappeared and judge alone trials occur even with respect to indictable offences. There have been significant statutory modifications. The law of evidence has often been reviewed. Many of the changes contained in the Evidence Acts can be seen as adapting to this change in the constitution of the tribunal of fact.<sup>26</sup>

There remains a reluctance to systematically review longstanding rules that are in fact anachronisms. Issues

of unreliability of evidence are the basis for a number of these rules and principles, e.g., the exclusion of involuntary confessions, of hearsay evidence, of evidence of general bad character, of coincidence or tendency evidence, once called similar fact and propensity evidence. Each of these exclusionary rules has accumulated exceptions and subrules, at common law and under statute. Insofar as they turn on questions of unreliability, as distinct from conflict with other public values, it may be that they are no longer appropriate outside the context of a jury trial.<sup>27</sup>

As a matter of practice in civil litigation, such exclusionary rules are often not invoked when they could be. Longstanding business records provisions removed the hearsay rule in most civil cases. It is now rare for documents not to be admitted subject to relevance. As a matter of practical reality, the system may have adapted informally to the change in the identity of the fact finder.

As the United States Supreme Court said in *Funk*, as quoted above, experience suggests that a systematic review of many practices and rules by reason of the demise of the civil jury would be justified. In this regard I would add it was the jury that determined a fundamental aspect of our civil procedure. A single continuous trial, at which all matters were to be determined at the same time is a product of the jury system. It may still be appropriate on cost and efficiency grounds, but not necessarily always.

Civil law jurisdictions have not had juries and, accordingly, have generally adopted an episodic procedure. Other principles and practices have developed differently. Many of the basic differences between the two systems have, convincingly, been attributed to the common law tradition of fact finding by juries.<sup>28</sup>

#### **Common law and civil law**

It is customary to distinguish between the adversarial or accusatory system of common law jurisdictions and the inquisitorial system of civil law jurisdictions. Although always an oversimplification, the distinction retains some utility in criminal proceedings. It has long since lost such utility as it may ever have had in civil proceedings.<sup>29</sup>

Relevantly, for present purposes, it is often asserted

that the critical difference is that an adversary system does not expressly dedicate itself to the search for truth, whereas an inquisitorial system does. This, in my opinion, is false.

The proposition is based in large measure on the differing roles in the two systems of the parties to a dispute and the judicial decision-maker. In common law jurisdictions the parties have carriage of the proceedings and determine what evidence will be called. Accordingly, the process will be determined by the interests of the parties, who do not, at least in civil proceedings, necessarily seek a finding of truth. In civil law jurisdictions the judicial officer has greater control of the proceedings and, at least in crime, determines what evidence will be called. He or she has no interests which may conflict with truth finding.

*The falsity of the proposition that is sometimes advanced, that investigatory or inquisitorial systems seek truth and adversary or accusatory systems do not, is well illustrated by the existence of rules and practices that exclude potentially relevant evidence.*

It is the case that criminal and civil codes in civil law jurisdictions often impose obligations to find the truth.<sup>30</sup> There are no similar express requirements in common law jurisdictions. However, absent a 'code' there is no need to set out such an objective. The adoption by statute in various jurisdictions of an 'overriding purpose' of civil litigation in recent years has been driven by cost and delay issues, not truth seeking.

The origins of the different approaches between the two kinds of systems are to be found in the different traditions about the relationship between the state and its citizens.<sup>31</sup> Common law jurisdictions reflect a narrower conception of permissible state activity. The adversary system and, perhaps even more clearly the use of the jury as the tribunal of fact, manifest the significance long attached in such jurisdictions to the autonomy of the individual and to the maintenance of personal freedoms, so that no arm of the state, not even the judiciary, controls and directs how they conduct their affairs, including legal affairs. In civil law jurisdictions, the authority of the state was more dominant and not traditionally restricted in such ways. However, in most such nations the balance changed in this respect, particularly after the Second World War.

The falsity of the proposition that is sometimes advanced, that investigatory or inquisitorial systems

seek truth and adversary or accusatory systems do not, is well illustrated by the existence of rules and practices that exclude potentially relevant evidence. I have set out above a list of principles and practices of the common law tradition which have this consequence. Although not stated in the same jurisprudential language, e.g., as an exclusionary rule of evidence, specific practices and rules in most civil law jurisdictions also lead to the consequence that certain information is not made available to the judicial decision-maker.

Some of these practices are of long standing. Others have been adopted and elaborated in the second half of the last century in almost all civil law jurisdictions as constitutional, statutory and treaty provisions for human rights protections, including the right to a fair trial.

As far as I have been able to determine, all such nations now restrict the use of potentially relevant evidence on the basis of a similar range of public policy considerations as has long been the case in common law jurisdictions, e.g., illegally obtained evidence, encompassing illegal searches and seizures; wire taps; involuntary confessions; the failure to warn of the right to silence; and a range of due process violations, reflecting the principle of a fair trial.<sup>32</sup> Various provisions prevent use of evidence acquired in breach of these principles. Indeed, in Germany rules restricting illegally obtained evidence date back to the late 19<sup>th</sup> century, long before any such principle was adopted in common law jurisdictions.<sup>33</sup>

The consistency and extent of the application of these rules varies considerably from one jurisdiction to another. Some commentators suggest that they are not applied with the same rigour as in common law systems.<sup>34</sup> Indeed, one observer concludes that these exclusionary rules have been systematically ignored or undermined in certain jurisdictions, namely Italy and Spain.<sup>35</sup> However, the rules are also capable of enforcement at a supranational level, e.g., by the European Court of Human Rights.

Civil law jurisdictions also recognise, in a somewhat different jurisprudential manner, what common law

nations would call legal professional privilege. In France, *avocats* enjoy such protection by the doctrine of *secret professionnel*, which cannot be waived, even by the client, and which privilege is not lost even if the material becomes known to third parties.<sup>36</sup> Similarly, German and Italian lawyers have an obligation of professional secrecy, breach of which is a criminal offence, although clients can waive the privilege.<sup>37</sup> In Switzerland violation of professional secrecy is also a criminal offence and lawyers cannot be compelled to give evidence or produce documents, even if the client waives the privilege. However, a lawyer can seek a judicial order for release from the obligation.<sup>38</sup>

One practice which inhibits truth seeking in the criminal justice system is plea or charge bargaining. Long regarded as an anathema in civil law jurisdictions, the practical needs of the system, of the same kind as operate in common law jurisdictions, have led to the adoption of such practices at least *sub silentio*.<sup>39</sup>

*Lawyers in common law jurisdictions would be particularly sceptical about the claim of truth seeking in civil cases because of the absence of a right to discovery in civil law jurisdictions.*

One of the most debated rules for exclusion of evidence in common law jurisdictions is the application of the hearsay rule. There is no equivalent rule in civil law jurisdictions. Nevertheless, there are other legal principles in those jurisdictions which have similar, albeit not identical, consequences.

What is referred to as ‘derivative evidence’ has traditionally been regarded in civil law jurisdictions as inferior to primary evidence. Of particular relevance for the circumstances in which the hearsay principle would apply in a common law jurisdiction is the doctrine of ‘immediacy’, which requires direct contact between the judicial decision-maker and the source of the proof. The practice of requiring the presentation of primary evidence where that is possible varies considerably from one civil law jurisdiction to another.<sup>40</sup> Perhaps more significantly, appellate review of fact finding, which shows little deference to factual findings at first instance, often recognises the use of derivative evidence as a source of relevant error.<sup>41</sup>

In some significant respects, civil law jurisdictions have rules and practices which impede truth seeking where a common law jurisdiction has no restriction. Many civil law jurisdictions contain forms of privilege which

are not known to the common law. For example, in some jurisdictions a witness may refuse to testify if the testimony could dishonour him or a relative, or even if it is likely to cause direct pecuniary damage. Of particular significance for commercial litigation is that confidential business information is protected from production, not merely subject to non-disclosure orders.<sup>42</sup>

Lawyers in common law jurisdictions would be particularly sceptical about the claim of truth seeking in civil cases because of the absence of a right to discovery in civil law jurisdictions.

Although general discovery is now often confined, for reasons of cost and efficiency, even discovery limited to issues or categories has no direct equivalent in civil law jurisdictions. Practitioners and clients in such nations, however, clearly regard common law discovery, particularly on the American model, as a case of the truth costing too much, in this respect, literally.

Civil law jurisdictions, of course, give the court powers to obtain documents. However, the system does not involve the right to detailed inquiry by a party in order to ensure that documents, no matter how damaging to that party’s case, are in fact revealed. A lawyer of the common law tradition would regard a right of access to the internal documents of the other party, enforced by the professional obligations of lawyers for that other party, as essential to determining the true facts. However, that is not, generally, available in the practical operation of most civil law systems.

As one civil lawyer put it:

We feel that the principle *onus probandi incum bat allegandi* excludes the possibility of obtaining the help of the court to extract evidence from the other side. We react to the notion of discovery, be it English or, worse, American style, as an invasion of privacy by the court, which is only acceptable in criminal cases, where the public interest is involved.<sup>43</sup>

As an English academic correctly observed: ‘The ‘inquisitorial’ civil law does more to protect a party’s privacy and to insist that the parties must prepare their own cases for themselves, than does the ‘adversarial’

common law. The latter, in effect, requires the parties to open their files by revealing what documents they possess and, in the absence of compelling reasons to the contrary, to lay them open for inspections.<sup>44</sup>

In Germany, where civil proceedings, other than in family law, proceed on an adversary basis, the judge may order the production of additional evidentiary material. Parties can request that documents from the other side be produced. However, the judge must be convinced that the efficacy of the trial and interference with the privacy of others is justified. He or she will apply a test of materiality in both the sense of relevance and a requirement of substantiation, a party must be able to generally describe the facts that the evidence is intended to prove and establish their relevance. This is a much higher standard of relevance than that which applies in many common law jurisdictions.<sup>45</sup>

*... where the decision-maker of fact operates as an umpire without responsibility for the discovery of facts, there is limited, if any, risk that the decision-maker will not have an open mind.*

In France the ability of a party to obtain evidence from the other side is also significantly limited.<sup>46</sup> The documents available to the ultimate decision-maker tend to be those which have been exchanged between the parties, not extending to internal communications which may reveal attitudes or record oral statements.<sup>47</sup> The Code of Civil Procedure does make provision for disclosure of documents by third parties and parties.<sup>48</sup> However, as in Germany, the conditions are restrictive. The applicant must identify the document and establish why she has been unable to obtain it himself.<sup>49</sup>

In most civil law systems, although parties have the right to suggest lines of inquiry, including an order for the production of documents, it appears that this right is not exercised as robustly as a common lawyer would do.<sup>50</sup> There must be tactical doubt about asking for evidence without knowing whether it will harm or help one's case. Most of the internal documents of the other side are likely to support its case. Only a brave lawyer would insist on the judge seeing such documents in the hope that there may be a smoking gun. Unlike a common lawyer, the option of not tendering all the documents is not open.<sup>51</sup>

Civil law jurisdictions do not accept that the 'maximum access to facts' approach will necessarily lead to better outcomes. As one observer put it, with respect to the German system:

There is no assumption that justice is likely to be directly proportional to the access of a party to fact. Indeed, it is the ability of the system to focus on determining those facts which are relevant to the legal issues that is considered critically important. ...

The central notion is that procedural justice is primarily secured by the informed professionalism of the judiciary. It is the judge's skill and experience in evaluating evidentiary material which is considered likely to lead to the 'truth', not the gathering of immense quantities of factual information by attorneys who are then free to present or not present such information and to manipulate its presentation to serve their own ends.<sup>52</sup>

This passage does highlight the different approaches between the two systems in a manner which is not based on the simple proposition that one is concerned with discovering truth and the other is not.<sup>53</sup>

Proponents of the adversary system contend that the professionalism, skill and, most significantly, the incentive to be complete and rigorous on the part of the lawyers for a party to proceedings, will ensure that the true facts are more likely to be uncovered. That, it is said, is preferable to taking a risk about the competence and enthusiasm of a judge, from a judicial tradition that is more bureaucratic than that which exists in common law jurisdictions.

Furthermore, where the decision-maker of fact operates as an umpire without responsibility for the discovery of facts, there is limited, if any, risk that the decision-maker will not have an open mind, but proceed on the basis of assumptions which were formed early in the process with the consequence that the fact finding is pursued with a view to proving a working hypothesis. That is particularly true when the judge has access to a police report or an earlier investigating magistrate's report prior to commencing the proceedings. As Justice Emmett has put it, in an adversarial system '... the art of suspended judgment can be practised for a much longer period by the judge'.<sup>54</sup>

Lawyers in the civil law tradition would emphasise the possibility that a lawyer for a party will not put evidence before the judicial decision-maker because the true facts, or other facts to which a particular witness could

attest, are not in the interests of his or her client. Judges in common law jurisdictions must still decide the facts on the basis of the evidence which the parties allow them to see or hear. Even in cases in which it appears that a witness can give direct evidence, the judge is not, as a general rule, entitled to call the witness. Statutory modifications to this principle have been few and common law exceptions remain narrowly defined.<sup>55</sup>

The judge may ask questions during the course of a witness's testimony but traditionally there have been strict restrictions on the scope, nature and intensity of such questioning. Theoretically, judges are not able to pursue the truth where, for tactical reasons or incompetence, lawyers do not do so. That is no longer how it works in civil litigation.

Commencing in commercial cases, but now applying more generally, judges seek to discover the true facts by asking questions of witnesses. This does not happen in criminal cases or in civil cases with significant consequences, e.g., civil penalty proceedings. Nor does it tend to happen where both parties are competently represented. However, to a degree which would not have occurred in the past, trial judges now intervene to ensure that a witness gives the evidence that he or she appears capable of giving.

This is a significant change in civil litigation practice and has happened gradually. It commenced two or so decades ago and was clearly motivated by truth seeking.<sup>56</sup> Within the bounds of procedural fairness, it is almost inconceivable today that an appellate court would intervene with a trial judge's pursuit of the truth.

In civil procedure there has been a significant degree of convergence between the two systems. Differences still remain. It is not useful to seek to resolve the arguments in support of each approach. One thing that is certain is that attempting to transpose principles and practices from one system to the other system is fraught with the possibility of the creation of perverse effects, in the same way as a body may reject foreign tissue. The education, skill set and work culture is quite different in the two kinds of jurisdictions. The process of convergence has been, and will continue to be, pragmatically slow.

### **Perception and memory**

I return to Sir Owen Dixon's statement that many facts are lost by reason of 'normal frailty and memory'. As

I indicated, perhaps that is what he thought Pontius Pilate meant by his question. The process of fact finding raises a wide range of issues. In this address I can touch on only a few. I commend for your careful consideration a longer discussion by the late Lord Bingham which, like everything his Lordship wrote, is incisive and insightful.<sup>57</sup>

Legal practitioners and judges must approach the task of establishing the truth with humility. We must always be prepared to reassess our assumptions and practices in the light of experience, as we traditionally have done, but also in the light of scientific research, which we have not traditionally done.

Sometimes our experience leads us astray. Notoriously, directions to juries in sexual assault cases and legal principles requiring corroboration were based on assumptions about human behaviour, thought to be well founded. For example, that a woman who had been sexually assaulted would necessarily complain at the first opportunity. We now know that that assumption was derived from the fact that, until comparatively recently, almost all judges were male and, frankly, had no idea as to how a person who had been sexually assaulted would behave.<sup>58</sup>

Five years ago two judges of the Supreme Court of New South Wales, Peter McClellan and David Ipp, coincidentally and without knowledge of each other's intention, considered such issues in addresses delivered within a few weeks of each other.<sup>59</sup> The two papers appear in Volume 80 of the *Australian Law Journal*. I commend them to anyone who wishes to understand the problems of determining the validity of oral evidence in the light of the considerable body of psychological research, to which both of the papers refer. They are more detailed than I can be on this occasion. I will deal generally with two matters at the heart of the fact finding process: perception and memory.

There are well known limitations on the capacity to perceive or hear events at the time that they occur. I refer to matters such as lighting, duration of the event, and the location, age, stress, fear, expectations and biases of, particularly, observers. Such difficulties of perception are reasonably well understood by lawyers.

The classic case, which is featured in numerous law school demonstrations of this problem was, I believe, first deployed by a professor of criminal law at the

University of Berlin in 1901. Persons enter a lecture room arguing, after a struggle one pulls a gun and a blank shot is fired and the protagonists quickly leave the room. All of the students in the lecture hall are then asked to write down various details of the persons and the events. On every occasion that this experiment has been staged there has been an extraordinary range of different responses about such matters as the colour of their hair, their height and about the sequence of events.

Many studies by psychologists conclude that a significant proportion of people get the sequence of events wrong. This, of course, has been known for some time.<sup>60</sup> Further research suggests that there may be some systematic distortions resulting in an inability to accurately judge distance, speed, duration or sequence of events. For example, there appears to be a propensity to systematically overestimate the time that an event takes. Psychological research suggests that the greater the amount of violence involved, the greater the degree of overestimation.<sup>61</sup>

It is well established that the victim of a crime will focus on the central aspects of the traumatic event, such as the weapon, to the exclusion of details at the periphery.<sup>62</sup> Much of cross-examination focusses on peripheral details, in order to lay the groundwork for the suggestion that the witness cannot be believed on the central facts. Psychological research suggests that this entire approach to cross-examination is wrong if truth, rather than victory, were the object of the exercise.

Nevertheless, issues of perception are reasonably well understood. I will spend a little more time on memory. The plasticity of memory is not so widely accepted.

Witnesses can, without any dissimulation or propensity to lie, confidently assert the truth of conversations, observations and events which did not happen. The plasticity of memory impedes the truth finding process. This is not an uncommon phenomenon.

One prominent author in the field has set out seven distinct problems with memory.<sup>63</sup> His list is as follows:

- 'Transience, refers to the weakening or loss of memory over time'.
- 'Absentmindedness, involves a breakdown of the interface between attention and memory' because

a person may not have focussed upon a particular matter which is later sought to be recovered.

- 'Blocking', involves a search for information which, for some reason, cannot be retrieved, as in a failure to be able to put a name to a face.
- 'Misattribution, involves a complex process of assigning memory to a wrong source'. This trick of memory is, 'much more common than most people realise'.<sup>64</sup> I will discuss misattribution further with respect to eyewitness testimony.
- 'Suggestibility, refers to memories that are implanted as a result of leading questions, comments or suggestions'. This is a matter of considerable significance for the legal system and is described by the author as 'the most dangerous'.<sup>65</sup> I will discuss this further.
- 'Persistence', involves remembering a subject, not necessarily of a traumatic character, which the person would prefer to forget.
- 'Bias reflects the influences of current knowledge and beliefs upon how we remember the past'. It is more common than anyone would like to admit. It involves 'editing or rewriting previous experiences in the light of what a person now knows or believes'. I will discuss bias further with respect to eyewitness testimony.

There is a small library of research on eyewitness testimony. The phenomena of misattribution, suggestibility and bias are encountered more often than lawyers care to admit.

A clear example of misattribution is the case of a woman who watched an interview on television and shortly afterwards was subjected to a rape. She gave a complete description of the rapist. It was in fact a description of the person who appeared on television. Luckily it was a live interview and he had a good alibi.<sup>66</sup>

Eyewitness testimony is particularly susceptible to that form of bias referred to as 'confirmation bias'. A person will remember being more sure about certain facts than he or she was at the outset. That is to say what started off as a suspicion, becomes knowledge and is asserted to be such. This will result in the person giving evidence with a sense of confidence that may be convincing.

The difficulties involved with eyewitness testimony are

frequently encountered in the course of litigation. Many of the matters that are considered in the psychological research have been the subject of legal decisions on the admissibility of evidence and on directions to juries about the use to which evidence could be put and its reliability. The context in which this issue has been faced in considerable detail is that of identification evidence. There is a considerable body of case law on the range of difficulties associated with both perception and memory issues.

For example the defect of 'suggestibility' is well understood to arise with respect to the use of photo identification.<sup>67</sup> Trial experience has led over many years to well understood defects and appropriate changes of practice.

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Perhaps persons are more than usually prone to refuse to accept that they could have made a mistake about a matter such as identification. However, the distortions that affect identification evidence similarly affect other forms of eyewitness evidence. It is important to realise that the psychological research is also applicable to a much broader range of matters than identification and about which direct evidence is usually given. I refer to such matters as the content of conversations, the sequence of events and the surrounding circumstances which are observed or heard.

It appears to me that suggestibility gives rise to the most frequent distortions of memory. This occurs because of the mechanisms of inquiry adopted for purposes of legal proceedings by the police and by lawyers, both before and during a trial. The author of the sevenfold categories of problems states, correctly in my view, that suggestibility 'can wreak havoc within the legal system'.<sup>68</sup>

My favourite example of the ability of questioning to implant false memories is an experiment in which people were shown a picture referring to Disneyland and Bugs Bunny shaking hands with children. They were later asked if they had shaken hands with Bugs Bunny when they had visited Disneyland as children. A significant proportion said they had. This was quite

unlikely, as Bugs Bunny is a Warners Bros character.<sup>69</sup>

Numerous psychological studies show how leading questions which assume or assert a certain element of an event, which did not in fact happen, were in fact recalled on no other basis than the question assumed or asserted that they were present or that some statement or photograph or film had contained or referred to this element.

The common law rejection of leading questions is well supported by psychological research, which clearly establishes that answers to such questions are less likely to be believed. There is, however, no control of leading questions in the procedures for police investigations or by lawyers preparing the written statements of evidence that have become ubiquitous in legal proceedings.

The stilted legal drafting, in words which the witness would never use, too often using the same formulation for all relevant witnesses, is an impediment to truth finding. The process props up a false witness, but a truthful witness will more readily concede a discrepancy in cross-examination and look the worse for the honest concession.

An observation, variously attributed to Lord Buckmaster or Lord Justices Bowen and Chitty, is that 'truth may sometimes leak out from an affidavit, like water from the bottom of a well'. Even if ethical restraints on witness coaching are complied with, the conduct of a lawyer taking a statement or preparing a witness may give clues on what evidence may be useful.

The issue of implanted memory came into dramatic prominence in the legal system a decade or two ago. I refer to the convictions based on allegedly repressed memories of sexual abuse, including the most bizarre recollections of satanic rituals. There are numerous studies which establish the falseness of such repressed memories.<sup>70</sup> That is not to say it never happens. It is that on too many occasions the memories were implanted by well meaning or ideologically motivated therapists.

This body of psychological research, together with a substantial body of confirmatory case law, emphasises

the care with which lawyers and judges should approach oral testimony and the restraint that ought to be displayed before making allegations that a witness is intentionally misleading the court. I am not sufficiently familiar with the detail of advocacy training to know whether this research is taught in a systematic way. If it is not, it should be.

Judicial education has focussed on such issues in recent years. However, more could be done. As Justices Ipp and McClellan emphasised in the two papers I have mentioned, an appreciation of the psychological research, which is constantly being updated, is a necessary part of truth seeking for all of us involved in litigation.

Perhaps one of the reasons why we have all avoided doing this in the past is that it may lead us into a morass from which there is no principled escape. One of the pioneer researchers in the field, Elizabeth Loftus, concluded:

Judges and jurors need to appreciate a point that can't be stressed enough: True memories cannot be distinguished from false without corroboration.<sup>71</sup>

In the courts we have to make decisions which scientists may avoid. The fact finding process will, however, be improved if we have a better understanding of the difficulties with which we must struggle. Fact finding is at the heart of legal craft. Public confidence in the administration of justice requires that the system must be directed to discovering the truth of the facts.

## Conclusion

In conclusion let me return to the Gospel of St John and his version of the trial of Jesus. I trust the religious amongst you will forgive me for considering the text in a secular spirit.

I approach these passages with some diffidence as they, together with the parallel version in the Gospel of Matthew, have been the source of Christian anti-Semitism for many centuries. It was, to say the least, convenient for the relationship between the early church and Roman authority to paint Pilate in a favourable light. Setting aside the possibility of divine authorship, these texts were either based on eyewitness testimony or reflect a collective folk tradition that was progressively edited for communal purposes.<sup>72</sup>

These eyewitnesses would have been subject to the full range of inadequacies of such testimony.<sup>73</sup> The process of editing folk tradition would have potentially involved systematic distortion. All this does is to confirm that fact finding is hard work.

Whether the words 'What is Truth?' and the sequence of events were accurately recorded by John cannot be determined with finality. However, like other facts, they can be determined with sufficient certainty for the task at hand, the degree of certainty varying with the seriousness of the purpose. Pilate's question, as Francis Bacon clearly acknowledged, is too good to check, even if we could.

All we toilers in the courts are required to do the best we can. I make no apology for so trite a conclusion. I advance it in the belief that we must do our best, with the determination that we always strive to do it better.

Traditionally, justice has been represented by a blindfolded woman holding equally balanced set of scales. That is no longer an appropriate symbol. The appropriate symbol for justice today is that which Gulliver discovered in Lilliput. There, justice was represented by a statue which had no blindfold and which, significantly, had eyes in the back of her head.

Blind justice is not an appropriate symbol of impartiality in a justice system dedicated to truth in fact finding. The balanced set of scales is sufficient for that purpose. The pursuit of justice cannot allow itself to be deceived. It may be constrained by other public values or by natural human failings, but it cannot allow itself to be deceived.

## Endnotes

1. Philip Ayres, 'Owen Dixon's Causation Lecture: Radical Scepticism' (2003) 77 *Australian Law Journal* 682 at 693.
2. Sir Owen Dixon, 'Jesting Pilate' in Judge Woinarski (ed) *Jesting Pilate and Other Papers and Addresses by the Right Honourable Sir Owen Dixon* The Law Book Company, Melbourne, 1965, at 4.
3. See J J Spigelman, 'Book Launch: Sydney' (2003) 77 *Australian Law Journal* 682 at 686-690; J J Spigelman, 'Foreword', in Philip Ayres (ed) *Owen Dixon* The Miegunyah Press, Melbourne, (2<sup>nd</sup> ed) 2007.
4. Ann Wroe, *Pilate: The Biography of an Invented Man* Vintage, London, 2000, at 41.
5. On 'procedural truth', see G L Certoma, 'The Accusatory System v the Inquisitorial System: Procedural Truth v Fact?' (1982) 56 *Australian Law Journal* 288; Thomas Weigend, 'Is the Criminal Process About Truth? A German Perspective' (2003) 26 *Harvard Journal of Law & Public Policy* 157 at 160, 170-173. On 'legal truth', see Robert S Summers, 'Formal Legal Truth and Substantive Truth in Judicial Fact-Finding' (1999) 18 *Law and Philosophy* 497; Joseph M Fernandez, 'An Exploration of the Meaning of Truth in Philosophy

- and Law' (2009) 11 *University of Notre Dame Australia Law Review* 53 at 79–80.
6. Sir Frederick Pollock, *Essays in the Law* Macmillan and Co, Oxford, 1922, at 275.
  7. *Hickman v Peacey* [1945] AC 304 at 318.
  8. *Air Canada v Secretary of State for Trade (No 2)* [1983] 1 All ER 161 at 167.
  9. See *Air Canada v Secretary of State for Trade* [1983] 2 AC 394 at 442.
  10. *Ibid.*, at 438–439 per Lord Wilberforce.
  11. *Ex parte Lloyd* (1822) Mont 70 at 72, reported as a note to *Ex parte Elsee* (1832) Mont 69. For a fuller statement of the position, see Franklin Strier, 'Making Jury Trials More Truthful' (1996) 30 *University of California Davis Law Review* 95 at 100–104.
  12. See, e.g., *United States v Cronin* 466 US 648 (1984) at 655; *Jones v National Coal Board* [1957] 2 QB 55 at 63 per Denning LJ; *Sharp v Rangott* (2008) 167 FCR 225 at 239–240 [53].
  13. *Ex parte Lloyd* supra at 72.
  14. *Giannarelli v Wraith* (1988) 165 CLR 543 at 578–579.
  15. 'Swearing-In Ceremony of the Hon J J Spigelman QC as chief justice of the Supreme Court of New South Wales' (1998) 44 NSWLR xxvii at xxxvi.
  16. The effect of judicial experience is well expressed by an American judge, see Marvin E Frankel, 'The Search for Truth: An Umpireal View' (1975) 123 *University of Pennsylvania Law Review* 1031 esp at 1032–1034.
  17. See, e.g., Strier (1996) supra at 116–123.
  18. See, e.g., Viscount Kilmuir, 'The Migration of the Common Law' (1960) 76 *Law Quarterly Review* 41 at 43; *Air Canada v Secretary of State for Trade* [1983] 2 AC 394 at 411.
  19. *Minet v Morgan* (1873) 8 LR Ch App 361 at 368.
  20. *Pearse v Pearse* (1846) 1 De G Sm 12 at 28–29; 63 ER 950 at 957.
  21. See, e.g., *The Queen v Ireland* (1970) 126 CLR 321 at 335 per Barwick CJ; *Ridgeway v The Queen* (1994) 184 CLR 19 at 52 per Brennan J; *Nicholas v The Queen* (1998) 193 CLR 173 at [34] per Brennan CJ. See also *The Queen v Swaffield* (1998) 192 CLR 159 at [91] per Toohey, Gaudron and Gummow JJ; *Whitehorn v The Queen* (1983) 152 CLR 657 at 682.
  22. See *Funk v United States* 290 US 371 (1933) at 381.
  23. For a detailed review of the position in United States criminal procedure, see Larry Laudan, *Truth, Error and Criminal Law: An Essay in Legal Epistemology* Cambridge University Press, Cambridge, 2008.
  24. For an eloquent statement of the conflicting values, see The Amphthill Peerage [1997] AC 547 at 569 per Lord Wilberforce.
  25. See J J Spigelman, 'The Truth Can Cost Too Much: The Principle of a Fair Trial' (2004) 78 *Australian Law Journal* 29.
  26. For example, the differentiation between the tests applicable in civil and criminal proceedings, where the court is asked to balance unfair prejudice and probative value by s 135 and s 137 of the *Evidence Acts 1995*.
  27. For example, the abolition of requirements for corroboration, save in a jury trial, by s 164 and s 165 of the *Evidence Acts 1995*.
  28. See, e.g., J A Jolowicz, 'Civil Procedure in the Common and Civil Law' in Guenther Doeker-Mach and Klaus A Ziegert (eds) *Law, Legal Culture and Politics in the Twenty First Century* Franz Steiner Verlag, Stuttgart, 2004; Guenther Doeker-Mach and Klaus A Ziegert (eds) *The Festschrift for Alice Erh-Soon Tay: Lawyer, Scholar, Civil Servant* Franz Steiner Verlag, Stuttgart, 2004 at 59–60.
  29. See, e.g., French Civil Code Article 16; L Cadet, 'The New French Code of Civil Procedure' in C H Van Rhee, *European Traditions in Civil Procedure Intersentia*, Antwerp, 2005 esp at [4.1.1]; Harold Koch and Frank Diedrich, *Civil Procedure in Germany* Kluwer, The Hague 1998 esp at [23]–[26].
  30. See, e.g., German Criminal Procedure Code s 244(2); French Code of Civil Procedure, ss 10 and 11.
  31. See, e.g., Matthew T King, 'Security, Scale, Form and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems' (2001) 12 *International Legal Perspectives* 185 esp at 193–207.
  32. See Walter Paktar, 'The Exclusionary Rules in France, Germany and Italy' (1985) 9 *Hastings International & Comparative Law Review* 1; Y Ma, 'Comparative Analysis of Exclusionary Rules in the United States, England, France, Germany and Italy' (1999) 22 *Policing: An International Journal of Police Strategies & Management* 280; Stephen C Thaman, 'Miranda in Comparative Law' (2001) 45 *St Louis University Law Journal* 581; Kuk Cho, 'Procedural Weakness' of German Criminal Justice and its Unique Exclusionary Rules Based on the Right of Personality' (2001) 15 *Temple International and Comparative Law Journal* 1; See M King, 'Security, Scale, Form and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems' (2002) 12 *International Legal Perspectives* 185 at 218; Yue Ma, 'A Comparative View of the Law of Interrogation' (2007) 17 *International Criminal Justice Review* 5; Stephen C Thaman, 'Fruits of the Poisonous Tree' in *Comparative Law* (2010) 16 *Southwestern Journal of International Law* 333.
  33. See Richard S Frase, 'The Search for the Whole Truth about American and European Criminal Justice' (2000) 3 *Buffalo Criminal Law Review* 785 at 821.
  34. See, e.g., King (2001) supra at 218.
  35. See Thaman (2010) supra at 303.
  36. See J McComish 'Foreign Legal Privilege: A New Problem for Australian International Law' (2006) 28 *Sydney Law Review* 297 at 303–304.
  37. *Ibid* at 304–305.
  38. *Ibid* at 306–308.
  39. See Thomas Weigend, 'Is the Criminal Process About Truth? A German Perspective' (2003) 26 *Harvard Journal of Law & Public Policy* 157 at 171.
  40. See Jeremy A Bloomenthal, 'Shedding Some Light on Calls for Hearsay Reform: Civil Law Hearsay Rules in Historical and Modern Perspective' (2001) 13 *Pace International Law Review* 93 at 100; Howard L Krongold, 'A Comparative Perspective on the Exclusion of Relevant Evidence: Common Law and Civil Law Jurisdictions' (2003) 12 *Dalhousie Legal Studies* 97 at 109–110.
  41. See Krongold (2003) supra at 110.
  42. See Mirjan Damaska, 'The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments' (1997) 45 *American Journal of Comparative Law* 839 at 842; David J Gerber, 'Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States' (1986) 34 *American Journal of Comparative Law* 745 at 764–766; B Kaplan, A von Mehren and R Schaefer, 'Phases of German Civil Procedure' (1958) 71 *Harvard Law Review* 1199 at 1237–1238.
  43. Claude Reymond, 'Civil Law and Common Law Procedures: Which is the More Inquisitorial' (1989) 5 *Arbitration International* 357 at 360–361; quoted in Rolf Trittman and Boris Kasowlosky, 'Taking Evidence in Arbitration Proceedings between Common Law and Civil Law Traditions – the Development of a European Hybrid Standard for Arbitration Proceedings' (2008) 31 *University of New South Wales Law Journal* 330 at 336.
  44. Jolowicz (2004) supra at 69.
  45. See David J Gerber, 'Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States' (1986) 34 *American Journal of Comparative Law* 745.
  46. See James Beardsley, 'Proof of Fact in French Civil Procedure' (1986) 34 *American Journal of Comparative Law* 459 esp at 461, 464 and 474.

47. Ibid, esp at 475.
48. Code of Civil Procedure, Articles 138-142.
49. See Jolowicz (2004) supra at 68-69.
50. See, e.g., Beardsley (1986) supra at 474, 485.
51. See Beardsley (1986) supra at pp 474, 475.
52. Gerber (1986) supra 768-769.
53. For a balanced comparison with respect to the conduct of criminal trials see Sandra Nehlep, 'A Glance at the Far Side: A Comparative Analysis of the Role and Powers of Judges in German and English Criminal Trials' (2005) 7 *The Judicial Review* 181.
54. Arthur R Emmett, 'Towards the Civil Law: The Loss of 'Orality' in Civil Litigation in Australia' (2003) 26 *University of New South Wales Law Journal* 447 at 457.
55. See Andrew Ligertwood and Gary Edmond, *Australian Evidence: A Principled Approach to the Common Law and the Uniform Acts* LexisNexis, Butterworths, Australia (5<sup>th</sup> ed, 2010) at paras [648]-[653].
56. See the analysis of the development by David Ipp, 'Judicial Intervention in the Trial Process' (1995) 69 *Australian Law Journal* 365 esp at 367-373; 'Reforms to the Adversarial Process in Civil Litigation' Parts I and II (1995) 69 *Australian Law Journal* 705, 790 esp at 712-715, 802-805.
57. T Bingham, 'The Judge as Juror: The Judicial Determination of Factual Issues' in *The Business of Judging: Selected Essays and Speeches* Oxford University Press, Oxford, 2000.
58. This became clear to me early in my judicial career. See *R v Johnston* (1998) 45 NSWLR 362 at 367.
59. See Peter McClellan, 'Who is Telling the Truth? Psychology, Common Sense and the Law' (2006) 80 *Australian Law Journal* 655; David Ipp, 'Problems with Fact Finding' (2006) 80 *Australian Law Journal* 667.
60. See, e.g., Glanville Williams, *The Proof of Guilt: A Study of the English Criminal Trial* Stephens & Sons, London, (3<sup>rd</sup> ed) 1963 at 87-88.
61. See, e.g., Elizabeth Loftus and James M Doyle, *Eyewitness Testimony: Civil and Criminal* Cluer Law Book, New York, 1987 esp at 38-39.
62. Ibid at 51.
63. Daniel L Schacter, *The Seven Sins of Memory: How the Mind Forgets and Remembers* Houghton Mifflin, New York, 2001.
64. Ibid at 5.
65. Ibid at 9.
66. Ibid at 114.
67. For an outline of these issues see Ligertwood (2010) supra at [4.54]-[4.75]. See especially the significant range of empirical psychological research on identification evidence referred to at [4.59]. The classic text is Elizabeth Loftus, J M Doyle and J Dysert, *Eyewitness Testimony: Civil and Criminal* (4<sup>th</sup> ed) LexisNexis Charlottesville, 2008. This most recent edition is not to be found in any Australian library. For a brief overview see A Daniel Yarmey, 'Eyewitness Identification: Guidelines and Recommendations for Identification Procedures in the United States and in Canada' (2003) 44 *Canadian Psychology* 181 or Steven E Clark and Ryan D Godfrey, 'Eyewitness Identification and Innocence Risk' (2009) 16 *Psychonomic Bulletin and Review* 22.
68. Schacter (2001) supra at 5.
69. Kathryn Braun, Rhiannon Ellis and Elizabeth Loftus, 'Make My Memory: How Advertising Can Change our Memories of the Past' (2002) 19 *Psychology and Marketing* 1 esp at 13-14, 17-18.
70. For a detailed survey see Richard J McNally, *Remembering Trauma* Harvard University Press, Cambridge, 2003.
71. Elizabeth F Loftus, 'Memory Faults and Fixes: Research Has Revealed the Limits of Human Memory; Now the Courts Need to Incorporate These Findings into their Procedures' (2002) 18 *Issues in Science and Technology* 41.
72. The thesis that the New Testament is based on eyewitnesses is advanced in Richard Bauckham, *Jesus and the Eyewitnesses: The Gospels as Eyewitness Testimony* Eerdmans, Grand Rapids, 2006.
73. Judith C S Redman 'How Accurate are Eyewitnesses? Bauckham and the Eyewitnesses in the Light of Psychological Research' (2010) 129 *Journal of Biblical Literature* 177. This article is a good short overview of the psychological research and provides a checklist for advocacy training.